BOOK REVIEWS

IN THE LAST RESORT: A Critical Study of the Supreme Court of Canada. By Paul Weiler, Carswell/Methuen. 1974. Pp. xv and 246.

Professor Weiler states in his Preface that he has not attempted to provide a comprehensive treatment of the Supreme Court, nor does he seek to analyse its work from a functional, sociological, behaviourist or historical point of view. Rather, his aim is to provide "an essay in legal philosophy, an attempt to develop a theory of the role of law in courts, which can be used to appraise the legal reasonings and decisions of the Supreme Court".[1] In view of this, one might be surprised that the learned author has not dealt in any way with the Court's attitude to Quebec or its role in the field of business and commercial law. On the other hand, one must admire the humility of his explanation: "I do not have the background in these areas to undertake such studies".[2] He starts from the premise that the Supreme Court "is not providing sufficient illumination and excitement in the evolution of Canadian law", for "our judges share an outmoded and unduly narrow conception of the role of law in courts".[3] While one would probably not disagree with him that, in deciding an appeal, "judges move gradually but inevitably from *applying* the law to *interpreting* the law to *creating* the law",[4] he appears to consider that the Supreme Court is not sufficiently aware of its obligations to create where necessary, but is rather intent on interpreting the law that is presented to it and delivering judgments which suggest that the law has always been as they describe and that this was in fact perfectly obvious. In his view, the "Supreme Court is unduly oriented to the task of adjudicating the concrete issue before it, as a result, it exhibits much too narrow a conception of legal reasoning to do justice to the important legal policies it is settling for the Canadian polity".[5] Surprisingly, however, he does not support the Reference system, and does not appear to appreciate that there is probably greater independence in the judicial approach than there is in that of legal advisers.[6]

One of Professor Weiler's basic criticisms stems from his view that the Court is too narrowly based to represent the needs and desires of Canadian society, for the Court "is a prime example of the 'vertical mosaic' of Canadian society".[7] He is equally critical of the fact that the Court is not a democratic body democratically elected, and this leads him to question its right to oversee legislative acts, especially as in such fields as labour relations the law has become highly technical and the judges are more generalists than specialists. For this reason, he is strongly opposed to judicial review of administrative bodies,[8]

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[1] Weiler, *In the Last Resort* (1974) at vii.

[2] *Id.* at viii-ix.

[3] *Id.* at 3, 4.

[4] *Id.* at 7.

[5] *Id.* at 235.

[6] *Id.* at 9-11.

[7] *Id.* at 18.

[8] *Id.* at 131.

although he concedes a role for the judiciary if a board should ignore the principles of natural justice.[9] On the problem of judicial review he appears to be somewhat schizophrenic in fact, for he talks of the Court's weapon of 'nullity' against both the executive and the adminisration,[10] for "I believe in the ideal of judicial review . . . [, but] for the moment at least, we might place greater trust in the virtue of our legislature than the infallibility of our courts".[11] On the other hand, Professor Weiler does seem to concede that if the Supreme Court would accept that the Bill of Rights is a postulate of philosophy as to the Canadian way of life, and not merely a parliamentary declaration of auto-limitation, then the Court might have a real function to play. He points out that "the Supreme Court's civil liberties role is . . . new . . . and tenuous. If our judges are prepared to establish new public policies in these critical areas, there will be entrenched participants in the government who will want to resist. The Court will need further weapons to implement its will, but it is sadly lacking in effective ones."[12] He does not explain, however, why the possession of such additional weapons should in any way mitigate the fact that the Court is undemocratic and non-elective. In connection with the Bill of Rights, he reminds us that Parliament can easily re-enact any statute overruled by the Supreme Court by including a *non obstante* provision.[13] Since his *In the Last Resort* aims to be a jurisprudential study of the role of law in courts, it is perhaps unfortunate that he did not, in this connection, consider whether, in the light of the supremacy of parliament, any future statute inconsistent with the Bill would be likely to be invalidated by the Supreme Court. At the same time, in view of his comments on *Drybones*[14] and *Lavell*[15] it is to be regretted that he did not question whether the Bill of Rights should apply in any way to the special position of a minority group that is covered by particular law which may in fact reflect its own desires, customs and differences from the remainder of the population. While he makes no mention of marriage customs, patrilocal, virilocal or exogamous, in regard to the Indian Act, he does recognise that "one must be very dubious about the likely success of a piecemeal judicial attack on the wisdom of the special legislative status of the Indian. The policy has a long history whose current effects cannot simply be wished away. Its many elements are interlocking in real life, though they may not so appear in isolated cases, and there is a real danger that the legal perspectives could have disastrous results".[16]

The whole of Professor Weiler's dissatisfaction with the Supreme Court flows from his own view of what should be the judicial function. Thus, in so far as the law of tort is concerned, and he pays particular attention to occupier's liability, he comments that "if a court continually decides how a situation should be legally treated only by first asking why the law would want it treated that way, then it is able to subject to continued, critical re-examination the specific policies the law has previously adopted in response to the question why. . . . As long as a court understands the direction in which the law should be moving, a view which it can discern from reflection on the themes of the law of torts

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[9] *Id.* at 135.

[10] *Id.* at 218.

[11] *Id.* at 217.

[12] *Id.*

[13] *Id.* at 221, 47.

[14] *Id.* at 196-198, 221-222.

[15] *Id.* at 223-224.

[16] *Id.* at 216.

generally, it can begin to rework each of the special directives as they are brought up in a particular case and gradually bring them into line with the overall drift of tort liability".[17]

Just as he is critical of the role of the Supreme Court in its approach to the law of tort, he is no more positive concerning its function in the field of criminal law, particularly in connection with constructive murder, and he would like to see the court and lawyers making far more use of the wide range of materials that are resorted to by the Supreme Court of the United States, using in fact anything that might be available to the legislature.[18] At times, one is left with the feeling that the author is too United States-oriented, to an extent that he forgets or minimises the English traditions of the Canadian law and legal outlook. His analysis of the role of the Supreme Court in tort and crime leaves one with the impression that his attitude may be summed up — 'If I agree, good; if not, . . .'.[19] While he concedes that the Court should innovate in these two fields, he is absolutely opposed to any such role for the Court in regard to labour law, where agreement of the parties is important and judicial intervention could frustrate the purpose of a statute to this end.[20] He operates on the assumption that because of such things as its background the Court would lose its impartiality in favour of the employers.[21] He contends, in fact, that the cases on labour law discussed by him "testify to the very narrow and inadequate concept of law which is operative in the Supreme Court of Canada and which also underlies current approval of the need to greater judicial control" of administrative specialized bodies.[22] Moreover, in the three cases examined the Supreme Court overturned the Ontario Court of Appeal "whose opinions were written by Mr. Justice Laskin. At the least this should alert us to the fact that the legal conclusions in these situations were not self-evident at all".[23] The author's eclecticism — and perhaps the bias one might expect from the Chairman of British Columbia's Labour Relations Board — is clear from the statement: "The desirability of judicial activism in any particular area of the law depends on the nature of the social problem raised and the relative resources of the courts to make a wise contribution. Within the two families of problems I analyzed in torts and criminal law, this approach does support judicial creativity. Within collective bargaining law the same approach suggests judicial restraint".[24]

Enough has probably been said on specific issues to enable one to comment on Professor Weiler's main conclusions and suggestions. As to the federal competence jurisdiction, he calls for an end to the right of private impeachment of legislation, contending that both provincial and federal governments should be able to legislate with the citizen obligated by both unless they should prove contradictory, when "the courts" would apply a rule of paramountcy,[25] for "law without judges — in particular, federalism without an umpire — is at least possible if not probable and desirable. Who has not played in a game which has been successfully carried on within the rules but in the absence of an

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[17] *Id.* at 70-71.

[18] *Id.* at 102; and n. 10.

[19] *See,* for example, 116.

[20] *Supra,* n. 1 at 122.

[21] *Id.* at 125.

[22] *Id.* at 151.

[23] *Id.*

[24] *Id.* at 154.

[25] *Id.* at 184.

umpire? . . . Constitutional conflict is not always so bad and, even when it is, I doubt that judicial review can make a durable contribution to its resolution".[26] As we have seen, he would also remove from the Court its power over labour, if not other tribunals as well. In addition, he would restrict the right of appeal to such cases as the Court gives leave as matters of general public legal significance, but the power to hear appeals from provincial jurisdictions should remain, even though this might entail over-ruling a statute enacted by a democratically elected body by one not so elected. In his view, the retiring age of the judges should be reduced to 65, with appointments being for ten to fifteen years, and non-renewable. He is not happy with suggestions that the Bar should have a role in appointment to the Supreme Court, and, since he feels that the Court's federalist role should disappear, he sees no need for provincial participation either. Adopting a leaf from the American book, however, he would like to see some parliamentary participation in the selection process, with the legislators questioning nominees as to their views on particular measures and on the role of the Court.

While it may well be true that some of Professor Weiler's criticisms of the Supreme Court are justified, he would appear to have a view of the Court and its function which is far removed from that which is inherent in our legal system. It is submitted that whatever advantages his proposals might possess, what he is really calling for is an entirely different legal philosophy from that which now prevails in Canada and with a new type of Court committed to that philosophy. His faith is pinned to an activist Court which, it is submitted, rather than interpreting the law could easily become the supplanter of the legislature to the extent that it felt the latter was out of line with public sentiment. That this is not too far from the learned author's approach may be presumed from some of his comments concerning the role of a court which is the protector of civil liberties. Having questioned[27] interpretation by judges who are tenured and not elected, and who therefore should not be able to destroy the acts of an elected body,[28] he goes on to assert that "some of the most important civil liberties ... are constituent elements in [the] process of self-government. When the majority in a legislature votes to encroach on these liberties, we must not assume that it is 'undemocratic' to invalidate such a measure. To be meaningful, democratic government must have an enduring form, an institutional core within which the process of popular discussion and debate plays a critical role. If a court requires a society to adhere to the principles of the democratic process, even against the wishes of immediate majorities who want to ignore them, this can often be the course which is conducive to the long run success of the risky enterprise of self-government."[29]

Not only is the substance of Weiler's *In the Last Resort* interesting, stimulating and provocative, but it is written in an easily readable style. The author has, however, a strange and not very attractive method of listing his cases and the persons whose opinions he cites. There is one comprehensive 'Index of Names and Cases', and there is no consistency in the compilation. While there may be some value in listing, e.g., *Drybones* as such, since this is the name by which it is generally known, would one really look up in such an index 'Chicken & Egg War'? Moreover, not all the persons listed are given the courtesy of their

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[26] *Id.* at 174-175.

[27] *Id.* at 208.

[28] *Id.* at 209.

[29] *Id.* at 210.

initials, although one does find 'Arthurs, Dean Harry', 'Hart, H. L. A.' and 'Russell, Professor Peter,' and would one really expect to find under *L* such entries as 'Lord Birkenhead' and 'Learned Hand'?

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CONSTRUCTION OF STATUTES: By E. A. Driedger, Q.C., B.A., LL.B., LL.D., Professor of Law, University of Ottawa, Former Deputy Minister of Justice and Deputy Attorney-General of Canada, Butterworths. 1974. Pp. 1 and 370. $19.50.

Mr. Driedger, in the Foreword to this book, points out that "The Construction of Statutes" is intended to be primarily a teaching book, having grown out of a series of lectures given by the author at the University of Ottawa. Its aim is to teach students how to read and understand statutes. To what extent has the author been successful in achieving this objective?

In answering this question and in thereby evaluating this book one must concede that the problem of the construction of statutes is at the best of times difficult. As Mr. Driedger admits, in referring to the maxims and canons of construction which he discusses, "sometimes they are applied, sometimes not, and there is no rule by which it can be determined whether they should or should not be applied in a given situation". It therefore must be recognized that the book's objective to teach students to construe statutes is not one which is easily met.

The method of instruction employed in the book is the case method. Mr. Driedger demonstrates the various maxims of construction by reference to cases in which these maxims were applied. There are over 700 cases referred to in the text — the majority of which are English.

The reference to so many cases and the exposition of the maxims necessitates a slow and careful reading of the book if it is to be worthwhile as a teaching aid. It is impossible to read the book as a narrative and at one sitting — the rules soon become clouded and the reader confused. The book must be put down and the points must be thought about and mulled over.

Moreover, it is essential to supplement the material presented in the book with the opportunity for the student to ask questions about it. All points were not clear to me and I often would have welcomed the opportunity to seek further clarification from Mr. Driedger. The book would, nevertheless, be very useful when used in conjunction with a course in Legislative Drafting and Construction.

The first four chapters of the book present the three prime rules of construction — the mischief rule, the literal rule and the golden rule — and seek to establish that they can all be fused into one modern principle:

> [T]he words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In these chapters Mr. Driedger analyses past judicial decisions on the basis of this principle of construction. He argues that the Courts in construing statutes should adhere to the following principle, as expressed by Lord Atkinson in *Victoria City* v. *Bishop of Vancouver Island*, [1921] A.C. 384, at 387:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.