Case and Comment

TAX AVOIDANCE—CAPITAL GAINS—CORPORATE ENTITY—DEDUCTION OF INTEREST—SECTION 126 OF THE INCOME TAX ACT.—The recent case of *McCool* v. *Minister of National Revenue*[1] comes straight from the mysterious Never-Never Land of legal formalism from which the tax experts draw their gracious living. McCool, who owned and operated a farm and in the winter months operated a small log and pulp-jobbing business, was fortunate enough to be able to secure from an unsuspecting spinster at a price of $35,000 timber licences whose real value was $150,000. At that stage of the game he had in his hands a potential profit of $115,000 and had he decided then and there to re-sell the licences it seems clear enough that the $115,000 profit realized by his astute dealings with Miss Booth would have come to him free of income tax: "A casual profit made on an isolated purchase and sale unless merged with similar transactions in the carrying on of a trade or business is not liable to tax".[2] Nor would it have made any difference if he had bought the timber licences with the sole object of turning them over at a profit as soon as possible: "in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property".[3]

Now, McCool was not that darling of the English and Canadian tax law, a speculator sitting on the side-lines, making his money work for him and realizing a so-called "capital gain" exempt from tax; he wanted to work himself and fill a public need by bringing the timber to market. But how was he to do it without at the same time losing under the aforesaid tax law the benefit of the tax exemption of the $115,000 profit he had already made off Miss Booth? For the trouble was that although he would be entitled to charge off against his receipts from the timber sold by him the amount embarked by him in securing

[1] [1948] Ex. C.R. 548.

[2] *Ryall* v. *Hoare*, [1923] 2 K.B. 447, *per* Rowlatt J. at p. 454.

[3] *Jones* v. *Leeming*, [1930] 1 K.B. 279, *per* Lawrence L.J. at p. 302; quoted with approval by several of the judges in the House of Lords, *Jones* v. *Leeming*, [1930] A.C. 415.

the right to cut it, he would not of course be allowed to charge off the real value of that right, *viz.* $150,000, but only what he paid for it, *viz.* $35,000; the measure of depletion allowance is not the "value" of the asset depleted but only the amount paid for it. In practical terms, he would, putting it negatively, not be able to deduct from his receipts from sales of timber the $115,000 potential profit on his first deal which he would consume in the course of making his second deal, and would, putting it positively, have to bring in as part of the taxable income arising from his second deal the tax-exempt potential profit made by him on his first deal.

This was a very absurd situation. Respectable persons would probably say that the absurdity lies in basing depletion allowance on cost instead of on "value". Non-respectable persons would say that it lies in the exemption at present accorded to "capital gains". Both groups however would agree that there is something odd about a tax law which makes it more advantageous tax-wise for a man to speculate than to embark on a productive enterprise. In the field of tax law, however, an absurdity plus an absurdity often makes sense and McCool's tax adviser saw the right way out — the corporate fiction, which plays in modern business the same part that the use played in the mediaeval land law and may yet meet its twentieth century Henry VIII.

All that McCool had to do, he was told, in order to preserve tax free the potential "capital" gain on the first deal and obtain as a basis for depletion allowance the full value of the licences as opposed to the amount he paid for them, was to incorporate himself and sell the licences to the McCool Company. "The basis for depletion allowance is the cost to the taxpayer of the property" and the McCool Co., our old friend McCool in disguise, having paid McCool their full value, *viz.* $150,000, for the licences will be able to claim a depletion allowance of $115,000 more than friend McCool could. Of course the McCool Co. need not pay friend McCool any money — indeed it had no money — but it should give him shares for part of the price and an interest bearing note, say $120,000, for the rest. "The advantage of the note will be", explained the adviser, "that it will counteract what I can only call the vicious double taxation imposed by our unjust tax laws on the profits of corporate enterprise. We have managed by our scheme of incorporation to dodge the silly rule about depletion; by the note we shall dodge the silly rule that levies a higher income tax on those

who choose to conduct their business in the twentieth century corporate way; by this means an apparent objection to the incorporation dodge is seen on further consideration to be without foundation. In your case there will not, provided only you do not cut your timber too fast, be any corporate profits to tax. Interest on borrowed money may be deducted by the corporation in order to arrive at its income and the interest on your note, McCool, will, I hope, be more than the operating profits of the company. You will, of course, be the recipient of that interest and so will be really getting your profits out of the Company, but because the Company will be paying it as interest and not as dividends, you will be getting it free of the corporation income tax; in your case there will not be any double tax."

Now all this is, again, very absurd indeed; none of it would deceive a baby. But that is not the question. To what extent must a judge who is bound by the myths and customs of the legal Never-Never Land force himself to be deceived?

As to the incorporation, the Exchequer Court was bound by the *Pioneer Laundry* case;[4] to the contention of the Department, which had disallowed the $150,000 depletion claimed by the McCool Company on timber licences which had only cost McCool $35,000 on the ground that there was no actual change of ownership of the licences and that the real cost of the licences to it was therefore the cost to McCool, the court therefore replied that the Department was not entitled, in the absence of any fraud or improper conduct, to disregard the separate legal existence of the company: "the appellant [McCool Company] was a new owner for all legal purposes and, in my view, is entitled to have the Minister determine what is a just and fair allowance to it and not to a predecessor in title" [friend McCool].[5] McCool's tax adviser was therefore quite right when he told him not to worry about the depletion rule but to play musical chairs with it and win the game by solidifying his own shadow and sitting down on it.

With the double tax rule the adviser was not so fortunate; his advice was in effect that McCool should pretend to be a creditor and not (what he really was) the owner of the McCool enterprise and so enable the McCool Company to exclude from its taxable income so much of its operating profits as went to pay the interest on the note. On this aspect of the case the Exchequer Court was bound by no decision and countered that

[4] [1940] A.C. 127.
[5] [1948] Ex. C.R. at pp. 558–559.

pretty game by a still prettier one. The court did not deny that McCool Company was debtor to McCool nor that it was paying him interest but pointed out that the deduction permitted by the express words of the statute was "interest on *borrowed* capital" and that McCool Company had *borrowed* nothing from McCool; it had *bought* timber licences and the interest was interest on unpaid purchase money.[6] A very strict reading of the statute, and fatal to this particular, but not to the general, kind of make-believe being played by McCool and his adviser. Next time they will be careful to add another act to the charade and win the game; McCool will borrow $120,000 (the face value of the interest bearing note to be given) from his bank for a day and *lend* it to McCool Company in return for the note; McCool Company will hand back the $120,000 to McCool as payment for the licences; and McCool will return to the bank the $120,000 in discharge of the loan. That, as McCool would no doubt say, will fix the Exchequer Court.

This Ruritanian pantomime with its lets-pretend corporation and make-believe creditor-owner is part of the stock-in-trade of any tax lawyer or accountant and far transcends in importance the particular case of McCool — which would, indeed, today be decided differently on the depletion point[7] and would, as just pointed out, be decided differently on the interest point if the tax adviser was careful to add another step. The corporation as a law-evading device is familiar enough and is by no means confined to the tax field; compare, for instance, its use to evade the rule that a man must pay his debts, business or personal, even at the cost of putting his wife and children out on the street; what a conveyance in fraud of creditors will not do, an incorporation will. Familiar too, and particularly in the company field, is the transmutation of the owner into the creditor and with most confusing results, for in these days of "the managerial revolution" it is hard indeed to distinguish the position of the share-holder owner from the bond-holder creditor. To what extent, however, should they be permitted to be used as tax avoiding devices?

This is a hard question to answer. When the law itself does not make sense neither the tax authorities nor the courts will be astute to counter them. In the field of inter-provincial double taxation by way of succession duty for instance, it is by

[6] [1948] Ex. C.R. at p. 562.

[7] The Act has been changed in such a way as to prevent such hocus-pocus; see s. 5(a) of the old Act (Office Consolidation 1947) and s. 11(1)(b) of the new Act.

no means unreasonable for a taxpayer to centralize in one province his Canada-wide investments by means of the personal holding corporation, but it is unfair that the taxpayer whose lawyer knows enough to use this device should pay lower duties than the taxpayer who dies without the benefit of such a lawyer. In the field of income tax law, it does seem hard that a small businessman cannot by means of incorporating his business protect his family against disastrous failure and obtain in common with his larger competitors the privilege of ploughing back into the business a reasonable part of the profits free of personal income tax without at the same time becoming liable to a heavier tax; it is difficult therefore not to smile benignly on the small businessman who when he incorporates reduces his taxes by selling the assets to the corporation for a small number of shares which will never pay dividends and a large number of bonds which will always pay interest. But again it is unfair to the taxpayer who does not know enough to make use of what looks like financial nonsense.

The real vice of law-making by the accountants and the tax lawyers — for that is what such well recognized tax avoidance practices as those just mentioned and previously highlighted in the *McCool* case are — is not that it "beats the Government" (governments are well able to protect themselves and are fair game anyway) but that it benefits only their clients and discriminates against those taxpayers who are not tax-conscious enough or rich enough to employ them. It offends, in a word, against the most fundamental principle of taxation —that persons in similar circumstances should pay similar taxes.

In order to carry out this principle and ensure that what is tax law in its books is also tax law in action for everybody, including the clients of the tax lawyers and tax accountants, the Canadian Government should make far more extensive use than hitherto of the powers contained in what is now section 126 of the Income Tax Act. Under this section, which substantially continues section 32A of the old Act, the Government, where "one of the main purposes for a transaction . . . was improper avoidance . . . of taxes . . . may give such directions as it considers appropriate to counteract the avoidance . . .". This section does, of course, make it much harder for the tax expert to give definite advice to his client and was therefore strenuously objected to in the debates previous to its passage and the usual ideological grounds were assigned for the objections; but the Government stood firm and insisted on its

retention.[8] It does, however, give the Government sufficient powers to enable it to reassure the mass of taxpayers, small wage-earners whose taxes are collected at the source, that there is one tax law for all and not one tax law for the clients of the tax experts and another tax law for other people. The only question is whether the Government will have the courage to use it. Would they for instance have used it in the *McCool* case if the section had then been in force?

The answer, hardly a very reassuring one, is probably in the negative. To begin with, the Minister of Finance went out of his way to assure the objectors that the power had only been used four times in the five years which have elapsed since its inception in 1943 and to emphasize the large sums of money involved in those cases;[9] the Minister obviously thought of the power as one to be used only in exceptional cases. It does not seem likely that the Government would use it in a routine case like McCool's. To go on with — and this is more important — it is by no means clear whether the Government could show that the avoidance by McCool was "improper". Although it is quite clear that if McCool had operated the licences himself he would not have been able to withdraw from the tax net the $115,000 "capital" of his $150,000 asset which he would exhaust in the process, it is also quite clear that, had he not operated them at all but sold them, he would have been able to withdraw the very same $115,000 tax free as "capital gain". The Government could certainly not apply the section to McCool if he took advantage of the time-honoured exemption of so-called "capital gains"; how then could it justify applying it to him if he takes the steps appropriate to preserve to himself the exemption when he decides to embark the proceeds of that "capital gain" in another venture?

And now — coming back again to the beginning of this swollen note — how about a tax on "capital gains"?

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[8] See House of Commons, Standing Committee on Banking and Commerce, Minutes of Proceedings, 1948, pp. 689-712; House of Commons Debates, June 23rd, 1948, pp. 5734-5740.

[9] Standing Committee Minutes 697-698.

CRIMINAL LAW—MEANING OF "UNLAWFUL" IN THE CRIMINAL CODE—CRIMINAL CODE, S. 216(1)(a).—The recent case of *Rex* v. *Robinson*[1] provides an interesting exercise in statutory interpretation. In return for a monetary consideration the accused had procured the services of a prostitute for two men. The woman was of full age and there was no suggestion that she was mentally or physically handicapped, so that intercourse with her did not fall within any of the sections of the Criminal Code[2] designed to protect young girls or handicapped women. The issue was whether the procuring was an offence under section 216(1)(a) of the Code, which reads:

> Every one is guilty of an indictable offence and shall be liable to ten years' imprisonment and on any second or subsequent conviction shall also be liable to be whipped in addition to such punishment who
>
> (a) procures, or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons.

The Ontario Court of Appeal held that the accused had procured "unlawful carnal connection" despite the fact that the intercourse itself was not prohibited by positive law, either criminal or civil.

This judgment invites consideration of (a) the correctness of the interpretation given in it to the word "unlawful" in section 216(1)(a); (b) the interpretation the word, when used in other sections of the Criminal Code, had previously received from the courts; and (c) the desirability of using the word descriptively in the sections of the Code creating offences.

In *Rex* v. *Robinson* Laidlaw J. A., referring to *Regina* v. *Connolly and McGreevy*[3] where "unlawful" was held to mean a "thing of public mischief" and *Lyons* v. *Smart*[4] where the term was applied to an act "wicked in itself", gave a seemingly novel view. At page 860 he states: "'Lawful' means authorized by law. The prefix 'un' may mean simply 'not', and 'unlawful' may be properly used to mean 'not authorized by law'. It is in that sense that the word is used in s. 216(a) of The Criminal Code . . .".

With respect, I have some difficulty in understanding just what "authorized by law" means in this quotation. Does it mean "encouraged by law"? If so, how does the law indicate those acts it encourages? Except by the disposal of state funds on such social security schemes as family allowances, no mach-

[1] [1948] O.R. 857.
[2] Criminal Code, R.S.C., 1927, ss. 215, 217, 219 and 301.
[3] (1894), 25 O.R. 151.
[4] (1908), 6 C.L.R. 143.

inery exists by which the law can encourage human conduct. The ordinary method by which the law seeks to achieve a desired standard of human behaviour is by penalizing those acts that deviate from the standard.

Even if the phrase "authorized by law" can be construed as meaning "with the law's licence", does not the law, except again by granting financial benefits, try always to compel the acquisition of its licence by imposing penalties for a failure to possess one? In this view, the licensing of conduct is really analogous to the penalty method of enforcing a standard of human behaviour.

It is submitted that since the "connection" before the court in *Rex* v. *Robinson* was not specifically prohibited by law it was not therefore unauthorized. Rather it was neutral, in the contemplation both of the criminal and the civil law. It was not encouraged or licensed, nor was it discouraged or unlicensed. Likewise the act of walking down the street is neither encouraged or licensed nor discouraged or unlicensed. Is the silence of the law on walking down a street to be interpreted as meaning that the act of walking down a street is unauthorized, or unlawful?

Later on in the same paragraph the learned judge says that "The consent of the girl does not make the act lawful . . ."; I presume that the act referred to here is the act of the procurer. The reasoning indicated in this quotation is difficult to follow, for the lawfulness or unlawfulness of the procuring is not discernible until the lawfulness or unlawfulness of the "connection" is decided. Obviously the procuring is only contingently unlawful. No quality of the procuring, however distasteful it may be, can by reflection change the character of the connection, which it possesses apart from its association with the procuring, unless the grammatical structure of section 216(1)(a) is distorted.

Hogg J. A. approved *Rex* v. *Karn*,[5] which indicated that "breaches of the moral law" were "unlawful" in the sense that word is used in sections 211 to 219 of the Criminal Code. He held the "connection" to be unlawful though "not contrary to the law in a criminal sense". Neither of the written judgments suggested that the connection was contrary to the civil law either. Seemingly the court adopted the sweeping definition of "unlawful" to be found in Stephen:

> The expression 'unlawful act', includes, I believe, all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the

[5] (1909), 20 O.L.R. 91 (Court of Appeal).

public; and particularly all acts commonly known to be dangerous to life.[6]

A review of some of the cases in which the meaning of "unlawful" has been discussed may be of value. In *Regina* v. *Connolly and McGreevy*,[7] the prosecution proved a conspiracy in which fictitious tenders were submitted to a government department in furtherance of a scheme to obtain an unfair advantage in the awarding of public works contracts. The court held that under section 133 of the Code as it then read[8] this course was "not permitted and therefore unlawful". In other words, the term "unlawful" was applied to a practice clearly violating the express procedure laid down for the awarding of government contracts.

The Manitoba Court of King's Bench, in interpreting the word "unlawful" in section 252(2)[9] of the Code, has expressly refused to follow Stephen. In *Rex* v. *Lawson*[10] the accused, while contravening the provincial hunting law, accidentally killed a fellow hunter. At page 388 the learned judge says, "unlawful act within the meaning of the above section does not include acts which are merely *mala prohibita*. The act must itself be of a criminal nature, or prohibition must be for the protection of the public from a dangerous act or conduct, or the act must be dangerous or wrong in itself".

In *Rex* v. *Adams*[11] Pettigrew J. S. P., in interpreting section 284[12] of the Criminal Code, said at page 272:

> For an act to be unlawful within the meaning of s. 284, it has to be an act set out in the *Criminal Code;* and when it concerns a violation of a provincial statute, this act must be one described in s. 164 of the said *Code*,[13] or else so dangerous for the peace and security of individuals that it is malum in se.

In *Markey* v. *Sloat* the New Brunswick Supreme Court interpreted "unlawful" as descriptive of an act forbidden by express law

[6] Stephen, A History of the Criminal Law of England, Vol. III, p. 16.
[7] (1894), 25 O.R. 151; 1 C.C.C. 468.
[8] Statutes of Canada, 1892, c. 29.
[9] Section 252(2) reads in part, "Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission. . . ".
[10] (1938), 70 C.C.C. 384.
[11] (1943), 80 C.C.C. 269.
[12] Section 284 reads: "Everyone is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person".
[13] Section 164 reads: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law".

and held that it did not embrace what was "merely immoral".[14]

Lord Halsbury in the celebrated trade combination case of *Mogul Steamship Company, Limited* v. *McGregor, Gow & Co.*[15] indicated that the more accurate use of "unlawful" implied "contrary to law".

Cowan v. *Milbourn*,[16] *Lyons* v. *Smart*[17] and *Rex* v. *Karn*[18] support the view of Stephen that acts of immorality are "unlawful". *Rex* v. *Karn*, a prosecution under section 217, might possibly be distinguished from *Rex* v. *Robinson*, since the description of the act in section 217 is "unlawfully and carnally", seemingly giving "unlawfully" the same meaning as "carnally" for the purpose of the section. The fact that similar phraseology is not used in section 216(1)(a) might provide a sound argument for giving a different interpretation to "unlawful" in section 216.

To sum up, the sweeping interpretation of "unlawful" advanced by Stephen seems to have been accepted by the courts in Canada only when dealing with offences of an immoral nature such as those found in sections 216 to 219. Despite the social disapproval undoubtedly attaching to the conduct of the accused in the instant case, it is submitted that the adoption of the Stephen view by the court may do more harm than good in this age of changing social customs. Sad as it may be, there is little agreement on what constitutes immorality. It is trite to say that the judicial attitude in the interpretation of criminal statutes has been rigorous in its protection of the individual against the results of nebulous drafting. The policy has been to require the legislature, when considering legislation that may affect the freedom of the individual, to express itself clearly or take the consequences. The very purpose of reducing laws to writing is that the subject may know the limitations imposed on his conduct. Foreseeability of consequences is a condition precedent to the observance of law. In advancing the Stephen view, it is submitted, the Court of Appeal has relaxed this classical attitude of the courts.

There is little justification for including the word "unlawful" in a section of the Criminal Code describing an offence. The reason one turns to the Code is to discover just what conduct the legislature has considered unlawful. The fact that the term is capable of the variety of interpretations discussed in this note is

[14] (1912), 6 D.L.R. 827, *per* Barry J. at p. 836, who later in his judgment said "Everyone understands unlawfully as meaning that which is contrary to law, illegally, wrongfully".

[15] [1892] A.C. 25, at p. 39.

[16] (1867), L.R. 2 Ex. 230.

[17] (1908), 6 C.L.R. 143.

[18] (1909), 20 O.L.R. 91.

proof that it is a dangerous adjective. Its use should be avoided in all sections of the Code that describe offences.

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CONFLICT OF LAWS — FOREIGN JUDGMENTS — CUSTODY — COMITY OF NATIONS — SOME FURTHER REMARKS ON *Re McKee*.— Mr. F. S. Weatherston's recent comment[1] upon *Re McKee*[2] is of particular interest because it appears to support the now-threadbare doctrine of comity of nations in private international law. It embodies a defence of the learned Chief Justice's dissenting judgment in which he said:

> . . . in the special circumstances of this case a proper observance of the comity of nations, in my humble opinion, requires that the Courts of this Province should not exercise their jurisdiction over this infant further than to assure his return to the country to which he belongs.[3]

It is difficult to believe that either Mr. Weatherston or the Chief Justice of Ontario was really supporting the much-denied[4] doctrine of the comity of nations. That theory requires the recognition of foreign law and foreign rights upon a reciprocal basis. It was nowhere suggested in the dissenting judgment that the order of the California court giving Mrs. McKee custody of the infant Terry should be recognized and enforced in Ontario because the California courts would afford orders of the Ontario court similar recognition. In fact, the learned Chief Justice did not hold that the order of the California court should be recognized at all, but simply declared that this was a case where the Ontario court ought not to exercise jurisdiction further than "to assure his [the infant's] return to the country to which he belongs".[5] The extent to which the rights of a foreign-appointed guardian should be recognized in England (or in Ontario) may still be debatable, but certainly it is not dependent upon the classical doctrine of comity of nations, any more than the recognition of foreign judgments generally is dependent upon that theory.

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[1] (1948), 28 Can. Bar Rev. 1373.
[2] [1948] O.R. 658.
[3] *Ibid.*, p. 672.
[4] See *e.g.* Cheshire, Private International Law (3rd ed.), pp. 5, 765-6; Wolff, Private International Law, pp. 14-15, 254; Schmitthoff, English Conflict of Laws, pp. 410-11.
[5] [1948] O.R. at p. 672.

True, the doctrine has received some support in early English cases,[6] as well as some academic and judicial approval in the United States,[7] but it is now abundantly clear that we afford consideration to foreign rules of law and rights acquired under foreign judgments not because the foreign court would give similar consideration to our domestic law and judgments, but because it would be unjust and inconvenient to ignore them entirely. The circumstances in and the extent to which foreign judgments will be recognized are determined in accordance with our rules of private international law and are not dependent upon the existence of the same or even similar rules in the country for whose judgment recognition is sought.[8]

Although the Ontario court in *Re McKee* was undoubtedly clothed with jurisdiction to decide the issues involved, the judgment of the learned Chief Justice and the argument of Mr. Weatherston appear to go no farther than to deny that this was a case where such jurisdiction ought to be exercised. It was not suggested that the judgment of the California court awarding custody to Mrs. McKee must be recognized. Once jurisdiction is exercised, however, it must be exercised in accordance with our own rules of private international law. Apparently, in the case of custody, those principles must take account of the doctrine that the overriding consideration is the welfare of the child. At least, that was the view of the majority of the Court of Appeal and appears to be supported by section 1(1) of The Infants Act.[9] It seems quite proper to give effect to that doctrine, especially in view of the fact that our rules of private international law do not require the recognition of orders of the type made by the California court, since, as is the case with most custody orders, proceedings are available by which they may be varied.

It would no doubt have been quite within the jurisdiction of the Ontario court to make such an order as that embodied in the judgment of the learned Chief Justice, and he may well have thought that the interests of the child would best be served by such a disposition of the issues. But the majority of the Court of Appeal believed that the interests of the child would best be served by awarding custody to his father.

Mr. Weatherston's view is as follows:

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[6] *Power* v. *Whitmore* (1815), 4 M. & S. 141, at p. 150; *Fenton* v. *Livingstone* (1859), 3 Macq. 497, at p. 548; *Messina* v. *Petrococchino* (1872), L.R. 4 P.C. 144, at p. 157.

[7] Beale, The Conflict of Laws, Vol. 3, p. 1389; *Hilton* v. *Guyot* (1895), 159 U.S. 113.

[8] See *supra*, footnote 4.

[9] R.S.O., 1937, c. 215.

> The court has jurisdiction over any infant within the jurisdiction as representing the King in his capacity of *parens patriae*. It should not exercise that jurisdiction unless the protection of the court is wanted by the infant. Protection is not wanted if a guardian has been regularly appointed in the infant's own country, unless the appointment is made in pursuance of a local policy that is offensive to the court. If jurisdiction is exercised, the paramount factor will be the welfare of the infant, especially if that is provided in a statutory enactment.[10]

This view excludes consideration of the infant's welfare where a guardian has been regularly appointed elsewhere because it would be "presumptuous for the courts of a country in which the infant is temporarily resident to say that their protection is wanted by the infant".[11] Although a guardian has been regularly appointed, it could scarcely be called presumptuous for a tribunal to exercise its jurisdiction where it has an opportunity to examine the evidence and especially where circumstances may have changed since the appointment of the foreign guardian or new evidence come to light. To disregard the welfare of the child, where such is the case, simply because a guardian has been regularly appointed elsewhere would be manifestly unjust. It is submitted that the consideration of the child's welfare ought always to be given precedence, even when a foreign court has regularly and properly appointed another guardian.

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LABOUR RELATIONS — PROSECUTION OF UNION — STRIKE DURING THE TERM OF A COLLECTIVE AGREEMENT.—The affirmative decision, several months ago, by the Ontario Labour Relations Board,[1] on a petition by an employer for consent to prosecute a union for authorizing a strike in contravention of the regulations made under the provincial Labour Relations Act, 1947, is of interest, not only on account of the specific questions raised in it, but also because such prosecutions are infrequent enough to be novel.

A collective agreement had been executed between the Company and the Union on May 7th, 1947, which was to remain

[10] (1948), 26 Can. Bar Rev. at p. 1376.
[11] *Ibid.*
[1] *The MacKinnon Industries Limited, Petitioner* and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America —C.I.O. Local No. 199, Respondent*, 1 Dominion Labour Service 2-1384.

in effect until November 1st, 1948. The agreement contained a no-strike clause but no reference to rates of pay. Wages were negotiated subsequently to the execution of the main agreement and were incorporated in a separate memorandum dated July 24th, 1947. Wage rates were also to remain in effect until November 1st, 1948. From April to July 1948 several meetings were held to discuss the Union's request for a further general wage increase. When the Company would not agree, a strike began on July 13th and the Company thereupon proceeded to seek leave to prosecute.[2]

The grounds for the petition were: the strike was in violation of the agreement and therefore contravened regulation 10 (4);[3] it was in violation of regulation 21(1) because the prescribed conciliation procedure had not been followed;[4] and it was in violation of regulation 21(3) which prohibits strikes during the term of the agreement.[5] The Board ruled against the petitioning Company on the first two grounds. With respect to regulation 10(4) it held that: "the Board is not disposed to rule on a question of violation of a collective agreement where to do so would be to assume a function which the parties have themselves agreed and, indeed, the Regulations provide, shall be performed by an arbitrator. It is the Board's view that upon such an issue arising, the aggrieved party as an initial step, should seek final and binding settlement through the process of arbitration."

One can have no quarrel with the view just quoted. Regulation 10 (4) would probably have been held to be available to one of the parties if the other refused to comply with the ar-

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[2] "No prosecution for an offence under these regulations shall be instituted except by or with the consent of the Board, evidenced by a certificate signed by or on behalf of the chairman of the Board, and in exercising its discretion as to whether any such consent should be granted, the Board may take into consideration disciplinary measures that have been taken by an employers' organization or a trade union or employees' organization against the accused." Regulation 38, Regulations made under the Labour Relations Board Act, 1944, and the Labour Relations Act, 1947 (Ontario).

[3] "Every party to a collective agreement and every employee upon whom a collective agreement is made binding by these regulations shall do everything he is, by the collective agreement, required to do and shall abstain from doing anything he is, by the collective agreement, required not to do." *Ibid.*, Regulation 10 (4).

[4] "No employee shall go on strike until
(a) bargaining representatives have been elected or appointed for the employees affected; and
(b) an attempt has been made to effect a collective agreement under regulations 11 and 12, and 14 days have elapsed since the Conciliation Board reported to the Minister." *Ibid.*, Regulation 21 (1).

[5] "No employer who is a party to a collective agreement shall declare or cause a lock-out and no employee bound thereby shall go on strike during the term of the collective agreement." *Ibid.*, Regulation 21 (3).

bitration award. The matter has now been clarified in the new Ontario Regulations (based on the federal Industrial Relations and Disputes Investigation Act, 1948), which do not contain a provision such as regulation 10 (4) but provide that the parties shall give effect to arbitration awards arising out of disputes concerning the meaning or violation of a collective agreement.[6]

On the second point, the Board held that regulation 21(1) (which prohibits strikes until completion of conciliation proceedings and for fourteen days thereafter) "is intended to apply to the situation where no collective bargaining rights have been acquired". No reasons were given for such a conclusion and there would appear to be ample grounds for questioning it, particularly if, as seems evident, the Board would have reached the same conclusion in respect of a strike following *permissible* negotiations for renewal of a collective agreement. However, discussion of the issue is now academic, because the point in question is also clarified in the new regulations.[7]

The Board also dealt with the Union's contention that, since it was not a legal entity, it could not be prosecuted. On this point the Board stated that it was ". . . not concerned with the legal status of trade unions at common law. The Regulations create certain offences and specifically provide that trade unions shall be liable on summary conviction to certain fines for their commission. Beyond question these provisions confer on trade unions a status which renders them subject to prosecution in the courts for infractions of the Regulations." Undoubtedly this view is also sound; whatever doubts there may have been are also resolved in the new regulations.[8]

The Union's main argument was that regulation 21 (3), which prohibits strikes during the term of an agreement, did not apply to strikes over a matter not covered by an agreement. It argued that, since the agreement of May 7th did not deal with wages and since the wage settlement was not a collective agreement, there was no violation. The Board obviously considered this a specious argument and rejected it in the following terms: "In the opinion of the Board, the whole scheme of the Regulations is based upon the premise that at any given time there may exist only one valid collective agreement having application to a particular bargaining unit of employees. The collective agree-

[6] "Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto." Regulation 19 (3), Regulations made under the Labour Relations Board Act, 1948.

[7] *Ibid.*, Regulation 21.

[8] *Ibid.*, Regulation 45 (1).

ment of May 7, 1937, may fairly be said to contain the essence of the collective bargaining relationship existing between the parties. The memorandum of agreement of July 24, 1947, is clearly not, by itself, a collective agreement; no more is the wage settlement reached on or about July 5, 1947. These two have no separate force or effect for the purpose of the Regulations but must be construed merely as addenda to the main agreement. The Regulations do not classify strikes but simply prohibit, in certain circumstances, *all* strikes, regardless of their nature or purpose. In the present instance, therefore, any strike during the term of the collective agreement of May 7, 1947, would constitute a violation of regulation 21 (3)."

The decision on this point is of considerable practical significance because of the growing tendency of some unions to insist upon separate wage agreements expiring on a different date than the main agreement. They have sought in this way to avoid throwing the whole agreement open during discussions or a possible strike over wages—a sort of "have your cake and eat it too" approach. In so far as the decision discourages the development of such a pattern it is most satisfactory.

It should be noted, however, that in the instant case the wage agreement expired at the same time as the main agreement and the Union actually had no legal right to force even discussions over wages. It is possible that under the new regulations a separate wage agreement expiring on a different date than the main agreement might be deemed, in effect, a wage re-opening clause. The prohibition on strikes during the term of an agreement is now not unqualified because the prohibition in the new regulations is preceded by the words "except in respect of a dispute that is subject to the provisions of subregulation two of this regulation".[9] Subregulation two refers to disputes over "revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement . . .", and the right to strike in respect of such disputes is merely *postponed* until conciliation proceedings have been completed and for seven days thereafter.

It is interesting to note that a Presidential Fact-Finding Board in the U.S. Steel Corporation dispute a few years ago considered that a contractual no-strike clause did not prohibit a strike in a dispute over wages as a result of a wage-reopening clause. That Board stated as follows: "A construction of the contract which would extend the specific no-strike provisions to the demand for a general wage increase would in effect leave the

[9] *Ibid.*, Regulation 22.

determination of the wage issue to the sole discretion of the Company. In the absence of an overriding contractual limitation to that effect, a remand of the wage issue to the parties for collective bargaining carried with it the right to strike if such bargaining should reach an impasse."[10]

The Ontario Board also gave some excellent obiter advice to labour and management in the interests of more stable labour relations: "The Board, before leaving this case, feels that it ought to express its opinion that a collective agreement ought not to be executed until all the matters about which the parties have bargained have either been settled or abandoned. The collective agreement should then record in full the terms and conditions of employment which the parties are agreed shall prevail during its lifetime. The present case affords an excellent example of the dangers to which the contrary practice gives rise, for it is abundantly evident that the parties differ widely in their understanding of their respective rights and obligations both in their immediate relationship to one another and under the Regulations."

Despite the generally sound reasoning in the *MacKinnon* case, one may be permitted to question the propriety of the Board dealing at such length with the substantive issues. It should be recalled that the proceeding was merely an application for leave to prosecute. The actual prosecution would still have to come before the courts, and the tribunal granting such leave should probably refrain from commenting at any great length on either the legal or factual questions involved. The National Wartime Labour Relations Board stated in an earlier case that, on such applications, it should confine itself to an inquiry as to whether the matter is of a serious nature or whether it is merely frivolous or vexatious.[11] Under the new Ontario Regulations applications for leave to prosecute go to the Minister of Labour instead of to the Board.[12]

It may also be of interest to point out that, although the prosecution of the union was commenced, the proceedings were never concluded, because in the meantime the strike was settled and one of the conditions of the settlement was withdrawal of the charges.

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[10] *United States Steel Corporation* and *United Steel Workers of America*, 1 P-H Labour Arbitration Awards 67244.

[11] *Joseph Stokes Rubber Co. Ltd., Appellant* and *United Electrical Radio and Machine Workers of America, Local 523, Respondent*, 1 Dominion Labour Service 7-601.

[12] Regulation 46, Regulations made under the Labour Relations Board Act, 1948.