Court File No. C41105

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ETHEL AHENAKEW, ALBERT BELLEMARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA McCRAKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS AND JOHN PERRIN

Applicants
(Appellants)

- and -

PETER MacKAY
on his own behalf and on behalf of all members of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondents
(Respondents in Appeal)

FACTUM OF THE RESPONDENTS,
MOVING PARTY ON THE CROSS-MOTION TO QUASH THE APPEAL
(motion returnable APRIL 27, 2004)

PART I - ORIGIN OF THE MOTION

1. This cross-motion, brought by the respondents, was ordered to be heard on April 27, 2004 with the appellants’ motion for leave to extend the time for perfecting their appeal, and if necessary, the merits of the within appeal.

PART II - NATURE OF THE MOTION

2. This is a motion by the respondents to quash the appeal as moot.

3. Alternatively, the respondents seek an order striking out paragraphs (e), (f) and (g) of the notice of appeal on the grounds that they differ from the relief sought before the learned Application Judge and further seek new relief not sought before the learned Application Judge.

PART III - THE FACTS

The Application to the Court Below

4. In their application the appellants sought a number of discretionary remedies to effectively prevent the Progressive Conservative Party of Canada (the "PC Party") and the Canadian Reform Conservative Alliance (the "Alliance Party") from making an application to merge under the *Canada Elections Act*, S.C. 2000, c. 9 (the "*Elections Act*").

5. On December 5, 2003, the learned Application Judge dismissed the appellants' application in its entirety.

Notice of Application dated November 20, 2003, Motion Record Tab 3

Reasons for Decision of Juriansz J., as he then was, dated December 5, 2003, Motion Record Tab 4

Subsequent Events Have Rendered the Appeal Moot

6. On December 6, 2003, 90.4% of the delegates voting at the special meeting of the PC Party voted in favour of authorizing the Leader of the PC Party and its Management Committee to take all necessary steps to merge with the Alliance Party, including making the necessary application and filings to the Chief Electoral Officer under the *Elections Act*.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 6

7. On December 7, 2003, the PC Party and the Alliance Party applied to the Chief Electoral Officer of Canada under section 400 of the *Elections Act* to merge into a single registered party named the Conservative Party of Canada (the “Conservative Party”). On the same day, the application was reviewed and accepted by the Chief Electoral Officer and the Elections Canada Registry of Political Parties (the “Elections Canada Registry”) was amended by replacing the names of the Alliance Party and PC Party with the name of the Conservative Party.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 8 and Exhibit B

8. Effective December 7, 2003, the PC Party was no longer a registered, deregistered or eligible political party on the Elections Canada Registry and, by operation of statute, all of its assets and liabilities became the assets and liabilities of the Conservative Party.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 9 and Exhibit C

9. On December 11, 2003, the Chief Electoral Officer announced the political parties that would receive an allowance in 2004 pursuant to sections 435.01 and 435.02 of the *Elections Act*. The PC Party did not receive an allowance. No amounts were due or have fallen due to the PC Party pursuant to sections 435.01 and 435.02 of the *Elections Act* since December 5, 2003.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 11 and Exhibit D

10. Despite the resolution to merge on December 6, 2003, the amendment of the Elections Canada Registry on December 7, 2003 and the December 11, 2003 announcement of the funds to be released to political parties pursuant to sections

435.01 and 435. 02 of the *Elections Act* for 2004, the appellants took no steps at any time to seek interim injunctive relief and did not file their notice of appeal until December 19, 2003.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at paras 5 and 12

Notice of Appeal dated December 19, 2003, Motion Record Tab 6

11. Effective March 26, 2004 the Progressive Canadian Party became an eligible political party on the Elections Canada Registry. The short form name of the Progressive Canadian Party on the Elections Canada Registry is “PC Party”.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 14

12. The Chief Electoral Officer can not permit parties with confusingly similar names, logos or short form names to appear on the Elections Canada Registry. Due to the Progressive Canadian Party’s status as an eligible political party on the Elections Canada Registry, it is not currently possible for the PC Party to be a registered political party as its name is confusingly similar to that of the Progressive Canadian Party and its short form name is identical.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 15

***Elections Act*, s. 368(a)(i)**

Appellants’ Recognition of Mootness

13. By a statement of claim dated February 13, 2004, one of the appellants commenced an action in the Ontario Superior Court of Justice against the Conservative Party. In his statement of claim that appellant admits that the merger of the PC Party and the Alliance Party has taken place and that all the assets of the PC

Party have become the assets of the Conservative Party. He also states that section 504 of the *Elections Act* makes political parties legal persons for the purpose of judicial proceedings such that no representative respondent is required and a registered political party can be sued in its own name.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 13 and Exhibit E

14. The appellants have further recognized the mootness of their appeal by altering the relief they are seeking and by seeking new relief not sought in the court below. The wording of the declarations sought in paragraphs (e) and (f) have been altered to use retrospective language and paragraph (g) seeks entirely new relief requesting that this court grant:

> (g) a permanent injunction enjoining and restraining any person with notice of the Court's order from dealing with PC Party assets in a manner inconsistent with the declarations of the Court sought above **and requiring that any person who has dealt with any assets in a manner inconsistent with such declarations forthwith account for and return such assets together with an order referring the matter to the Master at Toronto in order that all necessary inquiries may be taken and accounts conducted in order to ensure that the PC Party assets are restored to and held for their intended and lawful purpose;** [emphasis added, bold text denotes new relief]

Notice of Appeal, Motion Record Tab 6 at paras (e), (f) and (g)

Notice of Application, Motion Record Tab 3 at paras (1)(f), (1)(h) and (1)(i)

No Proper Respondents

15. Peter MacKay is no longer the leader of the PC Party. The class of named respondents, namely all members of the PC Party other than the applicants, no longer exists as the PC Party has been succeeded by the Conservative Party.

Affidavit of Brad Chapman dated April 12, 2004, Motion Record Tab 2 at para 10

PART IV - ISSUES AND THE LAW

A. New Relief Should be Struck

16. A matter should not be decided on the basis of a ground raised for the first time on appeal unless the appellant shows beyond all doubt that all the facts bearing on that ground are in the record and that the respondent is not prejudiced by the inability to adduce evidence on the new issue.

> ***Re National Trust Co. and Bouckhuyt et al.*** **(1987), 61 O.R. (2d) 640 (C.A.) at p. 646, Brief of Authorities Tab 1**
>
> ***Scarborough Golf & Country Club v. Scarborough (City)*****, 66 O.R. (2d) 257 (C.A.) at p. 268-269, Brief of Authorities Tab 2**
>
> ***Pedwell v. Pelham (Town)*****, [2003] O.J. No. 1774 QL (C.A.) at paras 50-52, Brief of Authorities Tab 3**

17. The respondents submit that entitlement to the new relief sought in paragraphs (e), (f) and (g) of the notice of appeal depends on evidence that was not before the learned Application Judge and is thus not before this court. The notice of application looked forward only to December 6, 2003. All evidence before the learned Application Judge was tendered by December 3, 2003. The notice of appeal is framed looking backward from December 19, 2003 and speaks to events that occurred after the decision of the learned Application Judge was released on December 5, 2003, after the amendment to the Elections Canada Registry on December 7, 2003 and after the announcement of the 2004 allowances for registered political parties on December 11, 2003 . There is no evidence in the appeal record of events after December 3, 2003.

B. Appeal is Moot

18. An appeal is moot when there is no live controversy between the parties such that a decision will have no practical effect on the rights of the parties.

> The doctrine of mootness is an aspect of 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 effect 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. …

***Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at p. 353, Brief of Authorities Tab 4**

19. The disappearance of the underlying substratum of the litigation will almost always render an appeal moot. Appeals have been found to be moot in circumstances where challenged legislation was repealed, where the parties reached a settlement between the decision at first instance and the hearing of the appeal, and where an event the litigation sought to prevent occurred prior to the appeal being heard.

Borowski, supra.

***Payne et al. v. Wilson et al.* (2002), 162 O.A.C. 48, Brief of Authorities Tab 5**

***Tamil Co-Operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), Brief of Authorities Tab 6**

***Lavoie v. Canada (Minister of the Environment)* (2002), 43 Admin. L.R. (3d) 209 (F.C.A.), Brief of Authorities Tab 7**

20. The application in this matter sought to prevent the merger of the PC Party and the Alliance Party pursuant to the *Elections Act* and specifically to prevent the

transfer of assets to their successor, the Conservative Party. With the amendment of the Elections Canada Registry on December 7, 2003, that merger has now occurred. By operation of statute, the Conservative Party has succeeded both former parties and their assets and liabilities are now the assets and liabilities of the Conservative Party. Events have overtaken the litigation such that its underlying substratum no longer exists and there is no live controversy between the parties.

> ***Elections Act*, *supra,* at s. 402(2)**

21. Like the appellant in *Lavoie, supra,* the appellants here took no steps to obtain interim relief or an expedited hearing such that live issues could be brought before the court. In fact, the appellants did not even file their notice of appeal until twelve days after the events rendering the appeal moot occurred. The appellants further delayed in perfecting their appeal for an additional 72 days beyond the date for perfection set out in the *Rules of Civil Procedure*. Like the relief sought in *Lavoie, supra,* the relief in this case, if issued, would amount to little more than hollow declarations and an unenforceable order.

> ***Lavoie, supra,* at p. 213**

C. Court Should Decline to Hear and Decide This Moot Appeal

22. Although the court has the discretion to hear and decide moot appeals, as a general rule it will not. The party seeking to have a moot appeal determined on its merits bears the onus of convincing the court to make an exception to this general rule.

> ***Payne, supra,* at p. 52**

***Tamil, supra,* at p. 572**

23. The relevant factors to be weighed in considering whether or not to hear and decide a moot appeal are (i) whether or not an adversarial context still exists despite the absence of a live controversy, (ii) concern for judicial economy, and (iii) recognition of the proper law-making function of the court.

Borowski, supra.

24. For the reasons outlined below, the respondents submit that this is not an appropriate case for the court to exercise its discretion to depart from the general rule.

(i) Adversarial Context

25. The respondents concede that despite the lack of a live controversy, an adversarial context continues to exist such that an appeal in this matter would be fully and forcefully argued, subject only to the page limit and time constraints imposed by this court.

26. Nevertheless, appellate jurisprudence cautions that matters should be determined in a genuine adversarial context and that making abstract decisions in the air may lead to decisions that are "at best unhelpful and at worst dangerous."

***Borowski, supra*, at p. 358-359**

***Payne, supra,* at p. 54**

***Tamil, supra,* at pp. 572 and 575**

***Lavoie, supra,* at p. 215**

(ii) Judicial Economy

27. A case must be exceptional in order for the scarce resources of the court to be allocated to make an academic decision when there are live controversies in other matters awaiting the court's attention.

> ***Borowski, supra,*** **at p. 360**
>
> ***Tamil, supra,*** **at p. 570**
>
> ***Lavoie, supra,*** **at p. 214-215**

28. A case that is unique and/or important can not overcome its lack of a live controversy unless the appellant is able to demonstrate that there is, in fact, a social cost to leaving the matter undecided.

> The importance of a legal issue raised in a proceeding is a relevant consideration in determining whether a court should hear a moot appeal. It is not, however, determinative. There are almost an infinite number of important legal issues lurking in the myriad of rules and regulations governing the citizenry upon which those interested in the issue would appreciate the opinion of an appellate court. If the importance of a legal issue is enough to overcome concerns associated with hearing moot appeals, the doctrine has little value. It means no more than that the court should not waste its time and resources deciding unimportant legal issues in cases where there is no longer a live dispute between the parties. This would seem self evident.

> ***Tamil, supra,*** **at p. 573**
>
> ***Borowski, supra,*** **at p. 362**

29. The respondents submit that there is no social cost associated with the court declining to decide this moot appeal. This is not a matter which involves a constitutional or *Charter* interpretation where there is a strong public interest in the resolution of the issues raised or where a dangerous uncertainty in the law will remain. The declarations the appellants seek are retrospective and deal with matters

relating exclusively to the PC Party, an entity which no longer exists. There is no benefit to the court rendering a decision in this matter. The interests of judicial economy clearly weigh in favour of the court adhering to the general rule and declining to hear and decide this moot appeal.

***Borowski, supra,* at p. 362**

***Tamil, supra,* at p. 573-574**

***Lavoie, supra,* at p. 215**

(iii) Proper Law Making Function of the Court

30. The third underlying rationale for the mootness doctrine, as articulated by the Supreme Court of Canada, 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. In particular, the court must guard against allowing appellants to engage in proceedings that essentially amount to private references to the court via moot appeals.

***Borowski, supra,* at pp. 362 and 365**
***Tamil, supra,* at p. 574**

31. The court must also guard against the perception that it is weighing in on what may be seen as essentially political rather than legal debates and favouring one side or the other. Even if the risk of a decision being so interpreted is viewed as small, it is a relevant consideration which supports the contention that the court should decline to hear the merits in politically charged moot appeals.

***Payne, supra,* at p. 55**

32. The respondents submit that if the court were to hear and decide this appeal, it would run the risk of its decision being perceived as favouring one side or the other in

a political dispute. The transcript of the appellant David Orchard's comments on the decision of the learned Application Judge to CBC radio clearly (Exhibit A to the affidavit of Brad Chapman) demonstrate the appellants propensity to use court proceedings and reasons for decision to seek media attention and promote their political agenda.

33. Finally, the respondents respectfully submit that to hear and decide this appeal would be to permit the appellants to collaterally attack the decisions of the Chief Electoral Officer of Canada and to do so in an improper forum. Decisions of the Chief Electoral Officer are subject to judicial review in the Federal Court of Canada and can not be raised at first instance in the Ontario Court of Appeal. The Federal Court has exclusive original jurisdiction to review the decisions of federal boards, commissions and other tribunals and to grant extraordinary remedies against them. To hear and decide this moot appeal would risk this court venturing beyond its proper function and effectively engaging in judicial review of a federal administrative decision.

***Federal Courts Act*, R.S.C. 1985, c. F-7, as am., s. 18**

PART V - ORDER REQUESTED

34. An order quashing the appeal as moot;

35. Alternatively, an order striking out paragraphs (e), (f) and (g) of the notice of appeal;

36. the costs of this motion and the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 12, 2004

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Arthur Hamilton

Solicitors for the Respondents

SCHEDULE "A"
LIST OF AUTHORITIES

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

Lavoie v. Canada (Minister of the Environment) (2002), 43 Admin. L.R. (3d) 209 (F.C.A.)

Payne et al. v. Wilson et al. (2002), 162 O.A.C. 48 (C.A.)

Pedwell v. Pelham (Town), [2003] O.J. No. 1774 QL (C.A.)

Re National Trust Co. and Bouckhuyt et al. (1987), 61 O.R. (2d) 640 (C.A.)

Scarborough Golf & Country Club v. Scarborough (City), 66 O.R. (2d) 257 (C.A.)

Tamil Co-Operative Homes Inc. v. Arulappah (2000), 49 O.R. (3d) 566 (C.A.)

SCHEDULE “B”
STATUTORY PROVISIONS RELIED UPON

Canada Elections Act, S.C. 2000, c. 9, as am., ss. 400-402

Merger of Registered Parties

Merger application

400. (1) Two or more registered parties may, at any time other than during the period beginning 30 days before the issue of a writ for an election and ending on polling day, apply to the Chief Electoral Officer to become a single registered party resulting from their merger.

Contents

(2) An application to merge two or more registered parties must

(*a*) be certified by the leaders of the merging parties;

(*b*) be accompanied by a resolution from each of the merging parties approving the proposed merger; and

(*c*) contain the information required from a party to be registered, except for the information referred to in paragraph 366(2)(*i*).

Registration for eligible merged parties

401. (1) The Chief Electoral Officer shall amend the registry of parties by replacing the names of the merging parties with the name of the merged party if

(*a*) the application for the merger was not made in the period referred to in subsection 400(1); and

(*b*) the Chief Electoral Officer is satisfied that

(i) the merged party is eligible for registration as a political party under this Act, and

(ii) the merging parties have discharged their obligations under this Act, including their obligations to report on their financial transactions and their election expenses and to maintain valid and up-to-date information concerning their registration.

Notice

(2) The Chief Electoral Officer shall notify the officers of the merging parties in writing whether the registry of parties is to be amended under subsection (1).

Notice in *Canada Gazette*

(3) If the Chief Electoral Officer amends the registry of parties, he or she shall cause to be published in the *Canada Gazette* a notice that the names of the merging parties have been replaced in the registry with the name of the merged party.

Effective date of merger

402. (1) A merger of registered parties takes effect on the day on which the Chief Electoral Officer amends the registry of parties under subsection 401(1).

Consequences of merger

(2) On the merger of two or more registered parties,

(*a*) the merged party is the successor of each merging party;

(*b*) the merged party becomes a registered party;

(*c*) the assets of each merging party belong to the merged party;

(*d*) the merged party is responsible for the liabilities of each merging party;

(*e*) the merged party is responsible for the obligations of each merging party to report on its financial transactions and election expenses for any period before the merger took effect;

(*f*) the merged party replaces a merging party in any proceedings, whether civil, penal or administrative, by or against the merging party; and

(*g*) any decision of a judicial or quasi-judicial nature involving a merging party may be enforced by or against the merged party.

Effect of merger on registered associations

(3) On the merger of registered parties, any registered association of a merging party is deregistered and, despite paragraph 403.01(*c*), may transfer goods or funds to the merged party or a registered association of the merged party in the six months immediately after the merger. Any such transfer is not a contribution for the purposes of this Act.

S.C. 2003, c. 19, s. 22.

***Federal Courts Act*, R.S.C. 1985, c. F-7, as am., s. 18**

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure

that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or order, make an order validating the decision or order, to have effect from such time and on such terms as it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal

to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

ETHEL AHENAKEW ET AL.
Appellants

and

PETER MACKAY ET AL.
Respondents

Court File No: C41105

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE RESPONDENTS MOVING PARTY ON THE CROSS-MOTION TO QUASH THE APPEAL (MOTION RETURNABLE APRIL 27, 2004)

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