THE CONDUCT OF AN APPEAL

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jurisdiction and was permitted to hear an appeal from the lower court's refusal to grant leave to appeal.[18]

§1.6 The Court of Appeal's reliance on the common law jurisdictional appeal is supported by the mandatory character of the rules governing the subject-matter jurisdiction of courts. Such mandatory jurisdictional rules must necessarily be enforced by some court, even if no appeal has been expressly provided for by law. A court of appeal might be said to have the responsibility of ensuring that courts and tribunals inferior to it comply with such mandatory jurisdictional rules, a responsibility which attaches because of the very nature of a court of appeal as a hierarchically superior court.

§1.7 Upon the receipt of an adverse ruling, whether prior to, during, or at the conclusion of trial, counsel's first duty is to ascertain whether, and to what court, an appeal is available. A careful study of the applicable legislation will reveal the proper appeal route, if any, and the grounds upon which an appeal may be taken. It is only when this data is in hand that counsel is in a position to advise the client concerning the wisdom of the proposed appeal.

§1.8 It is crucial, then, to establish at the outset whether and where an appeal may be taken: the existence of and preconditions to appellate jurisdiction must be uncovered. This chapter is concerned with the general issues that arise in determining appellate jurisdiction, including the proper forum for the proposed appeal and whether the appeal is by leave or as of right. The first step in most cases is to ascertain whether the judgment or order sought to be appealed from is final or interlocutory as that answer may determine the appeal route. The correctness of one's conclusions in this regard ensures the orderly conduct of litigation and guards against significant adverse costs orders.[19]

B. APPEAL FROM THE ORDER, NOT THE REASONS

§1.9 It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued and entered

[18] Similarly, the Manitoba Court of Appeal noted in *obiter* that Cartwright J.'s statement in *Canadian Utilities Ltd. v. Deputy Minister of National Revenue*, [1963] S.C.J. No. 67, [1964] S.C.R. 57 (S.C.C.) established an exception to the rule that no appeal lies from a denial of leave to appeal where the "tribunal refusing leave had mistakenly declined jurisdiction and failed to reach a decision on the merits of an application": *Jeffrys v. Veenstra*, [2004] M.J. No. 38, 2004 MBCA 6, 128 A.C.W.S. (3d) 628 at para. 5 (Man. C.A.). In addition, the Quebec Court of Appeal in *obiter* noted, "La Cour d'appel peut certes réformer la Cour supérieure lorsque celle-ci excède sa compétence": *Pharmascience inc. c. Régie de l'assurance maladie du Québec*, [2005] J.Q. no 3315, 2005 QCCA 379, 139 A.C.W.S. (3d) 424 at para. 20 (Que. C.A.).

[19] See *424317 Ontario Ltd. v. Silber*, [1989] O.J. No. 1382, 70 O.R. (2d) 59 (Ont. H.C.J.), in which solicitor-client costs were ordered.

in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order.[20] Although the appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal, and not the correctness of the reasons.[21]

§1.10 In the English case of *Lake v. Lake*,[22] the prospective appellant had succeeded in defeating her husband's petition for divorce; however, the reasons for judgment granting the order in her favour contained the finding that she had committed adultery. (The petition was dismissed on the basis that the husband had condoned the adultery.) The wife's appeal to the Court of Appeal against the finding of adultery was quashed for lack of jurisdiction. The Court found that the "judgment or order" from which an appeal could be taken is the formal order which disposes of the proceedings and which the successful party is entitled to enforce or execute. Evershed M.R. stated:

> . . . I think that there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party, even if the wife can be so described, to appeal from some finding or statement — I suppose it would include some expression of view about the law — which you may find in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding.[23]

Lake has been applied by the Ontario Divisional Court in *Canadian Express Ltd. v. Blair*,[24] and the underlying principle has been accepted by courts in other jurisdictions in Canada.[25]

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[20] *R. v. Sheppard*, [2002] S.C.J. No. 30, 2002 SCC 26, 210 D.L.R. (4th) 608 at para. 4 (S.C.C.). See also *1562860 Ontario Ltd. v. Insurance Portfolio Inc.*, [2010] O.J. No. 276, 260 O.A.C. 1 (Ont. Div. Ct.).

[21] *Canada (Royal Canadian Mounted Police) v. Ethier*, 1996 CanLII 3863 (F.C.A.): "This Court's role is not to correct impressions ...."

[22] [1955] 2 All E.R. 538 (C.A.). For an early Ontario case see, *McIlhargey v. Queen*, [1911] O.J. No. 838, 18 O.W.R. 763, 2 O.W.N. 916 (Ch.), refusing leave to appeal from (1911), 2 O.W.N. 781 (Ch.).

[23] *Ibid.*, at 541.

[24] [1991] O.J. No. 2176, 6 O.R. (3d) 212 at 215 (Ont. Div. Ct.).

[25] *Rogerville v. Canada (Public Service Commission Appeal Board)*, [1996] F.C.J. No. 1002, 117 F.T.R. 53 (F.C.T.D.), affd [2001] F.C.J. No. 692, 2001 FCA 142, 205 F.T.R. 160 (F.C.A.); *D.(B.) v. British Columbia*, [1997] B.C.J. No. 674, [1997] 4 W.W.R. 484 (B.C.C.A.) leave to appeal refused [1997] S.C.C.A. No. 305, 97 B.C.A.C. 80 (S.C.C.); *Clark v. Peterborough Utilities Commission*, [1998] O.J. No. 2915, 40 O.R. (3d) 409 (Ont. C.A.); see also *R.(D.) v. R.*, [1996] S.C.J. No. 8, 107 C.C.C. (3d) 289 at 322 (S.C.C.); *GKO Engineering v. Canada*, [2001] F.C.J. No. 369, 2001 FCA 73 at para. 3 (F.C.A.), *per* Rothstein J.A. (as he then was); *Re Delaney*, [1995] B.C.J. No. 2037, 13 B.C.L.R. (3d) 50 (B.C.S.C.), citing this work; *Singh v. Bains*, [2007] B.C.J. No. 2551, 2007 BCCA 590, 248 B.C.A.C. 317 at para. 9 (B.C.C.A.); *ARC Resources Ltd. v. SemCanada Crude Co.*, [2009] A.J. No. 700, 2009 ABCA 244, 457

§1.11 The importance of a lower court's reasons for judgment should not, of course, be understated. As mentioned above, those reasons often contain the foundation upon which an appellate court will draw its conclusions concerning whether the judgment or order below was based upon a reviewable error, and those reasons are generally the focus of an appeal. Other appellate courts have expressed their dissatisfaction with the lack of stated reasons for decision in the court below, owing to the difficulty in such circumstances of ascertaining whether an error has occurred without a record of the findings of fact and law made by the court below.[26] Indeed, in *R. v. Sheppard*, albeit not in a civil context, the Supreme Court of Canada held that it was an error of law for the trial judge to have granted judgment without providing sufficient reasons.[27]

C. INTERLOCUTORY AND FINAL ORDERS

1. The General Distinction

§1.12 Several of the relevant provincial Acts provide that the extent of a party's right of appeal (whether as of right or by leave), and in some instances the court to be appealed to, depends on whether the judgment or order sought to be appealed from is interlocutory or final.[28] The essence of the distinction, in Canada at least, is that a judgment or order that finally disposes of a "substantive right" in the litigation is final, and a judgment or

A.R. 225 at para. 16 (Alta. C.A.); *Canada (Attorney General) v. Clorey*, [1997] P.E.I.J. No. 68, 13 C.P.C. (4th) 60, 155 Nfld. & P.E.I.R. 245 (P.E.I.T.D.); *Clark v. Simmonds*, [1999] P.E.I.J. No. 10, 174 Nfld. & P.E.I.R. 21 (P.E.I.T.D.); *MacDonald v. MacKinnon*, [1997] N.S.J. No. 92, 157 N.S.R. (2d) 312 (N.S.C.A.), leave to appeal refused, [1997] S.C.C.A. No. 232, 164 N.S.R. (2d) 80 (S.C.C.); *J.D. Irving Ltd. v. Hughes*, [2010] N.B.J. No. 118 (N.B.C.A.), citing *Veno v. United General Insurance Corp.*, [2008] N.B.J. No. 179, 2008 NBCA 39, 330 N.B.R. (2d) 237 at paras. 76-77 (N.B.C.A.) as well as this work. See also *Mamaca v. Caseco Insurance Co.*, [2008] O.J. No. 2508, 238 O.A.C. 56 at para. 3 (Ont. Div. Ct.).

[26] *Bacon (Stonehouse) v. Stonehouse*, [1990] O.J. No. 403, 25 R.F.L. (3d) 71 (Ont. Div. Ct.); *Polansky Electronics Ltd. v. AGT Ltd.*, [2001] A.J. No. 153, 2001 ABCA 36, 90 Alta. L.R. (3d) 3 at paras. 17-19, 22 (Alta. C.A.); *Perfanick v. Panciera*, [2001] M.J. No. 528, 2001 MBCA 200, 160 Man. R. (2d) 287 at para. 39 (Man. C.A.). Note that appellate courts have also commented on the paucity of reasons provided by tribunals: *Euston Capital Corp. v. Saskatchewan Financial Services Commission*, [2008] S.J. No. 99, 2008 SKCA 22, 307 Sask. R. 100 at paras. 50-54 (Sask. C.A.); *Law Society of Upper Canada v. Neinstein*, [2010] O.J. No. 1046, 99 O.R. (3d) 1 (Ont. C.A.).

[27] *R. v. Sheppard*, [2002] S.C.J. No. 26, 2002 SCC 26, 210 D.L.R. (4th) 608 (S.C.C.).

[28] *E.g.*, *Court of Appeal Act*, R.S.B.C. 1996, c.77, s. 7; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 8(3.1) [en. 1981, c. 36, s. 6(b)]; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 40, as am.; *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss.17 and 19, as am.; *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42 Sch. D, rr. 57.02, 57.02A; *Code of Civil Procedure*, R.S.Q., c. C-25, s. 29.

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[29] See *Hendrickson*
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[30] G.D. Watson, *Ca*
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[2005] N.S.J. No.

[31] *Newterm Ltd. v. S*
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[33] Marshall J.A., *Un*
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[2006] B.C.J. No.

a judge of the court[332] and the New Brunswick Rules permit the Court of Queen's Bench to transfer a proceeding to the Court of Appeal.[333]

§1.141 In *Dunnington v. 656956 Ontario Ltd.*,[334] the Ontario Divisional Court was faced with an appeal in respect of which it had no jurisdiction. The appeal ought to have been properly brought in the Court of Appeal. Rosenberg J., speaking for the Divisional Court, set out the factors to be considered in exercising the Court's discretion to transfer the appeal as follows:

> We are of the view that, in exercising our discretion, we should consider, first, does the appellant have a meritorious appeal; secondly, will the respondent suffer undue prejudice as a result of further delay while the appeal is waiting to be heard by the Court of Appeal; and thirdly, has the appellant moved expeditiously once it was known that the jurisdiction was being disputed?[335]

§1.142 In *Dunnington*, the Court declined to transfer the appeal on the basis that the appellant had little chance of success, and the respondent had suffered, and would continue to suffer, prejudice by continuing delay. In such circumstances, the appellant's recourse is to seek leave for an extension of the time within which to commence an appeal in the Court of Appeal. In *Hammond v. State Farm Mutual Automobile Insurance Company*,[336] the Divisional Court considered the meaning of "meritorious appeal" and concluded that the appellant must have "an arguable case that could reasonably, but not necessarily be successful".[337] The Court concluded that the appellant's case was not meritorious because it was barred by a limitation period and refused the transfer.

G. THE DISCRETION NOT TO HEAR MOOT APPEALS

§1.143 An appellate court is occasionally faced with an appeal in which the factual *substratum* of the appeal has disappeared, either by the effluxion of time or by the interposition of fresh circumstances. In either event, the court must determine whether it is appropriate to hear and determine the appeal or, alternatively, to quash the appeal.

§1.144 There are, of course, an infinite variety of factual circumstances in which the *substratum* of an appeal can be said to have disintegrated. Some of the more common instances include the following:

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[332] *Federal Court Rules*, SOR/98-106, r. 49.

[333] *Rules of Court*, N.B. Reg. 82-73, r. 69.11.

[334] [1992] O.J. No. 365, 9 O.R. (3d) 124 (Ont. Div. Ct.).

[335] *Ibid.*, at 125.

[336] [2011] O.J. No. 2406, 99 C.C.L.I. (4th) 224 (Ont. S.C.J.).

[337] *Ibid.*, at para. 12.

- A party has died.[338]
- The remedy sought in the original litigation has been exhausted (*e.g.*, a labour injunction,[339] or a sentence for a criminal conviction).[340]
- The order appealed against has expired according to its terms.[341]
- The conduct sought to be enjoined in the original litigation has occurred.[342]
- The statute sought to be challenged has been repealed or rendered inoperative by judicial decision.[343]
- The dispute between the parties has changed such that the relief sought or question asked is no longer determinative of the dispute.[344]
- The parties have settled the dispute.[345]

[338] *Re Cadeddu and the Queen*, [1983] O.J. No. 3005, 146 D.L.R. (3d) 653 (Ont. C.A.); *R. v. Mercure*, [1988] S.C.J. No. 11, 48 D.L.R. (4th) 1, [1988] 1 S.C.R. 234 (S.C.C.); *Canada (Minister of Citizenship and Immigration) v. Nemsila*, [1997] F.C.J. No. 630, 214 N.R. 383 (F.C.A.); and *R. v. Lewis* (1997), 153 D.L.R. (4th) 184 (B.C.C.A.); see *Clark v. Peterborough Utilities Commission*, [1998] O.J. No. 2915, 112 O.A.C. 390 (Ont. C.A.), in which a challenge to a policy that required security deposits from welfare recipients was rendered moot when the challengers moved to a different municipality; and *R. v. Smith*, [2004] S.C.J. No. 385, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.); *British Columbia (Securities Commission) v. Eilers*, [2010] B.C.J. No. 444, 2010 BCCA 134, 317 D.L.R. (4th) 407 (B.C.C.A.).

[339] *International Brotherhood of Electrical Workers Local 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.J. No. 55, 65 D.L.R. (2d) 242 (S.C.C.); *O.K. Economy Stores v. R.W.D.S.U., Local 454*, [1994] S.J. No. 437, 118 D.L.R. (4th) 345 (Sask. C.A.), *per* Gerwing J.A.; *Great Atlantic & Pacific Co. of Canada Ltd. v. U.F.C.W., Locals 175 and 633*, [1995] O.J. No. 2229, 126 D.L.R. (4th) 742 (Ont. Div. Ct.).

[340] *Re Maltby and A.G. of Saskatchewan*, [1984] S.J. No. 415, 10 D.L.R. (4th) 745 (Sask. C.A.). See also *Histed v. Law Society of Manitoba*, [2007] M.J. No. 460, 287 D.L.R. (4th) 320 (Man. C.A.).

[341] *Southam Inc. v. Canada*, [1990] O.J. No. 433, 72 O.R. (2d) 376 (Ont. C.A.).

[342] *Margaree Environmental Association v. Nova Scotia (Minister of the Environment)*, [1989] N.S.J. No. 141, 58 D.L.R. (4th) 544 (N.S.C.A.).

[343] *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (S.C.C.); *Forget v. Quebec (A.G.)*, [1988] S.C.R. 90 (S.C.C.); *R. v. Finlay*, [1993] S.C.J. No. 89, 105 D.L.R. (4th) 699 (S.C.C.); *Grimble v. Edmonton (City)*, [1996] A.J. No. 190, 133 D.L.R. (4th) 587 (Alta C.A.); *Sierra Club of Western Canada v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 1324, 126 D.L.R. (4th) 437 (B.C.C.A.). There is a difference between cases being rendered moot due to inoperative legislation and cases where legislation appears to have been conclusively interpreted: see *Reference Re Public Schools Act (Man.) s. 79*, [1993] S.C.J. No. 26, 100 D.L.R. (4th) 723 at 728-29 (S.C.C.).

[344] *Phillips v. Nova Scotia (Commission of Inquiry into the Westway Mine Tragedy)*, [1995] S.C.J. No. 36, 124 D.L.R. (4th) 129 (S.C.C.); *W.(C.) v. Manitoba (Mental Health Review Board)*, [1994] M.J. No. 401, [1994] 8 W.W.R. 761 (Man. C.A.); *Romania (State) v. Cheng*, [1997] N.S.J. No. 408, 119 C.C.C. (3d) 561 (N.S.C.A.); *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, [2008] O.J. No. 1353, 90 O.R. (3d) 451 at para. 31 (Ont. C.A.) ("In summary, this appeal is moot because the relief sought by the Union is no longer available and because the Events have reshaped the dispute between the parties such that the issue this court is asked to decide is not determinative of that dispute").

[345] *Munro v. Munro*, [2005] O.J. No. 4167, 203 O.A.C. 26 (Ont. Div. Ct.).

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[352] [1988] S.C.J.

[353] *Borowski v. C*
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§1.145 The leading case on the discretion not to hear moot appeals is the judgment of the Supreme Court of Canada in *Borowski v. Canada (A.G.)*.[346] Some years earlier, Borowski had commenced an action seeking a declaration that the abortion provisions of the *Criminal Code*[347] were inoperative on the basis that they were inconsistent with provisions of the *Canadian Bill of Rights*[348] and, latterly, the *Canadian Charter of Rights and Freedoms*.[349] Borowski's case was dismissed at trial,[350] and his appeal to the Saskatchewan Court of Appeal was unsuccessful.[351] In the hiatus between the time that leave to appeal to the Supreme Court of Canada had been granted and the time of the hearing of the appeal, the provisions of the *Criminal Code* challenged by Borowski were struck down (for reasons very different from those advanced by Borowski) in the Supreme Court's judgment in *R. v. Morgentaler*.[352]

§1.146 The Court unanimously held that Borowski's case had been rendered moot by the previous striking down of the provisions he sought to challenge. Concerning the general principles of mootness, the Court stated:[353]

> 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

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346 *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (S.C.C.).

347 R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46].

348 R.S.C. 1970, App. III [now the *Constitution Act, 1791*, R.S.C. 1985, App. III].

349 *Constitution Act, 1982*, Pt. 1, enacted by the *Canada Act, 1982* (U.K.), c. 11.

350 *Borowski v. Canada (A.G.)*, [1983] S.J. No. 784, 4 D.L.R. (4th) 112 (Sask. Q.B.).

351 *Borowski v. Canada (A.G.)*, [1987] S.J. No. 312, 39 D.L.R. (4th) 731 (Sask. C.A.).

352 [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 (S.C.C.).

353 *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, , [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 239 (S.C.C.); see also *Memorial University of Nfld. v. Memorial University of Nfld. Faculty Assn.*, [1997] N.J. No. 188, 153 Nfld. & P.E.I.R. 62 (Nfld. C.A.).

> cases unless the court exercises its discretion to depart from its policy or practice. . . .[354]

§1.147 As indicated in *Borowski*, a court's consideration of its discretion to hear a matter which is arguably moot is a distinct two-stage process. The "mootness" of the case is not the end of the matter. It remains to be considered whether the case, notwithstanding that it is moot, ought, nevertheless, to be heard and decided in the parties' interest or in the public interest. The Court stated:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, 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.[355]

§1.148 In *Borowski*, the Court identified a number of relevant criteria to be considered in the exercise of the discretion to hear an appeal that has been determined to be moot. These criteria are necessarily connected to the underlying rationalia for the existence of a discretion in the Court to hear moot appeals. These three rationalia are as follows:[356]

- There is a presence of an adversarial context in the case, notwithstanding the mootness of the issue as between the parties, perhaps by way of collateral consequences of the outcome.[357]
- There is a concern for conserving the Court's resources.[358]
- There is a need for the Court to demonstrate a measure of awareness of its proper law-making function.[359]

§1.149 The adversarial context of litigation is absent in most cases in which a preliminary finding of mootness is made. A moot case is, almost by definition, a case in which the substance of the dispute between the parties

[354] *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 239 (S.C.C.); see also *Memorial University of Nfld. v. Memorial University of Nfld. Faculty Assn.*, [1997] N.J. No. 188, 153 Nfld. & P.E.I.R. 62 (Nfld. C.A.).

[355] *Borowski*, *ibid.*

[356] The *Borowski* criteria continue to be applied by the Court: see *Re St. Marys Paper Inc. (Bankrupt)*, [1996] S.C.J. No. 3, [1996] 1 S.C.R. 3 (S.C.C.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 at 686 (S.C.C.); *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 32, [1999] 2 S.C.R. 722 at 729 (S.C.C.); *New Brunswick v. G(J.)*, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124 at 142-43 (S.C.C.); *R. v. Smith*, [2004] S.C.J. No. 11, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.); see also *Grimble v. Edmonton (City)*, [1996] A.J. No. 190, 181 A.R. 150 (Alta. C.A.).

[357] See, *e.g.*, *R. v. Adams*, [1995] S.C.J. No. 105, 131 D.L.R. (4th) 1 at 10 (S.C.C.).

[358] See also, *Archambault v. Sunrise Suites Holdings Inc.*, [2005] O.J. No. 5091, 205 O.A.C. 198 (Ont. Div. Ct.); and *Penetanguishene Mental Health Centre v. Ontario*, [2010] O.J. No. 1044, 260 O.A.C. 125 (Ont. C.A.).

[359] *PC Ontario Fund v. Essensa*, [2011] O.J. No. 2366, 278 O.A.C. 383 (Ont. Div. Ct.).

has disappeared, leaving nothing for the parties to contest in the litigation. Nevertheless, in some circumstances, the mootness of the primary issue may leave important collateral issues outstanding for either or both of the parties. For example, in *British Columbia Transit v. British Columbia Council of Human Rights*,[360] an employer sought a prohibition order against an administrative tribunal to prevent the tribunal from proceeding with a hearing in which a former employee complained that he had been illegally discriminated against on the basis of age. In the course of the litigation, the Supreme Court of Canada upheld the legality of mandatory retirement provisions in a different case, and, thus, settled the law in relation to the employee's complaint in favour of the employer. Notwithstanding this substantive victory, the employer resisted the suggestion that its appeal to the British Columbia Court of Appeal on the prohibition order was moot, since an important procedural issue as between the employer and the tribunal remained outstanding. Taggart J.A., speaking for the Court, concluded that the employer had "a very real and significant interest" in having the court decide this procedural matter.[361]

§1.150 Similarly, where the Attorney General participates in a private litigation in response to a constitutional question raised by one of the litigants and the private litigants settle the underlying action before the appeal is heard, the Attorney General may continue with the appeal on the constitutional question because that issue is not moot.[362] On the other hand, the fact that a party that may be affected by the court's decision in the moot proceeding in some future proceeding does not give that party sufficient interest in the moot proceeding to give it continued life.[363]

§1.151 In some instances, the court will be willing to disregard a lack of adversarial context where the circumstances which have made the appeal technically moot have not fundamentally altered the positions of the parties. For example, the loss of an adversarial context in an appeal arising from the repeal of a statute may be ameliorated by the fact that the successor statute is substantially similar to the repealed statute. In *Mahe v. Alberta*,[364] the statutory provisions at issue had been repealed and replaced by new provisions. The Supreme Court held that, in view of the similarity of the language between the old and the new provisions, the appeal ought to be decided.[365]

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[360] [1991] B.C.J. No. 3089, 56 B.C.L.R. (2d) 261 (B.C.C.A.).

[361] *Ibid.* at 267.

[362] *Baril v. Obelnicki*, [2007] M.J. No. 110, 279 D.L.R. (4th) 304 (Man. C.A.).

[363] *Tamil Co-operative Homes Inc. v. Arulappah*, [2000] O.J. No. 3372, 49 O.R. (3d) 566 (Ont. C.A.).

[364] [1990] S.C.J. No. 19, 68 D.L.R. (4th) 69, [1990] 1 S.C.R. 342 (S.C.C.).

[365] *Ibid.*, at 105 (D.L.R.). See also *Harrison Hot Springs (Village) v. Kamenka*, [2004] B.C.J. No. 1251, 243 D.L.R. (4th) 141 at para. 8 (B.C.C.A.).

§1.152 The existence or non-existence of an adversarial context to the litigation, whether by way of collateral issues or interested interveners,[366] is not a determinative factor in the exercise of the court's discretion. The more important set of factors surround the question of the availability of judicial resources and the threshold for persuading the court that it ought to devote such resources to the determination of an appeal in which the adversarial context is lacking.

§1.153 Certain types of cases are, owing to their factual nature, inherently unlikely to arrive at the court of appeal before they become moot.[367] These cases are frequently referred to as those "of a recurring nature but brief duration"[368] or cases that are "evasive of review".[369] Cases involving interlocutory injunctions in labour matters are the paradigm: Almost inevitably, by the time the case reaches the court of appeal, the strike in relation to which the injunction was sought has been settled.[370] A stark example of this phenomenon is the notorious case of *Tremblay v. Daigle*,[371] in which Tremblay obtained an interlocutory injunction to restrain Daigle, who was then pregnant with his child, from having an abortion. Notwithstanding the remarkable speed with which the case proceeded to the

[366] See *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 224 (S.C.C.), citing *Law Society of Upper Canada v. Skapinker (Joel)*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161 (S.C.C.), and *R. v. Mercure*, [1988] S.C.J. No. 11, 48 D.L.R. (4th) 1, [1988] 1 S.C.R. 234 (S.C.C.). Note that the courts will be more likely to find that an adversarial context exists where the intervenors have participated in the litigation from the beginning rather than being parachuted in to preserve the adversarial context of an appeal: *Dragan v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 813, 224 D.L.R. (4th) 764 at para. 4 (F.C.A.).

[367] The corollary of this statement is that where appellants do not exercise due diligence in appealing an order and the appeal is moot, the Court may refuse to hear the appeal. See *Gagliano v. Canada (Attorney General)*, [2006] F.C.J. No. 338, 268 D.L.R. (4th) 190 (F.C.A.).

[368] *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 245 (D.L.R.).

[369] *Borowski, ibid.* See also *Tamil Co-operative Homes Inc. v. Arulappah*, [2000] O.J. No. 3372, 49 O.R. (3d) 566 at para. 20 (Ont. C.A.), in which the Court said, "The standard of review is not an issue which is 'evasive of review' in the sense that it is not amenable to judicial scrutiny through the normal litigation process".

[370] See *International Brotherhood of Electrical Workers Local 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.J. No. 55, 65 D.L.R. (2d) 242 (S.C.C.). Examples of cases that are "evasive of review" include the constitutionality of publication bans at bail hearings because the time frame of such bans is ordinarily brief (*Toronto Star Newspapers Ltd. v. Canada*, [2009] O.J. No. 288, 2009 ONCA 59, 302 D.L.R. (4th) 385 (Ont. C.A.)) and the propriety of short-term child protection orders (*Nova Scotia (Minister of Community Services) v. L.(J.)*, [2004] N.S.J. No. 261, 242 D.L.R. (4th) 274 (N.S.C.A.); *British Columbia (Director of Child, Family and Community Services) v. B. (S.J.)*, [2006] O.J. No. 2652, 270 D.L.R. (4th) 536 (Ont. C.A.)). See also *N. (B.) v. Alberta (Director of Child Welfare)*, [2004] A.J. No. 229, 237 D.L.R. (4th) 213 (Alta. C.A.).

[371] [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 (S.C.C.).

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[373] *Tremblay, ibid.*, at 6

[374] *Niemi v. Morris*, [19

[375] *Jane Doe v. Canada*

[376] Subsection 40(1) o
(4th) 231 at 246 (S.
ONCA 59, 302 D.L

[377] See *Tremblay v. D*
(S.C.C.), and *Profe*
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Supreme Court of Canada,[372] the Court was advised during the course of the hearing that the appeal had become technically moot by the fact that Daigle had obtained an abortion in contravention of the existing injunction. The Court determined to decide the appeal "in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified".[373]

§1.154 In an interesting reversal of the circumstances in *Tremblay*, the Manitoba Court of Appeal refused to exercise its discretion to decide an appeal brought by an individual who had unsuccessfully applied for an injunction to restrain his girlfriend's abortion.[374] The fact emerged at the hearing of the appeal that the respondent was not pregnant. Similarly, the Ontario Court of Appeal refused to exercise its discretion to decide an appeal brought by a woman challenging the constitutionality of the *Processing and Distribution of Semen for Assisted Conception Regulations* on the basis that the appellant successfully self-inseminated. However, another woman who had not been able to do so obtained intervenor status in the appeal and the Court remitted the challenge to another judge of the Superior Court for an expedited hearing on the *Charter* issues.[375]

§1.155 In exercising its discretion to devote scarce judicial resources to a moot question, the court will be influenced by the public importance of the issue in the appeal. Where a particular point is likely only to be decided in the context of a moot appeal, the court may exercise its discretion to decide the case in order to create certainty in the law. Public importance is not, of itself, determinative, particularly in appeals brought to the Supreme Court of Canada, in which the central precondition to the granting of leave to appeal is that the prospective appeal raises a question of national importance.[376] But where a broad cross-section of the public is likely to be affected by the court's decision, an enhanced element of public importance militates in favour of exercising the discretion to decide the appeal.[377] Alternatively,

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372 The injunction restraining the abortion was granted on July 17, 1989. The Quebec Court of Appeal delivered judgment upholding the injunction on July 26, 1989. The appeal was heard by a full panel of the Supreme Court of Canada on August 8, 1989. See *Tremblay*, *ibid.*, at 638 (D.L.R.).

373 *Tremblay*, *ibid.*, at 664 (D.L.R.).

374 *Niemi v. Morris*, [1990] M.J. No. 168, 64 Man. R. (2d) 319 (Man. C.A.).

375 *Jane Doe v. Canada*, [2005] O.J. No. 725, 75 O.R. (3d) 725 (Ont. C.A.).

376 Subsection 40(1) of the *Supreme Court Act*: See *Borowski*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 246 (S.C.C.); *Toronto Star Newspapers Ltd. v. Canada*, [2009] O.J. No. 288, 2009 ONCA 59, 302 D.L.R. (4th) 385 at para. 21 (Ont. C.A.).

377 See *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 (S.C.C.), and *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367, 72 D.L.R. (4th) 1 at 13 (S.C.C.).

where deciding an issue could potentially protect individuals in life-threatening situations, the required threshold may also have been met.[378]

§1.156 The third rationale underlying the court's discretion was described in *Borowski* as "the need for the court to demonstrate a measure of awareness of its proper law-making function."[379] The consideration of this rationale is largely a reflection of the court's circumspection on its role in the political process. The court will, in general, be disinclined to decide a moot point if the matter is more properly regarded as requiring a legislative solution by Parliament. This factor was determinative in *Borowski*, in which the Court held that the appellant's attempt to obtain the Court's opinion on the moot point raised by his appeal would have turned the appeal into a private reference, and may have pre-empted Parliament's consideration of a legislative solution.[380] This factor also appears to have been determinative in *Nova Scotia (Minister of Community Services) v. C. (B.L.)*, where the Court agreed to hear a moot appeal because the only question addressed in the appeal was the jurisdiction of the court to order the Minister to provide services under the *Child and Family Services Act*.[381] Counsel have raised other rationales that have been rejected by the courts. For example, the courts have held that the fact that the appellant obtained leave to bring a moot appeal is not a reason for the court to hear the moot appeal.[382] Furthermore, the importance of the issue to the parties is not a relevant consideration,[383] nor is the time or effort spent by the parties preparing for the appeal.[384]

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[378] *H.(T.) v. Children's Aid Society of Metropolitan Toronto*, [1996] O.J. No. 2578, 138 D.L.R. (4th) 144 at 154-55 (Ont. Gen. Div.). See also *Paluska v. Cava*, [2002] O.J. No. 1767, 212 D.L.R. (4th) 226 (Ont. C.A.).

[379] *Borowski v. Canada (A.G.)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at 246 (S.C.C.).

[380] *Ibid.*, at 249 (D.L.R.). See also *Toronto Star Newspapers Ltd. v. Canada*, [2009] O.J. No. 288, 2009 ONCA 59, 302 D.L.R. (4th) 385 at para. 22 (Ont. C.A.), "This case is not a departure from the court's traditional role. Moreover, at the core of the dispute is the continuing viability of one of this court's own decisions" (in dissent, but adopted by majority at para. 161).

[381] [2007] N.S.J. No. 164, 282 D.L.R. (4th) 725 at para. 13 (N.S.C.A.).

[382] *Tamil Co-operative Homes Inc. v. Arulappah*, [2000] O.J. No. 3372, 49 O.R. (3d) 566 at para. 32 (Ont. C.A.).

[383] *Ibid.*, at paras. 23-28.

[384] *Ibid.*, at para. 29-30.

> this Court will only interfere if it is satisfied that the Court appealed from has acted on some wrong principle of law or that its award is unreasonable having regard to the evidence and then it will be slow to act on the latter ground and will only do so under exceptional circumstances.[103]

§2.59 In *Fanjoy v. Keller*,[104] the Supreme Court of Canada exercised this power to reverse the New Brunswick Court of Appeal's reduction of damages in a personal injury action. Spence J., speaking for the majority of the Court, concluded that the Court of Appeal had not articulated a proper principle for its reduction in the trial judge's award, and, accordingly, the award at trial ought to be restored.

C. HEARING NEW ISSUES ON APPEAL

§2.60 A judgment from which an appeal is taken can properly be regarded as vulnerable to attack on all factual and legal grounds upon which the appellate court has jurisdiction. There are, however, practical limitations upon the breadth of an appeal from a judgment at trial. One of these is the general rule that an appellant may not raise a point that was not pleaded, or was not argued in the trial court, unless all relevant evidence is on the record.[105]

§2.61 An early discussion of this point is found in the judgment of the Supreme Court of Canada in *Lamb v. Kincaid*.[106] In *Lamb*, the plaintiffs succeeded at trial in obtaining judgment for damages in respect of a quantity of gold misappropriated by the defendants. On appeal, the defendants raised the argument that the plaintiffs had acquiesced in the trespass and were, therefore, disentitled to damages. Duff J. (as he then was), speaking for a majority of the Court, stated:

> Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proved to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in

[103] [1973] S.C.J. No. 59, 34 D.L.R. (3d) 650 at 655, [1973] S.C.R. 493 (S.C.C.).

[104] [1973] S.C.J. No. 81, 38 D.L.R. (3d) 81 (S.C.C.).

[105] In the constitutional context, see *Miron v. Trudel*, [1991] O.J. No. 1553, 4 O.R. (3d) 623 (Ont. C.A.), revd on other grounds, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.); *Renko v. Stevens Estate*, [1998] B.C.J. No. 440, 47 B.C.L.R. (3d) 7 (B.C.C.A.); and see the discussion of, *inter alia*, *Perez v. Salvation Army in Canada*, [1998] O.J. No. 5126, 42 O.R. (3d) 229 (Ont. C.A.) in Chapter 3 "Appellate Jurisdiction in Criminal Matters".

[106] [1907] S.C.J. No. 19, 38 S.C.R. 516 (S.C.C.).

> appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.[107]

The principle as stated had ample English authority in support,[108] and has been followed without controversy since.

§2.62 The rationale for the rule would appear to be that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal.[109] Thus, in *Ibottson v. Kushner*,[110] an appellant who had been held to hold lands in trust for the respondent was prevented by the Supreme Court of Canada from arguing that the respondent was disentitled from seeking the court's assistance on the basis that he had conveyed the land to the appellant to avoid a matrimonial property claim by his wife. Martland J., speaking for the Court, stated:

> The conveyance by the respondent to the appellant is not illegal upon its face and its illegality would depend upon proof of all the surrounding circumstances. The respondent had no notice of the necessity to lead evidence upon this issue.[111]

§2.63 In *Kaiman Estate v. Graham Estate*,[112] the Ontario Court of Appeal confirmed that allowing new issues to be raised on appeal would generally be contrary to the "interests of justice" and that appeals must be conducted with regard to the pleadings and positions advanced at trial.[113] Notably, in so

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[107] *Ibid.*, at 539.

[108] *Ibid.*, Duff J. cited the following cases, at 539: *Browne v. Dunn* (1893), 6 R. 67 at 76 (H.L.); *Connecticut Fire Ins. Co. v. Kavanagh*, [1892] A.C. 473 at 480 (P.C.); *The Tasmania* (1890), 15 App. Cas. 223 at 225 (H.L.); *Ex parte Firth* (1882), 19 Ch. D. 419; *Karunaratne v. Ferdinandus*, [1902] A.C. 405 at 409 (P.C.); *Loosemore v. Tiverton & North Devon Ry. Co.* (1882), 22 Ch. D. 25 (C.A.), revd (1882), 22 Ch. D. 44 (C.A.), revd (1884), 9 App. Cas. 480 (H.L.); *Page v. Bowdler* (1894), 10 T.L.R. 423 (D.C.); *Borrowman Phillips & Co. v. Free and Hollis* (1878), 48 L.J. Q.B. 65 at 68 (C.A.).

[109] See *M.(K.) v. M.(H.)*, [1992] S.C.J. No. 85, 142 N.R. 321 at 367 (S.C.C.). In *R. v. Brown*, [1993] S.C.J. No. 82, [1993] 2 S.C.R. 918 at 923 (S.C.C.), L'Heureux-Dubé J. articulated the two main concerns that courts have with the practice of raising new issues on appeal. They include: "first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue". See also *Johnson v. Athletics Canada*, [1998] O.J. No. 3757, 114 O.A.C. 388 (Ont. C.A.); *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd.*, [1999] B.C.J. No. 2360 Q.L. (B.C.C.A.); *O'Bryan v. O'Bryan*, [1997] B.C.J. No. 2161, 43 B.C.L.R. (3d) 296 (B.C.C.A.).

[110] [1978] S.C.J. No. 42, [1978] 2 S.C.R. 858 (S.C.C.).

[111] *Ibid.*, at 863.

[112] [2009] O.J. No. 324, 245 O.A.C. 130 (Ont. C.A.).

[113] In so ruling, the Court of Appeal cited the principles articulated in *R. v. Warsing*, [1998] S.C.J. No. 91, [1998] 3 S.C.R. 579 (S.C.C.) (per L'Heureux-Dubé J., dissenting) and *R. v. Sweeney*, [2000] O.J. No. 3534, 50 O.R. (3d) 321 (Ont. C.A.).

doing, the Court raised two additional considerations that should be taken into account by an appellate court in considering a request to hear new issues, namely: (i) whether the appellant has tried to "save harmless the respondents" from any additional costs, and (ii) the "likelihood of success of the appellants' argument" as compared to the "interests of finality".[114]

§2.64 In addition, recent case law suggests that the respondent's failure to expressly object to the new issue being raised on appeal will militate in favour of the appellate court's exercise of its discretion to permit the hearing of the new issue.[115]

§2.65 The burden on the party seeking to raise a new argument on appeal is substantial. In *Block Bros. Realty Ltd. v. Boese*,[116] the British Columbia Court of Appeal held that an appellant in such circumstances must prove "beyond a reasonable doubt" that all of the facts relevant to the new argument are before the appellate court, and that no satisfactory answer to the new argument could have been given by the opposing parties if the argument had been raised at trial.[117] Indeed, the courts have been reluctant to allow new issues to be raised on appeal even where all of the elements of the "new" cause of action (*i.e.*, not expressly pleaded) are nonetheless contained within the body of the original pleading.[118]

§2.66 Similar considerations apply in appeals in judicial review proceedings. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, Rothstein J., speaking for a majority of the Supreme Court of Canada, stated that "... raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue".[119]

[114] *Kaiman Estate v. Graham Estate*, [2009] O.J. No. 324, 245 O.A.C. 130 at paras. 23-24 (Ont. C.A.).

[115] See, *e.g.*, *Rizmi Holdings v. Vaughan (City)*, [2010] O.J. No. 1063, 260 O.A.C. 138 (Ont. C.A.); *Piresferreira et al. v. Ayotte et al.*, [2010] O.J. No. 2583, 263 O.A.C. 326 (Ont. C.A.).

[116] [1988] B.C.J. No. 416, 24 B.C.L.R. (2d) 178 (B.C.C.A.).

[117] See also *681210 Alberta Ltd. v. Hunter*, [2012] A.J. No. 237, 2012 ABCA 83 at paras. 25 *et seq.* (Alta. C.A.), in which the Alberta Court of Appeal declined to permit the appellants to raise the issue of laches as a new issue on the basis that the appellants had not proven beyond a reasonable doubt that no further evidence would need to be called.

[118] See, *e.g.*, *Lombardo v. Caiazzo et al.*, [2006] O.J. No. 2286, 211 O.A.C. 270 (Ont. C.A.), where the Ontario Court of Appeal rejected the argument that the trial judge should have considered the issue of fraudulent conveyances under the applicable statutes because all of the requisite elements of this cause of action were before the trial judge, notwithstanding the fact that the statement of claim did not expressly advert to this statutory cause of action.

[119] [2011] S.C.J. No. 61, 2011 SCC 61 at para. 26 (S.C.C.), citing this work.

§2.67 A failure to object at trial to a judge's charge to the jury on an issue is "usually fatal" to an appeal on that issue.[120]

§2.68 The presumption against hearing new issues on appeal is all the stronger where the issue has been expressly abandoned at the time of trial. In *Gray v. Cotic*,[121] the appellant put forward arguments in the Ontario Court of Appeal and the Supreme Court of Canada concerning the trial judge's failure to instruct the jury on the question of foreseeability of suicide in a case of wrongful death. In this case, however, the respondent (plaintiff) had agreed prior to trial to substantially reduce its damage claim in return for an agreement that the only question to be decided by the jury was the issue of causation. McIntyre J., speaking for the Supreme Court of Canada, observed that the wording of the question put to the jury and the presentation of evidence at trial were indicative that the question of foreseeability had been put aside by the parties. McIntyre J. stated: "The parties contested the trial on this basis and it would be improper, in my view, to open a new issue at this time".[122]

§2.69 There remains a distinction, however, between an entirely fresh issue, which has not been pleaded or adverted to in the evidence, and an issue which has been pleaded but not pursued in the course of the trial. In the former circumstances, the issue is most unlikely to be heard on appeal. In *Canadiana Towers Ltd. v. Fawcett*,[123] the Ontario Court of Appeal considered whether the appellant ought to be permitted to ground his appeal entirely on issues that were neither pleaded nor argued at trial. The Court declined to dispose of the new issues raised, citing the often-quoted passage in Lord Herschell's reasons in *The "Tasmania"*:

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

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[120] *K.(G.) v. K.(D.)*, [1999] O.J. No. 1953, 122 O.A.C. 36 at paras. 15 *et seq.* (Ont. C.A.); see also *Arland v. Taylor*, [1955] O.J. No. 544, [1955] O.R. 131 (Ont. C.A.); *Tsalamatas v. Wawanesa Mutual Insurance Co.*, [1982] O.J. No. 181, 31 C.P.C. 257 (Ont. C.A.); *Christie v. Westcom Radio Group Ltd.*, [1990] B.C.J. No. 2678, 75 D.L.R. (4th) 546 (B.C.C.A.).

[121] [1983] S.C.J. No. 58, 1 D.L.R. (4th) 187, [1983] 2 S.C.R. 2 (S.C.C.); see also *Hague v. Billings*, [1993] O.J. No. 945, 13 O.R. (3d) 298 (Ont. C.A.).

[122] *Gray v. Cotic*, *ibid.*, at 190 (D.L.R.). See also *R. v. Fertal*, [1993] A.J. No. 767, 145 A.R. 225, 85 C.C.C. (3d) 411 (Alta. C.A.), where the court found that the defence could not raise a new *Charter* argument on appeal where counsel for the defence chose, as a trial tactic and in agreement with the Crown, not to lead the *Charter* issue of admissibility at trial.

[123] [1978] O.J. No. 3564, 21 O.R. (2d) 545 (Ont. C.A.).

> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.[124]

§2.70 Shortly thereafter, in *Shaver Hospital for Chest Diseases v. Slesar*,[125] the Ontario Court of Appeal again declined to dispose of new issues on appeal, this time in circumstances in which the matter was pleaded but was not pursued at trial. Lacourciere J.A., speaking for the Court, took the view that while there was some evidence concerning the new argument led at trial, the scope of the evidence was insufficient to ground the argument for the purposes of appeal. His Lordship stated: ". . . it would be manifestly unfair to the respondent to allow the appellant to argue a point which was not raised at the trial at a time when relevant evidence bearing on it could have been introduced".[126]

§2.71 Similarly, in *National Trust Co. v. Bouckhuyt*,[127] the Ontario Court of Appeal refused to permit an appellant to challenge the validity of applicable regulations in the appeal in circumstances in which the matter had not been raised at trial and, furthermore, the appellants had conceded at trial that the validity of the regulations was not in dispute.[128]

§2.72 Where a point is pleaded but not pursued at trial, the question whether it may be raised later on appeal will depend upon the reasons for its failure to be pursued at trial. For example, in *Shaver*,[129] the point in issue was pleaded but in the discretion of counsel was never made a live issue at trial. In these circumstances, the appellant was not entitled to change his tack for the purposes of the appeal. However, in *Carriss v. Buxton*,[130] the respondent's counsel had unsuccessfully sought an amendment to the statement of claim at trial. He subsequently consented to the case being put to the jury on

[124] (1890), 15 App. Cas. 223 at 225 (H.L.), quoted in *Canadiana Towers*, *ibid.*, at 547. See also *Scarborough Golf & Country Club Ltd. v. Scarborough (City)*, [1988] O.J. No. 1981, 54 D.L.R. (4th) 1 at 13 (Ont. C.A.); *Tangye v. Calmonton Investments Ltd.*, [1988] A.J. No. 423, 51 D.L.R. (4th) 593 at 600 (Alta. C.A.).

[125] [1979] O.J. No. 4504, 106 D.L.R. (3d) 377 (Ont. C.A.).

[126] *Ibid.*, at 383.

[127] [1987] O.J. No. 930, 61 O.R. (2d) 640 (Ont. C.A.).

[128] *Ibid.*, at 646.

[129] *Shaver Hospital for Chest Diseases v. Slesar et al.*, [1979] O.J. No. 4504, 106 D.L.R. (3d) 377 (Ont. C.A.).

[130] [1958] S.C.J. No. 32, [1958] S.C.R. 441 (S.C.C.).

a basis that, naturally, did not account for the amendment he had sought. On appeal to the Supreme Court of Canada, Cartwright J. (as he then was), speaking for a majority of the Court, pointed out that in these circumstances the rule which holds a litigant to a position deliberately assumed by his counsel at trial[131] ought not to be applied where the position assumed at trial arose from a contrary ruling by the trial judge. His Lordship stated: ". . . that rule does not preclude counsel for the respondent from raising in this Court the very ground which he pressed vigorously, albeit unsuccessfully, at the trial".[132]

§2.73 It would seem that the only cases in which a new issue can be raised on appeal are cases in which the question is one of law upon which further evidence is not required.[133] In *Harris v. Burgess*,[134] the appellant appealed from the dismissal of his action for specific performance of an agreement for the purchase of the appellant's interest in a partnership. On appeal, the New Brunswick Court of Appeal declined to interfere with the trial judge's view of the evidence concerning the alleged agreement, but held that by the very act of bringing this action the appellant had dissolved the partnership, notwithstanding that this argument had not been pleaded or argued at trial.

§2.74 A respondent is in a slightly better position than an appellant with respect to new issues, in the sense that an appellate court will generally give greater latitude to a party seeking to uphold a judgment in its favour. Although *R. v. Perka*[135] is a criminal case, Dickson J. (as he then was) made general comments concerning the position of a respondent on appeal. In *Perka*, the accused were acquitted on the basis of the defence of necessity. The British Columbia Court of Appeal reversed the acquittal and ordered a new trial.[136] On appeal to the Supreme Court of Canada, the accused appealed from the reversal of their acquittal on several grounds. The Crown, as respondent, opposed the appellants' grounds and added a separate ground, that the trial judge had erred in charging the jury with respect to the necessity defence. In the Supreme Court of Canada, the appellants objected to the

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131 See *Scott v. The Fernie Lumber Company Limited*, [1904] B.C.J. No. 10, 11 B.C.R. 91 (B.C.C.A.).

132 *Carriss v. Buxton*, [1958] S.C.J. No. 32, [1958] S.C.R. 441 at 470 (S.C.C.).

133 *Alberta (Minister of Infrastructure) v. Nilsson*, [2002] A.J. No. 1474, 2002 ABCA 283 at para. 175 (Alta. C.A.); *Canada (Human Rights Commission) v. Toronto-Dominion Bank*, [1998] F.C.J. No. 1036, [1998] 4 FC 205 (F.C.A.). In some cases, the issue may be raised from the bench: *MacLeod v. Yong*, [1999] B.C.J. No. 924, 67 B.C.L.R. (3d) 355 (F.C.A.).

134 [1937] 4 D.L.R. 219 (N.B.C.A.); see also *Athey v. Leonati*, [1996] S.C.J. No. 102, 140 D.L.R. (4th) 235 at 247-48 (S.C.C.), in which the relevant evidence was in the record and the necessary findings of fact had been made with reference to the proposed new question of law.

135 [1984] S.C.J. No. 40, 13 D.L.R. (4th) 1, [1984] 2 S.C.R. 232 (S.C.C.).

136 [1982] B.C.J. No. 924, 69 C.C.C. (2d) 405 (B.C.C.A.).

Crown's presentation of arguments with respect to the necessity defence on the basis that these arguments were in the nature of a cross-appeal in the absence of an appeal as of right or leave to appeal having been granted. Dickson J. stated:

> In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellant's points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial: see *Brown v. Dean et al.*, [1910] A.C. 373; *Dormuth et al. v. Untereiner et al.* (1963), 43 D.L.R. (2d) 135, [1964] S.C.R. 122, 46 W.W.R. 20; *SS. "Tordenskjold" v. Horn Joint Stock Co. of Shipowners* (1908), 41 S.C.R. 154; *Dairy Foods, Inc. v. Co-operative Agricole de Granby* (1975), 64 D.L.R. (3d) 577, 23 C.P.R. (2d) 1, [1976] 2 S.C.R. 651. That is not the case here. The necessity defence was raised and fully argued in both courts below. Therefore, if we regard the Crown's submission as an argument to sustain the judgment below, this Court undoubtedly has jurisdiction to hear and decide the issue. Even if we regard the Crown's submission with regard to necessity as seeking to vary the decision of the court below, Supreme Court Rule 29(1) would still give this Court the power to treat the whole case as open:
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> > 29(1) If a respondent intends at the hearing of an appeal to argue that the decision of the court below should be varied, he shall, within thirty days after the service of the notice of appeal or within such time as a Judge allows, give notice of such intention to all parties who may be affected thereby. *The omission to give such notice shall not in any way limit the power of the Court to treat the whole case as open* but may, in the discretion of the Court, be a ground for an adjournment of the hearing.
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> [Emphasis added.][137]

§2.75 It does not follow, of course, that a respondent may obtain fresh relief with arguments raised in this fashion,[138] but the Court's reasoning in *Perka* is indicative of the wide berth that is given to respondents who seek to support the judgment obtained below.

§2.76 The question of the permissibility of new issues on appeal is sometimes intertwined with the question of the admission of fresh evidence, discussed in the section below. Southin J.A. of the British Columbia Court of Appeal put it this way:

[137] *R. v. Perka*, [1984] S.C.J. No. 40, 13 D.L.R. (4th) 1 at 8 (D.L.R.). See also *Reich v. Sager*, [1997] B.C.J. No. 2850, 43 B.C.L.R. (3d) 43 (B.C.C.A.).

[138] See the discussion of *Guillemette v. R.*, [1986] S.C.J. No. 24, [1986] 1 S.C.R. 356 (S.C.C.), in Chapter 4 "Appellate Powers in Criminal Matters". See also *Shell Canada Ltd. v. Canada*, [1998] S.C.C.A. No. 179, 171 D.L.R. (4th) 238 (S.C.C.).

> Fresh evidence is permitted so that the interests of justice will be properly served. But the interests of justice are not properly served when litigants go to trial on certain issues and those issues are resolved in a way that one litigant considers unsatisfactory, and he or she then seeks to put before this Court a wholly new theory and to raise evidence in support of a theory that is completely different from that which engaged the learned trial judge.[139]

D. ADMITTING FRESH EVIDENCE

§2.77 The power of an appellate court to admit fresh evidence is provided by statute in terms which leave the widest possible scope for the exercise of the court's discretion. In Ontario, the applicable provision is subsection 134(4) of the *Courts of Justice Act*, which reads as follows:

> (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,
>
> . . .
>
> (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs;
>
> . . .
>
> to enable the court to determine the appeal.

Notably, the Ontario courts have ruled that by virtue of the express reference contained in section 134(4) to "an appeal", fresh evidence cannot be tendered for the purposes of a motion for leave to appeal due to the leave court's lack of jurisdiction to admit such evidence.[140]

1. The Test

§2.78 The applicable test for the admission of fresh evidence on appeal has long been settled. Indeed, the various components of the test have varied little during this century. In the judgment of the Supreme Court of Canada in

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[139] *Osborne v. Pavlick*, unreported, January 4, 2000, Doc. No. CA025147, Roules, Ryan and Southin, JJ.A. at para. 10 (B.C.C.A.). Similarly, in *Romaine Estate v. Romaine*, [2001] B.C.J. No. 1775, 205 D.L.R. (4th) 320 (B.C.C.A.), the British Columbia Court of Appeal confirmed that an appellate court's willingness to consider new issues on appeal will be determined, in part, by "balancing the interests of justice as they affect all the parties" (see para. 21).

[140] *SLMSoft.com Inc. v. Rampart Securities (Trustee of)*, [2005] O.J. No. 4847, 78 O.R. (3d) 521 (Ont. Div. Ct.). In *obiter*, the Divisional Court further suggested that parties seeking to adduce fresh evidence should bring such evidence to the attention of the trial judge before the judgment is entered, failing which the "due diligence" component of the *Palmer* test (discussed below) will not have been adequately satisfied.