COMMENTS
COMMENTAIRES

COLLECTIVE AGREEMENT—EXPIRATION—CONTINUING LEGAL EFFECT—COMPATIBILITY WITH INDIVIDUAL COMMON LAW CONTRACT OF EMPLOYMENT—LEGAL STATUS OF EMPLOYEES—NATURE OF RELATIONSHIP OF EMPLOYER-EMPLOYEE: CONTRACT OR STATUS?—In an apparently straightforward decision the Ontario Court of Appeal raises issues of major significance concerning the legal effect of collective agreements.[1] The court decided that it was unnecessary to determine whether or not an "individual contract of employment" arose after the termination of a collective agreement because "[t]he Supreme Court of Canada . . . has questioned the compatibility of a collective agreement and individual contracts of employment . . .".[2] Instead, the legal status of the employees depended on a "*relationship* of employer and employee",[3] the terms of which "[a]re to be implied and would be similar to those spelled out in the collective agreement which related directly to the individual employer-employee relationship".[4]

In this case, there had been provision for severance pay in the expired collective agreement. Since there was no express contrary arrangement in the subsequent employment Mr. Zwelling was able to recover. The other employee had resigned and thereby was not entitled to severance pay. This conclusion rested on the "incompatibility" of the collective agreement with the common law individual contract of employment, on the one hand, and with the notion of the continuing legal effect of an expired collective agreement, on the other. Unfortunately, the cases[5] relied upon for the latter proposition

[1] *Telegram Publishing Co. Ltd* v. *Zwelling et al.* (1976), 11 O.R.(2d) 740, (1976), 67 D.L.R.(3d) 404, 76 C.L.L.C. 14, 047.

[2] *Ibid.*, at p. 747 (O.R.).

[3] *Ibid.*

[4] *Ibid.*, at p. 748 (O.R.).

[5] *Re Prince Rupert Fishermen's Co-operative Association and United Fishermen and Allied Workers' Union* (1967), 66 W.W.R. 43; and *Nelson's Laundries Ltd* v. *Manning* (1965), 51 D.L.R.(2d) 537, 51 W.W.R. 493.

have met with little approval and the conclusion of the Supreme Court of Canada with respect to the former (reported only a few months before this decision) was less than determinative:

> When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship.[6]

The common lawyer would acknowledge some difficulty in determining the components of the relationship but would have little or no hesitation in saying that a common law (''individual'') contract of employment must exist where the elements of service for remuneration are present. The gaps are, naturally, to be filled in by the various ''implied terms'' that are found to exist in all such contracts. In these cases, it may be that the implied terms are indeed those that existed within the collective agreement but it would require some notion of the law of contract (as applied in contracts of employment) to effect such result. Relevant notions would be custom, incorporation, practice, usage and the like.[7] Each of these carries with it its own difficulties, and presupposes an individual contract.

The court, however, does something quite different. It fills the gap with a ''relationship'' which is *not* to be confused with an individual common-law contract, and holds that the terms of that relationship are, in essence, the terms of the expired agreement. Thus, the agreement does not die unless the parties (now the individual employee and the employer) agree to a variation of its terms and, absent such variation, the provisions are enforceable.

What is the nature of the ''relationship''? If it is not based in contract (at least, the common-law contract of employment), then, presumably, it may be seen to be based on status. The labour lawyer would approve of this, seeing it as a welcome and long-awaited recognition of the rights of employees to be treated by the law at a level above that of the mere servant. Professor Rideout put it like this in 1966:[8]

> In recent years Courts have been made increasingly aware that once the relationship has been entered into incidents may attach to it which, though explicable in terms of contracts, tend to make it even more obvious that contract is not a complete explanation.

Once the status attaches to the individual, it is reasonable that only the ''individual'', as opposed to the ''collective'' terms of the

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[6] *McGavin Toastmaster Ltd* v. *Ainscough et al.* (1975), 54 D.L.R.(3d) 1, at p. 8, citing *C.P.R.* v. *Zambri*, [1962] S.C.R. 609, at p. 624.

[7] A valuable analysis of these notions is contained in B.C. Adell, The Legal Status of Collective Agreements (1970).

[8] The Contract of Employment, in Current Legal Problems (1966), p. 111, at p. 124.

collective agreement carry forward. In this case the right to severance pay was one which applied to each individual member but there remain some serious questions as to where such a distinction lies: for example, because of the accepted doctrine of the exclusive authority of the trade union to control the reference of grievances to arbitration, it is generally conceded that the right to arbitration, *Nelson's Laundries*[9] notwithstanding, is a "collective" one which would not become an implied term of the new "relationship". Indeed, *Zwelling* makes this clear in its use of the term "directly related to the employer-employee relationship", as cited above. What if the collective agreement had provided individual access to arbitration without reference to the union (as many university agreements do)? Will the right still exist? Will the arbitrator apply the terms of the expired contract, even in a situation where the union has simply failed to reach agreement on a renewal? Likewise, will it not be sufficient for a union to negotiate one contract and rely on arbitration boards and the courts to enforce it for all time?

If the continued effect of the collective agreement as an implied term is to be terminated, then it must be by variation, that is, by "contrary express arrangements".[10] Unilateral variation by the employer is not a possibility as the court was careful to point out that certain proposed variations did not meet with acceptance by the employees and were therefore legally ineffective. Section 70 of the Ontario Labour Relations Act,[11] however, implies that unilateral variation without the consent of the union is certainly legally possible under that Act after the conciliation period has run out (as it had in this case). Thus, the statutory scheme of recognition of the duration and effect of collective agreements appears to be at variance with the conclusions of the Court of Appeal in *Zwelling*.

Given the conflicts inherent in any examination of this important judgment, it would be useful to review the development of the law up to the decision, in order to understand its implications as to current notions of the legal effect of collective agreements as they relate to the individual contract of employment. The over-riding question is whether the Court of Appeal is now recognizing a totally new legal relationship, based on something like status, or whether it is merely extending the law as it has already developed.

It is now beyond question that a collective agreement "replaces" individual contracts of employment, leaving only the act of hiring to the employer. The employer must, in most cases, hire on

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[9] *Supra*, footnote 5.

[10] *Supra*, footnote 1, at p. 749 (O.R.).

[11] R.S.O., 1970, c. 232, as am.

terms which are the terms of the agreement in force and no others.[12] The right to negotiate individual terms is abrogated. Nevertheless, the individual contract of employment subsists and its terms are generally deemed to be those of the collective agreement, suitably "incorporated" into that contract.[13] Thus, in *Nelson's Laundries*,[14] a restrictive convenant contained in the collective agreement was found to be binding on each individual employee as a term of his contract of service.[15] In *Prince Rupert*[16] the right to proceed to arbitration was held incorporated, even after the collective agreement had expired and even with respect to a grievance arising after such expiry:

> That right would have become a term of the contract of employment when that contract was made and it cannot be said, in my view, that the dissolution of the source from whence it came by the termination of the collective agreements would by that fact and nothing more cause the imported term also to dissolve and to disappear from the contract of employment.[17]

In *Michaels* v. *Red Deer College*,[18] certain individual teachers' contracts had been renewed during the life of the governing collective agreement and dismissal had occurred after the expiry of that agreement. The plaintiffs argued for reinstatement because they were tenured and thus had security of employment under the agreement. It was their position that proper procedures (under the agreement) had not been carried out in their cases. A new agreement had been entered into which specifically excluded them from its operation and the earlier procedures had been superseded on and by the appointment of an administrator pursuant to the Department of Advanced Education Act.[19] In these circumstances the Alberta Court of Appeal held that *Prince Rupert* was of no assistance.[20] Apart from any other consideration, the appointment of the administrator had caused the tenure provisions to become "unworkable" and the effect of the expired agreement was "limited to providing one of the factors" to be taken into account in establishing the measure of damages.[21]

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[12] *Syndicat Catholique des Employés de Magasins de Québec Inc.* v. *Compagnie Paquet Ltée.* (1959), 18 D.L.R. (2d) 346 (S.C.C.); *McGavin Toastmaster Ltd* v. *Ainscough et al.*, *supra*, footnote 6.

[13] Expressly or impliedly. See Adell, *op. cit.*, footnote 7, pp. 28 *et seq.*, and 207 *et seq.*

[14] *Supra*, footnote 5.

[15] It should be noted that the agreement provided that the Union *and each employee* were so bound.

[16] *Supra*, footnote 5.

[17] *Ibid.*, at p. 47.

[18] (1974), 44 D.L.R.(3d) 447, aff'd (1976), 57 D.L.R.(3d) 386 (S.C.C.).

[19] S.A., 1972, c. 28.

[20] (1974), 44 D.L.R.(3d) 447, at p. 453. [21] *Ibid.*, at p. 456.

No subsequent decision has allowed for the arbitration of grievances which arise after expiry of the agreement[22] and *Zwelling* must be taken to exclude that possibility in Ontario on the ground that arbitration is not a term which relates "directly to the individual employer-employee relationship". Likewise, the effect of the *Red Deer College* case appears to be to deny the continued relevance of the agreement to the individual where a further act (the appointment of the administrator) brings about different conditions. It is significant that the tenure provisions in that case became "unworkable" as a result of an Act of the Alberta legislature.

If terms which relate to the individual remain incorporated, how can they be varied? The answer to this question depends on the juridical nature of the subsequent relationship. If it is a contract of employment at common-law, the principles are fairly well established; but if it is something else, the established principles may not be seen to apply. The Ontario Court of Appeal in *Zwelling* found it unnecessary to decide whether a common law contract existed but, at the same time, acknowledged indirectly that any variation must be by consent. It was noted that one of the employer's offers was not agreed to and, further, that one of the plaintiffs had voluntarily resigned. As stated above, the requirement of consent to variation after an agreement (and conciliation) has expired does not appear necessary by implication of section 70 of the Labour Relations Act:[23]

> 70(1) Where notice has been given under section 13 or section 45, and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
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> (a) until the Minister has appointed a conciliation officer or a mediator under this Act and,
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> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
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> (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,
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> as the case may be; or
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> (b) until the right of the trade union to represent the employees has been terminated,
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> whichever occurs first.

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[22] But there is no difficulty where they arose during the course of the employment; see *Belanger* v. *Les Commissaires d'Ecoles pour la Municipalité Scolaire de St Gervais* (1970), 16 D.L.R. (3d) 602, [1970] S.C.R. 948.

[23] *Supra,* footnote 11.

The statute provides protection during the period in which bargaining and attempts at bargaining continue but only thus far. The Ontario Labour Relations Board has held that this section applies to *all* terms and conditions, rights and privileges, whether or not included in the collective agreement,[24] indeed to "all of the legal incidents of the collective bargaining relationship",[25] excluding only an arrangement which is exclusively individual.[26] The freezing of terms and conditions of employment terminates after conciliation and section 70 has no further effect. As the crucial question is that of consent, it must be taken that the employer may insist unilaterally on any terms he wishes if the employees are to remain in his employment. This proposition, however, is now overtaken by the decision in *Zwelling*. At least so far as non-collective terms are concerned, there does not appear to be such freedom to vary and the requirement of consent seems to be maintained. Variation of those terms ought, therefore, to proceed along common law principles, unless the court is seen to have established a new relationship.

One serious difficulty in dealing with the notion of a new relationship is the question of dismissal. In *Zwelling*, the collective agreement no doubt included a provision for dismissal only for cause. This aspect of the agreement is, surely, a term which "relates directly to the employer-employee relationship". Yet the court acknowledged the right of the employer to dismiss merely on proper notice and one of the issues raised with respect to Zwelling himself was that the employer had, on the facts, failed to exercise this right. Thus the "relationship" appears to carry common law contract notions with it, despite the collective agreement requirement of "just cause".

With respect to all other terms, consent seems to be required but the common law imposes limitations on the requirement, generally on an estimate of the impact of the change on the nature of the job. The question commonly arises in the context of unfair dismissal for the purposes of the payment of redundancy payments in England and for the purposes of damages in lieu of notice in Canada. Contract notions have confused development in England but a 1957 decision of the Ontario Court of Appeal illustrates a sensible and straightforward approach to the question.

In *Hill* v. *Peter Gorman Ltd*[27] a salesman had a contract which

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[24] *C.U.P.E.* v. *Wellesley Hosp.*, O.L.R.B. Mthly Rep. July 1976, 364, where the Board froze a practice not included in the collective agreement even though it acknowledged the residual authority of the employer, outside the s. 70 period, to impose or revoke without consent.

[25] *Int. Chem. Wkers* v. *Kodak*, O.L.R.B. Mthly Rep. Feb. 1977, 49.

[26] Such as seen in *R.* v. *Canadian General Electric*, [1961] O.W.N. 117.

[27] (1957), 9 D.L.R. (2d) 124.

fixed his income at a specific commission on net sales. The employer withheld ten percent of these commissions against bad debts and the practice continued, with periodic objection by the employee, for more than a year. In an action to recover the commission that had been withheld, the Court of Appeal dealt with the question of variation of terms of the original contract and the majority held:[28]

> . . . [i]t cannot be said, as a matter of law, that an employee accepts an attempted variation simply by the fact alone of continuing in his employment. Where an employer attempts to vary the contracted terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.
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> . . . [T]he proper course for the defendant to pursue was to terminate the contract by proper notice and to offer employment on the new terms. Until it was so terminated, the plaintiff was entitled to insist on performance of the original contract.

The dissent was to the effect that notice of intention to withhold part of the commission terminated the original contract and the continuation in employment constituted acceptance of the new terms by the employee. The distinction between pure contract and something like status is clear.

In *Johnston* v. *Northwood Pulp Ltd*[29] a company reorganization left a senior employee on indefinite contract without a responsible job but rather an "office in Toronto" with nothing to do. The High Court saw this as a unilateral variation which was not accepted by the plaintiff and accordingly found his refusal to continue in employment to amount to a discharge, rather than a "quit". The court cited *Gorman* with approval and awarded one year's salary in lieu of notice.

It is worth noting that Freedland,[30] commenting on *Gorman* as an "interesting" case, noted that such a result would be unlikely in England, but rather:

> It is, however, likely that an English court would take the view that the continuation in employment for such a period of time did result in a consent by conduct to the variation. . . .[31]

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[28] *Ibid.*, at pp. 131-132.

[29] [1968] 2 O.R. 521, 70 D.L.R. (2d) 15.

[30] The Contract of Employment (1972).

[31] *Ibid.*, p. 62. The author sees some exceptions and points to a trend away from unilateral authority of the employer. See further, pp. 42-66 and 376.

At the point in time when the variation is imposed, there appears to be some confusion. On the one hand, Rideout,[32] citing *Cowey* v. *Liberian Operations Ltd*,[33] states:[34]

> Although at law an employer who wishes to vary a contract will be said to be terminating the former contract and offering a new contract, it is normal for the employer simply to offer new terms and there may *even* be a dispute as to what were the terms of the acceptance.

whereas, Crump states:[35]

> The individual nature of the contract must not be lost sight of, and a change or variation in a contract cannot be unilateral and imposed at the will of the Employer, but must be by agreement, tacit or otherwise; *Cowey* v. *Liberian Operations Ltd*. . . .

Hepple and O'Higgins[36] acknowledge the possibility of both but consider that the courts "would be slow to find a consensual variation" by continuing in employment where the variation is adverse to the employee's interest.[37]

Lastly, Cronin and Grime are of the view that:[38]

> It is equally axiomatic that, once the terms of a contract have been agreed, they cannot be varied save by subsequent agreement between the parties.

But they cite only non-employment cases as authority in support of the proposition.

Only in the area of redundancy and in answer to questions as to whether the "quit" was, in law, a discharge for the purposes of redundancy payments, have the English courts developed the requirement of consent by the employee to variation and the principle of *Johnston* v. *Northwood Pulp* seems now well-established.[39]

In all cases, however, notice will still have a legal effect. It is beyond argument that a common-law contract of employment may be terminated on reasonable notice. Accordingly, it can be argued that notice of a variation, at least as long as that required for termination, may well be construed as a notice to terminate and an implied re-employment on new terms after that date, with or without actual consent. Accordingly, if there exists a common law contract of

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[32] R.W. Rideout, Principles of Labour Law (1972).

[33] [1966] 2 Lloyd's Rep. 45.

[34] *Op. cit.*, footnote 30, p. 124, emphasis added.

[35] Dix on Contracts of Employment (1976), p. 106.

[36] Employment Law (2nd ed., 1976).

[37] *Ibid.*, p. 78.

[38] Labour Law (1970), p. 342.

[39] See *Phillips* v. *Glendale Cabinet Co.*, [1977] I. R.L.R. 307; *Coleman* v. *Baldwin*, [1977] I. R.L.R. 342, and the cases referred to in McGlyne, Unfair Dismissal Cases (1976), pp. 25 *et seq.*

employment, it cannot be argued that there is any requirement for "just cause" in the notice to terminate or to vary. As stated above, this principle is implied in *Zwelling*, but is *obiter* . At the same time, the court was careful to specify that it does not see a common-law contract of employment, as such, but rather a "relationship", a hybrid. The extent to which the common law will be permitted to encroach on the "relationship" is yet to be seen but it is unlikely that the "just cause" requirement of collective labour relations will survive on this flimsy footing.[40]

There is no expression in the *Zwelling* judgment of judicial recognition of a shift in thinking from contract notions to notions of employee status[41] or from Batt's[42] famous list of duties to a list of reasonable expectations. But it is inescapable that the development of collective bargaining and the creation of detailed "contracts" to govern the relationship of employer and employee have influenced the court. There is a concrete refusal to have recourse solely to common-law contract notions and a hybrid is better than nothing at this time.

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CORPORATIONS—COMPULSORY WINDING UP BY COURT—JUST AND EQUITABLE PROVISION—PARTNERSHIP IN FORM OF PRIVATE CORPORATION— DRASTIC REMEDY.—The decision of the Ontario Court of Appeal in *Re Rogers & Agincourt Holdings Limited*[1] is one among several recent Ontario decisions[2] involving a number of interesting questions on the just and equitable winding-up provisions of section 217 (d) of The Business Corporations Act.[3] That section reads as follows:

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[40] It is interesting to note that the current amendments to the Canada Labour Code, R.S.C., 1970, c. L-1, as am., allowing for hearings on unfair dismissal to non-unionized employees do just this, in effect.

[41] For an interesting discussion, see Flanders and Clegg, The System of Industrial Relations in Great Britain (1967), pp. 45 *et seq*., and, more recently, Kahn-Freund, Labour and the Law (2nd ed., 1977).

[42] Law of Master and Servant (4th ed., 1950).

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[1] (1977), 14 O.R. (2d) 489, aff'ing (1976), 12 O.R. (2d) 386, hereinafter cited as *Rogers*.

[2] See *Re Kennedy Square Warehousing Ltd*, per Garrett J. unreported, April 12th, 1977 (Ont. H.C.); *Re Sharon Golf & Country Club Ltd.* (1975), 20 C.B.R. 159; *Re Pre-Delco Machine & Tool Ltd*, [1973] 3 O.R. 115.

[3] R.S.O., 1970, c. 53.

> 217. *Winding up by court*—A corporation may be wound up by order of the court, . . .
>
> (d) Where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

In order to place the *Rogers* case in its proper perspective, it is necessary to set out the basic principles enunciated by the courts in considering such applications.

The three traditional grounds for just and equitable winding up appear to be the following:

(1) A justifiable lack of confidence in the conduct of the corporation's affairs by or on behalf of the majority shareholders;[4]

(2) a complete deadlock in the management of the corporation;[5] and,

(3) where the corporation is, in essence, an incorporated or quasi-partnership and grounds exist which would justify the making of an order for the winding-up of a partnership.[6]

It is the third of these categories with which this comment is concerned.

The basic principles applicable to any case for winding up under the "just and equitable rule" are set out in the decision of Mr. Justice Laidlaw in *Re R.C. Young Insurance Limited*:[7]

> I extract from [the authorities cited] certain principles and propositions which govern the Court in forming its opinion on the question whether or not it is just and equitable that a corporation should be wound up. . . .
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> 1. It is right to consider what is the precise position of a private company such as this, and in what respects it may be fairly called a partnership in the guise of a private company.
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> 2. The same principles ought to be applied where there is, in substance, a partnership in the form or guise of a private company. The circumstances which would justify the winding-up of a partnership are circumstances which should induce the Court to exercise its jurisdiction under the "just and equitable" clause and to wind up the company.
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> 3. As the foundation of applications for winding-up on the "just and equitable" rule there must be a justifiable lack of confidence in the conduct and management of the company's affairs.
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> 4. That lack of confidence must be grounded on the conduct of the directors in regard to the company's business. It may rest on lack of probity, good faith or other improper conduct on the part of a majority of directors.
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> 5. It must not spring from dissatisfaction at being outvoted in the business affairs or what is called the "domestic policy" of the company.

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[4] *Loch* v. *John Blackwood*, [1924] A.C. 783.

[5] *Re Michael P. Georgas*, [1948] O.R. 708; *Re Bondi Better Bananas Ltd.*, [1951] O.R. 845.

[6] *Re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 427.

[7] [1955] O.R. 598; see also Chesterman, The "Just and Equitable" Winding Up

The Fact Situation in Rogers.

Holmes and Rogers had been friends and business acquaintances for twenty years. In the fall of 1960 they entered into an arrangement whereby Rogers was to find suitable properties for development and arrange for the carrying out of the development, with Holmes providing the necessary capital. Each was to own fifty per cent of the development company that was to be formed and Holmes was to receive a salary. Several prospects were examined and, ultimately, it was decided to proceed with the construction of a motor hotel in the Toronto suburb of Scarborough. Rogers arranged to acquire the land, to obtain permission to build, the construction financing, the supervision of the preparation of the plans and the construction of the building itself. The hotel was completed for opening as the "Canadian Motor Hotel" in October, 1962. By this time, Holmes had insisted on changing the "partnership arrangement" from fifty to seventy per cent in his favour, to which Rogers reluctantly agreed. Two Ontario corporations were incorporated to carry out the venture—Agincourt Holdings Limited ("Holdings") and Agincourt Motor Hotel Limited ("Hotel"). Holdings was to own all of the assets and Hotel was to operate the hotel. Title to the lands was taken in the name of Anndale Investments Limited ("Anndale"), a corporation controlled solely by Holmes. The purpose of this was to enable Anndale to take advantage of tax losses following which ownership was to be transferred to Holdings. In addition, Rogers personally guaranteed the mortgage on the property.

After the opening of the Hotel, Rogers acted as its managing director and was largely instrumental in obtaining a liquor licence in December, 1963. A few days later Holmes instructed him to vacate his office in the Hotel, which Rogers did. This was motivated by Holmes' desire to eliminate Rogers' burdensome salary although Holmes was not averse to having Rogers continue to provide management services on an unpaid basis. Rogers continued to be a director and vice-president of Holdings and Hotel. At this point, abortive negotiations took place for the purchase by Holmes of Rogers' interest in the hotel business or, alternatively, the sale by them of their interest to a third party.

In 1967 Holmes, for the first time, denied that Rogers had even a thirty per cent interest in the land, buildings and equipment, which were still held by Anndale. Rogers commenced an action in the Supreme Court of Ontario to establish his interest in the realty. In an

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of Small Private Companies (1973), 36 Mod. L. Rev. 120, and Prentice, Winding Up on the Just and Equitable Ground: The Partnership Analogy (1973), 87 L.Q. Rev. 107 for an extensive review of the modern English position.

unreported decision rendered March 12th, 1970,[8] Stark J. declared that Anndale held the real property in trust for Holdings and that Rogers was entitled to have issued to him thirty per cent of the issued and outstanding common shares of Holdings. In due course the realty was transferred to Holdings and the shares issued to Rogers. At the annual meeting of Holdings in 1972, Holmes used his voting power to remove Rogers from the positions of director and vice-president, which he had held since inception. He had already been excluded from similar positions in Hotel in 1968. In October, 1973 he launched an application to wind up both Hotel and Holdings. Callon J. in dismissing the application at first instance,[9] stated:

> I find that it was the agreement of the applicant and Holmes that the applicant would play a primary role in bringing the motor hotel into being and into operation for which he was to receive a minority interest in the two companies and that their agreement did not extend beyond that.

The Divisional Court[10] reversed this decision and ordered both corporations to be wound up on two grounds:

(1) The repudiation by Holmes of the agreement that Rogers should hold thirty per cent of the shares of Holdings; and

(2) the pressure applied by Holmes to force Rogers to leave his office in the Hotel and to give up his participation in its management.

The court held that both of these actions justifiably destroyed the basis of the confidence which Rogers originally had in Holmes.

Holmes appealed the decision of the Divisional Court to the Court of Appeal, where his appeal was dismissed. The Court of Appeal specifically held (supporting the finding of Stark J. in the earlier action) that Rogers was to participate in the ongoing operation of the hotel business.[11] The court also found two further and, in our view, important reasons to justify the making of a winding up order. In delivering the court's judgment, Lacourciere J.A. stated:[12]

> (1) The incompatibility and quarrelling between Rogers and Holmes, even in the absence of a voting deadlock, is a valid consideration in situations where the Court is entitled to consider the case of an analogous application of the principles governing the dissolution of partnership . . . .
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> (2) The attempted freeze-out or expulsion principle is another significant factor that was only implicitly touched upon in the judgment appealed from.

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[8] An appeal from this judgment to the Court of Appeal was dismissed without written reasons on. A further appeal to the Supreme Court of Canada was abandoned.

[9] Unreported, reasons for judgment dated August 12th, 1975.

[10] *Supra*, footnote 1.

[11] *Rogers*, *supra*, footnote 1, at p. 497.

[12] *Rogers*, *ibid.*, at p. 495.

Ebrahimi v. *Westbourne Galleries Ltd, et al.*,[13] was a case of expulsion where the majority shareholder repudiated the personal relationship, and treated the minority shareholder as a mere employee, and voted him out of his directorship. At p. 501 Lord Wilberforce said:

> "The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management . . . even where under the partnership agreement there is a power of expulsion. . . ."

It is hard to disagree with a decision in favour of Rogers on these facts. While the decision is silent on the point, it appears that Rogers had received no dividends or other distributions from either of the corporations for a number of years. Because of the standard restrictions on transfer of shares of a private company, Rogers' minority holdings were difficult, if not impossible, for him to sell, except to the majority shareholder, an unlikely event in this case. In the result, Rogers was in the unenviable position of being unable to realize any benefit from his efforts in building up the value of the two corporations. In these circumstances, particularly since the court found that Rogers had been wrongfully excluded from management of the business, it was "just and equitable" that some compensation be made for Rogers' past service and thwarted expectations. In our view, however, this case is a powerful example of the use of a sledgehammer remedy when something less clumsy and final might have been just as effective, if not more so.

Ebrahimi v. *Westbourne Galleries Ltd, et al.*[14]

At this point it would be appropriate to make some comments on the factual situation in *Ebrahimi* referred to by Mr. Justice Lacourciere in his decision. In this case, E and N had carried on business in partnership as carpet dealers and, as partners, had an equal share in the management and profit. They formed a company to take over the business and 500 shares were issued to each of them. Soon after the company's formation, each of the two original shareholders transferred 100 shares to N's son G. All three were directors. The company made good profits, all of which were distributed by way of directors' remuneration, but no dividends were ever paid. Differences arose between E on the one hand and N and G on the other, about the running of the business.

At a general meeting E was removed from the office of director by N and G and thereafter excluded from any participation in the conduct of the company's business. A petition was issued for an order under section 210 of the United Kingdom Companies Act, 1948[15] that N and G purchase E's shares in the company and, in the

[13] [1972] 2 All E.R. 492 (H.L.). [14] *Ibid.* [15] 11 & 12 Geo. 6, c. 38 (Imp.).

alternative, for an order under section 222(f) of the Act that the company be wound up on just and equitable grounds.[16]

The trial judge ordered the company wound up, the Court of Appeal reversed this order and on appeal to the House of Lords, E's appeal was allowed. The basis of the decision is that membership in the company was entered into on the basis of a personal relationship involving mutual confidence or an understanding as to the extent to which each of the members was to participate in the management of the company's business. E was able to show some underlying obligation on the Part N and G that, so long as the business continued, E should be entitled to management participation.

Lord Cross, in the course of delivering his judgment, pointed out that:[17]

> What the minority shareholder in cases of this sort really wants is not to have the company wound up—which may provide an unsatisfactory remedy—but to be paid a proper price for his shareholding. With this in mind Parliament provided by s.210 of the Companies Act, 1948 that if a member of a company could show that the company's affairs were being conducted in a manner oppressive to some of the members including himself, that the facts proved would justify the making up of a winding-up order under the "just and equitable" clause, but that to wind up the company would unfairly prejudice the "oppressed" members the court could, *inter alia*, make an order for the purchase of the shares of those members by other members or by the company. . . . But the jurisdiction to wind up under s.222(f) continues to exist as an independent remedy. . . .

It was in this context that the expression "freeze-out" was used by Mr. Justice Lacourciere in delivering judgment in the *Rogers* case.

Issues for Consideration.

Several main issues emerge from the decisions:

(a) *The "freeze-out" principle.*

The interesting point to observe about *Ebrahimi* and *Rogers* is that in each of these decisions the majority shareholders could well have kept the applicant on the board of directors with absolutely no adverse consequences to themselves due to their right to control the board.[18]

If it is the mere removal from the board of directors which

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[16] The wording of that section is the same as that of s. 217 of The Business Corporations Act, *supra*, footnote 3.

[17] *Supra*, footnote 13, at p. 505.

[18] This would not have been the case in *Re A & B C Chewing Gum Ltd*, [1975]1 All E.R. 1017. Here the Articles and a Shareholders' Agreement provided for representation by the minority on the board and for unanimity in its decisions.

makes the difference in such applications, we wonder whether the courts are aware of the potential for "games playing" they have opened up by favouring form over substance.

In *Rogers*, the Court of Appeal's second ground for decision was the loss of confidence by Rogers as a minority shareholder in Holmes as a majority shareholder. It appears highly doubtful that absent fraud or actionable breach of contract, the court would have ordered the winding up without a freeze-out.[19]

(b) *Lack of other remedies.*

It would seem that, with the pressure of a winding-up order hanging over their heads, two opposing parties might be able to work out their differences or at least come to a more acceptable way of resolving them. There is no doubt that the court has the power to adjourn a winding-up order *sine die*. But the real question is, does the court have any further power? Section 219 of The Business Corporations Act provides:[20]

> The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim *or other order as is considered just*, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up to an officer of the court for inquiry and report and may authorize the officer to exercise such powers of the court as are necessary for the reference.

There was considerable discussion in *Re R. J. Jowsey Mining*[21] as to the scope of the court's powers under a predecessor of section 217(d). Laskin J.A. refused to make an order staying a winding-up order pending an attempt at settlement by the parties. His Lordship construed section 217(d) as "pointing to orders in furtherance of or otherwise in connection with a present or prospective winding-up order. . . . Any possibility of the court becoming a superior board of directors should be avoided".[22] This is an example of the traditional reluctance of the common law to involve itself in the internal affairs of a corporation—to deal in matters of law only and to avoid the conscious making of business or policy decisions.

This view should be contrasted to the provisions of section 207(1)(b)(ii) of the Canada Business Corporations Act.[23] It provides that a court may order the liquidation and dissolution of a

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[19] See for example in *Re Sharon Golf & Country Club Ltd*, *supra*, footnote 2.

[20] *Supra*, footnote 3. Italics added.

[21] [1969] 2 O.R. 549.

[22] *Ibid.*, at pp. 551-552. This statement is *obiter*. In *Re A & B C Chewing Gum Ltd*, *supra*, footnote 18, at p. 1029, Plowman J. commented that, in England, in practice a stay of a winding-up order is never made.

[23] S.C., 1974-75, c. 33.

corporation if it is satisfied that it is "just and equitable that the corporation should be liquidated and dissolved". Under section 207(2), on an application, the court may make an order under this section or section 234, as it sees fit.

Section 234 is very broadly cast and provides a myriad of remedies, including the power under section 234(3)(f) to make an order "directing a corporation . . . or any other person, to purchase securities of a security holder".

We have already referred to the situation in England. It would appear that one of the major reasons for enacting section 210 in the United Kingdom was to lessen the drastic consequences of the exercise of the court's power under section 222.

It is interesting to note that in *Ebrahimi*, while the applicant sought a compulsory purchase order, the court gave effect to the alternative and administratively simpler remedy of winding-up. This solution was adopted despite Lord Cross' admission of what the minority shareholder really wanted as quoted above.[24]

The Lawrence Committee[25] had the opportunity to recommend parallel changes to the Ontario legislation but failed to do so. It stated in its report:[26]

> British Columbia is the only Canadian jurisdiction to adopt section 210 of the United Kingdom Companies Act. The concept, however, has many proponents who regard it as an omnibus solution to the many difficulties (real or imaginary) which can confront the individual shareholder. . . . Section 210 has an aura of reservation and defeatism about it in that it abandons the solution of the problems of shareholders' rights to the unfettered discretion of the judiciary. There are, in any event, some serious deficiencies inherent in section 210 as the Jenkins Report recognized. The Committee is of the opinion that the fundamental objection to this approach to the solution of shareholder grievances is its complete abandonment of the functional principle of judicial non-interference in the management of companies.

(c) *Existence of other remedies.*

It appears the availability of other remedies will not preclude the court from exercising its discretion to order a winding-up. In *Re A & B C Chewing Gum, Ltd*,[27] the applicant could have had an order reinstating its nominee as a director. In *Rogers*, the court used language implying there was an agreement allowing Rogers to serve as a director of both corporations.

For the court to have ordered specific performance of these

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[24] See *supra*, footnote 13, at p. 505.

[25] 1967 Interim Report of the Select Committee on Company Law (Legislative Assembly—Province of Ontario).

[26] *Ibid.*, s. 8.5.2.

[27] *Supra*, footnote 18.

implied agreements would have been futile. The damage had already been done in that the personal relationship had been destroyed. In *Ebrahimi*, Lord Wilberforce spoke of entitlement to management participation as an obligation so basic that if broken the conclusion must be that the association has to be dissolved.[28]

(d) *Limitation to quasi-partners.*

In addition to *Rogers*, there are several other recent cases which warrant comment in this context.

In *Re Sharon Golf & Country Club Ltd*[29] a minority shareholder brought an application for the just and equitable winding-up of a company which had been incorporated in 1961 to acquire and operate a golf course. Wolfe, the applicant, was one of the three original incorporators, but in the intervening years some ten other shareholders were admitted. Wolfe had a falling out with Martin, the majority shareholder, and brought this application on the basis that the company was operated for Martin's benefit.

Goodman J., although he agreed that the bookkeeping was irregular, found that no impropriety on the part of Martin had been established. The company's business was ongoing and profitable, both factors to be given serious consideration in deciding whether to allow a winding-up. In the circumstances, the facts did not justify the making of the order applied for.

Goodman J. also found that, although Wolfe, Martin and the other original incorporator might have considered the company to be, at its incorporation, "a partnership in the guise of a private company", the issue of shares to ten other shareholders over a period of years removed the company from the quasi-partnership sphere. He said:[30]

> There is nothing in the material before me to suggest that those persons either expressly or by implication understood at the time of the acquisition of the shares by them that the principles of law applicable to partnerships would apply to them and other shareholders rather than the principles of law that would ordinarily apply with respect to ownership of shares in and control in management of a limited company.

Perhaps the courts would be inclined to give a more liberal interpretation to fact situations such as those in *Re Sharon* if they were not compelled to make a winding-up order in consequence of their finding. In our view, the courts' consciousness of the consequences inhibits the extension of the remedy to such situations whenever the conduct complained of is marginal, or where the

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[28] *Supra*, footnote 13, at p. 501.

[29] *Supra*, footnote 2.

[30] *Ibid.*, at p. 172.

existence of the "quasi-partnership" cannot be established. *Re Sharon* is one example of both limiting factors.

The quasi-partnership limitation also affects the position of the shareholder "who inherits shares of a private company which is making a surplus sufficient to pay the salaries of the remaining working directors but not a reasonable return on the shares". This situation is considered in the Jenkins *Report.*[31] The Committee recommended that such companies provide in their charters for compulsory purchase of the shares of the deceased shareholder at an appraised or arbitrated price, in default of which the company is to be wound up. No statutory remedy in the absence of such a provision was recommended.

The shareholder may safely be excluded from management and the board of directors, without giving rise to a right to have the company wound up, at least until some judicial or legislative change of heart takes place.

If, as has been stated on many occasions, the just and equitable winding-up order is a flexible one, why cannot this problem be resolved judicially, rather than through a legislative change?

(e) *Written agreements.*

The underlying principle expressed in the leading case of *Re Yenidje Tobacco Co. Ltd*[32] was that a breach of the original agreement and of the good faith which underlay it might of itself be a sufficient basis to wind up a quasi-partnership.

However, it is this very insistence in the "quasi-partnership" cases on the prior existence of some form of agreement which weakens the use of the section. If a written agreement setting out a code of procedural and substantive rights of all shareholders exists in a particular case, we believe that the courts would be inhibited in exercising their equitable jurisdiction. Where the agreement is unwritten and established to the satisfaction of the court on oral evidence, as in *Re Rogers*, no such stricture exists. Yet, in many instances, shareholder buy-sell contractual arrangements, perhaps reasonable at the time of execution of the agreement, are even more punitive in their effect than a just and equitable winding-up.

If regard is also had to the decision of *A & B C Chewing Gum Ltd*,[33] it will be noted that there, the parties had agreed in writing to ensure that the board of directors consisted of one of the nominees of

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[31] Report of the Company Law Committee (U.K.) June, 1962, Cmnd 1749, pp. 72 and 73.

[32] *Supra*, footnote 6.

[33] *Supra*, footnote 18.

the minority shareholder. The majority shareholders claimed they had the right to run the company with the exclusion of any director appointed by the petitioner, who then applied for an order that the company be wound up under section 222(f) of the United Kingdom Companies Act. It was held that the majority shareholders had repudiated the petitioner's right under the Articles and the Shareholders Agreement to participate in the management of the company and this repudiation was so fundamental that it constituted grounds, following *Ebrahimi*, for applying the just and equitable rule to wind up the company.

In *Bentley-Stevens* v. *Jones*,[34] Plowman J. refused to grant an injunction restraining the minority from exercising its lawful power of removing a minority director but commented following *Ebrahimi* that such removal in appropriate circumstances could entitle the applicant to a winding-up order.

(f) *Applicability of Re R.C. Young Insurance Limited.*

It is our opinion that Laidlaw J.A. in the passage from *Re R.C. Young Insurance Limited*[35] quoted earlier did not intend to rigidly establish a series of five factors which *must* be present in every case before a winding-up order will be granted.

This is reinforced by the Court of Appeal's decision in *Rogers* where Mr. Justice Lacourciere stated:[36]

> It is quite proper, of course, to draw upon previous cases for general guidance but counsel and the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories, for each case depends to a large extent on its own facts. It is in this light that we must consider the principles and propositions set out by Laidlaw, J.A. in *Re R.C. Young Ins. Ltd*, . . . Laidlaw, J.A. himself stated . . . that the decision rested "primarily on findings of fact".

It is obvious that at least points three and four were not present in the *Rogers* decision.[37]

Conclusion

We understand that Holmes sought and obtained leave to appeal to the Supreme Court of Canada from the decision of the Court of

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[34] [1974] 2 All E.R. 653.

[35] *Supra*, footnote 7.

[36] *Supra*, footnote 1, at p. 493.

[37] See also the decision of the Ontario Divisional Court in *Re Investment Properties International Ltd* (1974), 2 O.R. (2d) 654, aff'ing (1973), 1 O.R. (2d) 633, where Keith J. had granted a winding-up order to protect minority shareholders in a case where assets were being diverted from the corporation in "highly suspicious circumstances".

Appeal but the matter was subsequently settled and the appeal not proceeded with. So far, at least the Court of Appeal in Ontario, as did the House of Lords in England in the *Ebrahimi* case, has extended the scope of the use of the just and equitable winding-up powers in a narrow set of circumstances. Unfortunately, this liberal construction of the provision seems still to be applied with unnecessary rigidity on an all or nothing basis to a limited range of fact situations. It leaves the shareholder who cannot demonstrate the necessary "quasi-partnership" relationship without a remedy and, as a result of its decision in *Re R.J. Jowsey Mining*,[38] it leaves no scope for judicial creativity in developing less drastic but perhaps more useful remedies. In the light of this judicial attitude, it may be that a person who is forming a corporation together with a number of other people and who will hold only a minority interest may require the corporation to be incorporated under the Canada Business Corporations Act, rather than under The Ontario Business Corporations Act, to gain the benefit of the court's powers under sections 207 and 234 in the event the business relationship does not work out.

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PARENT AND CHILD—LEGAL INTERVENTION—ANOTHER DEVELOPMENT.—The decision of the English Court of Appeal in the recent case of *Re D.J.M.S. (a minor)*[1] raises a number of important issues involving legal intervention in the parent-child relationship and is, it is suggested, in its own way, something of a landmark decision. The facts of the case, not a little extraordinary in themselves, were as follows: the parents of the boy in question, whose name was Duncan,[2] had an implacable objection to comprehensive education, a system which operated in the town in which they lived. Until D. was eleven years old, they had sent him to an independent free-paying school, but they were unable, thereafter, to afford to pay for that kind of education. They then told the local education authority that they were opposed to D. going to any comprehensive school and refused to send him to any of those offered by the authority[3] and the father suggested to the authority

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[38] *Supra*, footnote 21.

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† Clifford S. Goldfarb, of the Ontario Bar, Toronto.

[1] [1977] 3 All E.R. 582.

[2] Hereinafter referred to as D.

[3] The extent of the parents opposition to the concept of comprehensive education

that it was their duty to pay for D.'s education at an independent school which they had, in fact, done in the case of D.'s two older sisters. Indeed, in D.'s case, the authority seriously considered the proposal, but ultimately rejected it as being contrary to their policy. As a consequence of the parents' behaviour, D. did not attend school after the end of the summer term 1975 and they did not comply with a school attendance order served on them early in 1976. In view of the failure of the procedure in the case of D.'s sisters, the authority elected not to prosecute the father under the provisions of the Education Act 1944,[4] but, instead, brought care proceedings in the juvenile court in respect to the boy under section 1 of the Children and Young Persons Act 1969.[5] On May 3rd, 1976, the juvenile court made a care order under the Act and D. was removed from his home to a local authority home for children in care, even though the parents kept a good home and D. was generally well behaved. D. stayed at the local authority home for nineteen days, attended a comprehensive school daily and went home to his parents at weekends. At the end of this period, D. went home for the Whitsun holidays, after which his parents refused to return him to the local authority home, alleging that he had been unhappy and adversely affected by his stay there. The parents continued, in addition, to refuse to send him to school. D. then appealed to the Crown Court against the order made by the juvenile court. At the hearing, the only witness who appeared for the boy was his father, whilst a number of witnesses called by the authority, including the superintendent of the home and a senior social worker, disputed the father's claim that D. had been unhappy at the home. Nonetheless, the Crown Court revoked the order on the grounds that the boy was not in need of "care of control" as prescribed in section 1(2) of the Children and Young Persons Act because he was not in need of physical or moral care or control and, thus, the juvenile court had no power to make the order. Alternatively, the Crown Court said that, even if the juvenile court had had the power to make the order, its use was not appropriate to the kind of case under consideration as the making of the order had proved to be injurious to the child. The authority should either have prosecuted the father or paid for D. to attend an independent school. The authority appealed to the Divisional Court, which upheld the Crown Court, and then to the Court of Appeal, which unanimously allowed their appeal.

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may be seen from two facts noted in the judgment of Lord Denning M.R., [1977] 3 All E.R. 582 at p. 586. First, the father had been imprisoned after refusing to pay a £10 fine for failing to send his two older daughters to school. Second, the father had been shown a new comprehensive school and, although he specifically had no complaints about either the buildings or the staff, he again refused to send his son there on the grounds that it was a comprehensive school.

[4] 7 & 8 Geo. 6, c. 31. [5] C. 54.

After having outlined the facts and referred to the relevant statutory provisions, Lord Denning M.R., citing *Bracegirdle* v. *Oxley*,[6] stated[7] that the Court of Appeal was entitled to inquire into inferences which the Crown Court had drawn from the primary facts and: "Not only are the inferences of those facts able to be reviewed; but in addition the reasonableness of the discretion can be reviewed. The court can interfere if it is a decision to which no reasonable person could come. Furthermore, it can interfere if the court below has misdirected itself on the facts or misunderstood them, or has not taken into account relevant considerations. All these are grounds on which the higher court can interfere with the discretion of the court below. These grounds are so many and various that it virtually means that an erroneous exercise of discretion is nearly always due to an error in point of law." Having awarded himself this very broad basis for review, the Master of the Rolls then turned[8] his attention to the main issue. "The only question" he said, "is, what is to be done? What is the best course to take for the welfare of the child?" Lord Denning reviewed the various courses of action which might be applicable and came to the conclusion that, on balance, the best course was that the care order should be made. Lord Denning was of the opinion[9] that: "In the last resort it should be implemented so that this child can be educated instead of being deprived of the opportunity to make good in the world. Everybody knows that a child ought to be properly educated. It is utterly unreasonable for the parents to keep him back from school because of their implacable opposition to the comprehensive school system." Lord Denning then refuted[10] the contention that the local authority were involved in a contest with the parents; the authority, he said, were doing their best for the child and the child's education and that, therefore, the care order should be made, although he hoped that it would not have to be enforced.

Geoffrey Lane L.J. laid[11] particular emphasis on the attitude of the father towards comprehensive education and referred to notes of evidence, which were not before the Divisional Court when they made their decision, from which it was plain that the father could give no intelligible reason for the views which he held. Cumming-Bruce L.J. was of the view[12] that the interests of the child had been

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[6] [1947] K.B. 349.

[7] *Supra*, footnote 1, at p. 589.

[8] *Ibid.*, at p. 590.

[9] *Ibid.*, at p. 590.

[10] *Ibid.*, at p. 590.

[11] *Ibid.*, at p. 590.

[12] *Ibid.*, at p. 591.

confused with the interests of the father, a confusion which made it difficult for the Crown Court and the Divisional Court to appreciate what the child's real interests were. In addition, Cumming-Bruce L.J. noted[13] that, in cases of this kind, the child's legal advisers should carefully consider how far it is consistent with their duty to the child to present a case which appears to be identical with the obsessive views of a parent.

The first point to be made about *Re D.J.M.S.* (*a minor*) is that it makes a substantial dent, in England at least, in the notion, which is even included in the Universal Declaration of Human Rights,[14] that the parents have a prior right to decide the kind of education which shall be given to their children. It is also an assertion made by text writers,[15] and is hallowed, by age at least, in English jurisprudence. Thus, in *Hall* v. *Hall*,[16] it was held that the guardian was the proper judge of which school a sixteen year old boy should attend and that, if the boy should refuse to go, then the court would compel him. However, this traditional approach has been questioned by Eekelaar in an important article,[17] where he suggests that it ". . . arrogates to the parental claim unjustified superiority over the welfare principle and that the proper approach is to follow the course dictated by that principle unless the parental preference would not detract from it, or would do so only insignificantly or speculatively". The decision in *Re D.J.M.S.* (*a minor*) clearly represents judicial approval of Eekelaar's view.

In Canada there is scant authority on the right of parents to determine the kind of education to be received by their children, perhaps because the attraction of fee paying schools is less than in England. Although there are many judicial statements, mainly of some antiquity,[18] emphasizing a parent's, usually a father's right, to determine a child's religious education, there is a contrary line of Canadian authority which suggests that a welfare principle is appropriate. The leading case is *De Laurier* v. *Jackson*,[19] where

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[14] Art. 26(3). [13] *Ibid.*, at p. 591.

[15] See P. M. Bromley, Family Law (5th ed., 1976), pp. 332-333; S. M. Cretney, Principles of Family Law (2nd ed., 1976), pp. 316-317.

[16] (1749), 3 Atk. 721. See also *Tremain*s Case (1719), 1 Strange 167, where the child, ". . . being an infant . . . went to Oxford contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford, there went another *tam* to carry him to Cambridge, *quam* to keep him there".

[17] What Are Parental Rights (1973), 89 L.Q.Rev. 210, at p. 221.

[18] *In Re Ross* (1876), 6 P.R. 285; *Re Laurin*, [1927] 3 D.L.R. 136; *Re Smith* [1952] 2 D.L.R. 778; *Re Carswell* (1875), 6 P.R. 240; *Re Faulds* (1906), 12 O.L.R. 245; *Re Bigras* (1923), 55 O.L.R. 57.

[19] [1934] 1 D.L.R. 790.

Duff C.J., Crockett and Smith JJ. of the Supreme Court of Canada said[20] that: "Due consideration is, of course, to be given in all cases to the father's wishes but if the court is satisfied in any case upon a consideration of all the facts and circumstances, as shown by the evidence, that the father's wishes conflict with the child's own best interest, viewed from all angles—material, physical, moral, emotional and intellectual as well as religious—then the father's wishes must yield to the welfare of the child. . . . It is not a question of the father having forfeited his parental rights by serious misconduct, and it is, therefore, not necessary, in order to justify the court in ignoring the father's or the mother's wishes, that any such serious misconduct should be proved. It is solely a question of what is in the child's best interest." This approach has been utilized in other cases,[21] even though, in one,[22] it had been said that, in such cases, the court should proceed cautiously.

There can be little question, in view of instances such as the appalling case of *Maria Colwell*,[23] that the state is obliged to intervene to protect children from, at least, the grosser forms of parental aberration. Indeed, one of the features of that case was the failure of the relevant social organizations to take effective action, even when reports were made to them. There are other areas in which the law intervenes, depriving a parent of custody where his behaviour is such that the child's welfare is thereby prejudiced. It is suggested that the law should be more prepared to intervene in the parent and child relationship where the behaviour of both parents is detrimental to the child's welfare. A particular example, of which I have written elsewhere,[24] is where parents, to use Selby J.'s phrase in the New South Wales case of *Ex parte Paul; Re Paul*,[25] hold unbalanced and extravagant religious beliefs.[26] The clear relationship between religious upbringing and general education is apparent from the earlier discussion of the Canadian cases[27] and, therefore it

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[20] *Ibid.*, at p. 791.

[21] *R. Bennett*, [1952] 3 D.L.R. 699; *Re Le Blanc* (1970), 13 D.L.R. (3d) 225.

[22] *MacDonald* v. *MacDonald*, [1954] 1 D.L.R. 422.

[23] For comment on this case, see J. G. Howells, Remember Maria (1974), albeit a somewhat sensational account. From the legal point of view, O. M. Stone, Hard Cases and New Law for Children in England and Wales (1974), 8 Fam. L.Q. 351, at pp. 368-371; F. Bates, Redefining the Parent-Child Relationship. A Blueprint (1976), 12 U.W.A.L.Rev. 518, at pp. 526-528.

[24] F. Bates, Religion in Custody Disputes—A Comparison of American and Australian Judicial Attitudes (1974), 7 C.I.L.S.A. 332.

[25] [1963] N.S.W.R. 14, at p. 20.

[26] There is, in fact, empirical evidence to support intervention in these cases, see F. Bates, Child Law and Religious Extremists: Some Recent Developments, to be published soon in the Ottawa Law Review.

[27] *Supra*, text at footnotes 19 *et seq.*

is suggested that the law would be justified in intervening in the parent and child relationship in the case of parents whose views on education were, as in *Re D.J.M.S. (a minor)*, objectively unreasonable. Although, perhaps surprisingly, not much has been written on the reasons which motivate parents to send their children to independent schools, there is, at least, some evidence, which can be called especially from Gathorne-Hardy's monumental study of English private schools,[28] that parents do so from wrong motives or in ignorance of the kind of education which they are likely to receive there.[29] Even the ultra-conservative Australian magazine *The Bulletin*[30] notes that the motives which cause parents to send their children to independent schools vary enormously: from genuine parental concern to gross self-interest.

From the strictly legal point of view, where does *Re D.J.M.S. (a minor)* fit in with the general law relating to the relationship of parent and child? One must, of course, be aware of the problems surrounding this whole area of the law: thus Eekelaar, after an analysis of various aspects of the relationship, concluded[31] by saying that, ". . . it is no easy matter to determine with precision what rights pertain to parenthood and what happens to them when other persons acquire guardianship or custody of the child" and, likewise, Freeman has said[32] that, "The whole adult-child relationship is obfuscated in tangled terminology".[33] My view is that *Re D.J.M.S. (a minor)* is a continuation of that line of English[34] cases, *J.* v. *C.*,[35] *Re W (an infant)*[36] and *O'Connor and Another* v. *A. and B.*[37] These cases, the first on wardship and the latter two on adoption, clearly demonstrate how little attention the English appellate courts will pay

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[28] J. Gathorne-Hardy, The Public School Phenomenon (1977), *passim*.

[29] A colleague of mine was sent, not all that long ago, to an English Preparatory school where the proprietress was an alcoholic woman whose mission it was to write the fifth Gospel. Thus, had she not eventually been institutionalized, one might have been faced with the Gospels according to Matthew, Mark, Luke, John and Mrs. Cooper! It is hardly likely that my colleague's father, a clergyman, would have sent him to such a school had he known the true facts at the appropriate time.

[30] Issue of Feb. 21st, 1978.

[31] *Op. cit.*, footnote 17, at p. 234.

[32] M. D. A. Freeman, Child Law at the Crossroads (1974), 27 C.L.P. 165, at p. 168.

[33] The issue is further complicated by the fact that the legal nature of the relationship will vary with the age of the child, see *Hewer* v. *Bryant*, [1970] 1 Q.B. 357, at p. 369, per Lord Denning M.R.

[34] English in the sense that they were all decided by the House of Lords, the two last named cases originated in Scotland.

[35] [1970] A.C. 668.

[36] [1971] A.C. 682.

[37] [1971] 2 All E.R. 1230.

to claims of parental rights and *Re D.J.M.S. (a minor)* affirms and strengthens that notion, even though, in that case, no reference[38] was made to any of the three earlier cases. Although it is not proposed to analyze those three cases in detail, as that has been done elsewhere,[39] there are some points of especial interest in them as regards *D.J.M.S. (a minor)*. In *J. v. C.*, Lord MacDermott appeared to suggest[40] that the welfare of the child, in this kind of case was the only truly relevant consideration.[41] In *Re D.J.M.S. (a minor)* is it clear that Lord Denning was of the same opinion.[42] In *Re W. (an infant)*, Lord Hailsham L.C. discussed the meaning of the word "reasonableness" in relation to a natural parent's refusal to consent to adoption. He said[43] that it can, ". . . include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness or excessive lack of commonsense". It was of the essence of the judgments of Lord Denning M.R.[44] and Geoffrey Lane L.J.[45] in *Re D.J.M.S. (a minor)* that the conduct of the boy's father was, in a number of respects, unreasonable. *O'Connor and Another* v. *A. and B.* represents the first instance of a court's dispensing with the consent of both natural parents in an adoption case; in *Re D.J.M.S.*, both parents were involved in the decision, even though the father was obviously the dominant partner.

Although developments in other jurisdictions have tended to mirror English developments, though not in such a spectacular manner,[46] *Re D.J.M.S. (a minor)* demonstrates the growing tendency for the state, through the courts, to intervene in the relationship of parent and child where, through the objectively unreasonable conduct of the parent, the welfare of the child is prejudiced. There can be no doubt, in my opinion, that this is a desirable development and one which deserves to be copied in other

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[38] No reference, that is in the judgments. *Re W. (an infant)* was cited before the court.

[39] See F. Bates *op. cit.*, footnote 23, at pp. 520-523. Also a note on the latter two by L. Blom-Cooper, Adoption and the Unreasonable Parent (1971), 34 Mod. L. Rev. 681.

[40] *Supra,* footnote 35, at p. 710.

[41] Although Freeman, *op. cit.*, footnote 32, at p. 184 does not consider Lord MacDermott's comments to be a legitimate interpretation of the words of the relevant Act and Lord Donovan and Lord Upjohn adopted more traditional views.

[42] *Supra*, footnote 1, at p. 590. Text at footnote 8.

[43] *Supra,* footnote 36, at pp. 699-700.

[44] *Supra,* footnote 1, at pp. 589-590.

[45] *Ibid.*, at p. 590.

[46] See F. Bates, *op. cit.*, footnote 23, at pp. 523 *et seq.*

jurisdictions. In view of new knowledge regarding the internal dynamics of the family—particularly family violence—we can no longer regard it as the entirely beneficent institution it was once considered to be. As regards the legal view of parental claims of right, the law has come a long way from the view expressed in 1881 by an Australian judge[47] that, "There is no question as to the legal right of the father to the custody of his children. The law makes the father the absolute lord of both wife and children . . . ".[48]

FRANK BATES*

* * *

ENVIRONMENTAL ASSESSMENT IN ONTARIO: MYTH OR REALITY?—On October 20th, 1976, the environmental assessment process established by The Environmental Assessment Act, 1975 of Ontario was proclaimed in force.[1] To January 1978, only one environmental assessment has been submitted under the Act and that assessment does not even concern an actual physical project. It is a *Class* environmental assessment submitted by the Ministry of Transportation and Communications which lays out a framework or study process which will be used internally by this ministry in dealing with all *future* projects of the type specified in the application.[2] In short, no assessment has yet been submitted for any concrete project. One is moved to ask whether environmental assessment in Ontario is a myth or reality.

The Act was passed "for the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment".[3]

Upon entry into force, the Act applied to undertakings carried out by provincial, municipal or other public bodies.[4] As of January 16th, 1977, it became applicable to major commercial or business enterprises designated by regulation.[5]

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[47] *Re Ewing and Ewing* (1881), 1 Q.L.J. 15, at p. 15 per Lilley C.J.

[48] In Canada, see *Re Allen; R.* v. *Allen* (1871), 31 U.C.Q.B. 458.

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[1] S.O., 1975, c. 69. The operational sections were proclaimed in force on Oct. 20th, 1976, by O.C. 2885/76, dated Oct. 13th, 1976.

[2] M.O.E. File #:2-76-0001-000. A short resumé is found in E.A. Update, A Digest for People Interested in Environmental Assessment, published by the Ministry of the Environment, Vol. 2, No. 5 (Oct., 1977), p. 7.

[3] S. 2.

[4] S. 3(a).

[5] S. 3(b), brought into force by proclamation dated Dec. 15th, 1976, and

The Act was intended to introduce into the planning stages of an undertaking a thorough assessment of its impact on the environment. The environment is defined broadly as:[6]

(i) air, land or water,
(ii) plant and animal life, including man,
(iii) the social, economic and cultural conditions that influence the life of man or a community,
(iv) any building, structure, machine or other device or thing made by man,
(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
(vi) any part or combination of the foregoing and the interrelationships between any two or more of them,

in or of Ontario.

An undertaking to which the Act applies cannot proceed until the environmental assessment is accepted by the Minister of the Environment and he has given his approval to proceed.[7] That is, he must agree that the assessment submitted is an accurate picture of the impact on the environment of the proposed undertaking and the balance of advantages and disadvantages lies in favor of proceeding with the proposal. An environmental assessment shall consist of:[8]

(a) a description of the purpose of the undertaking;
(b) a description of and a statement of the rationale for,
  (i) the undertaking,
  (ii) the alternative methods of carrying out the undertaking, and
  (iii) the alternatives to the undertaking;
(c) a description of,
  (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
  (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
  (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and
(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

Thus, the Act promises a great deal. Indeed, too much. It is clear that a full assessment of all public undertakings would bring

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published in the Ontario Gazette, Vol. 110-2, Jan. 8th, 1977, p. 69. Two private proposals have been designated by regulation: the Reed Paper timbering operation in Northern Ontario (O. Reg. 1009/76), and the Inco Hydroelectric dam on the Spanish River (O. Reg. 416/77). It has been announced in the legislature that a regulation will be issued designating the Onakawana lignite deposits project south of Moosonee.

[6] S. 1(c).

[7] S. 5(1).

[8] S. 5(3).

development to a grinding halt. Thus, there are powers of exemption—powers which have been used for *almost all* concrete proposals which have been considered since the operational parts of the Act came into force. There are several projects for which environmental assessments are now being prepared.

Powers of Exemption

Section 41(f) allows the Lieutenant Governor in Council to make regulations exempting any undertaking, class of undertaking, person or class of persons from the provisions of the Act. Pursuant to this power, General Regulations[9] were issued which exempted:

— all undertakings and classes of undertakings by municipal bodies;[10]
— all undertakings and classes of undertakings carried out by the Ministries of Revenue, Labour, Correctional Services, the Attorney General, Colleges and Universities, the Solicitor General, Community and Social Services, Consumer and Commercial Relations, Education, and Health, Agriculture and Food, and Housing;[11]
— until March 1st, 1977, all undertakings and classes of undertakings by the Treasurer of Ontario, The Minister of Economics and Intergovernmental Affairs and the Minister of Culture and Recreation; and
— until September 1st, 1977, all undertakings and classes of undertakings carried out by an authority under The Conservation Authorities Act, and after that date, most projects of such authorities.[12]

After taking into account these regulations, few undertakings remain within the ambit of the Act. But for those that do, section 30 provides that, with the approval of the Lieutenant Governor in Council, the Minister may exempt an undertaking from the provisions of the Act where he is of the opinion that it is in the public interest to do so having regard to the purpose of the Act and weighing the same against the injury, damage or interference that might be caused to any person or property by the application of the Act. Using this power, the Minister has issued a host of exemption orders.

Indeed, so numerous have these exemptions been that the Ministry was moved to prepare a list of projects still requiring an

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[9] O. Reg. 836/76, as am. by O. Regs 1020/76, 94/77, 416/77, and 636/77.

[10] *Ibid.*, s. 5.

[11] *Ibid.*, s. 6(1), though it should be noted that the Ministry of Government Services does most of the construction work for these Ministries.

[12] *Ibid.*, s. 8(1), as am. by O. Reg. 636/77.

environmental assessment.[13] This list shows that various undertakings by the following authorities are still within the application of the Act:

— Ministry of Colleges and Universities;[14]
— Ministry of the Environment;
— Ministry of Government Services;
— Ontario Hydro;
— Ministry of Industry and Tourism;
— Ministry of Natural Resources;
— Ministry of Transportation and Communications;
— Toronto Area Transit Operating Authority;
— Ontario Transportation Development Corporation;
— Ontario Northland Transportation Commission;
— Ontario Telephone Development Corporation.

The "undertakings" still included would cover most of the major governmental construction projects.

Municipalities and the Act

The problem of application of the Act can best be seen in the case of municipalities. The terms of the Act call for application of the assessment process to all municipal undertakings immediately upon entry into force. However, as already noted, from the outset all such undertakings were exempted from the operation of the Act by the General Regulations issued before the entry into force.

It was apparent that the Act could not be applied to all municipal undertakings. Why then were they included in the first place? The question remains inadequately answered. In December 1975, the Ministry of the Environment established a Municipal Working Group to discuss the types of municipal projects which would require an environmental assessment under the Act. The Group consisted of representatives of the Municipal Engineer's Association, the Municipal Liaison Committee, and the staff of the Ministry. In December 1976, the Group submitted its *Report* to the Ministry.[15]

The *Report* identifies broad categories of projects to which environmental assessment could be applied, for example, transit and waste management systems. Within the broad categories, the Group suggests specific types of projects requiring an assessment based on

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[13] See E.A. Update, Vol. 2, No. 1 (Jan., 1977), pp. 7-13.

[14] The only projects under this Ministry listed as being covered are new campuses for community colleges or for universities. In view of the tight budgetary situation in the field of higher education, this inclusion is illusory.

[15] Report of the Municipal Working Group—Recommendations for the Designation and Exemption of Municipal Projects under The Environmental Assessment Act, found as an Appendix in E.A. Update, Vol. 2, No. 1 (Jan. 1977).

consideration of the potential impact of the technology to be used, the magnitude of the project or, where possible, evaluation of the sensitivity of the environment that would be affected. A list of "Screening Criteria" is included in an Appendix to the *Report*.

The Group suggests that, when municipal undertakings are made subject to the Act, the Minister should make suitable use of his powers under section 30 (exemption orders) and section 41 (f) (exemption regulations) to exclude projects where an assessment would be inappropriate. In any event, there should be a general phasing-in period during which specific activities should be excluded from the operation of the Act:[16]

> . . . if by the effective date of the E.A. regulations:
>
> 1) the municipality has authorized by Council resolution or by-law, the preparation of detailed construction plans and specifications for the project; or
>
> 2) land has been secured to implement an undertaking authorized by Council resolution or by-law; or
>
> 3) a plan of expropriation has been filed to provide land required for the specific project;
>
> and contracts are awarded for construction of the undertaking or construction is commenced within three years of the effective date of The Environmental Assessment Act Regulations.

On October 21st, 1977, The Honorable George Kerr, Minister of the Environment, presented the Ministry's response to the *Report*. *The Environmental Assessment Act and Municipalities*[17] contains an analysis of the comments received on the Working Group's *Report* from municipalities and municipal organizations, as well as Environment's comments on points contained in the *Report* of the Planning Act Review Committee referring to The Environmental Assessment Act's application to municipal and municipally regulated undertakings. The paper suggests solutions for major areas of concern.

Basically, the recommendations put forward retain the application of the Act to all municipalities, with the adoption of the phasing-in provisions suggested by the Municipal Working Group *Report*, and suggest:

> . . . that the Municipal Working Group's recommendations with respect to inclusion or exemption of certain types of municipal undertakings be implemented by regulation with the addition of an exemption provision for minor projects, not on the inclusion list, but with an estimated completion value of less than $1,000,000.[18]

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[16] *Ibid.*, pp. 5-6.

[17] Found as Appendix in E.A. Update, Vol. 2, No. 5 (Oct. 1977).

[18] *Ibid.*, p. 15.

In order to develop a coherent planning process which meets both municipal and provincial needs within the framework of The Planning Act and The Environmental Assessment Act, the paper proposes a rationalization strategy based on three principles:[19]

1. Consideration of natural environmental concerns should become an integral part of the the administration of The Planning Act at the local and provincial levels.
2. The Environmental Assessment Act should be applied to municipal or municipally regulated undertakings only in those situations where it is in the provincial interest to do so.
3. In any area where duplication, overlap or conflict remains, an "override" or "streamlining" solution should be developed.

The fundamental problem of The Environmental Assessment Act is that it promises so much and can deliver so little. The record of its first year in operation raises serious questions of legal technique. Was it wise to enact such a broad piece of legislation which requires such an exhaustive exemption process? Supporters of the legislation will argue that passing a bill through the legislature is so difficult that it is necessary to get as much as possible in the way of administrative discretion in order to operate the system effectively. They argue that it is better to allow administrative exemptions by secondary legislation rather than pass a narrow piece of primary legislation which can be expanded only by another difficult round in the legislature. On the other hand, I suggest there are tolerable limits to the gap between the word and reality of legislation. When the practice bears no resemblance to the reading of the Act, then the illusion breeds a sense of disrespect which is dangerous. In the Ministry's reply, they are moved once again to repeat the oft-stated argument:[20]

> The Ministry of the Environment recognized the potential for overlap and duplication between the Ontario Municipal Board and the Environmental Assessment Board at the time The Environmental Assessment Act was being drafted and has repeatedly indicated its willingness to work on methods of resolving the potential problems.
>
> . . . a basic criterion for determining whether the Act should apply to a given class of undertakings is the adequacy of the existing approvals and hearing processes to which the class is subject. For example, the Minister of the Environment has clearly stated to the Legislature that The Environmental Assessment Act would not have general application to the residential housing industry in Ontario. This eliminates a large area of potential overlap between The Environmental Assessment Act and The Planning Act and their respective hearing processes.
>
> The Planning Act Review Committee has apparently overlooked the Government's repeated statements that The Environmental Assessment Act is intended

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[19] *Ibid.*, p. 17.

[20] *Ibid.*, pp. 10-11.

> to apply only to undertakings of major significance. As a consequence of the Committee's misconception that the Act will be applied to ordinary developments, the Committee has greatly overestimated the potential area of conflict between The Environmental Assessment Act and The Planning Act and proposed solutions which, in face of reality, are inappropriate or unnecessary.
>
> Nevertheless, The Ministry of the Environment agrees with the view of the Committee that The Environmental Assessment Act should be directed at "developments of truly major or provincial significance" and has reflected this view in its administration of the Act to date.

The statement has been quoted at length because it is important that we understand fully the view of the Ministry with respect to the *real* application of the Act. The plain and simple point is that there should be no need for such statements. The Act should have been drafted properly so that its intent was clear on its face. It is becoming tiresome hearing the Ministry repeat over and over again that the Act is not intended to do what it says it does. Indeed, the above statement reflects a sense of disbelief on the part of the Ministry that the Planning Act Review Committee has not yet got the point. I suggest that the fault lies in The Environmental Assessment Act, not in the Committee.

Exemption Orders

For over a year since the coming into force of The Environmental Assessment Act, the Environmental Assessment Section of the Ministry's Environmental Approvals Branch has busied itself almost solely with consideration of applications for exemption from the Act *and has granted nearly every application*! Now it is true that a certain measure of environmental assessment is inherently involved in the question of whether or not to grant an exemption. However, the real issue is whether or not we need such an exemption process in view of the other review and planning procedures which were already in place before the Act came into force.

A review of the exemption orders will disclose a number of considerations which are taken into account in granting an exemption.

Firstly, the Minister is concerned not to interfere unduly with the proponent or the public where the environmental significance of the proposed undertaking is low.

Secondly, the Minister relies on the existence of other approvals processes which will take into account environmental considerations.

Thirdly, the Minister does not wish to interfere with projects which have already progressed past the planning stage.

Fourthly, the Minister is content to grant an exemption subject to conditions which offer adequate environmental protection, such as

supervision of the planning, construction and operation of the undertaking by the Environmental Assessment Section.

Several examples will show these considerations in operation. In the first illustration, the subject is a major project—the Darlington nuclear generating station. In the second, the undertaking is a relatively insignificant water works installation:

> OHQ-17 (July 25th, 1977): O.C. No. 1952/77.
>
> Having received a request from the Minister of Energy and Ontario Hydro that an undertaking, namely:
>
> > The program of planning, designing, constructing, operating and maintaining a 3,400 megawatt nuclear generating station project on the Darlington site,
>
> be exempt from the application of the Act pursuant to Section 30; and
>
> Having been advised by Ontario Hydro that if the undertaking is subject to the application of the Act the following injury, damage or interference with the persons and property indicated will occur:
>
> 1. The public will be interfered with by any delay in installing generating capacity which would result in either more costly replacement generation being required or in power shortages;
> 2. Ontario Hydro will be interfered with and damaged by the undued delay and expense resulting from having to provide environmental assessments for projects that were well advanced prior to the Act being proclaimed in force; and
>
> Having been advised by the Minister of Energy that a delay in the Darlington project could have very serious consequences on Ontario Hydro's ability to meet the demand for electricity; and
>
> Having weighed such injury, damage or interference with the betterment of the people of the whole or any part of Ontario by the protection, conservation and wise management in Ontario of the environment which would result from the undertaking being subject to the application of the Act;
>
> I am of the opinion that it is in the public interest to order and do order that the undertaking is exempt from the application of the Act for the following reasons:
>
> 1. Environmental Assessment should be carried out as an integral part of the decision making process for an undertaking, but, in the case of the Darlington project the Provincial Government and Ontario Hydro had made significant decisions regarding the provincial requirement for electrical capacity, the mode of generation and location prior to proclamation of The Environmental Assessment Act in accordance with procedures followed prior to proclamation.
> 2. Parts of the undertaking are subject to the review and approval under The Environmental Protection Act, 1971; and The Ontario Water Resources Act.
> 3. Ontario Hydro has submitted a report on the Environmental analysis for the undertaking including documentation of the public participation and review by Ontario Government Ministries as well as a Community Impact Report to the Provincial Government.
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> MOE-6 (June 30th, 1977): O.C. No. 1798/77.

Having received a request from the Ministry of the Environment that an undertaking namely:

> The activity of constructing and operating the Improvement District of North Shore-Community of Serpent River Provincial Water Works Program, consisting of financing and providing water softening equipment for the existing water supply systems

be exempted from the application of the Act pursuant to Section 30; and

Having been advised that if the undertaking is subject to the application of the Act, the following injury, damage or interference with the persons and property indicated will occur:

1. The Crown will be interfered with and damaged by the undue delay and expense required to prepare an environmental assessment for this project which consists of equipment changes to the existing Scott water works system as well as to those individual premises now drawing directly from the Serpent River;
2. The public will be interfered with by delaying the construction of facilities upon which property owners are depending to correct existing pollution problems; and

Having weighed such injury, damage, or interference with the betterment of the people of the whole or any part of Ontario by the protection, conservation and wise management in Ontario of the environment which would result from the undertaking being subject to the application of the Act;

I am of the opinion that it is in the public interest to order and do order that the undertaking is exempt from the application of the Act for the following reasons:

1. The undertaking is unlikely to have any significant adverse environmental effects, in fact the water quality will be improved and therefore the interference with the undertaking which would be caused by the application of the Act would be undue.
2. The Atomic Energy Control Board has indicated that the radioactive content of the backwash material will be sufficiently low that no licences will be required under its Act.

This exemption is subject to the following terms and conditions:

1. The Environmental Assessment Section of the Environmental Approvals Branch be involved at all stages of the planning of any contract that could have environmental implications.
2. The construction of works be carried out in accordance with the construction and site restoration guidelines set out by the Environmental Assessment Section.
3. The backwash material be disposed of in accordance with a Certificate of Approval issued under Part 5 of The Environmental Protection Act.

Hartt Inquiry

In late-1976, Reed Ltd. announced a gigantic timber harvesting and processing operation to be developed in Northern Ontario. Here was the opportunity the Government was waiting for—a high-profile, highly controversial private undertaking with significant potential adverse environmental consequences. Environmental

assessment was called for, an assessment which would demonstrate the Act in operation. In a news release on February 10th, 1977,[21] the Premier announced three steps in the assessment process:

— the Reed proposal would be designated for assessment pursuant to section 3(b) of the Act;

— the Act would be amended to permit an environmental inquiry *before* the submission of the environmental assessment document by Reed;

— Mr. Justice Patrick Hartt, of the Supreme Court of Ontario, would be appointed to conduct the inquiry.

Bill 59, an amendment to The Environmental Assessment Act was given first reading in the Legislature on April 26th, 1977. The Bill would have added to the Act a Part on Inquiries, enabling the Lieutenant Governor in Council, on the recommendation of the Minister of the Environment, to appoint one or more persons to inquire into any matters relating to the purpose of the Act.

In July 1977, the Government dropped the Bill to avoid defeat in the Legislature. The Opposition had demanded, as its price for support of the Bill, a ban on sport fishing in the mercury-polluted English-Wabigoon river system.[22]

Instead, by Order-in-Council under The Public Inquiries Act, the Government established the Royal Commission on the Northern Environment with Mr. Justice Hartt as Commissioner.[23]

The Environmental Assessment Act's big chance disappeared in the rhetoric of the Legislature.

Finale

The Environmental Assessment Act was never intended to apply as it reads. It will never be applied in that way. Except to those in the Ministry and a few persons outside it, the Act is an illusion. It exists only as an exemption process. Before the people of Ontario lose all faith in the promise, it is time to make environmental assessment meaningful. The Act should be amended to make clear that it applies only to major undertakings of significant environmental concern. Then, instead of granting exemptions, the government should apply its legislation and put into *real* operation the environmental assessment system.

J. W. SAMUELS*

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[21] Recorded in E.A. Update, Vol. 2, No. 2 (March 1977), pp. 1-2.

[22] Globe and Mail, July 13th, 1977 (Ont. ed.), pp. 1-2.

[23] O.C. No. 1900/77 (July 13th, 1977), found in E.A. Update, Vol. 2, No. 4 (Aug. 1977), pp. 28-31.

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