

Comments on Legislation and Judicial Decisions

Chronique de législation et de jurisprudence

PRACTICE AND PROCEDURE—EXAMINATION FOR DISCOVERY—EFFECT OF ANSWERS BY EMPLOYEE ON EMPLOYER AT TRIAL.—A recent decision¹ of the Saskatchewan Court of Appeal holds that where an employer is sued for the tort of his employee who is also a defendant, the answers on oral discovery of that employee are admissible at trial against the employer, without reference to any of the decided cases to the contrary.²

This decision is unusual and alarming. The only justification given is that an employer who is responsible in tort for the acts of his employee should also be fixed with whatever explanation the employee later chooses to give as to how the accident occurred.³ That of course does not follow logically at all. It confuses the completely separate⁴ doctrines of

- a. involuntary liability for the torts of the employee, with or without the consent of the employer,⁵ and

¹ *Newsco Well Service v. Canadian Propane Gas and Oil* (1981), 7 Sask. R. 291, 122 D.L.R. (3d) 228, at p. 243 (C.A.).

² *Pelican Oil & Gas Co. v. Northern Alberta etc.*, [1918] 1 W.W.R. 957, at p. 963, 14 Alta L.R. 172 (C.A.); *McLean v. C.P.R.* (1916), 10 W.W.R. 949, 951, 12 Alta L.R. 61, 28 D.L.R. 550 (C.A.); *Empire Financiers v. Nance*, [1920] 1 W.W.R. 694, at p. 697, 16 Alta L.R. 109, 51 D.L.R. 231 (C.A.); *Hoskins v. Minneapolis Threshing Machine Co.*, [1930] 2 D.L.R. 696, at p. 698, [1930] 1 W.W.R. 369, 370, 24 Alta L.R. 437, at p. 439 (C.A.); *Dench v. Alberta Pub. Co.*, [1931] 2 W.W.R. 116, at p. 120, [1931] 3 D.L.R. 260, 25 Alta L.R. 326 (C.A.); *Comm. Credit Corp. v. Klebeck* (1963), 42 D.L.R. (2d) 760 (Sask.); cf. *Holmsted and Langton's Ontario Judicature Act* (5th ed., 1940), pp. 990-991; cf. *Burr v. Ware R.D.C.*, [1939] 2 All E.R. 688; Sask. R. 223(2).

³ *Supra*, footnote 1, at pp. 243-244 (D.L.R.).

⁴ See Cross on Evidence (5th ed., 1979), Ch. 19, Part C(4), pp. 524-527; *G.W. Ry. v. Willis* (1865), 18 C.B. (n.s.) 748, 144 E.R. 639, 34 L.J.C.P. 195; *Burr v. Ware R.D.C.*, *supra*, footnote 2; *Price Yards v. Tiverton Tpt Co.* (1957), 11 D.L.R. (2d) 669 (Ont. C.A.).

⁵ Fleming, *The Law of Torts* (4th ed., 1977), Ch. 18, esp. pp. 354-356, 366-367; Salmond on Torts (16th ed., 1973), Ch. 20, Para. 172-173, 176-177; Winfield and Jolowicz on Tort (10th ed., 1975), Ch. 25, esp. pp. 516-518, 527.

- b. voluntary clothing of an agent with authority to make certain admissions on behalf of his principal.⁶

Nor can one even find any "rough justice" in the result by ignoring legal theory entirely. An employee who is perfectly well fitted to sweep a floor, or rake leaves, or shovel coal into a furnace, may be completely lacking in verbal skills and easily flustered on an examination for discovery. He may speak English very poorly. He may since the accident have had a falling out with his boss and be eager to harm the employing company. And he may be the plaintiff's brother-in-law. Surely the whole point of the modern Rules⁷ allowing a corporation to choose its spokesman is to avoid its being injured by the answers of such person.

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A COMMON LAW ACTION FOR DISCRIMINATION IN JOB APPLICATIONS.—In 1958, Sir A.J. Denning, as he then was, advanced the proposition that "it is a cardinal principle of our law that [persons of all races] shall not suffer any disability or prejudice by reason of their race and shall have equal freedom under the law . . .".¹ In his work, *Race Jobs and the Law in Britain*, Bob Hepple posed the question "may a worker bring a common law action against an employer who refuses his employment on racial grounds?". The author's answer was an emphatic "no".²

In light of these apparently contradictory views, it is perhaps not surprising that the recent case of *Bhadauria v. The Board of Governors of the Seneca College of Applied Arts and Technology*³ has been the occasion of substantial judicial disagreement. At first instance, Callaghan J. held that a plaintiff denied employment by reason of her ethnic origin had no cause of action at common law for such discrimination. That decision was reversed by the unanimous Ontario Court of Appeal, which held that a plaintiff who can establish that she was refused employment and thereby suffered damages be-

⁶ Cross, *op. cit.*, footnote 4.

⁷ E.g., Sask R. 223; Alta R. 214.

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¹ *Freedom Under the Law* (1951), p. 51.

² (1970), p. 234.

³ (1980), 27 O.R. (2d) 142 (Ont. C.A.).

cause of her ethnic origin has a common law action for the tort of discrimination against the person who refused her employment. In June 1981, however, the Supreme Court of Canada unanimously set aside the judgment of the Court of Appeal and restored the decision of Callaghan J. dismissing the plaintiff's action.⁴

This comment examines the conflicting judgments of the Supreme Court of Canada and the Ontario Court of Appeal. It is concluded that, while the Supreme Court judgment is consistent with established common law doctrine (represented by Hepple's remarks quoted above), both the judgment and the established view are open to criticism. The established view, it is argued, is open to the criticisms advanced by Professor R. Dworkin⁵ and fails to explain adequately how the common law courts have actually behaved in the area of discrimination. It is suggested that Dworkin's model is to be preferred to that of the established view because it better explains the case law and reconciles the apparently conflicting views of Hepple and Lord Denning. It is contended that when the defective model of the established view of law is replaced by the superior model of Dworkin, the Court of Appeal's decision in *Bhadauria* ceases to be an apparently unwarranted judicial innovation and, it is submitted, is to be preferred to the Supreme Court's finding.

The established view that the common law provides no remedy for a victim of discrimination, denied employment on racial grounds, rests on the foundation of Lord Davey's dictum in *Allen v. Flood*⁶ that:

... an employer may refuse to employ [a workman] from the most capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him . . . a man has no right to be employed by any particular employer and has no right to any particular employment if it depends on the will of another.

Underlying that decision, the orthodoxy contends, is the doctrine of contractual freedom, which implies "an absolute right" on the part of the employer to discriminate in the choice of his employees. In Hepple's words "as racial discrimination did not arise as a crisp legal problem in the formative years of the law of contract in the nineteenth century, it cannot now be subjected to those rules".⁷ The author observed further that "when the firmly-entrenched doctrine of freedom of contract has come into conflict with the post-Second-World-War concept of freedom from discrimination, it is hardly surprising

⁴ (1981), 124 D.L.R. (3d) 193.

⁵ *Taking Rights Seriously* (1978).

⁶ [1898] A.C. 1 at pp. 172-173 (H.L.).

⁷ *Op. Cit.*, footnote 2, p. 234.

that the older better-appreciated freedom has prevailed".⁸ Hepple illustrates this point by reference to the Ontario case of *Noble and Wolf*⁹ in which the Ontario Court of Appeal stated that the principle of freedom of contract "... represents a paramount public policy which is to be preferred against an alleged public policy of freedom from discrimination".

In essence, what Hepple terms the "doctrinal reason" for the alleged absence of a common law action for discrimination appears to be that the courts have traditionally taken the view that they cannot create new heads of public policy so that the ascendancy of freedom of contract over freedom from discrimination, engraved in stone since the nineteenth century, must continue to be recognised by the courts today. Any challenge to the pre-eminence of freedom on contract, the established view argues, must be by way of statute or by collective bargaining, but not through a common law action for discrimination. Indeed, Hepple implies that the very creation of statutory remedies in common law jurisdictions has foreclosed the possibility of development of a common law public policy against discrimination. Such established view of the common law was clearly shared by Merrien A. Lester and G. Bindman,¹⁰ by the Employment Appeal Tribunal in *City of Birmingham District Council v. Beyer*¹¹ and by Mr. Justice Griffiths in *MacDonald v. 283076 Ontario Inc.*¹²

Against this background, the Ontario Court of Appeal's decision in *Bhadauria* was noteworthy. The unanimous court held that a plaintiff who can establish that she was refused employment because of her ethnic origin and thereby suffered damages has a common law action against the discriminator who has refused her employment. The Court of Appeal's reasoning was that the preamble to the Ontario Human Rights Code,¹³ which provides that "it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour . . ." "is evidence that it is public policy in the Province of Ontario that such rights be legally protected."¹⁴ The court reasoned that the common law must give full

⁸ *Ibid.*, p. 155.

⁹ [1948] 4 D.L.R. 123 (Ont. H.C.). Approved in the Ontario Court of Appeal [1949] 4 D.L.R. 375.

¹⁰ *Race and Law* (1972), p. 52.

¹¹ [1977] Ir.L.R. 211. A man alleging discrimination on grounds of union activity, but without the protection of the Trade Union and Labour Relations Act 1974, was told by the EAT that "while you may have been the victim of unfair discrimination, with the present state of the law there is nothing you can lawfully and properly do about it". At p. 212.

¹² (1979), 23 O.R. (2d) 185; 95 D.L.R. (3d) 723; 10 C.P.C. 242.

¹³ The Ontario Human Rights Code, R.S.O., 1970, c. 318 as am. by S.O., 1971, c. 50, s. 63, 1972, c. 119, and 1974, c. 73. Now R.S.O., 1980, c. 340.

¹⁴ *Supra*, footnote 3, at pp. 148-150.

protection to these rights. Delivering the court's judgment, Wilson J.A. did not regard the existence of the Ontario Human Rights Code with its statutory remedies as in any way inhibiting the appropriate development of the common law, contending that the fundamental right not to be discriminated against, while recognised by the Code, was not created by it. While not referring to Lord Denning's statement quoted above, the Court of Appeal handed down a judgment clearly consistent with it.

The decision of the Court of Appeal was hailed by civil libertarians as a landmark. One commentator described it as "the most important decision for the little guy on the street in the history of this country".¹⁵ Nevertheless the judgment also attracted scholarly criticism. Mr. P.S.A. Lamek considered it "... very difficult to perceive why it was thought appropriate to establish a co-existent common law right and remedy alongside a statutory Code which although not expressly stated to be exclusive was clearly intended to be so".¹⁶

The Supreme Court of Canada shared Mr. Lamek's misgivings and, in June 1981, unanimously set aside the judgment of the Ontario Court of Appeal, restoring the decision of Callaghan J. The Right Honourable Bora Laskin C.J. for the court held that "not only does the Ontario Human Rights Code foreclose any civil action based directly upon a breach thereof, but it also excludes any common law action based on an invocation of the public policy expressed in the Code".¹⁷

Chief Justice Laskin examined the following reasoning of Madame Justice Wilson in the Court of Appeal:¹⁸

I regard the preamble to the Code as evidencing what is now, and probably has been for some time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place or origin", as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that then the common law must, on the principle of *Ashby v. White et al.* afford her a remedy.

I do not regard the Code as in any way impeding the appropriate development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the Code, it was not created by it. Nor does the Code, in my view, contain any expression of legislative intention to exclude the

¹⁵ Attributed to Mr. J. Pomerant, *Globe and Mail*, Thur., Dec. 13th, 1979.

¹⁶ *Bhadauria v. Seneca College*, P. S. A. Lamek Q.C., Canadian Bar Association — Ontario, Fifth Annual Institute of Continuing Legal Education, April 1980.

¹⁷ *Supra*, footnote 4. See transcript of hitherto unreported judgment, at p. 203.

¹⁸ *Supra*, footnote 3, at p. 150. See also Supreme Court of Canada judgment, at p. 202.

common law remedy. Rather, the reverse, since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.

The Supreme Court of Canada rejected Madame Justice Wilson's reasoning. Laskin C.J. confessed to having some difficulty in understanding the basis of the Court of Appeal's observation that "... while the fundamental human right we are concerned with is recognized by the Code, it was not created by it".¹⁹

It is the view of this article that the Supreme Court's rejection and Mr. Lamé's criticism of the judgment of the Court of Appeal in *Bhadauria* are based on an established perception of the common law that is itself defective. The primary defect of the established view is that, in spite of its continued acceptance, it does not serve well as a theory to describe adequately what the common law courts have actually decided on the subject of discrimination since *Allen v. Flood*. The established view rests on the proposition that common law judges have invariably preferred the doctrine of freedom of contract to the exclusion of freedom from discrimination when the two have come into conflict, and must continue, as a matter of law, to do so. The manifest shortcomings of such doctrine are readily evident from a perusal of the significant number of cases in which the doctrine of freedom from discrimination has been judicially accepted in preference to the doctrine of freedom of contract.

Such preference was evident, for example, in the Scottish case of *Rothfield v. North British Railway Co.*²⁰ (referred to in both the Court of Appeal and the Supreme Court) where the defenders sought to exclude the pursuer from their hotel because he was a German-Jewish money-lender. In the Outer House of the Court of Session, Lord Ordinary Anderton held: "It is obvious that the defenders are not entitled to exclude the pursuer from the hotel because he is a Jew and it would have made no difference in my opinion had it been proved that he is a Jew of German origin. An individual is not responsible and ought not to be made responsible for his ancestry. Nor is it a sufficient ground that he is a money-lender. That is a lawful occupation and therefore money-lenders are entitled to all the privileges enjoyed by other members of the State including the right to be entertained in the inns of the country."²¹ This view was upheld upon appeal to the Inner House (second division) where the Lord Justice Clerk affirmed.²²

I agree entirely with the Lord Ordinary as to the objection on the ground of the pursuer's race and nationality.

¹⁹ *Ibid.*

²⁰ [1920] S.C. 805.

²¹ *Ibid.*, at p. 820.

²² *Ibid.*, at p. 828.

Judicial preference for the doctrine of freedom from discrimination over freedom of contract was also explicit in the Ontario case of *Re Drummond Wren*²³ where a restrictive covenant in a deed prohibiting the sale of land to "Jews or persons of objectionable nationality" was struck down as offensive to public policy.

The importance of these cases and others referred to by the Court of Appeal²⁴ is, it is submitted, that they indicate clearly judicial acceptance of the principle that the infringement of freedom from discrimination can give rise to an action at common law even if the competing doctrine of freedom of contract must be thereby overridden. It is of course true that, historically, freedom from discrimination has been outweighed by the competing doctrine of freedom of contract in a preponderance of cases. However, this does not imply, as the established view alleges, that the doctrine of freedom from discrimination has been permanently banished from judicial recognition. All that can be validly concluded is that, as a matter of practice, the common law courts have generally, but not exclusively, favoured as a matter of contingency the doctrine of freedom of contract over freedom from discrimination when the two have come into conflict.

The weakness of the established view as a theory of judicial behaviour is that it rests on the positivist "rules" perception of law so effectively criticised by Dworkin. Dworkin contends that positivism (the established view of the common law) "is a model of and for a system of rules and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules".²⁵ Dworkin uses the term "principle" generically to refer to the whole set of standards other than rules that he considers central to the functioning of the common law. When we recognize with Dworkin the central role of principles in the common law, the strait-jacket of the established doctrine of legal positivism can be discarded. Dworkin's model permits us to view "freedom from discrimination" and "freedom of contract" as living, competing principles which underlie judicial decision-making. Such a view, it is submitted, is rather more consistent with decided cases than that of the established doctrine which demands, in the face of contradictory evidence, that "freedom of contract" and "freedom from discrimination" be viewed as respectively the victorious and the vanquished combatants of history when the "rules of the game" were being worked out.

²³ [1945] O.R. 778, [1945] 4 D.L.R. 674.

²⁴ *Loew's Montreal Theatres Ltd v. Reynolds* (1919), 30 Que. K.B. 459, *Franklin v. Evans* (1924), 55 O.L.R. 349; *Constantine v. Imperial London Hotels Ltd*, [1944] 2 All E.R. 171.

²⁵ Dworkin, *op. cit.*, footnote 5, p. 22.

When the Dworkin-inspired model of competing principles or doctrines is substituted for the defective "rules" model of the established view, the Court of Appeal's decision in *Bhadauria* ceases to be surprising or problematic. The judgment need be viewed no longer as "one which relies on a conception of the common law as a brooding omnipresence in the sky with solutions for every conceivable human problem waiting only to be perceived by human insight".²⁶ No longer is the judgment open to Mr. Lamek's criticism that it relies on the view that "the common law action for discrimination has been up there in the ether, but, until now, we have simply failed to recognize it". Only an unnecessary reliance on the defective established view leads Mr. Lamek, it is submitted, to the perception of the Court of Appeal's decision in *Bhadauria* as "the occasion when the scales fell from [the Court's] eyes permitting [it] to see clearly for the first time what had long existed unseen".²⁷

When one discards the defective approach of the established view and substitutes the proposed Dworkin-inspired model, it can be perceived that the Court of Appeal's approach and decision involved no startling insight, innovation or aberration, but merely a departure from the general but not universal judicial practice of attaching greater weight to the principle of freedom of contract than to freedom from discrimination when the two have come into conflict. The Court of Appeal's decision should not be viewed as the *creation* of a common law action for discrimination where none existed before, but merely as the most recent occasion when the court decided that, in the circumstances of the case, greater weight must be attached to the principle of freedom from discrimination over freedom of contract.

It should be of little surprise that an Ontario court displayed a preference for the principle of freedom from discrimination in a case involving a potential employment relationship. The generally predominant position of freedom of contract in the common law has been continually eroded since *Allen v. Flood* both by statute and by the courts. The statutory and judicial limitation of exclusion clauses²⁸ are but one dimension of such erosion. In contrast, the doctrine of freedom from discrimination has recently loomed substantially larger in the priorities of legislators and judges in the common law world. The Ontario Human Rights Code, the British Race and Sex Discrimination Acts²⁹ are examples of legislative activity.

²⁶ Lamek *op. cit.*, footnote 16, p. 6.

²⁷ *Ibid.*

²⁸ See for example in Britain the Unfair Contract Terms Act 1977, and prior judicial limitations on freedom to exclude liability in contract in *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 W.L.R. 125, [1964] 1 All E.R. 304.

²⁹ Race Relations Act 1968, c. 71, repealed by the Race Relations Act 1976, c. 74. See also the Sex Discrimination Act 1975.

Enhanced judicial acknowledgement of the principle of freedom from discrimination is illustrated by two English cases concerning (potentially) polygamous marriages. English courts long refused to recognize for any purposes a (potentially) polygamous marriage entered into abroad. Such practice was rationalized by reference to *Hyde v. Hyde*³⁰ but Lord Green's judgment in *Baindail v. Baindail*³¹ makes it clear that *Hyde* was never a binding authority for judicial refusal to give recognition to a polygamous marriage in any circumstances. At the root of such refusal was a judicial reluctance to acknowledge that a relationship other than a monogamous Christian or civil marriage might properly be recognized in England as a marriage at least for certain purposes.

Two cases in the 1960s illustrate the change in judicial policy whereby the restrictive application of *Hyde* was relaxed in the interest of public policy. In *Shahnaz v. Rizwan*³², Winn J. stated:³³

As a matter of policy, I incline to the view that, there being so many Mohammedans resident in this country, it is better that the Court should recognize in favour of women who have come here as a result of Mohammedan marriage, the right to obtain what it [the marriage] has promised to them.

The court proceeded to enforce a marital contract which required payment by the "husband" to the "wife", notwithstanding the polygamous nature of the marriage.

In *Alhaji Mohammed v. Knott*³⁴ a juvenile court had held that a thirteen-year-old Nigerian girl residing in England was exposed to moral danger within the meaning of the Children and Young Persons Act 1963.³⁵ The girl was cohabiting with her "husband" of a potentially polygamous marriage entered into in Nigeria and valid under the Moslem law of that country. The juvenile court held, *inter alia*, that the polygamous marriage was not capable of recognition by an English court and that the continued cohabitation of the girl with her "husband" would be repugnant to any decent-minded Englishman or woman. The girl was placed in the care of the local authority. In quashing the "care order", the Court of Appeal recognized the potentially polygamous marriage and ruled that the girl was not exposed to moral danger merely by carrying out her wifely duties of cohabitation, albeit with a man who, the court agreed, was not free from moral blame. Lord Parker C.J. held further that, in deciding on the attitudes of the "decent-minded English man or woman", the

³⁰ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130.

³¹ (1946), 62 T.L.R. 122.

³² [1965] 1 Q.B. 390, [1964] 3 W.L.R. 759, [1964] 2 All E.R. 993.

³³ *Ibid.*, at pp. 401-402 (Q.B.).

³⁴ [1969] 1 Q.B. 1.

³⁵ C. 37, s. 2.

court must not impose the standards of the way of life of a thirteen-year-old girl brought up within the Western Christian way of life, but those of the Moslem way of life.³⁶ In doing so, the Court of Appeal found no grounds for committing the girl to care of the local authority.

The foregoing cases illustrate that, recently, the English courts have been prepared to go a substantial way towards recognizing, for some purposes, a non-Christian polygamous marriage. In essence, what has occurred is a judicial acceptance that the traditional social values associated with recognition of only the monogamous marriage can be outweighed by higher social values in certain circumstances. In each of the cases, the rigid application of the traditional *Hyde* principle would have served to discriminate, albeit unintentionally, against a party to the polygamous marriage. In *Shahnaz*, the discrimination would have arisen because the wife of the polygamous marriage would have been denied rights available in law to the wife of a valid monogamous marriage. In *Alhaji*, the discrimination would have arisen from the failure of the court to recognize that a girl brought up according to the laws and customs of the Mohammedan religion was entitled to consideration in light of such customs not in light of Western Christian values. Such cases illustrate that a decade before the concept of "indirect discrimination" was imported from the United States into Britain³⁷ and Ontario³⁸, amid great fanfare, English courts had unobtrusively given relief to persons who stood to suffer the discriminatory effects of certain apparently entrenched principles of English law.

Why have English and Canadian courts demonstrated a recent willingness to attach greater weight to the doctrine of freedom from discrimination than in the past? A clue to the answer appears to be provided by the English case of *Nagle v. Feilden*³⁹ perhaps surprisingly not cited by counsel in the *Bhadauria* case. In *Nagle*, the plaintiff had been denied a race horse trainer's licence by the Jockey Club allegedly on grounds of her sex and such denial prevented her from pursuing her desired occupation. In recognizing the relevance of

³⁶ At pp. 15 and 16.

³⁷ In the Sex Discrimination Act 1975, s. 16(b) and the Race Relations Act 1976, *supra*, footnote 29, s. 1(1)(b).

³⁸ First recognized under The Ontario Human Rights Code in *Singh v. Security and Investigation Services Ltd* unreported Ontario Board of Inquiry (May 31st, 1977) and subsequently in *Colfer v. Ottawa Board of Commissioners of Police* unreported Ontario Board of Inquiry (Jan. 12th, 1979). The concept of unintentional or indirect discrimination had been recognized previously by the Supreme Court of Alberta in *Attorney-General for Alberta v. Gares* (1976), 67 D.L.R. (3d) 635 (Alta S.C.T.D.). See an account by W. Black, *From Intent to Effect—New Standards in Human Rights* (1980), 1 Canadian Human Rights Reporter p. c/1.

³⁹ [1966] 2 Q.B. 633 (C.A.).

the plaintiff's common law action for discrimination the Court of Appeal (per Danckwerts L.J.) referred to the Sex Disqualification (Removal) Act 1919 as "showing the position of present-day thought"⁴⁰ on the issue of sex discrimination. The action was not brought under the Act but, in deciding on the policy of the common law, Lord Justice Danckwerts was prepared to take guidance from the statute. It is not unreasonable to imagine that the subsequent enactment of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 and of the two Race Relations Acts will have stimulated even greater willingness in the courts to acknowledge that "freedom from discrimination" has become a higher priority item of public policy.

A similar approach was taken by the Ontario Court of Appeal in *Re Drummond Wren*⁴¹ where Mr. Justice Mackay adopted the rule state in that Court in *Walkerville Brewing Co. Ltd. v. Mayrand*⁴² to the effect that federal and provincial statutes and public law may be resorted to as a guide to public policy. Mackay J. viewed the Charter of the United Nations, the Atlantic Charter and the Racial Discrimination Act 1944 as evidence of a community repugnance towards discrimination on racial and religious grounds. The judge stated "my opinion as to the public policy applicable to this case in no way depends on the terms of The Racial Discrimination Act save to the extent that such Act constitutes a legislative recognition of the policy which I have applied".⁴³

It is scarcely satisfactory that the Supreme Court should find "no quarrel" with the approach in *Re Drummond Wren* but nevertheless felt compelled to reject that approach because of a subsequent decision of the same court. The Supreme Court was constrained to do so because it has not responded to Dworkin's call to shed the yoke of positivism and a "rules-based" concept of law. Adherence to such a philosophy required the court to view *Re Drummond Wren* as laying down a rule which was subsequently negated by the conflicting decision in *Re Noble and Wolf*.⁴⁴

Had it adopted the alternative "principles-based" conception of law, the Supreme Court could have viewed *Noble and Wolf* as an assertion by the Ontario Court of Appeal that it did not agree with the view of the court in *Re Drummond Wren* that in the early post-war period the principle of freedom from discrimination could be assigned greater weight than the principle of freedom of contract in the circumstances of such cases.

⁴⁰ *Ibid.*, at p. 651.

⁴¹ *Supra*, footnote 23.

⁴² (1929) 63 O.L.R. 773, [1929] 2 D.L.R. 945.

⁴³ *Supra*, footnote 39, at p. 682.

⁴⁴ *Supra*, footnote 9.

Basing its judgment on the "rules-based" philosophy of positivism, the Supreme Court in *Bhadauria* was virtually compelled to view *Noble and Wolf* as a rejection of *Re Drummond Wren* and to reject the common law action for discrimination in spite of the fact that the Supreme Court did not disapprove of the approach taken in *Re Drummond Wren*. Had it adopted a "principles-based" theory of law in the Dworkin mould, the Supreme Court could have viewed *Noble and Wolf* in the context of its era. The Chief Justice could have recognized that, while that decision may have represented a satisfactory balancing of the competing principles of freedom of contract and freedom from discrimination in the early post-war era, it was not necessary that the courts of today be bound by the calculus of the courts of a different era.

Since the early post-war era, the doctrine of freedom from discrimination appears to have developed into a more formidable element of public policy. The proliferation of national and provincial legislation and international conventions on the subject, illustrates the growth of non-discrimination as a significant aspect of public policy in the common law world. In contrast the doctrine of freedom of contract, while remaining an important element of legal policy, has been subject to successive limitation by courts and legislators. Such events can reasonably be viewed as grounds for a judicial reappraisal of the appropriate weight to be attached to the competing principles and it is submitted that this is what the Court of Appeal effectively did in the *Bhadauria* case. Married to the rules-based jurisprudence of positivism, the Supreme Court was unable to characterize the Court of Appeal's judgment in terms of principles in spite of the logic of and authority for the latter's position.

The foregoing arguments sought to establish that the Court of Appeal's decision in *Bhadauria* was consistent with both logic and judicial authority. It has not yet been established whether the decision of the Court of Appeal is preferable to that of the Supreme Court. After all, had the Supreme Court used the "Dworkinite" model suggested in this comment, it might have held with justification that a remedy for discrimination must be denied because, upon weighing the competing claims of the principles of "freedom of contract" and "freedom from discrimination", the court preferred to attach greater weight to the former principle. It is suggested for the following reasons that the Court of Appeal's decision represents a preferable solution to the balancing exercise than that of the Supreme Court.

The Ontario Court of Appeal's decision in *Bhadauria* commends itself, firstly, because it recognizes the important declaratory role of legislation as opposed to its punitive or remedial role. In its first

annual report, the British Race Relations Board⁴⁵ identified the role of law in general (and the Race Relations Act 1968 in particular) to be firstly "an unequivocal declaration of public policy". Lester and Bindman⁴⁶ acknowledge the declaratory role of law, but suggest that this aspect of law is mainly concerned with the effect of legislation on people in a position to discriminate. While the importance of such declaration must be acknowledged, it is submitted that the declaratory role of statutes is of no less importance in assisting the courts to develop the common law in step with public policy. It would be perverse, would it not, if the mind of "the man on the Clapham omnibus" were presumed to be duly influenced by the declaration of public policy embodied in anti-discrimination legislation, while those entrusted with the task of reading that mind were assumed to remain blissfully unaware of such declaration. In preferring the doctrine of freedom from discrimination over freedom of contract, the Court of Appeal in *Bhadauria* effectively recognized the significant declaratory role of legislation and international conventions in influencing consensus about public policy. It is submitted that the court correctly held that the declaratory effect of such statutes and conventions was such as to warrant the greater weight attached to freedom from discrimination than was attached by the court in *Re Noble and Wolf* in the early post-war years when statutory declarations were novel and less categorical.

A second advantage of the decision of the Court of Appeal is that it is consistent with judicial authority. The decision is compatible with the recognition of a remedy for discrimination in *Rothfield v. North British Railway Co.*, *Constantine v. Imperial London Hotels Ltd.*,⁴⁷ *Re Drummond Wren*, *Nagle v. Fielder* and *Edwards v. SOGAT*⁴⁸ and with Lord Denning's dictum quoted at the start of this comment. Furthermore, by adopting the alternative to the established view proposed in this comment, one can explain apparently contradictory judicial authority in terms that the courts have as a matter of contingency, generally, but not exclusively, attached greater weight to the value of freedom of contract over freedom from discrimination. As public policy evolves, the outcome of the balancing process may of course change.

In contrast, the judgment of the Supreme Court is entirely inconsistent with Lord Denning's proposition. Furthermore, the judgment can be reconciled with judicial authority only by seeking to distinguish employment from other contracts. While this is permissible,

⁴⁵ Report of the Race Relations Board for 1966-67 (HMSO 437), p. 22.

⁴⁶ *Op. cit.*, footnote 10, p. 85.

⁴⁷ [1944] 2 All E.R. 171.

⁴⁸ [1971] Ch. 354.

unduly refined distinctions can place great strain on logic. For example, it is not immediately obvious that, in principle, Ms. Bhadauria's position differed from that of Ms. Nagle, yet the Supreme Court's approach requires that a narrow ground of distinction be found.

In fact, *Nagle v. Feilden*, not cited in *Bhadauria*, offers perhaps the most persuasive support for the Court of Appeal's judgment in the latter case. The defendant Jockey Club in *Nagle* was not the plaintiff's prospective employer, but its discretion to award or withhold a licence placed it in a position substantially similar to that of an employer in hiring process. One characteristic of the defendant in *Nagle* untypical of most employers was the fact that refusal of the trainer's licence effectively excluded the plaintiff from her desired occupation. It has been suggested that the effective monopoly position of the defendant in *Nagle* was part of the ratio of that case. In the subsequent case of *Edwards v. SOGAT* where a common law action for discrimination was also recognized, the defendant union also occupied a strong position vis-à-vis the plaintiff though not a total monopoly. It is submitted that the dominant position of the defendant, vis-à-vis the plaintiff is relevant only to the question of proof of damage. Clearly, if a defendant can effectively exclude a plaintiff from his desired occupation, damage is likely to be easily proved. If, on the other hand, the plaintiff has alternative avenues of employment, the damage suffered by virtue of discrimination is less obvious. It is submitted, however, that while the dominant position of the discriminator is relevant to damage, it is not relevant to liability and that the cases of *Nagle v. Feilden* and *Edwards v. SOGAT* are authority for the general proposition that discriminatory exclusion of a person from earning his livelihood is actionable upon proof of damage.

Even if the rationes of *Nagle* and *Edwards* are limited to quasi-monopoly or dominant positions, the cases may still provide judicial authority for the Court of Appeal's judgment in *Bhadauria*. In the prevailing economic environment where job seekers generally outnumber available openings by a substantial margin, a major employer of a particular type of labour such as the defendant employer in *Bhadauria* may occupy a de facto monopoly position vis-à-vis job applicants in the local labour market. The fact that the plaintiff in *Bhadauria* applied ten times for advertised positions, failed to obtain even an interview and remained unemployed as a teacher, is consistent with the view that the defendant employer did indeed occupy a dominant position in the labour market vis-à-vis the plaintiff. It is submitted therefore that *Nagle v. Feilden* and *Edwards v. SOGAT* are authority for the Court of Appeal's judgment in *Bhadauria* even if the rationes of these cases are limited to circumstances in which the defendant occupies a predominant position vis-à-vis the plaintiff.

A third advantage of the Court of Appeal judgment is its implicit recognition of the potential advantages that can flow from the availability of a common law remedy as an alternative to the statutory one. The Supreme Court clearly viewed the statutory scheme under the Human Rights Code to provide adequate administrative procedures and remedies and an acceptable measure of judicial supervision by way of appeal and judicial review.⁴⁹ Yet there does exist in the statutory scheme a gap for which a common law action could provide an important safety net. The statutory appeal mechanism is triggered only if a board of inquiry is appointed.⁵⁰ As both courts noted, it is the Minister of Labour who has discretion on unsettled complaints, but, in practice, the Minister invariably follows the recommendation of the Human Rights Commission.⁵¹ The Commission publishes no information as to the criteria that it employs in deciding whether or not to recommend a board of inquiry. Moreover, the complainant has no right to a hearing before the Commission or the Minister when the decision is made and there is no right of appeal against the Minister's (effectively the Commission's) decision not to appoint a board of inquiry.

The possibility of conflict between the Commission and a complainant is clear. The Commission must consider what it views to be the public interest as well as the complainant's. One possible danger is that the Commission may pursue too actively a policy of conciliation and be prepared to accept "soft" settlements. A dispute between the Commission and a complainant over the acceptability of a settlement occurred in the case of *Amber v. Leder*.⁵² The Commission viewed the employer's offer to settle as adequate and sought disbandment of the board of inquiry which had been established by the Minister, but had not commenced proceedings. The complainant was not satisfied with the "negotiated" settlement and wished the inquiry to proceed. The board of inquiry held that, because it had been established, it could not abandon proceedings unless *all* parties, including the complainant, were satisfied with any "out of court" settlement. Nevertheless, it is clear that, if the "settlement" had been acceptable to the Commission prior to appointment of the board of inquiry, the complainant would not have been in a position to insist on adjudication. The complainant would have been in a position of "take it or leave it" with no avenue of appeal to the courts.

⁴⁹ *Supra*, footnotes 4, at p. 7.

⁵⁰ The Ontario Human Rights Code, *supra*, footnote 13, s. 14 d.(4). The Supreme Court, *supra*, footnote 4, at p. 7, did not view Ministerial discretion as a significant gap in the availability of judicial remedies.

⁵¹ See K. Miller, *Racial Discrimination in Canada* (LL.M. Thesis Queen's University of Ontario 1975), p. 67.

⁵² Unreported Ontario Board of Inquiry (March 1970).

A further source of difficulty may arise out of the limited funds available to the Commission. The Commission itself has warned of the dangers of inadequate funding⁵³ which can be compounded if the grounds of unlawful discrimination are expanded.⁵⁴ Backlogs of pending investigations can put pressure on Commission staff to accept "soft" settlements and to confine recommendations for boards of inquiry to cases that are virtually certain to succeed. Mr. Miller⁵⁵ expressed some concern that excessive financial constraints on a Human Rights Commission could reduce the willingness of the Commission to support cases that were further down the ladder of probable success.

The climate of financial constraint affecting the Human Rights Commission and the absence of effective supervision over decisions about the appointment of boards of inquiry render it important, it is submitted, that the safety net of a common law remedy for discrimination be available in addition to the statutory remedy.

The need for an alternative common law remedy appears to be even more pressing in Britain than in Ontario. Mr. Lustgarten's recent work⁵⁶ reveals that the statutory remedies available to complainants in employment discrimination cases in Britain are greatly defective. The industrial tribunals appear unprepared to challenge the accepted industry practices that are themselves at the root of racial discrimination in employment while the Employment Appeal Tribunal has generally shown itself equally unwilling to challenge prevailing industrial practices and attitudes. The likelihood of Parliamentary intervention is extremely low. It is unrealistic to suggest that in the short run British courts could be relied upon to pursue the aggressive course in combatting discrimination pursued by the United States Supreme Court. Nevertheless, the availability of legal aid to assist plaintiffs might help to wrest free the British system of legal control of race relations in employment from the strangle hold of labour relations consensus which is the very fountain of discriminatory employment practices perpetuated by the statutory machinery which serves the interests of such consensus.

⁵³ Life Together—A Report on Human Rights in Ontario, Ontario Human Rights Commission (1977), pp. 10-11.

⁵⁴ An expansion of the number of grounds for discrimination is planned in Ontario, see Bill 7, 1st sess. 23rd Leg., 30 Eliz. II, 1981, clause 4(1) which proposes the addition of family, handicapped and criminal record. The dangers for effective enforcement that may accompany the extension of coverage of anti-discrimination legislation are observed by G. Martin, *New Civil Rights and Coverages, Progress or Facism?* (1975), IV J. Inter Group Rel., No. 1.

⁵⁵ Miller, *op. cit.*, footnote 51, p. 82.

⁵⁶ Legal Control of Racial Discrimination (1980).

It has been argued that the Supreme Court's rejection of the Court of Appeal's decision in *Bhadauria* is open to criticism. The Supreme Court's approach was founded on the traditional rule-based positivism that has gripped common law jurisprudence for too long. It was submitted that Dworkin's perception of law presents a more satisfactory explanation of judicial activity with respect to freedom of contract. The Dworkin-inspired approach suggested here viewed the relevant case law as the outcome of judicial acts of balancing the competing claims of the principles of "freedom of contract" and "freedom from discrimination". It was acknowledged that, while the basis of the Supreme Court's rejection of the Court of Appeal's decision was objectionable, the denial of a remedy to the plaintiff in *Bhadauria* might still be justified by balancing the competing principles of freedom of contract and freedom from discrimination. It was suggested, however, that the declaratory force of statute and international conventions is such that the courts ought now to recognize that "freedom from discrimination" can no longer flit only fleetingly from the shadow of "freedom of contract". It was suggested finally that, while the statutory remedies for discrimination in Ontario and in Britain are likely to be relied on in virtually all cases, a common law action from discrimination can operate as a useful safety net for those unable to obtain satisfactory redress through the statutory machinery.

IAN B. McKENNA*

* * *

CANADIAN BILL OF RIGHTS—FAIR HEARING—EQUALITY BEFORE THE LAW—NATIONAL DEFENCE ACT—COURT-MARTIAL JURISDICTION.—Does the Canadian Bill of Rights¹ render inoperative those provisions of the National Defence Act² which authorize the trial by service tribunals of military personnel charged with offences committed in Canada contrary to the Narcotic Control Act?³ In *MacKay v. The Queen*,⁴ the Supreme Court of Canada decided that it did not. An

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¹ R.S.C., 1970, App. III.

² R.S.C., 1970, c. N-4. For a succinct history of the antecedents of the Act, see Starkman, *Canadian Military Law: The Citizen as Soldier* (1965), 43 Can. Bar Rev. 414.

³ R.S.C., 1970, c. N-1.

⁴ (1981), 114 D.L.R. (3d) 393. Ritchie J., joined by Martland, Pigeon, Beetz and Chouinard J.J., wrote the majority opinion. McIntyre J. wrote a concurring opinion in which he was joined by Dickson J., and Laskin C.J.C. attracted the support of Estey J. in dissent.

analysis of the case reveals a serious weakness in the way in which the court approaches issues arising under the Bill of Rights—a weakness which is apt to remain even if a Charter of Rights is entrenched in the Constitution.

The accused, a private in the Armed Forces, was suspected of selling small quantities of marijuana to soldiers on his base in Esquimalt, British Columbia. In accordance with the procedures set out in the National Defence Act, charges were laid by his commanding officer, a senior commander directed that the trial take place before a Standing Court Martial, a prosecutor was appointed, and the accused retained outside counsel.⁵ The accused was convicted of a number of counts, and was sentenced to sixty days detention. All but one of his convictions having been affirmed by the Court Martial Appeal Court,⁶ the Supreme Court granted leave to appeal.⁷

Section 120 of the Act confers jurisdiction on the military to try two kinds of offences.⁸ The first are those which pertain uniquely to

⁵ For a detailed consideration of the procedures under the Act, see Fay, *Canadian Military Criminal Law: an Examination of Military Justice* (1975), 23 Chitty's L. J. 120, 156, 195, 228.

⁶ S. 197 guarantees appeals from conviction to the Court Martial Appeal Court, constituted under s. 201. The judges of the court are chosen by the Governor in Council from the ranks of the Federal Court of Canada and the superior courts of criminal jurisdiction. S. 201(2), as am. by Federal Court Act, S.C., 1970-71-72, c. 1, s. 64(2).

⁷ Appeals to the Supreme Court are governed by s. 208 of the Act.

⁸ The section reads in part as follows:

120. (1) An Act or omission

(a) that takes place in Canada and is punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada; or

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada;

is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided under subsection (2).

(2) Subjects to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,

(a) if the conviction was in respect of an offence

(i) committed in Canada, under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada and for which a minimum punishment is prescribed, or

(ii) committed outside Canada under section 218 of the *Criminal Code*, impose a punishment in accordance with the enactment prescribing minimum punishment for the offence; or

(b) in any other case,

(i) impose the penalty prescribed for the offence in Part XII of this Act, the *Criminal Code* or that other Act, or

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

the military, and for which there are no counterparts in the civilian law.⁹ The second are those federal offences to which all persons are subject, and over which the ordinary courts retain a concurrent and paramount jurisdiction.¹⁰ It was the exercise of this latter jurisdiction which was challenged in *MacKay*.

The constitutional questions as posed by the court were as follows:

1. Are the provisions of the National Defence Act which authorized the trial by service tribunals of military personnel charged with criminal offences committed in Canada contrary to the Narcotic Control Act or the Criminal Code inoperative by reason of Section 1(a), (b), 2(e) and 2(f) of the Canadian Bill of Rights?
2. Is the National Defence Act in as far as it permits criminal proceedings before service tribunals for offences committed in Canada contrary to the Narcotic Control Act or the Criminal Code to be instituted and conducted by military prosecutor and not by the Attorney General of a province or the Attorney General of Canada, *ultra vires* the Parliament of Canada?

In argument before the court, the appellant restricted his submissions to sections 1(b) and 2(f) of the Bill of Rights.

1. *The right to a fair hearing by an independent and impartial tribunal.*

The appellant argued that his right to a fair trial was abrogated by the degree of control which the military exercised over all stages of the proceedings to which he was subject. This measure of control raises the possibility that the military personnel called upon to play various roles in the process, most notably the adjudicator, will be

⁹ Paradigm examples of such military offences include insubordination (s. 73), desertion (s. 78) and absence without leave (s. 80). Some of the offences included in this characterization, although they have analogues in the civilian law, are said to assume a greater significance in the military context. The oft-cited example is that of striking an officer (s. 74). To the extent that such offences are proscribed specifically in the Act, they were not at issue in *MacKay*.

¹⁰ The jurisdiction of the civil courts is maintained by s. 61(1), which provides: "Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court". Where a person has been tried initially by a service tribunal for an offence against the civilian law, he cannot rely upon the special pleas of *autrefois acquit* and *autrefois convict*. These pleas, contemplated in ss 535-537 and 743(2) of the Criminal Code, are unavailable by virtue of s. 4 of the Criminal Code, which provides: "Nothing in this Act affects any law relating to the government of the Canadian Forces". The pleas are available before a service tribunal when the accused has been tried before by either a service tribunal or a court. National Defense Act, s. 56.

The only offences over which the military does not have jurisdiction are murder, rape and manslaughter when committed in Canada: s. 60 of the National Defense Act.

influenced subconsciously by a desire to please the officer who initiated the proceedings.¹¹ Given that the adjudicator is chosen from the ranks of the military, can he resist "the subtle psychological difficulties of performing an impartial judicial function in an environment where unquestioned respect for rank and obedience to superiors are the paramount virtues?"¹²

In rejecting the appellant's argument, both the majority and concurring opinions allude to the special expertise enjoyed by the military adjudicator by virtue of his familiarity with service life. Both opinions suggest that this makes such a person "a more suitable candidate for president of a court martial than a barrister or a Judge who has spent his working life in the practice of non-military law".¹³

Both opinions rely as well upon the appeal procedures established by the Act, whereby non-military judges can review the actions of service tribunals.¹⁴ These provisions are said to protect the accused's right to a fair trial, and to make the appellant's argument "difficult to sustain".¹⁵

The dissenting judgment correctly rejects as irrelevant the adjudicator's familiarity with service life. With respect to a charge under the Narcotic Control Act, no measure of military expertise better equips a military judge to analyse questions of fact or law in comparison with his civilian counterpart. Indeed, would it not be violative of an accused's right to a fair trial if the judge were influenced by the special needs of the military, at least with respect to the

¹¹ As one American writer put it: "[C]ourts-martial are not convened unless the commanding officer believes the defendant is guilty; and since the officers who make up the trial panel know that the commandant is of this persuasion—and because they must often look to the commandant for promotion—they will most often come through with the verdict he wants. It is, in fact, that simple".

Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970), p. 76. To the same effect is the opinion of Black J. in *Reid v. Covert* (1956), 354 U.S. 1, at p. 36. See also Special Committee on Bill No. 133—An Act Respecting National Defence: Minutes of Proceedings and Evidence (1950), p. 123.

¹² Factor, *Federal Civilian Court Intervention in Pending Courts-martial and the Proper Scope of Military Jurisdiction over Criminal Defendants: Schlesinger v. Councilman and McLucas v. Champlain* (1976), 11 Harv. Civil Rights—Civil Liberties L. Rev. 433, at p. 440.

See also O'Connell, *The Nature of British Military Law* (1963), 19 Military Law Rev. 141, at p. 155.

¹³ *Supra*, footnote 4, at p. 411, per Ritchie J., McIntyre J. makes the same point at p. 421.

¹⁴ *Supra*, footnote 6.

¹⁵ *Supra*, footnote 4, at p. 418, per Ritchie J. This position was adopted by McIntyre J., at p. 421. One eminent American jurist was of the opinion that civilian appeal can be "an effective guarantor of our citizens' rights to due process when they are subjected to trial by court martial". Warren, *The Bill of Rights and the Military* (1962), 37 N.Y. Univ. L. Rev. 181, at p. 189.

establishment of the elements of the offence and any available defences? Military expertise may be relevant in other respects, but not in the way relied upon by the majority and concurring opinions.

The reliance on the availability of civilian appeal procedures is also open to criticism. Whether or not there is such an appeal mechanism is a question distinct from that of the fairness of the trial itself. Furthermore, unless the court of first instance makes a serious error of law, or draws completely unreasonable inferences from the facts as judicially found, an appellate court is unlikely to interfere.¹⁶ (To the extent that one might argue that this deference would not obtain in the context of an appeal from a service tribunal, equally could one assume that more deference will be paid to the service tribunal, given the ostensible relevance of that tribunal's expertise in military matters.) Finally, it is unlikely that an appellate court would detect the subtle ways in which the military adjudicator may have been influenced by the psychological pressures noted above.¹⁷ It might be said that an appellate court should restrict itself to cases where there is an allegation (and evidence) of actual bias, but this only reinforces the argument that the potential unfairness of the original trial might go undetected.

Whereas the majority appears to ignore the possibility of such psychological pressures on the military judge, McIntyre J. confronts the issue directly by denying that the military judge's "close association" and "identification" with the military community renders him unsuitable to discharge his judicial function:

It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.¹⁸

This "confession and avoidance" is remarkable; it is rare for a judge to acknowledge the tension between the ideal of impartiality

¹⁶ See, for example, *Corbett v. The Queen*, [1975] 2 S.C.R. 275. It would appear that the Court Martial Appeal Court is without jurisdiction to consider an appeal on a question of fact alone. Ss 195, 197 of the National Defense Act, *supra*, footnote 2.

¹⁷ "[T]he knowledge that one's commanding officer has, in essence, already found probable cause to exist and is watching over the proceedings may prey on the minds of those appointed by him to conduct the court martial. If bias results it may on occasion be too evanescent to discover on a case-by-case basis." *Curry v. Secretary of the Army* (1973), 439 F. Supp. 261, at p. 263, per Gesell D.J. (U.S.P.C., D.C.).

¹⁸ *Supra*, footnote 4, at pp. 420-421.

and the predilections a judge brings to his task by virtue of his background.¹⁹ Indeed, it is an open question whether or not a judge succeeds in ensuring that no injustice results from that fact, a question to which further research would profitably be directed. But, whatever be the results of such research, the problem of impartiality in the military legal system remains. The accused "was in the hands of his military superiors in respect of the charges, the prosecution and the tribunal by which he was tried".²⁰ At a minimum, does this not raise the problem of the appearance of impartiality? This appears to be the thrust of the remarks of the Chief Justice, writing in dissent:

In my opinion, it is fundamental that when a person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a Court of Justice, separate from the prosecution and free from any suspicion or influence of or dependency on others.²¹

Both Ritchie J. and McIntyre J. allude to the necessity for service tribunal jurisdiction,²² with McIntyre J. appearing to draw an analogy with the necessity for such jurisdiction over service persons stationed abroad.²³ But where is such a necessity when a crime is committed in Canada with the civilian court system available? As a matter of principle, it is appropriate for a court to ask not only if the impugned process is fair, but also if any potential unfairness might nonetheless be justified as necessary.²⁴ Neither the opinions of the court, nor the written submissions of the parties disclosed what that necessity is.

¹⁹ In an extra-judicial context, the tension was acknowledged by Lord Justice Scrutton: "This [impartiality] is rather difficult to attain in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour . . . It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class." Scrutton, *The Work of the Commercial Courts* (1923), 1 Cambridge L.J. 6, at p. 8.

²⁰ *Supra*, footnote 4, at p. 401, per Laskin C.J.C.

²¹ *Ibid.*, at p. 402.

²² *Ibid.*, at pp. 416, per Ritchie J. and 420, per McIntyre J.

²³ "It must be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal process. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service and I find no offence to the *Canadian Bill of Rights* in this respect." *Ibid.*, at p. 421.

²⁴ Gold, *Equality Before the Law in The Supreme Court of Canada: A Case Study* (1980), 18 Osgoode Hall L.J. 336, at p. 383.

2. *The right to equality before the law.*

In support of his argument that the exercise of court-martial jurisdiction violated section 1(b) of the Bill of Rights, the appellant relied upon the fact of military jurisdiction in and of itself, the different procedures which distinguish a court-martial from a civilian trial, and the possibility of a soldier being subjected to double-jeopardy at the hands of a civilian court.²⁵ Both the majority and concurring judgments proceed on the basis that the principle of equality before the law is satisfied if the impugned legislation was enacted for the purpose of achieving a valid federal objective. From this common starting point, the two judgments diverge in approach.

Ritchie J. cites the authority of Parliament to legislate in relation to the Militia, Military and Naval Service, and Defence, a power conferred by section 91(7) of the British North America Act. He asserts that this "must . . . include the authority to enact legislation for regulation and control of the behaviour and discipline of members of the services and this in turn includes the making of provision for the establishment of courts to enforce such legislation".²⁶ For Ritchie J., the National Defence Act was "obviously enacted for the purpose of achieving a valid federal objective".²⁷

As noted elsewhere, a majority of our court continues to apply the valid federal objective test in a way that adds nothing to the analysis traditionally undertaken in division of powers controversies.²⁸ As a result, the analysis of the majority remains at a level of generality which obscures the real issues in the case.

At the heart of any issue concerning the application of section 1(b) of the Bill of Rights is the question of justification. Once a *prima facie* case of inequality before the law has been established (as clearly was the case here), the court must ask what reasons, if any, serve to justify the deviation from equality impugned in the law.²⁹ The majority does not address this question overtly.

²⁵ There are no cases where a soldier, convicted or acquitted by a service tribunal, has been tried by a civilian court for the same offence. Starkman, *op. cit.*, footnote 2, at p. 422, n. 38. This issue might be rendered moot by s. 11(h) of the proposed Charter of Rights and Freedoms: "11. Any person charged with an offence has the right . . . (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;" The only question outstanding would be whether the limitations clause (s. 1) would be applied to justify the subsequent trial.

²⁶ 30-31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act. *Supra*, footnote 4, at p. 410.

²⁷ *Ibid.*

²⁸ MacPherson, *Developments in Constitutional Law: The 1978-79 Term* (1980), 1 Supreme Court L. Rev. 77, at pp. 118-119.

²⁹ Gold., *op. cit.*, footnote 24.

The concurring opinion is an improvement in this regard. Discussing the valid federal objective test, McIntyre J. notes that "[t]he word 'valid' in this context must impart a concept of validity not only within the field of constitutional legislative competence but also valid in the sense that it does not offend the Canadian Bill of Rights".³⁰ Two formulations of his preferred approach are offered, of which the second is the more complete:

[A]s a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective.³¹

Applying this test, McIntyre J. finds no violation of section 1(b) in "[t]he creation of a body of military law and the tribunals necessary for its administration . . . in certain cases".³² The justification cited is the need for a disciplined and efficient military. McIntyre J. proceeds to echo the American concept of the "less restrictive alternative"—a requirement that the impact of a law on fundamental rights be minimized to the extent possible, given the objectives desired:³³

It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives.³⁴

As a result, McIntyre J. refuses to give full effect to the plenary scope of service tribunal jurisdiction as conferred by the terms of section 120, denying that the "legitimate needs of the military extend so far".³⁵

McIntyre J. adopts the American test that military jurisdiction over ordinary offences will be upheld when and only when the offence is "service connected".³⁶

In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well as offence falling within the jurisdiction of the courts

³⁰ *Supra*, footnote 4, at p. 422.

³¹ *Ibid.*, at p. 423. Space constraints preclude a discussion of the element of motive. See Ely, *Democracy and Distrust* (1980), pp. 136-48; Tribe, *American Constitutional Law* (1978), pp. 1028-1032.

³² *Supra*, footnote 4, at pp. 423-424, emphasis added.

³³ See Tribe, *op. cit.*, footnote 31, pp. 682-688.

³⁴ *Supra*, footnote 4, at p. 424.

³⁵ *Ibid.*

³⁶ This test was articulated by the Supreme Court of the United States in *O'Callahan v. Parker* (1968), 395 U.S. 258. The test is applied on a case-by-case basis, an approach made explicit by the Supreme Court in *Relford v. United States Disciplinary Commandant* (1970), 401 U.S. 355, at pp. 365-366. In *Relford*, the court listed the

martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect general standards of discipline and efficiency of the service.³⁷

Applying this test to the facts of *MacKay*, McIntyre J. has "no difficulty" in deciding that trafficking in drugs in a military establishment falls within the category of service connected offences.³⁸

McIntyre J.'s general conception of equality before the law is a synthesis of the various standards of review applied by the American courts under the equal protection clause.³⁹ Three standards have been articulated. The rational basis test, or minimal scrutiny, requires that legislative classifications be reasonably related to legitimate state

following twelve factors as relevant to the determination of whether an offence was service connected:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

Of the substantial literature generated by the court's decisions in this area, some of which is cited in *Relford*, at pp. 356-357, the following are most informative: Cooper, *O'Callahan Revisited: Severing the Service Connection*, [1977] 76 Military L. Rev. 165; Facter, *op. cit.*, footnote 12.

The military authorities in Canada claim that they have been applying a concept of service connection for years and that the test, were it adopted by a majority of the court, would have no practical effect. Information obtained from the office of the Judge Advocate General, Ottawa.

³⁷ *Supra*, footnote 4, at p. 426.

³⁸ *Ibid.*, at p. 427. Ritchie J. makes no mention of the service connection test, but it appears that he would adopt McIntyre J.'s analysis. Towards the end of the majority opinion, at pp. 417-418, Ritchie J. states: "It may be thought also that the offence of trafficking in narcotics takes on a special character when it is committed, as it was here, at an armed forces base where service personnel are equipped with firearms."

In the United States, the drug cases constitute the largest category of litigation under the service connection test. Most cases are concerned with the issue of off-base possession and trafficking; such activities on the base would appear to be the paradigmatic case of a service-connected offence. See Cooper, *op. cit.*, footnote 36, at pp. 175-182; Facter, *op. cit.*, footnote 12, at pp. 468-470.

³⁹ See Tribe, *op. cit.*, footnote 31, ch. 16.

interests. Strict scrutiny requires that laws which discriminate to the detriment of a "suspect" class or which impinge upon a "fundamental" right be justified as necessary to achieve a compelling state interest. Intermediate scrutiny requires that impugned classifications be substantially related to the achievement of important governmental objectives.

McIntyre J.'s test differs from that of minimal scrutiny insofar as the relationship between means and ends must be necessary, not merely reasonable. It is unlike strict scrutiny in the sense that the governmental objective need not be compelling, only "necessary and desirable". It would be a mistake, however, to read too much into the form of words employed. As in all aspects of law, the real picture emerges only when we examine how the test is applied. As applied, the test proves very deferential to Parliament.

McIntyre J. accepts the conventional wisdom that drug use in the military undermines discipline and efficiency. No evidence of this "fact" appears in the written submissions to the court, and the opinions are silent as to how this conclusion was arrived at. If one accepts the requirement that military jurisdiction must be justified as necessary, the court should have put an onus on the respondents to provide some evidence that drug use has this adverse effect. Absent such evidence, what is the justification for military jurisdiction over drug offences?

More generally, if McIntyre J.'s conception of equality before the law is to be anything more than a "rational basis" test—a standard which ultimately means no review at all⁴⁰—the court must develop rules which define who must bear the burden of justification in a given case, and by what measure that burden can be satisfied. Unless such rules impose some onus on the party defending the challenged legislation, one cannot take seriously the language of necessity employed by McIntyre J.

A similar problem arises with respect to the concept of a service connected offence. Is the test consistent with McIntyre J.'s statement that deviations from the principle of equality before the law are to be countenanced "only to the extent necessary" in light of the objective sought? The commission of a particular offence may have an impact upon military discipline and efficiency, but this alone does not make it *necessary* that the military have the jurisdiction to try the offender.

3. *Is military jurisdiction necessary?*

Twice in this comment it was noted that the opinions failed to explain the necessity for military jurisdiction over service persons

⁴⁰ Gold, *op. cit.*, footnote 24, at pp. 376-377.

charged with crimes committed in Canada. Is such an explanation available?

One might argue that the necessity inheres in the need for the military to have breaches of the law dealt with expeditiously, both to minimize the loss to the troops of a soldier pending trial, and to deter delinquent behaviour in general. Although neither the factums nor reasons for judgment allude to this, it is a consideration which traditionally has been invoked in support of military jurisdiction.⁴¹ Notwithstanding its allure, the argument is not persuasive.

Even though a charge has been laid, there appear to be no reasons why an accused soldier could not continue to discharge his duties in the military. Admittedly, his continued service will be dependent upon his being granted some form of pre-trial release, but this should not prove to be an insurmountable problem. Given the general principles governing pre-trial release,⁴² and considering the submissions that could be made by the military on that issue, it is likely that most accused soldiers would be free to continue their duties, assuming that the military authorities so desired. Furthermore, the National Defence Act itself contemplates a variety of restrictions upon the liberty of the soldier awaiting trial.⁴³ As such can it truly be said that the operation of the service would be disrupted significantly if accused soldiers were tried in the civilian courts?

The plain fact is that soldiers like Private MacKay would *not* be tried in the civilian courts, because the civilian authorities tend not to prosecute minor drug offences. The military, however, believe that drug use undermines discipline and morale, and have an interest in seeing all drug offenders prosecuted. In fact, approximately one half of the courts martial concerning offences under civilian law within the past ten years were for drug offences.⁴⁴ As such, one could rephrase the central issue as follows: do the demands of military discipline and morale justify the military's prosecution of a soldier in circumstances where the civilian authorities would not have prosecuted a civilian for the same offence? When the issue is framed in this way, one begins to appreciate the difficulty which our court experiences in interpreting

⁴¹ The factor of expedition was alluded to in the preamble to the first Mutiny Act, 1688, 1 Will. & Mary, sess. 2, c. 4, which noted the need to subject soldiers "who shall mutiny or stir up sedition, or shall desert their majesties' service . . . to a more exemplary and speedy punishment than the usual forms of law will allow". See also Bishop, *Justice Under Fire* (1974), p. 21.

⁴² Bail Reform Act, R.S.C., 1970, 2nd Supp., c. 2, s. 5.

⁴³ Ss 136, 137; Queen's Regulations, art. 105.

⁴⁴ Approximately 950 courts-martial were held during the past ten years, of which one-half concerned breaches of civilian law. Of these, approximately one-half were for drug offences. Information obtained from the office of the Judge Advocate General, Ottawa.

the Bill of Rights. In this regard, it is instructive to examine first the dissenting opinion.

Laskin C.J.C. does not proceed within the framework of the valid federal objective test, holding that *MacKay* is "on all fours in principle with the judgment of this Court in *The Queen v. Drybones*".⁴⁵ The analogy is explained in terms of the different and harsher treatment meted out to one class as compared with another:

In *Drybones* it was Indians and here it is members of the armed forces who were under disabilities: treated differently, in short, from other persons in respect of the application to them of the same law.⁴⁶

At the outset, it is significant that the dissenting opinion does not explain why military status should be considered to be the equivalent of race for the purposes of section 1(b) of the Bill of Rights. Harsher treatment might not be justified in terms of race, but might be justified in terms of the needs of the military. The dissenting opinion does not confront this possibility, in the same way that the court in *Drybones* failed to ask what reasons, if any, justified the impugned provisions of the Indian Act.⁴⁷ The court remains unwilling to confront the crucial questions in controversies about rights, that is what reasons might justify the law. If this is because to do so would be to violate the principle that courts will not question the wisdom of legislation, so much the worse for the principle. How else could the court do its job under the Bill of Rights? The dissenting opinion identifies the correct principle—that of harsher treatment—but does not relate it to the central question of enforcement.

The majority opinion was the only one to address the question of enforcement at all. The issue was analysed in terms of *R. v. Hauser*.⁴⁸ According to Ritchie J., the sole issue was whether the grant of prosecutorial power "interfered with the power of the province to legislate in regard to matters under s. 92(14) of the B.N.A. Act, 1867".⁴⁹ The majority refers to the judgment of Pigeon J. in *Hauser* for the proposition that such provincial power applies "only where the subject-matter involved falls strictly within the criminal law

⁴⁵ *Supra*, footnote 4, at p. 403. Laskin C.J.C. appears to approve of a "reasonable classification approach" in some cases. *Re Prata and Minister of Manpower and Immigration* (1972), 31 D.L.R. (3d) 465 is approved of as not involving an "irrelevant discrimination" or an "unreasonable classification", at p. 407. *R. v. Burnshine* (1974), 44 D.L.R. (3d) 584 was interpreted as having held the impugned provision of the Prisons and Reformatories Act, R.S.C., 1970, c. P-21 to be a "reasonable way of classifying young offenders", at p. 408.

⁴⁶ *Supra*, footnote 4, at p. 403.

⁴⁷ Gold, *op. cit.*, footnote 24, at pp. 352-353.

⁴⁸ [1979] 1 S.C.R. 984.

⁴⁹ *Supra*, footnote 4, at p. 415.

power itself".⁵⁰ Neither the National Defence Act nor the Narcotic Control Act were considered to be "criminal law". The former derives its force from section 91(7) of the B.N.A. Act while the latter, following Pigeon J. in *Hauser*, is characterized as valid under the peace, order and good government clause. For Ritchie J., these considerations are determinative.

The majority also relied on *R. v. Smythe*.⁵¹ In *Smythe*, the court alluded to the power of the Attorney General to decide whether or not a person will be prosecuted for a given offence. This power, not questioned by the court, was relied upon to uphold the discretion of the Attorney General to choose the form in which prosecutions take place. Ritchie J. applies *Smythe* to reject the appellant's argument, holding that "the Minister of National Defence stands in the place of the Attorney General".⁵²

The *Hauser* case is an inadequate doctrinal framework for resolving the enforcement issue in *MacKay*. In *Hauser*, the opinions failed to analyse adequately the federal and provincial interests in the enforcement of federal legislation.⁵³ As applied to *MacKay*, *Hauser* simply does not speak to the same issues. Moreover, it bears repeating that the majority in *MacKay* did not disclose what the real enforcement issue was.

The use of *Smythe* is also problematic. First, the case itself avoided the issue of what limits, if any, there should be on the exercise of prosecutorial discretion. Second, by suggesting that a statutory grant of discretion cannot be challenged under the Bill of Rights in light of the way in which the discretion is being exercised, the court in *Smythe* unduly restricted the potential scope of the Bill of Rights. Third, the decision adopted a static conception of rights by defining equality before the law in terms of the law as it was when the Bill of Rights was enacted. Finally, the court relied upon the fact that the discretion of the Attorney General did not "place any particular person or class of persons in a condition of being distinguished from any other member of the community".⁵⁴ In the case of minor drug offences committed by a soldier, the National Defence Act functions to distinguish soldiers from virtually all other classes of persons in society. The *Smythe* case is not sufficient to dispose of the issue, especially when crucial facts remain undisclosed.

⁵⁰ *Ibid.*

⁵¹ [1971] S.C.R. 680.

⁵² *Supra*, footnote 4, at p. 413.

⁵³ See Elliott, Note (1979), 14 U.B.C. L. Rev. 163, Cf. Taman, *Hauser* and Control over Criminal Prosecutions in Canada, [1980] 1 Supreme Court L. Rev. 410.

⁵⁴ *Supra*, footnote 51, at p. 685.

Had the court analysed the enforcement issue in *MacKay* more completely, it is not clear how it should have been resolved. The argument for upholding the exercise of military jurisdiction does not depend solely on the ostensible impact of drug use on military discipline. To say that the prosecution of minor drug offence is necessary in the military context, when it is deemed not to be in the civilian context, is to assert that there is a relevant distinction between military and civilian society. Traditionally, the armed forces have been viewed as a "specialized society separate from civilian society",⁵⁵ but is this conventional wisdom true?

Modern sociological research suggests that the nature of military society has changed dramatically since the second world war. There has been a "gradual convergence of military and civilian social structures",⁵⁶ so that the traditional assumptions about what is needed to maintain discipline may not hold. Discipline may not be enhanced by the military cracking down on minor drug offences; treating the Canadian soldier more like his civilian counterpart might be a more effective way to ensure that orders are obeyed and duties discharged.⁵⁷

How should the Supreme Court of Canada deal with this factual uncertainty? It would be inappropriate for the court to rely upon these sociological speculations to strike down the law; a court is not equipped to evaluate this kind of information. Nor is a court likely to understand the nature of military society and what is necessary to ensure discipline and efficiency. (It is here that the question of expertise is relevant). Is deference to Parliament the only appropriate response?

One should distinguish between a court deferring to the institution of Parliament and a court deferring to a judgment of that institution. The former approach would be an abdication of the role which the Supreme Court has assumed for itself under the Bill of Rights. The latter approach may be the most sensible resolution of the majority of cases, assuming that the court has some evidence of what that judgment is. The only way to get that evidence is to demand it. As such, the court should have put an onus on Parliament to defend its assumptions about the nature of military society and its disciplinary needs. Only then could the court be justified in deferring to Parliament on this issue.

⁵⁵ *Parker v. Levy* (1973), 417 U.S. 733, at p. 743, per Rehnquist J.

⁵⁶ Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military* (1974), 49 *Indiana L. J.* 539, at p. 542.

⁵⁷ See generally, Janowitz, *Sociology and the Military Establishment* (1965).

4. Conclusion.

If there is a lesson to be learned from *MacKay*, it is that the Supreme Court of Canada remains unable to come to grips with questions of rights. Assuming that, as a matter of principle, an apparent abrogation of rights can be justified if it is necessary, it is incumbent upon the court to explain what that necessity is. The court's failure to do so undermines the persuasiveness of the decision. Moreover, it suggests that apparently sophisticated doctrine, such as was offered by McIntyre J., is worth little in the absence of an adequate analysis of the facts.

The weakness in the court's approach is not primarily a function of the non-entrenched status of the Bill of Rights. It is a function of our legal culture, which traditionally has defined a role for the judiciary subordinate to that of the legislature.⁵⁸ This role inhibits the court from asking the questions which must be asked when issues of rights are considered. Old habits die hard, and there is little reason to expect that the court will change its orientation dramatically if a Charter of Rights is entrenched.

MARC GOLD*

* * *

SECURITY INTERESTS IN SECURED OBLIGATIONS.—Complex priority questions arise in connection with secured transactions with secured obligations. Additional complications come to the surface where the statute which governs the secured transaction with the obligation does not apply to the interest securing it. This is typical where the collateral under the secured transaction is an obligation secured by a real estate mortgage. All this came up recently in *Re Urman*,¹ a decision given by Steele J. of the Ontario Supreme Court.

The facts of the case were as follows: before his bankruptcy, Urman carried on business as a real estate mortgage broker. The Canadian Imperial Bank of Commerce ("the bank") which acted as his banker acquired from him a general assignment of accounts with respect to which a financing statement was properly registered under

⁵⁸ Gold, *op. cit.*, footnote 24, at pp. 348-358.

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¹ (1982), 128 D.L.R. 33, (1981), 38 C.B.R. (N.S.) 261 (Ont. S.C. in Bkcy). All internal cites in this comment are from the C.B.R., being the only report of the case, at the time the comment was submitted for publication.

the Ontario Personal Property Security Act.² Apparently, the general assignment related to all existing and future accounts held by Urman. The financing statement was outstanding at the time of Urman's bankruptcy.

At all material times, the bank was aware that Urman, in the ordinary course of his business, was acquiring real estate mortgages primarily for resale to his clientele. The bank provided a revolving line of credit for this purpose. Repayment to the bank was anticipated to be from Urman's sale of mortgages, payment on the mortgages themselves, and from profits on the sale of mortgages. The general assignment provided that all monies collected or received by Urman were to be received by him as trustee for the bank and ought to be paid over to the bank.

Urman's trustee in bankruptcy ("the trustee") applied to the court for advice and direction³ to determine the respective interests and priorities with respect to certain mortgages held or formerly held by Urman. Four test cases were the subject of the decision. The first, third and fourth cases were contests with respect to mortgages that had been assigned by Urman to specific lenders to secure his indebtedness to each of them.⁴ The subject-matter of the second case was a mortgage held by Urman for the benefit of certain "trust claimants", that is, various persons from whom he received money after he had advanced his own money to the mortgagor-borrower.⁵

Some of the competing assignees, but not the bank, registered their respective interests in the appropriate registry or land titles office. None of the competing assignees or "trust claimants" registered a financing statement under the PPSA.

Steele J. held that the PPSA applied to all of Urman's assignments. Since the bank registered a financing statement in connection with the general assignment, it held a perfected security interest in all

² Presently R.S.O., 1980, c. 375, as am., hereinafter cited as PPSA.

³ Pursuant to s.16 of the Bankruptcy Act, R.S.C., 1970, c. B-3, as am.

⁴ In the third case the contest was between the bank and a sub-assignee of the mortgage. Originally, the bank approved to the assignee a line of credit for the purpose of purchasing mortgages from Urman. The assignee never availed himself of the approval but acquired mortgages from Urman with funds borrowed from another bank (the sub-assignee) to which the mortgages had been then assigned. In the fourth case, subsequent to the assignment of the specific mortgage, Urman specifically assigned to the bank moneys owing under that mortgage.

⁵ Each trust claimant's rights were spelled out in a detailed trust agreement which constitutes Schedule A of the original judgment. In fact Urman syndicated the mortgage among the various "trust claimants". The court found that "[h]e did not receive the money in trust to be advanced on behalf of the trust claimants but received the money after he had advanced his own money. . .": *Urman*, *supra*, footnote 1, at p. 273.

debts owing under the real estate mortgages.⁶ However, "the bank impliedly waived its charge in each case where Urman sold or transferred a mortgage or the debt created thereunder to others".⁷ On their part, having declined to register financing statements, "these other persons failed to perfect their [respective] security interest[s] and therefore became subordinate to the trustee".⁸ The ultimate winners were therefore Urman's unsecured creditors.⁹

The remainder of this comment will examine the issues presented by *Urman* in the following manner: Part I will discuss the relationship between a debt and collateral and the implications of this relationship with respect to priorities among competing security interests in the debt and the collateral. Part II will examine whether the analysis of Part I fits into the scheme of the PPSA in cases where the obligation which constitutes the collateral is secured by personal property so that both the security interest in the obligation and the interest securing it are governed by that statute. Part III deals with the direct issues dealt with in *Urman*. It will first examine the applicability of the framework so far established to situations where the obligation which constitutes the collateral is secured by a real estate mortgage. Next, it will deal with the treatment of the bank's waiver in *Urman* and the ultimate victory of the unsecured creditors. Part IV will set forth my conclusions which support the substance of Mr. Justice Steel's decision and examine possible legislative solutions to some of the issues raised by *Urman*. It will also examine critically Bill 163, recently enacted in Ontario partly in response to *Urman*.^{9a}

I

In *Thornborough v. Baker*,¹⁰ Lord Nottingham stated that "in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money".¹¹ Therefore, on the mortgagee's death in this case, the debt was considered to constitute part of his personal estate and became payable to his executor. It did not pass together with the mortgagee's lands to his

⁶ Registration of a financing statement perfects a security interest in intangibles under PPSA, s. 25(1)(c). For the nature of the mortgaged debts as "intangible", see text and footnotes 60-61 *infra*.

⁷ *Urman*, *supra*, footnote 1, at p. 269.

⁸ *Ibid.*, at p. 279.

⁹ Under PPSA, s. 22(1)(a)(iii), "...an unperfected security interest is subordinate to ... the interest of a person ... who represents the creditors of the debtor as ... trustee in bankruptcy. ...".

^{9a} Bill 163, 1st Sess. 32nd Legisl., 30 Eliz. II, 1981, received Royal Assent on December 11th, 1981.

¹⁰ (1675), 3 Swan 628, 36 E.R. 1000.

¹¹ *Ibid.*, at p. 630.

heir. The heir held the estate in the mortgaged land on trust for the executor until the discharge of the debt.¹²

The result is that in equity the mortgage follows the debt. He who holds the debt is entitled to the benefit of the mortgage. This emerges from *Morley v. Morley*.¹³ In this case, the mortgagees assigned the debt secured by the mortgage but reserved the security to themselves. It was held that the assignment transferred the right to sue on the mortgagor's covenant for payment, but that the mortgagees remained "the persons . . . to foreclose".¹⁴ Nonetheless, money to be obtained by the mortgagees' foreclosure was to be held by them in trust for the assignees. As "the only persons who could enforce the deed", the mortgagees "would be trustees of the money recovered for the [assignees] . . . and liable to account to them".¹⁵ This means that the benefit of the mortgage passes to the assignee as an incident of the assignment of the debt secured by the mortgage.

According to Falconbridge, "a complete transfer of the mortgage includes an assignment of the debt and a conveyance of the land, but either may be assigned or conveyed separately".¹⁶ This however should be read subject to the preceding analysis. A separate assignment and conveyance could create a split between the entitlement to sue on the debt and the entitlement to enforce the mortgage. Nonetheless, as explained, enforcement of the mortgage is to be carried for the benefit of the one holding the debt. No split can be created between the right to the debt and the benefit of the mortgage. He who owns the debt ultimately enjoys the benefit of the security.¹⁷

This relationship between the debt and security is reflected in *Canadian Bank of Commerce v. Yorkshire & Canadian Trust Ltd.*,¹⁸ a 1938 decision of the Supreme Court of Canada. The case was concerned with the assignment of money due under a contract for the sale of land. The question dealt with was whether an assignment of a debt for the unpaid price necessarily carries with it the interest in the land reserved by the vendor "as a means of compelling payment of the

¹² See in general: C.H.M. Waldock, *The Law of Mortgages* (1950), p. 327.

¹³ (1858), 25 Beav. 253, 53 E.R. 633.

¹⁴ *Ibid.*, at p. 259.

¹⁵ *Ibid.*, at p. 258.

¹⁶ Falconbridge on *Mortgages* (4th ed., 1977, by Rayner and McLaren), p. 249.

¹⁷ In the language of an American text book, "the security is inseparable from the obligation, and . . . whoever can establish his claim to the obligation gets with it the security interest. . .". G.E. Osborne, G.S. Nelson and D.A. Whitman, *Real Estate Finance Law* (1979), p. 315 and n. 43, relying on the classic statement of the U.S. Supreme Court in *Carpenter v. Longan* (1872), 83 U.S. (16 Wall.) 271, 21 L. Ed. 313, according to which "the debt is the principal and the mortgage an accessory".

¹⁸ [1939] 1 D.L.R. 401 (S.C.C.).

debt secured upon it". The court gave an affirmative answer: the security and the right to payment "could not in point of law be separated". The former passed to the assignee as an incident of the assignment of the latter.¹⁹

*Jones v. Gibbons*²⁰ may appear to be inconsistent with this analysis. The case was a contest with respect to a debt between a transferee of the mortgage securing it and a subsequent assignee of the debt. The court held in favour of the former: "he, who has the estate, has in effect the debt . . . [B]y the assignment of the mortgage the debt necessarily passes, as incident to it."²¹ Nonetheless, this proposition should not be taken to reverse the relationship between a debt and the mortgage securing it. The case was concerned with the construction of the document conveying the mortgage. It held in effect that a transfer of the mortgage without an assignment of the debt secured by it is a futile act and that therefore the document had to be read as conveying not only the mortgage but also the debt. The transferee of the mortgage won not because he was a transferee of the mortgage, but because the document he relied on was construed to convey to him the debt as well. He won because his right to the debt was prior in time to that of the subsequent assignee. On final account the decision supports the view that the mortgage follows the debt: without his priority with respect to the debt, the transferee of the mortgage could not retain the benefit of the security.

II

Secured transactions with obligations are governed in Ontario by the PPSA.²² Under this statute, a writing or group of writings which evidences both a monetary obligation and a security interest in specific goods is "chattel paper".²³ Other obligations constitute "intangible".²⁴ Monetary obligations incurred in favour of a trader and in the ordinary course of his business, are "book debts".²⁵ Where

¹⁹ *Ibid.*, at pp. 405-406, per Davis J. See also at pp. 406-407 per Kerwin J; and at pp. 408-409 per Hudson J. The result was that "in accepting the assignment of the moneys due . . . the bank . . . lent money . . . upon the security of lands", in violation of the then in force s.75(2)(c) of the Bank Act, 1934 (Can.). *Ibid.*, at pp. 406-407 per Kerwin J.

²⁰ (1804), 9 Ves. 407, 32 E.R. 659.

²¹ *Ibid.*, at p. 411. See also *Neveren v. Wright* (1917), 36 D.L.R. 734, at pp. 740-741 (Ont. S.C. App. Div.), and *Falconbridge, op. cit.*, footnote 16, at p. 253 and n. 33.

²² The PPSA applies to all secured transactions with personal property: ss 2(a), 1(y), and 1(m).

²³ *Ibid.*, s.1(c).

²⁴ *Ibid.*, s.1(m)

²⁵ Provided "in the ordinary course of [the trader's] business [they] would be entered in his books". The term is not defined in the PPSA. Its definition comes from

they are evidenced by a writing or group of writings which evidences also a security interest in specific goods, book debts are part of "chattel paper". Otherwise they are "intangible[s]". The PPSA applies not only to the assignment of book debts intended as security, but also to their outright sale.²⁶

The characterization of "chattel paper" as a category of "collateral",²⁷ covering a monetary obligation as well as the security interest in the goods securing it, requires some explanation. In fact, it is only the obligation which constitutes the collateral. The security interest in the goods is incidental to the right to enforce the obligation, and as such, benefits the party with a security interest in the "chattel paper".²⁸ This can be demonstrated by considering the position of an assignee with a perfected security interest in goods as compared to that of a party with a perfected security interest in the obligation secured by these goods.

An assignee of an unperfected security interest may register "a financing statement . . . in which [he] is shown as the secured party".²⁹ An assignee of a perfected security interest may file a financing change statement.³⁰ Registration under section 48(2) is for the purpose of perfecting a security interest in the goods.³¹ Registration under section 48(1) has nothing to do with perfection: an assignee of a security interest succeeds to the assignor's position "so far as . . . perfection is concerned".³² The effect of registration under section 48(1) is to make the assignee "the secured party of record".³³ Inquiries concerning the transaction, authorized under section 20,

Shipley v. Marshall (1863), 32 L.J.C.P. 258, 259, 143 E.R. 567, cited in approval in *Re Paddle River Construction Ltd* (1961), 35 W.W.R. 605, at p. 614, (Alta S.C.). See also *Official Receiver v. Tailby* (1886) 56 L.J.Q.B. 30, at p. 33 (C.A.), and *Re Alna Manufacturers Ltd* (1963) 4 C.B.R. (N.S.) 167, at p. 168 (Ont. S.C.).

²⁶ PPSA, s. 2(b).

²⁷ "Collateral" is "property that is subject to a security interest": PPSA, s. 1(d).

²⁸ Indeed, even without a direct provision, the PPSA must be read to provide that the security interest in the goods passes to the assignee by an outright assignment of book debts secured by these goods. The doubts of the B.C. Law Reform Commission on this point are not justified. See its report on Debtor-Creditor Relationships (Project No. 2) Part V—Personal Property Security (1975), p. 26.

²⁹ S. 48(2). An assignee may also take advantage of s. 47(2) and where the collateral is goods to be held for sale or lease he may register a financing statement before a security agreement is signed: *West Bay Sales Ltd v. Hitachi Sales Corp. of Canada Ltd* (1979), 28 C.B.R. (N.S.) 244 (Ont. S.C. in Bkcy), and Ziegel, (1979), 3 Can. Bus. L.J. 222, at p. 233. Stated otherwise, a financing statement may be registered by the assignee before the attachment of the assignor's security interest.

³⁰ PPSA, s. 48(1).

³¹ PPSA, s. 47(1).

³² PPSA, s. 23(2).

³³ PPSA, s. 48(3).

would be addressed to him. He will be entitled to file subsequent financing change statements in connection with the security interest.³⁴

The assignee's security interest in the goods is, however, not a security interest in the secured obligation. Perfection of the former does not secure perfection of the latter. Perfection of the security interest in the secured obligation is obtained by perfecting a security interest in the chattel paper containing the obligation. All this is demonstrated by the example given in comment 7 to article 9-302 of the Uniform Commercial Code:

Buyer buys goods from Seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The Security interest, in X's hands and without further steps on his part, continues perfected against Buyer's transferees and creditors. If, however, the assignment from Seller to X was itself intended for security [or was an assignment of book debts not intended as security], X must take whatever steps may be required for perfection in order to be protected against Seller's transferees and creditors.

This example presupposes that the assignment of Seller's security interest in the goods carries with it the right to enforce Buyer's obligation,³⁵ so as to give X a security interest in the chattel paper.³⁶ If X does not take additional steps to perfect his security interest in the chattel paper, he ends up with a perfected security interest in the goods and an unperfected security interest in the chattel paper. On Buyer's default, he will be protected against Buyer's judgment creditors levying on the goods. At the same time, on Seller's default, his unperfected security interest in the chattel paper will be subordinate to the interest of Seller's judgment creditors levying on the chattel paper without knowledge of X's unperfected security interest.³⁷

Indeed, a perfected security interest in the goods does not protect its assignee against Seller's transferees and creditors. Protection against them depends on priority with respect to the chattel paper. This is illustrated by adding the following facts to the previous example.

Suppose Seller, after his assignment to X, assigns the chattel paper to Y who perfects a security interest in it.³⁸ On Seller's default, X's interest in the chattel paper is subordinate to Y's security

³⁴ Cf. Comment to ss 9-405 of the American Uniform Commercial Code, hereinafter cited UCC.

³⁵ In the manner considered in the last paragraph of Part I, *supra*.

³⁶ Which is the collateral in the UCC example. See PPSA, s. 1(c).

³⁷ PPSA, s. 22(1)(a)(ii).

³⁸ Cf. facts of *G.E.C.C. v. Bankers Commercial Corp.* (1968), 429 S.W. (2d) 60 (Ark. S.C.).

interest.³⁹ On Buyer's default and as between X and Y, who has priority with respect to the goods? X claims to hold a perfected security interest in the goods on the basis of registration either by the assignor⁴⁰ or by himself.⁴¹ Y has not registered any financing statement with respect to his interest in the goods. On Buyer's default, will X come ahead of Y on the basis of the perfected security interest in the goods?

Neither the UCC nor the PPSA contains provisions directly dealing with this issue. General principles suggest a negative answer. On Buyer's default the perfected security interest in the goods will not put X ahead of Y. Regardless of registration, a security interest in the goods can benefit only the one entitled to enforce the secured obligation.⁴² Where both Seller's assignments, to X and Y, were intended as security, Y who on Seller's default comes ahead of X with respect to the chattel paper, may enforce his security interest in the chattel paper and proceed to collect payments from Buyer. Then, on Buyer's default, having already enforced his security interest in the chattel paper, Y may enforce the security interest in the goods.

Where both Seller's assignments to X and Y were outright assignments of book debts, Seller's default is not a condition precedent to an assignee's rights to proceed against Buyer. Nonetheless, as between X and Y, the right to obtain payment from Buyer is vested in Y, who under the PPSA comes ahead of X with respect to the chattel paper.⁴³ The result is that on Buyer's default, as between X and him, Y is the one entitled to enforce the security interest in the goods, as well as to benefit from its perfected status as against Buyer's creditors and transferees.⁴⁴

³⁹ Perfection by Y could be accomplished either by taking possession (s. 24(a)) or by registration (s. 25(a)). X neither took possession nor registered a financing statement with respect to his interest in the chattel paper.

⁴⁰ PPSA, s. 23(2).

⁴¹ PPSA, s. 48(2).

⁴² See: Part I, *supra*.

⁴³ The alternative is that as between two outright assignees the priority with respect to the assigned debt is to be determined by non-PPSA rules, namely by the rule of *Dearle v. Hall* (1828), 3 Russ. 1, 38 E.R. 475 (priority according to the order of notices to the account debtor). This does not sound plausible. While normally, the benefit of the PPSA priority scheme is given to a secured party only where his debtor is in default, the application of the PPSA to the outright assignment of book debts (s. 2(b)) must mean that the outright assignee may benefit from the PPSA priority scheme in the absence of the assignor's default.

⁴⁴ But see V. Countryman, A.L. Kaufman and Z.B. Wiseman, *Commercial Law* (2nd ed., 1982), pp. 148-9. I understand their argument to suggest that X and Y compete over the goods as two creditors of Buyer. X's perfected security interest in the goods thus puts him ahead of Y with respect to them. I disagree. Neither X nor Y is Buyer's creditor in his own right. Both are transferees from Seller. He who prevails with respect

All this is consistent with the theme of Part I, namely that the security follows the debt. Entitlement to the benefit of the security interest in the goods is determined according to the priority with respect to the right to enforce the secured obligation. Indeed, "the debt is the principal and the [security] an accessory".⁴⁵

III

I will now examine the direct issues dealt with in *Urman*.^{45a} I will first examine the applicability of the framework so far established to situations where the obligation which constitutes the collateral is secured by a real estate mortgage. In this context I will consider the experience under the UCC as well as the interaction between real estate law and the PPSA priority scheme. Finally I will deal with the treatment of the bank's waiver in *Urman* and the ultimate victory of *Urman*'s unsecured creditors.

UCC 9-102(3) provides that "[t]he application of . . . Article [9] to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply". The subsection is illustrated in comment 4 as follows:

The owner of Blackacre borrows \$10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage [,] of delivery or non-delivery of the mortgage [,] or of recording or non-recording of an assignment of the mortgagee's interest. . . .

Originally, comment 4 stated that article 9 applied "to the security interest . . . in the note and the mortgage".⁴⁶ This language was modified, and the comment presently states that article 9 applies to the security interest in the instrument, "even though the instrument is secured by a real estate mortgage" (see the second sentence from the

to the right to receive Buyer's payment must prevail with respect to the goods securing it. I also disagree with their suggestion that an assignee's failure to control the record is detrimental to his priority with respect to the goods. See discussion on ss 48 and 23(2), *supra*.

⁴⁵ Cf. footnote 17, *supra*.

^{45a} Except where otherwise indicated, these issues are discussed under the law which was in force when *Urman* was decided, namely under the PPSA as it was prior to the enactment of Bill 163, *supra*, footnote 9a. The modifications introduced by Bill 163 are dealt with at the end of Part IV.

⁴⁶ For the "legislative history" of Comment 4, see Shaw, Security Interests in Notes and Mortgages: Determining the Applicable Law (1979), 79 Col. L. Rev. 1414, at p. 1425. The 1959 original text of Comment 4 is reproduced there in full at p. 1416.

end of the quotation). The modification was a response to a fear raised among real estate mortgage financiers that the original language meant that the mortgage or the mortgage-note package was a "general intangible".⁴⁷ A security interest in general intangibles is perfected by registration. A security interest in instruments is perfected by possession.⁴⁸ The practice among United States real estate mortgagees is to take mortgagors' promissory notes in connection with mortgage indebtedness. The revision of the comment was thus designed to reaffirm the efficacy of perfecting security interests in such promissory notes by taking possession rather than by registration.

Nonetheless, two American cases seized on the modification in the language of comment 4 and held that article 9 does not apply to security interests in real estate mortgages. Where a promissory note and mortgage together become the subject of a security interest, only that portion of the package unrelated to the real property "is now covered by Section 9-102".⁴⁹ One case, *In re Bristol Associates, Inc.*⁵⁰ was concerned with the applicability of article 9 to a security interest in a real estate lease. The other, *Rucker v. State Exchange Bank*⁵¹ dealt with the position of the mortgage assignee vis-à-vis the mortgagor and his transferees and creditors. None of them was faced with competing priorities with respect to a real estate mortgage, or with the assignee's position vis-à-vis the mortgagee's transferees and creditors. Nor did these courts have anything to say on the split priorities with respect to the note and the mortgage resulting from their decisions. Their authority is strongly undermined by their failure to consider the relationship between the right to enforce the note and the right to enforce the mortgage, namely the relationship between the debt and the mortgage securing it.⁵²

Indeed, faced with competing priorities with respect to mortgages and notes, or with the assignee's position vis-à-vis the mortgagee's creditors, one American court went the other way. Thus, in *In*

⁴⁷ See in general, Coogan, Kripke and Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements* (1966), 79 Harv. L. Rev. 229, at pp. 270-271.

⁴⁸ UCC §§9-302 and 9-305, corresponding to PPSA ss 25 and 24. All UCC cites are from the 1972 official text.

⁴⁹ *In re Bristol Associates, Inc.* (1974), 505 F. (2d) 1056, at p. 1061 (U.S. C.A., 3rd Cir.), cited with approval in *Rucker v. State Exchange Bank* (1978), 355 So. (2d) 171, at p. 174 (Fla Dist. C.A.).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² The cases are criticized by Shaw, *op. cit.*, footnote 46, at p. 1422. See also Bowman, 'Real Estate Interests as Security Under the UCC: The Scope of Article Nine' (1980), 12 U.C.C.L.J. 99, at p. 132 (in conjunction with pp. 120-121).

re Staff Mortgage and Investment Corporation,⁵³ the court was concerned with priorities with respect to real estate mortgages and notes secured by them. The contest was between an assignee of the mortgagee claiming a security interest in the mortgages and the notes and the mortgagee's trustee in bankruptcy. The court concluded that the collateral was an "instrument", and held for the trustee in bankruptcy since the secured party, not being in possession of the notes, had failed to perfect his security interest.⁵⁴ Registration of the assignments of the mortgages in local real property records was of no avail to the secured party.⁵⁵

The Ontario PPSA does not have a provision modelled on UCC 9-102(3).⁵⁶ Nonetheless, it is submitted that the provision as construed in *Staff Mortgage*⁵⁷ is good law in the province. This construction is consistent with general principles governing the relationship between debt and mortgage. As will be demonstrated below, it produces a coherent approach to the determination of priorities.

I will now examine the reasoning given in *Urman* to the application of the PPSA to the competing rights with respect to *Urman's* mortgages. Relying on *Falconbridge*,⁵⁸ Steel J. stated that:⁵⁹

It has long been settled that a real estate mortgage security is personal property as well as usually being a conveyance of the title to the land. The mortgage transaction normally includes both an acknowledgement of debt and a conveyance of the land as security and either may be assigned or conveyed separately.

He then considered legislative history, and concluded that "the P.P.S.A. should be read to embrace all personal property in its widest sense".⁶⁰ "Intangible" under section 1(m) is "all personal property, including those in action" which does not fall within a specific class of collateral (namely goods, chattel paper, documents of title, instru-

⁵³ (1977), 550 F. (2d) 1228 (U.S. C.A. 9th Cir.).

⁵⁴ Under UCC 9-301(1)(b), as well as under PPSA, s. 22(1)(a)(iii), an unperfected security interest is subordinate to the interest of the debtor's trustee in bankruptcy.

⁵⁵ Other American cases which are in line with the principal holding of *In re Staff Mortgage* are cited by Shaw, *op. cit.*, footnote 46, at p. 1421.

⁵⁶ At the same time there is no parallel in the PPSA to UCC 9-104(j): "This Article does not apply . . . to the creation or transfer of an interest in . . . real estate. . .". The provision was held to be subject to s. 9-102(3) (quoted at the beginning of Part III, *supra*): *Groves v. United States* (1978), 202 Ct. Cl. 660, at p. 675. See Shaw, *op. cit.*, footnote 46, at p. 1421:

⁵⁷ See *supra*, footnote 53.

⁵⁸ *Falconbridge*, Law of Mortgages of Land (3rd. ed., 1942), pp. 219 and 249.

⁵⁹ *Urman*, *supra*, footnote 1, at p. 265.

⁶⁰ *Ibid*, at 267. In this direction see also *C.T.L. Uniforms Ltd v. ACIM Industries Ltd* (1981), 33 O.R. (2d) 139 (H.C.) where Krever J. held (at pp. 146-147) that a leasehold in land is "intangible" under the PPSA. Real estate leases are explicitly excluded from the coverage of Article 9: UCC 9-104(j). They were later excluded from the scope of the PPSA by Bill 163.

ments or securities). Accordingly, Urman's mortgages fell within the ambit of "intangible".⁶¹

Insofar as Mr. Justice Steele appears to suggest the possibility of splitting between the debt and the benefit of the mortgage⁶² his analysis should be rejected.⁶³ Nonetheless, his ultimate conclusion was that the mortgage followed the debt, and that priority with respect to the debt conferred on the prevailing party also the benefit or the mortgage. This indeed is in line with *Staff Mortgage*.⁶⁴ It is further consistent with the theme of this comment.

I will now discuss the question of competing priorities with respect to mortgages and the debts secured by them. I will deal with the interaction between real estate law and the PPSA priority scheme first in general, and second as applied to *Urman*.

It is submitted that the principles determining priorities among competing interests in connection with obligations secured by personal property, discussed in Part II of this comment, suggest a framework governing the determination of priorities with respect to obligations secured by real property. Such a framework was in fact applied in *Staff Mortgage*⁶⁵ as well as in *Urman*. Thereunder, the position of the mortgagee's assignee as against the mortgagor's creditors and transferees is determined according to the mortgagee's priority with respect to the land. The mortgagee's priority, as well as the mortgagee's remedies are governed by real estate law. But whether a particular assignee succeeds to the mortgagee's position is another matter, not governed by real estate law. To the extent that a particular assignment is governed by the PPSA, namely where it is an assignment intended as security or an outright sale of book debts,⁶⁶ whether the assignee claiming under it succeeds to the mortgagee's position, or in other words, the question of the assignee's position as against the mortgagee's creditors and transferees, depends on a timely perfection of the security interest in the secured debt. It is therefore determined under the PPSA.

⁶¹ Normally, promissory notes are not used in Canada in connection with mortgage indebtedness. Consistently with this practice, such instruments were not used in connection with *Urman's* mortgages. For the contrary U.S. practice, see text which follows footnote 48, *supra*. The difference between the U.S. and the Canadian practice was noted by Britton, *Assignment of Mortgages Securing Negotiable Notes* (1916), 10 Ill. L. Rev. 337, at p. 338 and n. 8.

⁶² See footnote 59 and text, *supra*.

⁶³ See Part I, *supra*.

⁶⁴ See text and footnotes 53-55, *supra*.

⁶⁵ *Ibid.*

⁶⁶ See in general, first paragraph of Part II, *supra*.

I will now consider the application of this analysis to land governed by the Land Titles Act.⁶⁷ Under section 93(3) of this act, the registration of a real estate mortgage "confers upon the chargee a charge upon the interest of the chargor . . . free from any unregistered interests in the land". A registered charge is "a security upon the land . . . to the extent of the money . . . actually advanced . . ." and certain future advances.⁶⁸ Its priority ranks ahead of all interests subsequently registered.⁶⁹ This priority is, however, only as against the mortgagor's transferees and creditors. Where the mortgagee borrows money and as for his indebtedness assigns the mortgage, the assignee's position as against the mortgagee's transferees and creditors is governed by the PPSA. This stems from the applicability of the PPSA to the security interest in the secured debt and the relationship between that debt and the mortgage securing it. It is further supported by section 69 of the PPSA which provides that in a case of a conflict between the PPSA "and a provision of any general or special Act, other than the *Consumer Protection Act*" the PPSA prevails. As was in fact suggested by Steele J. in *Urman*,⁷⁰ section 100(3) of the Land Titles Act which provides for the effect of registration of a transfer of a charge in the land titles office⁷¹ is thus superseded by the PPSA.

Registration of an assignment under the Land Titles Act is nonetheless not meaningless. For example, certain powers, including the power to enforce a charge, are in the hands of one whose interest is registered under the Land Titles Act.⁷² Unless superseded by the PPSA, this could cause a split between the entitlement to foreclose, determined under the Land Titles Act, and the entitlement to the benefit of the foreclosure, determined under the PPSA according to the entitlement to the debt. Such a split has always existed where a mortgage purported to convey the land separately from the assignment of the debt.⁷³

⁶⁷ R.S.O., 1980 c. 230.

⁶⁸ *Ibid.*, s. 93(4).

⁶⁹ *Ibid.*, s. 81(5).

⁷⁰ *Urman*, *supra*, footnote 1, at pp. 267-268. Steele J. did not mention specifically s. 100(3) of the Land Titles Act, *ibid.*

⁷¹ Under s. 100(3), *ibid.*: "The transfer [of a charge], when registered confers upon the transferee the ownership of the charge free from any unregistered interests therein, and the transfer of part of the sum secured by a charge confers upon the transferee the ownership of such part free from any unregistered interests therein."

⁷² See *e.g.*, ss 96 (entry by owner of charge), 97 (foreclosure by owner of charge), 98 (remedy of owner of charge with power of sale) and 99 (dealings with registered charge), *ibid.*

⁷³ See footnotes 13-17 and text, *supra*.

This analysis is explained by the following example. Owner of Whiteacre, to which the Land Titles Act applies, borrowed money from Lender. As security for his obligation, Owner mortgaged Whiteacre. The charge was properly registered under the Land Titles Act. Lender borrowed money from Assignee and assigned to him the mortgage as security for his indebtedness. Assignee registered a financing statement under the PPSA. Subsequently, Owner mortgaged Whiteacre to Financer as security for another loan and Lender assigned the first mortgage and Owner's debt secured by it, to Broker. Financer and Broker respectively registered only under the Land Titles Act. Both Owner and Lender defaulted. Lender comes ahead of Financer with respect to Whiteacre.⁷⁴ Assignee prevails over Broker not only as to Owner's debt secured by Whiteacre, but also as to Whiteacre itself.⁷⁵ While Broker, the registered transferee of the charge on Whiteacre might hold the power to enforce the mortgage, this power ought to be exercised solely for Assignee's benefit.⁷⁶ Obviously, foreclosure or the enforcement of the mortgage in Whiteacre is governed by real estate law.

The report of *Urman* does not state explicitly whether the general assignment from Urman to the bank was intended as security or whether it was an outright sale of Urman's accounts. Nonetheless, Steele J. spoke of "the bank loan".⁷⁷ Likewise he stated⁷⁸ that the general assignment in *Urman* was "similar" to the one dealt with in *In Re Wiarton Lumber Company Ltd.*⁷⁹ In that case the general assignment was intended as security⁸⁰ so we can safely assume that this was the case in *Urman*. But even if this is an erroneous assumption, Urman's general assignment to the bank was an outright sale of book debts.⁸¹ Either way, the assignment, governed by the PPSA, conferred upon the assignee-bank priority as against competing unperfected or subsequently registered security interests governed by

⁷⁴ S. 81(5) of the Land Titles Act, *supra*, footnote 67.

⁷⁵ For a contrary view see Shaw, *op. cit.*, footnote 46, at p. 1429 and n. 85-87: "[where] both the mortgagee and mortgagor default, the failure of the mortgagee's [assignee] to record . . . [the] assignment . . . could well impair his ability to foreclose on the real property or to withstand a challenge by the mortgagor's trustee in bankruptcy". I disagree. See text and notes 62-75.

⁷⁶ See text and note 61, *supra*.

⁷⁷ *Urman*, *supra*, footnote 1, at p. 269. See also at p. 268.

⁷⁸ *Ibid.*, at p. 270.

⁷⁹ (1924), 4 C.B.R. 477 (Ont. S.C. in Bkcy).

⁸⁰ *Ibid.*, at 478.

⁸¹ See footnote 84, *infra*. Nonetheless, Steele J. erred in holding (*Urman*, *supra*, footnote 1, at p. 268) that *In Re Wiarton Lumber Company Ltd.*, *supra*, footnote 79, is an authority to the application of the old book debts legislation to a similar situation. That case dealt with the assignment of debts and choses in action under the federal Bank Act.

the PPSA, as well as against subsequent buyers.⁸² Apparently, all of Urman's competing assignments, as well as the interest given by him to the "trust claimants" were intended as security.⁸³ Since the debts assigned to the competing claimants arose in Urman's course of business as a mortgage broker, they seem to constitute "book debts",⁸⁴ and thus even if any assignment was an outright sale, it gave rise to a "security interest"⁸⁵ and was governed by the PPSA.⁸⁶ In the priority contest between the bank and the competing claimants, the former, having a perfected security interest in the secured debts, appeared to win as against the latter who held unperfected security interests in the same collateral. Registration of their respective interests in a registry or land titles office by some competing claimants was of no avail. None of the contests was concerned with rights to the land as against the *mortgagor*. Rather they were all priority contests among transferees and creditors of the *mortgagee*, with respect to the secured debts for which the mortgages were accessories.

Nonetheless, at the end of the day the bank was unable to take advantage of its priority and for a good reason. As Steele J. concluded, "the entire purpose of the bank loan . . . was to permit Urman to carry on his business in the normal course".⁸⁷ The mortgages in Urman's hands were his "stock-in-trade"⁸⁸ and "the bank never intended, nor did Urman intend, that the general assignment would hamper Urman from dealing with the mortgages and debts thereunder in the normal course of his business".⁸⁹ The bank rather gave Urman "the implied authority" to sell and deal with the mortgages.⁹⁰ Accordingly, "once [a] mortgage was dealt with or assigned by [Urman], it was freed from the [bank's] specific charge".⁹¹ There-

⁸² See in general ss 9, 22(1)(b) and 35(1). Cf. Bowman, *op. cit.*, footnote 42, at pp. 134-135. For the limits of this priority, see text and footnotes 81-94, *infra*.

⁸³ See in general footnotes 4-5 and text, *supra*. Note however that Steele J. regarded the "trust agreements" as "trust receipts" falling under s. 2(a)(i) of the PPSA: *Urman*, *supra*, footnote 1, at p. 274. However, "trust receipts" denotes a mechanism for inventory financing, used in the U.S. more than in Canada, which has nothing to do with the fact situation in *Urman*. In general for the U.S. trust receipt, see e.g.: G. Gilmore, *Security Interests in Personal Property* (1965), Vol. 1, ch. 4.

⁸⁴ For the definition of "book debts" see footnote 25 and text, *supra*. For the comprehensiveness of the term and its applicability to debts created by the sale of intangibles in the ordinary course of trade of a seller of such intangibles, see e.g., *Shipley v. Marshall*, *supra*, footnote 25, at p. 569 (E.R.).

⁸⁵ PPSA, s. 1(y).

⁸⁶ PPSA, s. 2(b).

⁸⁷ *Urman*, *supra*, footnote 1, at p. 269.

⁸⁸ *Ibid.*, at p. 270.

⁸⁹ *Ibid.*, at p. 269.

⁹⁰ *Ibid.*, at p. 271, see also at p. 275.

⁹¹ *Ibid.*, at p. 271.

fore, notwithstanding the perfection of its security interest, the bank did not come ahead of the competing claimants.

In fact Steele J. found in favour of the competing claimants by treating them as purchasers in the ordinary course of their vendor's business. In Ontario, rights of an ordinary course buyer are protected under section 2(1) of the Factors Act,⁹² as well as under section 30(1) of the PPSA. Both provisions are limited to buyers of goods; they do not protect a purchaser of debts secured by real estate mortgages. Nonetheless, this aspect of the analysis of Steele J., dealing with the protection of the competing claimants as against the bank, is entirely correct and sound. The PPSA explicitly provides that dealing with the collateral by the debtor in a manner "expressly or impliedly authorized" by the secured party puts an end to the latter's security interest.⁹³ The extinction of the perfected security interest in favour of any ordinary course buyer is in fact a specific situation falling also within the general rule of section 27(1) (a). A purchaser of a secured debt in an authorized dealing⁹⁴ is definitely protected under the latter.

The competing claimants' victory over the bank turned out to be a pyrrhic victory. To the extent that Urman's assignments and "trust" obligations created security interests in his secured debts,⁹⁵ perfection by registration was required to protect these interests from Urman's trustee in bankruptcy.⁹⁶ Having failed to register financing statements, the competing claimants lost the benefit of their security interests. Their failure was of no avail to the bank: "Once the bank waived its rights they cannot be revived . . . merely because other persons have not taken proper action to protect themselves."⁹⁷ The ultimate winners were Urman's unsecured creditors.⁹⁸

On its facts *Urman* was correctly decided. None of the secured parties acted properly to protect their respective positions. The bank had the advantage of having a PPSA financing statement in connection with Urman's mortgages. Nonetheless, it failed to anticipate the

⁹² R.S.O., 1980, c. 150.

⁹³ S. 27(1)(a). Regrettably, "apparent" authority is not mentioned. Cf. UCC 9-306(2): "A security interest continues in collateral notwithstanding . . . disposition . . . unless the disposition was authorized by the secured party in the security agreement or otherwise. . . ." (emphasis added).

⁹⁴ In any event note that an authorized dealing under s. 27(1) differs from the transfer "with consent" under s. 49(1). The former contemplates the *waiver* of the security interest by the secured party, typically in inventory or stock in trade. The latter contemplates the *retention* of the security interest by the secured party.

⁹⁵ See in general text and footnotes 77-82, *supra*.

⁹⁶ PPSA, ss 25(1)(c) and 22(1)(a)(iii).

⁹⁷ *Urman*, *supra*, footnote 1, at p. 279.

⁹⁸ See footnotes 8-9 and text, *supra*.

issue raised by the authority given to Urman to deal with the mortgages. The bank was supposed to look only to the proceeds arising from the assignments of Urman's mortgages.⁹⁹ Probably it failed to perfect a security interest with respect to them as required by section 27(2).¹⁰⁰ The competing claimants appeared to be entirely unaware of the applicability of the PPSA to their dealings. They thus failed to take steps designed to perfect their respective security interests under the PPSA. Accordingly, the mortgages and the debts secured thereby fell into the hands of Urman's trustee in bankruptcy.

IV

Urman held that the PPSA applies to the assignment of real estate mortgages, and that priorities with respect to such mortgages are determined according to the PPSA. The decision did not please the real estate bar. Nonetheless, as explained in this comment, the case was correctly decided as a matter of general principles of law as well as of statutory interpretation.

Whether the decision reflects a desirable state of law is obviously an entirely different question. From this viewpoint, the real issue is not the applicability of the PPSA as a matter of general principles and statutory provisions, but rather the desirability of applying the "floating lien" concept into real estate mortgage financing. The question is whether we are interested, on policy grounds, in the creation of a security interest in a mortgage portfolio, in the same way that an effective security interest in changing inventory of goods can presently be created. Stated otherwise, the question is whether we want a mechanism which will enable a mortgage dealer to be financed like a car dealer, as well as enabling a small mortgage lender to obtain funds from a larger lending institution on the security of his mortgage portfolio.¹⁰¹

If such a financing tool is desired, then the PPSA serves as a useful vehicle to accomplish it. In this respect, to enhance its effectiveness, it requires only relatively minor or cosmetic changes. Thus for example, the Act should be amended so as to avoid the split between the right to foreclose and the entitlement to the benefit of a

⁹⁹ PPSA, s. 27(1)(b).

¹⁰⁰ *Urman*, *supra*, footnote 1, at p. 271.

¹⁰¹ Cf. the practice of "mortgage warehousing", widely spread in the U.S. Under this practice: "[T]hrift institutions, including savings and loan associations, saving banks, and credit unions, pledge mortgages and notes of their homeowner borrowers to a commercial bank or mortgage banker as security for their own borrowings. The bank takes delivery of the paper and "warehouses" it until the institution has accumulated a block of mortgages large enough to sell." Shaw, *op. cit.*, footnote 46, at p. 1415.

mortgage. This may be achieved by explicitly providing in the PPSA that where the collateral is a secured debt, the entitlement to the benefit of a charge securing it is followed by an entitlement to exercise all remedies and privileges in connection with this charge.¹⁰² Another amendment could require that where a general assignment purports to cover debts secured by real estate mortgages, this fact must be noted in the financing statement.¹⁰³ The PPSA should also be amended to apply explicitly the section 30(1) ordinary course buyer exception to a buyer of intangibles from one who deals with them in the ordinary course of his business.¹⁰⁴

Such amendments would undoubtedly improve the operation of the PPSA in relation to security interests in mortgage portfolios. It is nonetheless obvious, that even without them, the PPSA accommodates the "floating lien" concept much better than the Registry Act¹⁰⁵ or the Land Titles Act,¹⁰⁶ where the concept does not fit in at all.

The position of an assignee of a specific real estate mortgage will now be considered. Should he be required to register a PPSA financing statement? Such registration does not enhance the effectiveness of a security interest in a mortgage portfolio. One thing is to say that unless an assignee of a specific real estate mortgage qualifies as an ordinary course purchaser or that the disposition to him is authorized, his interest is subordinate to a security interest in the assignor's mortgage portfolio, with respect to which a PPSA financing statement was previously registered. Another thing is to say that unless an assignee of a specific real estate mortgage registers a PPSA financing statement his interest will be defeated by the assignor's trustee in bankruptcy notwithstanding the assignee's compliance with registration requirements under real estate law. Policy grounds which may justify the former, do not extend to the latter. No useful purpose appears to be served by double registration by an assignee of a specific real estate mortgage. Yet such double registration was required from the competing claimants in *Urman*. A PPSA financing statement was required for protection from *Urman*'s trustee in bankruptcy. Real estate registration was still useful for the purpose of rights under real

¹⁰² For the split between the benefit of the mortgage and certain powers and privileges with respect to them, see footnote 72 and text, *supra*.

¹⁰³ Cf. PPSA, s. 10(b) requiring land identification in fixture financing and Regulation 3 under the PPSA, O. Reg. 879/75 as amended by O. Reg. 547/79 requiring to set out in a financing statement the classification of the collateral and its description in a case of a motor vehicle classified as consumer goods.

¹⁰⁴ Cf. text and footnotes 92-94, *supra*.

¹⁰⁵ R.S.O., 1980, c. 445.

¹⁰⁶ *Supra*, footnote 67.

estate law.¹⁰⁷ Saying that *Urman* was correctly decided on this point does not mean that it reflects desirable policies.

Needless to say, merely excluding the interest of an assignee of a specific real estate mortgage from the coverage of the PPSA will not serve as a comprehensive solution. An amending statute must provide for the priorities between a security interest in a mortgage portfolio and the interest of an assignee of a specific real estate mortgage. A sound legislative solution should be consistent with the PPSA priority scheme as well as with the policy of avoiding superfluous registrations. Such a solution should provide that for the purpose of the PPSA priority scheme the effect of registering a specific mortgage assignment in a proper land registry office is the same as the registration of a PPSA financing statement with respect to the debt secured by it. Such a provision will not undermine the effectiveness of a security interest in a mortgage portfolio. Registration of a PPSA financing statement in connection with this portfolio will put the secured party ahead of the interest acquired by a subsequently recorded unauthorized real estate mortgage assignment. At the same time, registration of the assignment under the proper real estate statute will put the assignee ahead of a subsequently registered PPSA security interest¹⁰⁸ as well as the assignor's trustee in bankruptcy.

All this presupposes the desirability of a "floating lien" in connection with real estate mortgages. But if such a mechanism is considered to be undesirable, the best legislative solution is to exclude explicitly all assignments of debts secured by real estate mortgages from the coverage of the PPSA. An assignment of a mortgage will be construed to include an assignment of the debt secured by it.¹⁰⁹ Priority as to the debt will be determined according to the priority as to the mortgage.

Unfortunately, Bill 163, "An Act to amend the Personal Property Security Act", recently enacted¹¹⁰ *inter alia* in response to *Urman*, neither improves the "floating lien" mechanism, nor excludes altogether real estate mortgage financing from the coverage of the PPSA. It rather introduces confusion and uncertainty into what appears to me a clear, though not always defensible, state of law.

¹⁰⁷ See text and footnotes 72-73, *supra*.

¹⁰⁸ Obviously, where a promissory note is given for a mortgage obligation, no registration of the mortgage assignment whether under the PPSA or in a land registry office, can secure priority to the assignee. See PPSA, s. 31(1)(a), preserving rights of a holder in due course. Assignee's priority against a holder in due course of the note can be provided only by an amending statute. For the use of promissory notes in real estate mortgages financing see footnote 61, *supra*.

¹⁰⁹ Cf. last paragraph of introduction, *supra*.

¹¹⁰ See footnote 9^a, *supra*.

Bill 163 contains three provisions applying to security interests in debts secured by real estate mortgages:

1. An amended section 3(1) of the PPSA provides *inter alia* that the assignment of a real estate mortgage is excluded from the coverage of the PPSA. Nonetheless, the PPSA applies to "an assignment of a right to payment under a mortgage . . . where the assignment does not convey or transfer the assignor's interest in the real property" (new section 3(1)(e)(ii)).
2. As new section 54(1)(b) provides for the registration of a notice in the proper registry office where "the security interest is . . . in right to payment under a mortgage . . . of real property to which [the PPSA] applies".
3. Under a new section 36a(2):

A security interest in a right to payment under a mortgage . . . of real property, to which [the PPSA] applies, is subordinate to the interest of a person who acquires the mortgagee's . . . interest in the mortgage . . . if the interest of the person is registered in the proper land registry office before a notice of the security interest is registered in the proper land registry office.

The form of the notice under section 54(1)(b) will be prescribed by regulations. To the extent that such notice will have to identify the land concerned, Bill 163 rejects the "floating lien" concept in connection with real estate mortgages. At the same time, as explained below, the PPSA is not rendered altogether irrelevant in determining priorities in connection with real estate mortgage financing.

Read alone, new section 3(1)(e)(ii) seems to raise the possibility of a split priority between a debt and the right to a real estate mortgage securing it.¹¹¹ Yet, read in conjunction with new section 36a(2), new section 3(1)(e)(ii) makes more sense. The combined effect of the two provisions is that the registration of a specific assignment in the proper land registry office will put the assignee ahead of a secured party who subsequently registered his PPSA security interest in the land registry office under new section 54(1)(b). The assignee's priority will be with respect to the land as well as to the debt.

What is the position of a security interest in a right to payment under a real estate mortgage to which the PPSA will apply under Bill 163, vis-à-vis the interest of an assignee of a specific real estate mortgage, where the latter registered the mortgage assignment *after* a notice of the security interest had been registered in the proper land registry office? The negative implication from new section 36a(2) is that priority is given to the security interest in the right to payment

¹¹¹ Cf. text and footnotes 49-52, *supra*.

governed by the PPSA. But does this priority extend to the real estate mortgage securing the right to payment? A positive answer is suggested if one recalls that the mortgage follows the debt. Nonetheless, is not this rule explicitly rejected by proposed section 3(1)(e)(ii)? Does this mean a split priority? Does this mean that real estate law determines priority? I do not know.

Had Bill 163 been law in *Urman*, priority would have been given to the competing claimants. Registration of their interests in the proper land registry office, would have protected them against the trustee in bankruptcy. As I indicated, I find this result quite desirable. Nonetheless, Bill 163 does not represent the best way to achieve it.

BENJAMIN GEVA*

* * *

FAMILY LAW—SUPPORT FOR ILLEGITIMATE CHILDREN—STATUTORY CONSTRUCTION—RETROACTIVE OPERATION OF LAW ABOLISHING ILLEGITIMACY—RETROACTIVE OPERATION OF NEW CHILD SUPPORT LAW.—A wise judge has been quoted early in this century as saying, "There are no illegitimate children; only illegitimate parents", and Ontario's laws have finally caught up with this perceptive reflection with the passage of The Children's Law Reform Act, 1977.¹ Under this enactment, all children, whether born in or out of wedlock are to be treated equally for all purposes in the eyes of the law of the province.² Regrettably, the recent decision of the Ontario High Court in *Re Bagaric and Juric*³ has suggested that all children are not yet equal, and that the repealed legal regime that distinguished between legitimate and illegitimate children may still survive to haunt those who were unfortunate enough to be born out of wedlock. The case has disturbing implications.

In 1973, nine months after the birth of Elizabeth Bagaric, her unmarried mother brought an application under Ontario's now repealed affiliation legislation⁴ for an order declaring the putative father to be in fact the father of the child and requiring him to pay support. That application was dismissed, no order for maintenance was made,

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¹ S.O., 1977, c. 40; now consolidated as R.S.O., 1980, c. 68.

² *Ibid.*, 1 and 2.

³ (1980), 29 O.R. (2d) 491, 114 D.L.R. (3d) 509 (Ont. H.C.).

⁴ S. 51 of The Child Welfare Act, R.S.O., 1970, c. 64; repealed by subs. 73(2) of The Family Law Reform Act, 1978, S.O., 1978, c. 2 now consolidated as R.S.O., 1980, c. 152.

and no further action was taken for eight years. The old legislation contained a limitation provision⁵ whereby no affiliation order could be made against a putative father after the lapse of two years from the date of the child's birth.

In the meantime, a new legal regime was introduced in Ontario on March 31st, 1978 when The Children's Law Reform Act, 1977, and The Family Law Reform Act, 1978,⁶ came into force. The concept of illegitimacy and the affiliation statute were abolished, and all children, regardless of the marital status of their parents, were given equal rights to parental support. There was an explicit recognition of parents' mutual responsibility for their children and there were no longer any statutory limitation periods cutting off a child's access to these rights.⁷

In 1980, Elizabeth Bagaric, by her next friend, made application before the Supreme Court of Ontario for a declaration of parentage under The Children's Law Reform Act, 1977, and for child support payments under The Family Law Reform Act, 1978. Although her application for a declaration of parentage was permitted to proceed, her application with respect to support was struck out.

In his reasons for judgment, Mr. Justice Osborne dismissed the application for support because he found that the respondent had acquired a limitation defence to an affiliation order under the old legislation and:⁸

... his defence was a right which cannot be taken away by subsequent legislation unless the legislation provides that it is to be given retrospective effect.

⁵ *Ibid.*, s. 53.

⁶ *Supra*, footnote 4.

⁷ New Brunswick has a legislative regime similar to that of Ontario in respect of domestic relations and thus, its courts can eventually expect to confront the issue raised in *Re Bagaric and Juric*. Ss 96 and 97 of the Child and Family Services and Family Relations Act, S.N.B., 1980, c. C-2.1 abolish illegitimacy of birth as a concept of any legal consequence, while section 113 prescribes a child support obligation that is without distinction to the marital status of the biological parents. Section 145 repeals the former affiliation statute along with its limitation periods.

Prince Edward Island is in an unusual position. S. 65 of the Family Law Reform Act, S.P.E.I., 1978, c. 6, has repealed the affiliation laws of that province, while s. 18 of that Act imposes child support obligations without regard to illegitimacy. But the concept of illegitimacy has not been specifically abolished yet. An abortive attempt was made in ss 10 and 11 of Bill 57 (Child Welfare Act, 1980) of the 2nd Session of the 55th General Assembly of Prince Edward Island, which died on the Order Paper when the Assembly prorogued on April 17th, 1980. The more fortunate successor to Bill 57—the Family and Child Services Act, S.P.E.I. 1981, c. 12 [in force on Jan. 15th 1982]—is a much more conservative document, containing no trace of any reform in the status of illegitimate children.

⁸ *Supra*, footnote 3, at pp. 497 (O.R.), 514 (D.L.R.).

Since the child was born in 1973, the statutory limitation period had expired long before the new legislation was passed. A defence had crystallised in the respondent's favour and the presumption against the retroactive application of statutes precluded that he should now be deprived of it.

The court nevertheless held that a declaration of parentage could still be made under The Children's Law Reform Act, 1977, because this was something quite distinct from an affiliation order and had a much wider impact. Such a declaration was a new and separate right; it was a judgment *in rem* that was to be recognised for all purposes.⁹ On the other hand, the application for support under The Family Law Reform Act, 1978, was held to be essentially the same cause of action as the old affiliation proceeding. In both, a finding of paternity was a mere finding of fact and:¹⁰

... had no integrity apart from it being a threshold issue to an order of the court requiring the putative father to make some sort of support payment for a child.

Because of this similarity, a defence that had accrued under the repealed legislation had survived and should be given full effect according to principles of statutory interpretation.¹¹

If a putative father's two-year limitation defence survives the repeal of the old Act that imposed it, then all children born out of wedlock before March 31st, 1976—that is, more than two full years before the promulgation of the new legal regime—will be discriminated against in Ontario for purposes of support under the new regime, as in the case of Elizabeth Bagaric. For the reforms allegedly introduced by the new legislation, this is nothing short of a disaster if this precedent is seriously adopted by other judges. Unfortunately, there is already some evidence that this decision has begun to affect judicial thinking in Ontario to the detriment of this particular class of children.¹²

⁹ See Diana C. Dzwiekowski, Findings of Paternity in Ontario—*Sayer v. Rollin* (1980), 3 Can. J. Fam. L. 318, at pp. 322-323.

¹⁰ *Re Bagaric and Juric*, *supra*, footnote 3, at pp. 497-498 (O.R.), 515 (D.L.R.). For the difference between a finding of paternity and a declaration of parentage under The Children's Law Reform Act, 1977, see Dzwiekowski, *op. cit.*, footnote 9.

¹¹ Subs. 14(1) of The Interpretation Act, R.S.O., 1980, c. 219, states in part: Where any Act is repealed or where a regulation is revoked, the repeal of revocation does not, except as in this Act otherwise provided, . . .

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked; . . . Similar provisions exist in the legislation of all provinces and territories of the Dominion, including Quebec. For example, in Alberta, see cl. 31(1)(c) of The Interpretation Act, S.A. 1980, c. 70; in Quebec, see art. 12 of the *Loi d'interprétation*, R.S.Q., 1977, c. I-16.

¹² See, for example, *Re Dolobaille and Carrington* (1981), 32 O.R. (2d) 442, 21 R.F.L. (2d) 207 (Ont. Prov. Ct. Fam. Div.), where in an infant's application for

The ratio of *Re Bagaric and Juric* centres about the widely misunderstood concept of the retroactive operation of statutes. It is certainly true that there is a presumption against such an operation and a large volume of case law supports this. In a recent appeal,¹³ the Supreme Court of Canada adopted the words of an English court¹⁴ where retroactivity was described as:

... contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law.

Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, *unless by express words or necessary implication it appears that such was the intention of the legislature.*

The principle so stated has been reiterated frequently in both English and Canadian cases and the repugnance for retroactivity in many instances is understandable. The rule, however, provides its own exception, namely, the express or implied intention of the legislators to the contrary. In the case of *The Children's Law Reform Act, 1977*, and *The Family Law Reform Act, 1978*, there are good grounds upon which to believe that it was in fact the express or implied intention of the Ontario Legislature that this pair of statutes should be considered exceptional and therefore ascribed retroactive force.

A recent County Court decision¹⁵ in Ontario considered the same issue that arose in *Re Bagaric and Juric* and concluded *The Family Law Reform Act, 1978*, was *expressly* intended by the Legislature to have retroactive force. In that case, a limitation defence had also been acquired under the old law and was being put forth as a bar to an application for support under the new regime. The court pointed out, however, that *The Family Law Reform Act, 1978*, already expressly provided an exception to its application—namely, a transitional provision¹⁶ which directed that any proceeding commenced under the old law, and still underway at the time when the new law came into force would continue to be governed by the repealed law. To the

support against his mother and stepfather, the judge stated, by way of *obiter*, that the child's natural father would have a limitation defence that survived the repeal of the old affiliation statute and therefore had no outstanding support obligation.

¹³ *Bingeman v. McLaughlin (Bingeman)*, [1978] 1 S.C.R. 548, at p. 557, 16 N.R. 55, at p. 63, 77 D.L.R. (3d) 25, at p. 32, 28 R.F.L. 58, at p. 64, per Spence, J., apparently referring to the excerpt quoted by Brooke, J.A., in (1976), 12 O.R. (2d) 65, at p. 70, 68 D.L.R. (3d) 17, at p. 22, 26 R.F.L. 75, at p. 80 (Ont. C.A.).

¹⁴ *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, at p. 23, 10 Best & Sm. 1004, at pp. 1037-1038, 40 L.J.Q.B. 28, at p. 37, 22 L.T. 869, at p. 876, per Willes, J. (Exch.), italics added.

¹⁵ *Connelly v. Schiller* (1980), 20 R.F.L. (2d) 440 (Ont. Co. Ct), affirmed on narrow evidentiary point by the Ont. C.A., Dec. 23rd 1981, digested at 12 A.C.W.S. (2d) 473.

¹⁶ S. 89 (and its reference to s. 73), *supra*, footnote 4.

court, this narrow concession to the old regime indicated that the legislators intended that the repealed law extend only to those proceedings that happened to be caught in progress on March 31st, 1978, and to no other, for, had they intended otherwise, they would have widened that concession to include proceedings already adjudicated and completed or to defences that had already crystallised under the old regime. *Expressio unius est exclusio alterius* and thus, adjudications or defences under the old regime could have no effect on the new, further than was allowed by that narrow transitional provision. Thus, since no regard was to be paid to the old regime, the new Act was effectively retroactive.

The Children's Law Reform Act, 1977, also contains phrases that expressly or impliedly indicate the Legislature's intention to abolish illegitimacy of birth retroactively. For example, the statute specifically states that this abolition applies to:¹⁷

... any Act of the Legislature or any regulation, order or by-law made under an Act of the Legislature enacted or made *before*, on or after *the day this Act comes into force*; ...

The repeated and unqualified use of the phrase "for all purposes" in reference to the effect of a declaration of parentage¹⁸ certainly seems to eliminate the possibility of any exceptions to the operation of this new law. Enabling a child to assert his or her right to support is one of these purposes. The word "all" admits no qualification within the scope of provincial power, especially when the preferred exception is a remnant from the old regime that the legislation has seen fit to repeal. It would be anomalous if, for some children, "for all purposes" is construed literally, while for others (those born two or more years before the new regime came into force), it is qualified.

Even if The Children's Law Reform Act, 1977, and The Family Law Reform Act, 1978, lacked any express or implied words suggestive of retroactivity, it may well be that the rule against retroactivity does not apply at all because of the intrinsic nature of these laws. Elmer Driedger, a Canadian jurist of some authority on matters of statutory construction, has outlined two well recognized and very important exceptions to the presumption against retroactivity.¹⁹ First, he pointed out that there are two distinct kinds of "requisites" for the application of a statute from time prior to its passage, namely, a characteristic or status and an event. A statute cannot truly be said to be retroactive if it is invoked on the grounds of a characteristic or status that arose before it was enacted, but it would be retroactive if it

¹⁷ Cl. 2(2)(a), *supra*, footnote 1, italics added.

¹⁸ *Ibid.*, subs. 4(4) and 5(3).

¹⁹ See Elmer A. Driedger, Status: Retroactive, Retrospective Reflections (1978), 56 Can. Bar Rev. 264.

were invoked on the grounds of some event described in the statute that predated the statute's promulgation.²⁰

For example, where a recent statute confers new benefits or imposes new liabilities upon widows, it is clearly referring to the *status* of widowhood already in existence at the time of the Act's promulgation and from that time forward. It would be foolish to argue that a particular widow was exempt from the operation of the law simply because her husband died before it was enacted. On the contrary, application of the Act to such a widow would not violate the rule against retroactivity for this is not true retroactivity. Obviously, what matters is the current *status* of widowhood. A widow is a widow for the purposes of the Act, no matter when she became one, even if it was long before the Act's coming into force.²¹

These principles must certainly apply to the status of a child as well. It is quite evident that a provincial Legislature has the power to create new forms of personal status and destroy old ones. It clearly also has the authority to attach new rights and liabilities to completely new as well as to long-recognized forms of status. The concept of retroactivity is meaningless when one deals with the rights and obligations attached to or flowing from a certain status. To be sure, the rights and obligations are prospective only, but it does not matter that the status upon which they are based is drawn from the past. This kind of law is clearly distinguishable from one that imposes a penalty for an act or event that took place before the statute was passed. The latter is repugnant to anyone's sense of justice; the former is not.

At common law, bastardy was a status that carried certain legal disabilities for certain children. Ontario's old statute law²² had used the euphemism "child born out of wedlock" to denote this detrimental status. It was abolished in Ontario as of March 31st, 1978 under The Children's Law Reform Act, 1977. Children who were formerly considered illegitimate were now given a new status, one of equality in every sense of the word with children who were born in wedlock. This new universal status of *childhood* had new rights and disabilities attached to it by various other statutes such as The Family Law Reform Act, 1978, and The Succession Law Reform Act, 1977.²³ These were conferred upon all those who fitted within the parameters of the new definition of "child" on March 31st, 1978 and thereafter. The tragedy of *Re Bagaric and Juric* is that it perpetuates the disabilities of a status that has been abolished, and it effectively

²⁰ *Op. cit.*, *ibid.*, at p. 267.

²¹ *The Queen v. Inhabitants of St. Mary, Whitechapel* (1848), 12 Q.B. 120, 3 New Sess. Cas. 262, 17 L.J.M.C. 172, 11 L.T.O.S. 473, 12 Jur. 792, 116 E.R. 811.

²² See Part III of The Child Welfare Act, *supra*, footnote 4.

²³ S.O., 1977, c. 40; now consolidated as R.S.O., 1980, c. 488.

denies new status to a vast number of children who were intended to benefit from Ontario's equalizing reform legislation. This is a vital consideration that was not raised in *Re Bagaric and Juric* and its absence may lead one to conclude that the conclusion of Osborne J., was rendered *per incuriam*.

The second important qualification made by Driedger was that the presumption against retroactivity applies only to prejudicial or penal statutes, and not to beneficial enactments. Where the object of any Act is not to punish offenders, but to protect the public, the presumption against retroactivity does not arise.²⁴

A 1979 judgment of the Ontario Court of Appeal²⁵ dealt with this issue in relation to an Act that was held to be for the public benefit—The Family Law Reform Act, 1978. For certain limited purposes, such as financial support and custody of children, this Act has extended the status of “spousehood” to persons who are not married to each other but who have cohabited as husband and wife, subject to the proviso that any application for relief must be made within a year of their separation.²⁶ In this particular case, the parties had separated ten months before the Act came into force. Thus, at the moment of separation, they were not considered “spouses” but ten months later, to the distress of the “husband”, a new legal regime was created under which they were suddenly “spouses”. The “wife” immediately launched a successful support application under the new Act. It was a textbook example of the immunity of status to any objections of retroactivity.

The Court of Appeal, in fact, disposed of the matter on precisely this basis: the woman, *at the time of her application*, had spousal status and was therefore entitled to invoke the benefits of the new Act. More importantly, however, the court went on to discuss the nature of the legislation. The court speculated that even if this result were to make the legislation truly retroactive, then this was indeed the intention of the Legislature. The Family Law Reform Act, 1978, was found to be social legislation that conferred benefits on people in need, and although there would be conflicting prejudices—the injustice of retroactive operation of the law upon the obligor on the one hand, and the injustice of financial hardship upon his dependents whose ultimate support would otherwise have to be subsidised by the taxpayers, on the other—the latter was more unjust than the former. Thus, retroactivity was to be tolerated in the service of a higher cause.

²⁴ Driedger, *op. cit.*, footnote 19, at p. 273.

²⁵ *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429, 99 D.L.R. (3d) 713, 9 R.F.L. (2d) 81 (Ont. C.A.). See also the earlier case of *Illington v. Hyatt* (No. 1) (1978), 1 F.L.R.A.C. 128 (Ont. Prov. Ct. Fam. Div.).

²⁶ See subcl. 14(b)(i) of The Family Law Reform Act, 1978, *supra*, footnote 4.

Another example of the same sort of logic was provided by a case²⁷ involving child support. The Family Law Reform Act, 1978, has defined "child" to include infants of "psychological parents" that is, of persons who had demonstrated—presumably at any time in the past—a settled intention to treat the child as a child of their family.²⁸ In this instance, the respondent had demonstrated such an intention for seven years but had abandoned the child before the promulgation of the new Act. The Provincial judge hearing the matter acknowledged that the imposition of a support obligation on this respondent would amount to retroactive operation of the Act. Nevertheless, he concluded that the overriding social object of the Act should prevail over any prejudicial consequences to any one individual.

It would be difficult to dispute the contention that The Children's Law Reform Act, 1977, and The Family Law Reform Act, 1978, are indeed enactments designed to promote public benefit. It has been held that laws compelling certain obligors to support their dependants are laws for the public benefit,²⁹ for they relieve society of a burden that would otherwise have to be borne by taxpayers, while simultaneously providing a form of relief to those who are incapable of supporting themselves. Although there may be negative consequences involved for certain individual members of the public, these are certainly not penal proceedings, and at worst, may be considered regulatory. The overall social objective of these Acts was designed to protect the public, and consequently, the presumption against retrospectivity should not be invoked, for it would defeat to a large extent, the reforms and social improvements that were seen as necessary by the Legislature.

Precisely this argument was recently accepted in another Ontario case³⁰ surprisingly similar to that of *Re Bagaric and Juric*. A child had been born out of wedlock and an application under the old legislation for an affiliation order had been dismissed. About fifteen months after the child's birth, The Family Law Reform Act, 1978, and The Children's Law Reform Act, 1977, came into force and a fresh application for child support was filed under the new legal regime. The respondent in this case pleaded *res judicata*—a defence that could have been raised in *Re Bagaric and Juric* as well, but was

²⁷ *Barlow v. Barlow* (1978), 8 R.F.L. (2d) 6, 1 Fam. L. Rev. 308 (Ont. Prov. Ct. Fam. Div.). See also *Allen v. Allen*, unreported decision of Allen, Prov. J., January 24th, 1979, Ont. Prov. Ct (Fam. Div.) of the Jud. Dist. of Peel, cited in the annotation by James G. McLeod at 8 R.F.L. (2d) 7.

²⁸ See cl. 1(a) of The Family Law Reform Act, 1978, *supra*, footnote 4.

²⁹ *Williams v. Moody Bible Institute of Chicago*, [1937] 2 W.W.R. 316, [1937] 4 D.L.R. 465 (Sask. C.A.).

³⁰ *Bouchard v. Wheeler* (1981), 22 R.F.L. (2d) 104 (Ont. Prov. Ct. Fam. Div.).

apparently never discussed.³¹ The Provincial judge rejected that plea on the basis that The Family Law Reform Act, 1978, and The Children's Law Reform Act, 1977, were indeed retroactive in their operation. These Acts, he found, conferred new rights on children and new responsibilities in respect of the child-parent relationship. Thus, a previous decision made under the repealed legal regime could no longer create an estoppel to the bringing of a new action under a new law since the questions before the court were not identical. Moreover, in the area of domestic relations, and especially children's rights, he felt that courts must endeavour to be as flexible as possible in order to support those rights that necessarily have retroactive effect and to avoid defeating the basic policy and intention of the Legislature, namely the conferral of equal status and new rights on *all* children without discrimination. A defence or bar to an action under repealed legislation did not therefore necessarily constitute a defence under reform legislation.

In light of all these considerations, the decision in *Re Bagaric and Juric* produces not only a very troubling result but one that seems to be inconsistent with judicial trends in interpreting The Family Law Reform Act, 1978, and with the principles of statutory retroactivity. To be sure, all retroactivity problems disappear in good time; in this instance, by March 31st, 1994, all children born out of wedlock prior to March 31st, 1976 will be beyond the provincial age of child support and so will no longer be of concern to the courts. Thus, beyond that future date, the unusual result in *Re Bagaric and Juric* will cease to have any practical effect. With a small margin of luck, however, by invoking some of the principles discussed above, some enterprising barrister may yet convince a higher court to overrule it much sooner.

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* * *

³¹ See *Worden v. Worden* (1980), 20 R.F.L. (2d) 108, 12 Fam. L. Dig. 122 (B.C. Co. Ct), a case involving a reform in the definition of "child" for purposes of child support, where the defence of *res judicata* was rejected.

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CHOICE OF LAW—MATRIMONIAL REGIMES—RECOGNITION IN ONTARIO OF FOREIGN EXPRESS OR IMPLIED MARRIAGE CONTRACT OR SETTLEMENT—DOMESTIC CONTRACT—NARROW CONSTRUCTION—OWNERSHIP AND DIVISION OF FAMILY ASSETS ON MARRIAGE BREAKDOWN.—In the common law provinces, the legislatures have now adopted provisions dealing with the ownership and division of family assets in the case of a marriage breakdown. This legislation may be invoked where a decree nisi of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation.¹ The ownership and division of family assets provisions apply, *inter alia*, to the matrimonial home and property owned by one spouse or by both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.² In the absence of a marriage breakdown, ordinary rules of matrimonial property continue to prevail and in most common law provinces the spouses are separate as to property.

In general, the division of family assets and the ownership as between spouses of movable property wherever situated are governed by the internal law of the place where both spouses had their last common habitual residence or, where there is no place where the spouses had a common habitual residence, by the *lex fori*.³ With

¹ Family Law Reform Act, 1978, R.S.O., 1980, c. 152; The Matrimonial Property Act, S.A., 1978, c. 22; The Family Law Reform Act, S.P.E.I., 1978, c. 6; The Marital Property Act, S.M., 1978, c. 24, as am.; The Family Relations Act, R.S.B.C., 1979, c. 121, ss 43-55; The Matrimonial Property Act, S. Nfld, 1979, c. 32, as am; The Matrimonial Property Act, S.N.S., 1980, c. 9; The Marital Property Act, S.N.B., 1980, c. M-1-1. Comp. The Matrimonial Property Act, S.S., 1979, c. M-6.1 which does not require marriage breakdown.

² *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 3(b).

³ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 13(1). The choice of law provisions often vary from province to province. For instance in Manitoba the legislation applies retroactively to all spouses whether married within Manitoba or a jurisdiction outside of Manitoba, if the habitual residence of both spouses is in Manitoba; or where each of the spouses have a different habitual residence if the last common habitual residence of the spouses was in Manitoba; or where each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since the solemnization of their marriage, if the habitual residence of both at the time of the solemnization was in Manitoba. The Marital Property Act, *supra*, footnote 1, s. 2(1). *Wolch v. Wolch* (1980), 19 R.F.L. (2d) 307 (Man. Q.B.). In Alberta, a spouse may apply to the court for a matrimonial property order only if the habitual residence of both spouses is in Alberta, whether or not the spouses are living together, the last joint habitual residence of the spouses was in Alberta, or the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta. The Matrimonial Property Act, *supra*, footnote 1, s. 3(1). The matters to be taken into consideration in making a distribution include the terms of an oral or written agreement between the spouses: *ibid.*, s. 8(g). If a

respect to the ownership of immovable property the internal *lex situs* applies, but where the *lex fori* is applicable respecting the division of family assets, the value of the foreign property may be taken into consideration for this purpose.⁴

The ownership and the division of family assets may be affected by a "domestic contract" which includes a marriage contract in which the spouses agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death including ownership in or division of property, support obligations, the right to direct the education and moral training of their children but not the right of custody of or access to their children, and any other matter in the settlement of their affairs.⁵ However, any provision in a marriage contract purporting to limit the right of a spouse with respect to possession of the matrimonial home is void.⁶ This limitation applies to a contract made outside the enacting province which is valid by its proper law or by the law of the enacting province.⁷ The legislation also recognizes marriage contracts validly made before it came into force.⁸

The new legislation raises a number of very interesting choice of law issues when the spouses were married in a foreign country where they were then domiciled and resident and subsequently became domiciled and resident in the enacting province. However, this comment will be limited to the case where the spouses, now domiciled and resident in the enacting province, had entered into an express or implied marriage contract valid by its proper law as determined by the

petition is issued under the Divorce Act, R.S.C., 1970, c. D-8, as am., the petitioner or the respondent may apply for a matrimonial property order: *ibid.*, s. 3(2). The New Brunswick Act, *supra*, footnote 1, s. 44(1)(b) also applies where one of the spouses has maintained his or her last residence in the province. Note that The Family Relations Act of B.C., *supra*, footnote 1, as well as the Matrimonial Property Act of Saskatchewan, *supra*, footnote 1, do not contain statutory choice of law rules. Thus, the courts must determine the scope of the Acts. In *McKinney v. McKinney* (1980), 17 R.F.L. (2d) 208 (B.C.S.C.), Spencer L.J.S.C. applied B.C. law as the *lex fori* because the wife resided in B.C., the last matrimonial home was B.C., the house and some of the personal assets were in B.C., the husband deserted the wife in B.C. and he had submitted to the jurisdiction of the courts of B.C. Also *Sinclair v. Sinclair*, Cranbrook S.C., Registry No. 5907-00985, June 26th, 1979. It could be argued that since s. 13(1) and (2) of the Ontario Act covers both *ownership* and *division* of family assets, it replaces the common law rules. However, this does not appear to have been the legislature's intent as the Act does not deal with matrimonial property or family assets in the absence of marriage breakdown. Some Acts do not refer to ownership as between spouses.

⁴ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 13(2). Not all the provinces use the word "internal". Thus "renvoi" may be used.

⁵ *E.g.*, Family Law Reform Act, 1978, *ibid.*, ss 2(9) and 50-59.

⁶ *E.g.*, Family Law Reform Act, 1978, *ibid.*, ss 51(2) and 49(1).

⁷ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 57(b). See also s. 55.

⁸ *E.g.*, Family Law Reform Act, 1978, *ibid.*, s. 59.

choice of law rules of the enacting province, and a petition for the division of family assets has been made.

Will the court give effect to the foreign express or implied marriage contract? It will be recalled that under traditional choice of law rules in force in the common law provinces, where there is a marriage contract or settlement, the rights of the husband and wife to all movables and immovables within its terms, whether possessed at the date of the marriage or acquired afterwards, are governed by the proper law of the contract or settlement, even if there is a change of domicile or residence after the marriage.⁹

Thus, it has been held that where the spouses were married while domiciled in a country the law of which provides that, in the absence of an express marriage contract, they are subject to a matrimonial regime which gives the respective spouses certain proprietary rights, such rights will be recognized and enforced.¹⁰

This situation is the most usual. The husband and wife by intermarrying without having entered into a marriage contract in writing are placed by their *lex domicilii* at the time of marriage and by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and express covenants all and every one of the provisions of the domiciliary law relating to property rights between spouses including the distribution of their assets upon dissolution of the marriage. The implied contract is formed by operation of the law of their domicile, if by the husband's domicile at the time of the marriage, the imposition of the matrimonial regime is characterized as contractual in nature. The proper law of the contract is that of the husband's domicile.

The first questions which arises is whether such an implied contract is a "domestic contract". It is submitted that the answer should be in the affirmative notwithstanding the provision that requires that a "domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the persons to be bound and witnessed".¹¹ This provision deals with locally entered domestic contracts not those entered abroad. It is made clear by the provision which states that the manner and formalities of making a "domestic contract" and its essential validity

⁹ *De Nicols v. Curlier*, [1900] A.C. 21 (H.L.); *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410; *Devos v. Devos*, [1970] 2 O.R. 323, 10 D.L.R. (3d) 603; *Taillifer v. Taillifer* (1892), 21 O.R. 337, 11 C.L.T. 274 (C.A.); *Re McCarthy* (1970), 16 D.L.R. (3d) 72 (N.S. Prob. Ct); *Re Jutras Estate*, [1932] 2 W.W.R. 533 (Sask. C.A.); *Beaudoin v. Trudel*, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.).

¹⁰ *De Nicols v. Curlier*, *ibid.*

¹¹ Family Law Reform Act, 1978, *supra*, footnote 1, s. 54(1).

and effect are governed by the proper law of the contract.¹² If the law of the husband's domicile at the time of the marriage implies the creation of a valid contract between the parties as to their property, that law should be regarded as the proper law of the contract, and the contract should be recognized in the common law provinces that have adopted legislation dealing with the ownership and division of family assets. This seems to be the only sensible construction to be given to the provisions with respect to the form of domestic contracts.

Having argued that an implied contract created by operation of law is a "domestic contract" within the letter and the spirit of the new legislation, the next question is whether an express or implied marriage contract or settlement validly entered before or after the coming into force of the new legislation governs the ownership and division of the property of the spouses so as to supersede the division of family assets by virtue of that legislation, provided the contract does not deal with matters that are excepted from its scope as a matter of public policy. It is submitted that such an express or implied marriage contract must be given effect by the court at the time of the dissolution of the marriage. It all depends upon the contents of the proper law. If the express or implied marriage contract or settlement is governed by the law of say the province of Quebec, an Ontario court must examine that part of the law of Quebec dealing with the matrimonial regime adopted by the express or implied marriage contract. The relevant Quebec domestic law will determine the cases in which the regime comes to an end and the method of ownership and division of the assets belonging to the spouses.¹³ It is not necessary for the spouses to have specifically dealt with the division of their assets in their marriage contract or settlement. The law governing their regime deals with this question. Unfortunately, the courts that have interpreted express marriage contracts or settlements do not seem to have considered the question of ownership and division of spousal assets from this particular vantage point.

In *Sinnett v. Sinnett*,¹⁴ the spouses had entered into a marriage contract valid according to Quebec law which was its proper law, as the contract was made in that province while the parties were domiciled and resident there. Subsequently the spouses moved to Ontario. The court held that the marriage contract did not preclude the husband from making a claim to family assets and non-family assets held by the wife assuming that both had contributed to the property.

¹² Family Law Reform Act, 1978, *ibid.*, s. 57.

¹³ See Quebec Civil Code of Lower Canada (1866), arts 1257 to 1425 and Civil Code of Quebec (1980), arts 463 to 524. Note that the regime may not come to an end by a mere marriage breakdown such as a *de facto* separation.

¹⁴ (1980), 15 R.F.L. (2d) 115 (Ont. Co. Ct.).

The court expressed the view that since the marriage contract dealt with both possessory and proprietary rights it was void and unenforceable as it was contrary to the provisions of the Ontario legislation dealing with the possession of the matrimonial home. Actually, it seems difficult to maintain that a marriage contract in which the spouses merely declared that they are separate as to property limits the rights of a spouse to *possession* of the matrimonial home.

The court was also of the opinion that since the spouses had not expressly excluded the relevant provisions of the Family Law Reform Act, it could apply them. In other words, a contract dealing with ownership could not govern a division of property made on a basis other than ownership. Of course, at the time of making the contract, the future spouses could not have foreseen their move to Ontario nor the adoption of the Family Law Reform Act by the legislature of that province. However, it is submitted that by adopting the regime of separation of property in their contract, by necessary implication they excluded the application of the Ontario provisions dealing with the division of family assets. The proper law of the contract was the law of Quebec and according to that law the parties were entitled to their respective assets.¹⁵ It would have been sufficient to hold that the Quebec marriage contract was a valid "domestic contract"¹⁶ which the court would enforce except, on the ground of public policy,¹⁷ with respect to the possession of the matrimonial home.

The question whether effect should be given to a Quebec marriage contract providing for separation of property which is valid by its proper law was also considered by the Ontario High Court in *Kerr v. Kerr*.¹⁸ The future spouses were domiciled in the Province of Quebec at the time they entered into the marriage contract. More than ten years later they moved to Ontario where a matrimonial home was purchased in the name of the husband alone. When the husband petitioned for divorce, the wife counter-petitioned for divorce and joined a claim pursuant to the Family Law Reform Act 1978 for a share in the matrimonial home. The court accepted the wife's claim and held that she was entitled to an equal share in the matrimonial home notwithstanding the Quebec marriage contract. The approach

¹⁵ Note that the contract specifically stated that the parties "shall be and remain separate as to property as permitted by the Civil Code of Lower Canada". This refers to arts 1436 and 1450 now repealed and replaced by L.Q., 1980, c. 39, arts 518-520.

¹⁶ The court did not decide whether the Quebec marriage contract was a domestic contract as envisaged by ss 2(9) and 50-59 of the Act (at p. 138). However, see *Kerr v. Kerr* (1981), 32 O.R. (2d) 146 (H.C.) and *Hansson v. Hansson*, [1981] 4 W.W.R. 88, 21 R.F.L. (2d) 252 (B.C.S.C.).

¹⁷ The court resisted the temptation of considering whether the marriage contract was void as contrary to public policy under the common law (at p. 137).

¹⁸ *Supra*, footnote 16.

taken was novel although the court declared that it was in complete agreement with the result implicit in the judgment in *Sinnett v. Sinnett*.¹⁹

The issues were circumscribed: firstly, to what extent, if any, has the Family Law Reform Act, 1978,²⁰ altered the existing law with regard to the effect of a marriage contract entered into by Quebec domiciliaries in the Province of Quebec prior to their marriage on their subsequently purchased matrimonial home situated in the Province of Ontario where they both now reside and are domiciled? Secondly, does a marriage contract that provides only that the spouses adopt a regime of separation as to property operate to defeat a claim brought by one spouse, the wife, under section 4 of the Act, for a division of family assets, namely, the sale of their matrimonial home which has always been registered solely in the name of the husband?

The court began its opinion by pointing out that section 13, the so-called "conflict of laws" section of the Act has no application in interpreting or determining the intrinsic validity of the marriage contract as such contract was a valid "domestic contract" made in accordance with the various provisions contained in part IV of the Act. Thus, it appears that a foreign marriage contract valid by its proper law as determined by Ontario choice of law rules is a domestic contract which by virtue of section 9(2) must prevail over the provisions contained in part I of the Act.²¹ However, the court expressed the view that where the marriage contract, as it was the case here, merely provides, simpliciter, that the spouses are to be separate as to property, it is not capable of constituting that type of agreement contemplated by the concluding words of section 3(b) of the Act.²² In other words, the marriage contract did not make provision in respect of a matter that is provided for in the Act. This view is regrettable as it automatically excludes the enforcement of marriage contracts or settlements except upon the dissolution of the marriage by death of one of the spouses.

Although the marriage contract may specifically provide for the ownership and division of the spouses' assets upon dissolution of the marriage, this is rarely the case especially if the marriage contract is implied by law. As already indicated, the proper law will apply to the ownership, division and distribution of the spouses' assets. This

¹⁹ *Supra*, footnote 14.

²⁰ *Supra*, footnote 1.

²¹ In *Hansson v. Hansson*, *supra*, footnote 16, the court also expressed the view that an antenuptial contract was a marriage agreement within the definition of s. 48 of the B.C. Family Relations Act, *supra*, footnote 1.

²² "... but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets".

means the domestic law applicable to the regime expressly or impliedly adopted by the spouses.

If, as the court did, one interprets a marriage contract narrowly, there is no doubt that as the right to a division of family assets based not on ownership but rather on equity is a new substantive right, any marriage contract entered long before the enactment of the Family Law Reform Act, 1978 will fail to specifically deal with this right. This reasoning forced the court to rephrase the issue: does a marriage contract which provides for some property rights prevail on all the property provisions of the Act or does it only prevail with respect to the particular property rights dealt with by the spouses in the contract? The answer given was that in each individual case, the court must determine from the contract itself whether the spouses can be said to have turned their minds to a consideration of the particular right or provision of the Act.

The application of this test is relatively easy when the contract specifically provides for the division of the assets belonging to the spouses. It is not in most cases, as foreign lawyers or notaries, even with respect to a marriage contract entered into after the enactment of the Family Law Reform Act 1978, may not be familiar with its provisions or the spouses may not have contemplated moving to a jurisdiction that has adopted this type of legislation. It is submitted that a wide interpretation of the marriage contract is much more realistic²³ especially in the case of a contract implied by law, provided it is valid by the proper law ascertained in accordance with the choice of law rules of the enforcing province. The court would apply to the ownership, division and distribution of property the relevant provisions of the foreign domestic law governing the regime expressly or impliedly selected by the parties.

²³ But not necessarily more equitable. As the court pointed out, *supra*, footnote 16, at p. 154, although since 1964 the spouses had been governed in their relationship by the terms of a marriage contract which they both had freely and knowingly entered into, their choice of a property regime had been quite limited. Furthermore the regime of separation as to property which they selected differed little from the law of Ontario prior to the enactment of the Family Law Reform Act. Thus they could not complain. This may be true in this case. However, the issue was whether effect should be given to their marriage contract. There is a policy argument to be made that an Ontario couple could always take legal advice and be told that they could make a new marriage contract, and determine for themselves how they wanted their property to be divided. A couple who had married under the law of Quebec might reasonably assume, on the other hand, that their marriage contract, express or implied, had always dealt with the division of property, and that the change in Ontario law did not affect them. On this account they would be less likely to get legal advice and make a new contract than an Ontario couple would, and the court should therefore not proceed on the assumption that the two couples' positions were in all respects the same.

However, on the ground of public policy, the court would refuse to set aside the right of any spouse to the possession of the matrimonial home located within the enforcing province. The approach presently adopted by the court reduces considerably the recognition which the legislation gives to marriage contracts that are valid by their proper law and appears to eliminate those that are implied by law. The words used by the court that in order to "have the domestic contract prevail by virtue of section 2(9), provision must be made expressly or by *necessary implication* in the domestic contract for the specific matter provided for in the section of the Act in question",²⁴ seem to give support to this interpretation. "By necessary implication" could mean by virtue of the domestic law applicable to the matrimonial regime chosen by the parties. Although some further clarification is needed, *Kerr v. Kerr* represents an important step in the development of this branch of the law.

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²⁴ *Ibid.*, at p. 153, italics added.

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