

# DUE PROCESS AND FAIRNESS: THE DEMOCRATIC DEFICIT OF THE SAVINGS AND RESTRUCTURING ACT, 1995 (BILL 26)

BY JOHN EVANS

Extensive governmental powers are an inescapable feature of modern life. Even after the Common Sense Revolution has had its day, we shall still call on government to perform essential regulatory functions, to protect human rights, and to provide a wide range of social services and benefits. Powers on the scale needed for these tasks are, of course, open to abuse. The traditional political process would not be capable of effectively holding government accountable for the conduct of public officials, and public administration would grind to a halt if every dispute between an individual and the bureaucracy had to be decided by a court.

Due process and fairness protect citizens from the abuse and neglect of power by public officials. They require government to observe procedures for two purposes. First, due process and fairness minimize the risk that decisions that harm individuals will be made on the basis of erroneous or inadequate information, or for ulterior reasons. Second, they strengthen the democratic basis of government by exposing the exercise of power to the influence of concerned citizens.

Reduced to their essentials, due process and fairness require that those potentially affected by government action be given an effective opportunity to participate in the decision-making process by making representations to the decision makers. In order to en-

sure an element of impartiality in the resolution of disputes between government and the individual, it is common for statutes to provide for a right of appeal to an independent board, or tribunal, to decide these disputes more cheaply, informally, and speedily than the regular courts. A requirement that reasons be given for decisions is also an important aspect of procedural fairness. And, while not an aspect of procedural fairness, the absence of any statutory criteria or standards from the grant of statutory discretion is liable to reduce consistency and predictability in decision making, and to render government much less accountable for the exercise of public power.

## POWER WITHOUT ACCOUNTABILITY

Bill 26 significantly increases the power of the government over the delivery of several important programs in ways that have an immediate impact on individuals and on communities. However, the Bill has little to say about the rights of individuals to a fair hearing, or of communities to be consulted, before any of these powers are exercised, or about rights of appeal to independent tribunals, or about the giving of reasons for decisions. And the terms in which it grants powers to ministers and others could scarcely be broader. The government's determination to steamroller Bill 26 through with the minimum of public scrutiny is fully re-

flected in the absence from the Bill of adequate provisions for public input or other means of ensuring accountability.

It should be noted that, even if a statute is silent on rights of participation, the courts may, nonetheless, hold that an exercise of power is invalid because a fair procedure was not observed. But it reduces uncertainties, and the need to resort to litigation, if statutes expressly spell out the procedures that administrators must follow. However, if the statute provides for no independent tribunal to review the exercise of a power, the courts cannot invent one.

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On the other hand, the absence of a right of appeal to a court from an administrative decision does not remove the judiciary from their supervisory role. On an application for judicial review to the Divisional Court, a person may ask the court to set aside an exercise of public power on the grounds of procedural unfairness, illegality, abuse of power, irrationality, or violation of the applicant's constitutional rights.

## GOVERNMENT BY MANAGEMENT-STYLE COMMAND

Let me offer a few examples of the sweeping powers that Bill 26 grants without any provi-

sion for public representation, or a right to a hearing by a person whose rights are being removed, or any access to an independent tribunal.

First, the minister of health may grant, reduce, or withdraw hospital funding whenever the minister considers it in the public interest to do so. No procedures are provided, even before the drastic step is taken to withdraw funding. Now, it is true that one of the amendments tabled by the government provides that 30 days' notice must be given to a hospital board of the minister's intention to exercise his or her power to close or amalgamate a hospital "if the Minister considers it in the public interest to do so." This means that, before a closure or amalgamation is ordered, the hospital board will have the right to make representations to the minister. But the same right may not be enjoyed by hospital staff, unions, or members of the community, whose interests may not be adequately represented by the board. Of course, a hospital could be effectively shut down by a withdrawal of funding, for which, apparently, no notice is required. (Schedule F, Part II, *Public Hospitals Act* sections 5(4), 6(1), (3), and (4.1)). The licences of private hospitals may be revoked whenever the minister is of the opinion that it is in the public interest to do so (Schedule F, Part III, *Private Hospitals Act*, section 15.1(1)).

Second, ability of individuals to pursue their professions and earn their livings have long been regarded in this province as basic rights that should be limited only for clear cause, and after they have had a fair opportunity to know and answer the case against them. However, the power granted by this Bill to the minister to determine the

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number of doctors eligible to bill OHIP in any given area of the province contains no criteria for determining either what is an appropriate supply of doctors or, if there are more doctors than the allowed "quota," which doctors will be eligible and what procedures must be observed before a doctor is found ineligible (Schedule H, section 24, adding section 29.3 to the *Health Insurance Act*).

To summarize, we should be deeply concerned by the absence from Bill 26 of basic procedural safeguards of administrative justice for individuals and of government accountability to the public at large. I, for one, do not accept that Ontario's fiscal problems can be solved by introducing government by management-style command and increasing the province's democratic deficit. ❁

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### ESSAY

## CIVIC SOCIETY AND STATE REFORM IN CANADA: BOWLING ALONE?

BY TERRY SULLIVAN

Robert Putnam used the image of Americans bowling alone to symbolize consequences of the shrinking civic tradition in the United States. His work is used to confirm neo-conservative views that government is an optional extra and that what really matters is the vitality of private, non-governmental social and economic institutions. But there is another dimension to his concept of civic society. It is the evidence that effective government, a civic tradition of community compromise and mutual concern go hand in hand.

The concept of civic society is rich in its implications. It includes those community associations that underlie our public life, and the extent to which citizens behave toward each other in a civilized manner. Some associations are short-lived, like political parties, or sports clubs. Some are more institutionally and historically rooted, like universities or cultural groups. Others are linked more to our home and work communities. Government, too, has a special responsibility to nurture civic society, particularly for the delivery of public services that support the sick and vulnerable in our society.

We Canadians have not fully assimilated the importance of the civic quality of Canadian society for our future. In crucial respects, Canadian civic society parts company with that of our American cousins. In Canada, our

tradition is built on the positive exchange between all levels of government and community associations. This difference may well enable Canadians to cope with the harsher realities of the smaller state. In Putnam's empirical work, regions in Italy with a strong tradition of compromise and mutual concern produce governments that work more effectively. This results in a virtuous

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cycle of social capital that generates prosperity for all. Why is this the case?

### CIVIC SOCIETY AND THE FEDERATED STATE

The civic order in Canada rests on foundations discernibly different from those in both the English and the American traditions. Canada possesses neither the historical experience of the British nor the revolutionary experience of the Americans. The positive exercise of parliamentary power is accepted to a degree unthinkable in the congres-

sional south. The restraints on Canadian governments relate more to the regulation of linguistic and interregional conflict than to ordering the conflict between the individual and the state, and they are perfectly compatible with the vigorous public pursuit of collective purposes. Why is private philanthropy such a central part of American progressive life while it is a much less important factor in Canada, and less important still in the United Kingdom or Europe? Why are out-of-state university tuition fees an accepted reality in the United States, when their equivalent, with no regulatory support whatsoever, is entirely absent in Canada? Public policy analysis would be hard put to explain such matters. They appear to have something to do with the noticeably different forms of civic tradition in Canada, the United States, and Britain. Here, then, are four postulates about civic society and the Canadian state:

Government is both the creature and the creator of civic society, and national programs are both the manifestations of civic society and agents of maintenance or change in civic society. In Putnam's explanation of why some regional governments in Italy work better than others, civic communities tended to produce governments that work better and propel virtuous cycles of prosperity associated with "community capital."

Unlike its American counterpart, the government in Canada, at least for the moment, still gives expression to a broad spectrum of community values. It is wrong for Canadians to swallow the idea that government is weak and