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In the Last Resort: A Critical Study of the Supreme Court of Canada

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Reviews

In the Last Resort: A Critical Study of the Supreme Court of Canada. By Paul Weiler. Toronto: Carswell/Methuen. 1974. Pp. xv, 246. Price: $12.95.

Paul Weiler has given us a book which can help end the sterile debate between the analytical school and those who advocate a policy-oriented approach to legal analysis. Weiler demonstrates that each of these groups is making a valid claim on our legal system in terms of the common law tradition, and that an appropriate style of legal reasoning in the Supreme Court of Canada requires a blending of legal policy and doctrinal analysis.

The interesting thing to discover is that the style of reasoning urged by Weiler looks like the tradition of the common law at its best, as seen in the "grand tradition" of the nineteenth century in England, and now revived in the landmark public law decisions of the House of Lords and Privy Council of the past decade: *Ridge v. Baldwin,*[1] *Conway v. Rimmer,*[2] *Padfield v. Minister of Agriculture,*[3] *Anisminic,*[4] *Liyanage v. The Queen,*[5] and, to the delight of this reviewer, in the majority judgment of the Supreme Court of Canada in *Thorson v. A-G Canada,*[6] now the leading case on standing to challenge the validy of legislation in Canada.

The key to a vital and creative common law system, in Weiler's analysis, lies in an understanding of the relationship between rules and principles. A rule is a specific formulation, designed for operation within a technical framework of analysis to provide solutions to concrete disputes. Rules link the general to the particular. A principle is a more general expression of a value or of a balancing of competing values. One gets a sense of what the law is trying to accomplish from an articulated principle, whereas a rule tends to assume that the process of inquiring into and balancing competing interests has ended. We apply the rule, confident that its authority flows from the fact that the best accommodation possible

1. [1964] A.C. 40.
2. [1968] A.C. 910.
3. [1968] 2 WLR 924.
4. *Anisminic Co. v. Foreign Compensation Commission* [1969] 2 WLR 163.
5. [1967] A.C. 259.
6. [1974] 43 DLR (3d) 1.

has been arrived at. But if we have any sense of history we also re-examine rules from time to time to ensure that changing circumstances or misinterpretation have not diminished their usefulness or rendered them counter-productive. Since any given rule is unlikely to receive the attention of the highest court in the land very often, it seems reasonable to suggest, as Weiler does, that the Supreme Court concern itself continuously with the underlying principles that support the rules found in precedent.

This is what Weiler is driving at when he urges a shift in style of reasoning. He argues, with ample justification, that the Supreme Court's recent style involves too much of a search for the key words or phrases in a precedent, for the *ratio decidendi,* as if rigorous analysis of the written word will eventually lead to the "true rule" for the case before the Court. This approach is the direct consequence of a mental set that sees the law as a great mass of rules, found in precedents, capable of infinite shades of meaning, one for every conceivable set of facts. Weiler's central theme is that the appellate function requires a different mental set, one which views the law as a coherent body of principles whose purpose is to balance and accommodate competing and complementary interests. Certainty in the law is but one of the major interests involved. One cannot build a sound legal order on certainty alone.

I would add that while it is essential that appellate courts express their decisions in terms of principles, trial courts too must perceive rules as particular expressions of principles if they are to apply soundly the law laid down by appellate courts.

Because of the book's great potential as a basis for dialogue in the legal profession, it is important that Weiler's thesis not be misunderstood. It is especially vital to guard against the common misconception of what is meant by the word "policy" when used by a responsible legal scholar. The following is a key passage in the necessary clarification:

> It is a basic feature of an appellate process that the judges write a reasoned opinion justifying their legal conclusions. We can now see how much more complicated this reasoning is than the layman's view of what is involved in the easy cases. To be sure, courts are supposed to adjudicate the concrete cases before them by fitting them within the legal system. Important legal values such as predictability, efficiency, and impersonality support this demand for judicial adherence to the established law. Yet the dictates of this law are not unambiguous in the typical case which reaches a final court of appeal. As we saw in *Barbara Jarvis,* the language used in a statute will not clearly tell the judges what the legislature has prescribed for the issue at the heart of the

> appeal. That ingredient of the legal system will be firmly settled for the first time by the opinion of the court adjudicating the immediate lawsuit.
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> Since this is the inescapable responsibility of the judicial role, we shall naturally prefer a style of legal reasoning which appraises the fitness of the rules that are available and anticipates the policy results of the one that is selected. Only in this way can the judicial contribution to the law that governs us exhibit decent workmanship. Yet we rightly deplore too free-wheeling a stance in our judges. Even a final court should not have complete discretion to look at any policy factors its members consider relevant or take the law in any direction they believe desirable. A detached view of the judicial institution raises some qualms about the wisdom, the coherence, and the popular acceptability of judge-made law. Judicial creativity is a necessity and can be a virtue, but it must have its limits. Can we say anything useful about where these boundaries are located?
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> There is a legal instrument which summarizes and integrates the thrust of these many factors lurking in the background of any judicial decision. This indispensable weapon in the judicial armoury is the *legal principle*. A principle is a very different kind of legal doctrine than a rule. A rule is applied directly to a fact situation in order to prescribe a specific legal result. A principle is an argument which is appealed to as a justification for the adoption of such a legal rule in the trouble case where this is necessary (p. 49).

Weiler then goes on to give an example of the point he is making, and it is a major strength of this book that the author has chosen to use particular areas of the law and particular decisions of the Supreme Court of Canada to explain his criticism of the Court's dominant reasoning style and to elucidate the style he is advocating.

This preliminary assessment of Weiler's study is intended to persuade potential readers of the book's value in disposing of less productive lines of debate and providing a foundation for constructive dialogue about the Canadian legal system and its future. I would urge its use as background reading for weekend seminars of mixed groups of judges, practitioners and academics.

The preface tells us that "This is 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 reasoning and decisions of the Supreme Court." There are three Parts. Part I devotes fifty pages to general analysis of the Court as an institution and of the nature of the appellate function of a nation's highest court. This is where the author sets out his "theory of the role of law in courts", and he does it well. The following excerpts indicate the quality of writing and suggest a strong influence of the writings of Mr. Justice Cardozo.[7]

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7. If Canadian legal education had, from the start, put less emphasis on case law

> The judge will not find the solution in the bare words of the statute book, no matter how long he stares at the page or how many dictionaries he may consult; the answer is not there. This does not mean that a court is lost in a sea of legal uncertainty. Judges simply must recognize that there is more to a legal rule than its linguistic expression. Every legal rule has a hidden dimension, an underlying structure. The rule prescribes a standard of conduct in order to achieve some social objective within an over-all statutory scheme. The aims of the legislature have an equal claim on the title "law" as do the words chosen to express this aim. The reasons why a judge is supposed to respect the language of a legal rule equally demand fidelity to its purpose. As the passage of time throws up marginal and unanticipated cases to an appellate court, faithful interpretation of the rule requires that the judges discern this hidden reality of legal policy and draw out its implications for the case at hand (p. 35).
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> In sum, if an internal logic is visible in the existing structure of the law, the legal community should be able to sense, at least within a reasonable margin, the scope for judicial creativity in the immediate future. In fact, I believe that legal argument in terms of principle is not only a necessary avenue towards a better quality of legal *justice,* it is the primary source of the stability and predictability of a legal *order* (p. 53).

Part II fills most of the book, containing 168 pages and five chapters on the Supreme Court's decision-making in various areas of the law: tort, criminal law, administrative law, federal division of powers and civil liberties. In most, if not all, cases, these chapters are based on articles which appeared earlier in legal periodicals and will be familiar to regular readers of the Toronto-based journals.

Despite my admiration for Weiler's general theory and clarity of reasoning I believe that his conclusions about the Canadian Constitution and the rôle of the judiciary suffer from two defects. The first is the inevitable superficiality that arises from trying to deal with many major areas of law and the resulting failure to appreciate fully some of the undercurrents in such complex areas as constitutional and administrative law. The second defect flows from a view that Canadian constitutional law is simply English constitutional law with the federal division of powers tacked on, and from the resulting over-emphasis on the doctrine of legislative supremacy. Weiler appears unwilling to acknowledge the separation of powers entrenched in the *British North America Act,* 1867, a legal fact clearly documented and expounded by Lederman in his

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and doctrinal analysis, and more on works of legal philosophy such as Cardozo's classic essays in *The Nature of the Judicial Process, The Paradoxes of Legal Science,* and *The Growth of the Law,* much of the criticism made by Weiler would be unnecessary today.

classic article, *The Independence of the Judiciary*[8] (the starting point in the education of Canadian constitutional lawyers), and now established in Commonwealth constitutional law by the Privy Council decision in *Liyanage v. The Queen.*[9]

My disagreement with Professor Weiler as to the relative importance in our constitutional law of the democratic principle of legislative supremacy and the rule-of-law principle of separation of powers leads to inevitable differences on the rôle of the judiciary in interpreting the federal division of legislative power, reviewing administrative action, and administering the Canadian Bill of Rights. I should add, however, that I believe these differences can be resolved within the theoretical framework provided in Part I of the book.

I have no quarrel with the urging of greater resort to principle by the Supreme Court in tort cases and criminal appeals, and I find convincing the analysis of particular problem areas in terms of the principles and social interests that the Supreme Court is in fact dealing with when it decides such matters. The author's view of the Supreme Court's responsibility in these areas is clearly stated in the final paragraph of the chapter on criminal law:

> Fidelity to law is an important value but it is not absolute. Judges who have made and are continuing to make our law must be equally concerned with the fairness and wisdom of the legal doctrines they are using. A legal principle such as *mens rea* in criminal law, or negligence in tort law, is the vehicle through which the resources of the judicial process can be brought to bear for the incremental refinement of the whole area of law. As stated earlier, there are limitations on the wisdom, legitimacy, and effectiveness of judicial law reform. If a court justifies its innovations by reference to established principles, it will respect these limits. However, there are institutional reasons why the courts are often the only, and sometimes even the best, source of necessary legal reforms from within our governmental structure. Only a court that is ready to overturn outmoded legal rules which can now be seen to be irrational anomalies in the general thrust of the law (and the case of *Fleming v. Atkinson* is a beautiful example), will fulfill this indispensable role in securing a just and coherent legal system (p. 118).

Weiler's approach to administrative law is that of an experienced labour arbitrator who sees judicial review largely as unwarranted interference with important social purposes which the legislature has deliberately entrusted to administrative agencies. While I agree that the courts have often gone too far and have failed to articulate a

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8. (1956) 34 *Can. Bar Rev.* 769, 1139.
9. Footnote 5, *supra.*

credible theory of judicial review, I do not share the author's faith that our civil rights can be adequately secured if the power exercised by labour boards and other agencies is put beyond judicial review.[10] Governments everywhere are coming to regard legal restraints on their power as technical obstacles standing in the way of their grand schemes. Only a vigorous exercise of judicial review power can prevent this trend from becoming official contempt for the law and the courts. James Bay may provide the ultimate test of judicial resolve.

Weiler urges judicial restraint out of deference to the greater sensitivity of labour boards to the problems and purposes the legislature has sought to provide for. In so doing, he bases his position entirely on the will of the legislature, thus failing to balance this with the competing interest in legality, or the rule of law, which is constitutionally inspired and therefore of the same order of importance as the legislative will. This interest requires that labour board autonomy be contained within the limits of the power delegated to it, and since that power is delegated by statute, definition of its limits is a matter for courts of law manned by an independent judiciary. If the Supreme Court would only recognize the constitutional basis of its authority to review administrative action, it could then engage in a conscious process of balancing these competing interests. Thus, the problem here is not one of judicial restraint versus activism but rather one of clarifying the constitutional values in issue and the legal policies through which the courts ought to seek an appropriate balance between competing values.

In his chapter on the Supreme Court as umpire of Canadian federalism, Weiler chooses one of the most difficult areas in terms of justiciability — marketing regulation — to make the point that what passes for legal interpretation in this area is often little more than judicial application of social, economic and political considerations. However, the difficulty of developing and applying legal principles to guide the ongoing interpretation of sections 91 and 92 of the *British North America Act* does not lead necessarily to

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10. The new *Labour Code* of British Columbia Act, S.B.C. 1973 2nd. sess., c. 122, attempts to put the B.C. Labour Relations Board beyond the supervision of the superior courts on any ground, including jurisdiction and *ultra vires*. The inevitable challenge to the privative enactments in the *Code* will provide an interesting case which will test the Supreme Court's sense of the constitutional origin of its ultimate review power over ultra vires administrative action.

the conclusion that the powers of the respective legislatures be resolved by bargaining and compromise between governments. The author does not suggest eliminating the courts entirely, but does urge that diplomacy become the "primary vehicle for such adjustment". He also suggests that the courts should be spared the burden of decision in cases like the *Manitoba Egg Reference*.[11]

Certainly the chicken-and-egg war left the Court slightly shell-shocked, but we can hope that the experience will have taught governments the constitutional dangers of using reference powers for political purposes. The experience need not be repeated, and the Court can continue to perform the vital task of laying down the general guidelines and identifying the major areas of federal and provincial power, without which federal-provincial negotiations would operate in a legal vacuum, responding only to power.

I suspect the difference between Weiler and myself goes to the appropriate balance of emphasis on the processes of political bargaining and legal interpretation in applying the federal division of legislative powers. Weiler's analysis of the problems of legal interpretation are perceptive and should be helpful in the search for greater objectivity and rationality in this process.

In his chapter on the Supreme Court as defender of our civil liberties Weiler rightly warns of the dangers of too much judicial activism in the application of vague terms like "equality before the law" and "due process of law." However, I find his constitutional theory confused. Referring to the *Drybones* case,[12] he states: "When the court struck the provision [Indian Act, S. 94] down, it overrode the wishes of an elected body." This is a statement of philosophic preference rather than legal fact, for *if* the majority in *Drybones* correctly read the intention of Parliament as expressed in the Bill of Rights then it *gave effect to* the wishes of the elected body. It was Parliament, not the Court, that condemned the provision in question to limbo, the same Parliament which could, by adding a *non obstante* clause, bring it back from limbo.

I suggest that Weiler is too charitable, and that the courts have often ignored or frustrated the will of Parliament through unwillingness to continue the development, in the cases, of fundamental constitutional principles that was begun by Mr. Justice

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11. *The Attorney-General for Manitoba* v. *The Manitoba Egg and Poultry Association*, [1971] SCR 689.
12. [1970] SCR 282.

Rand. I suggest further that the vagueness of terms found in the *Bill of Rights* is partly in the eye of the beholder. If Parliament were to use the expressions "equality before the law" and "due process of law" in its next amendment of the Income Tax Act or Canada Corporations Act, I doubt if it would require more than six months for the courts to be provided with a wealth of authority, drawn from our Anglo-Canadian legal heritage, to guide them in giving concrete meaning to these phrases in particular cases.

I think Weiler is right when he asserts that "The decision in *Drybones* can be of profound importance in the evolution of Canadian law and courts . . . . because of its potential for the substratum of legal reasoning in our courts." In determining the extent of judicial responsibility under the Bill of Rights and how to discharge it, the Supreme Court will have to go beyond doctrinal analysis to a systematic consideration of legal theory. In fairness to the Court, Parliament must end the right of appeal in civil cases on a monetary basis to make this possible. Weiler's analysis, which draws on the best of English and American legal scholarship and applies the resulting theory to the unique constitutional arrangements of Canada, could be very useful to the judges.

When Parliament recites, in the preamble to the Bill of Rights, its desire that the Bill "shall ensure the protection of these rights and freedoms in Canada," then goes on to declare the right to liberty and security of the person and the right not to be deprived thereof except by due process of law, further specifies the right of a person detained to retain and instruct counsel without delay, and enacts that every law of Canada (including the law as to admissibility of evidence) *shall* be so applied as not to authorize the infringement of those rights, it seems clear that the courts, however unwise they may consider this policy, are being told by the legislative branch to withhold judicial sanction from executive action done in deliberate violation of the right to legal counsel. When, in the face of all this, the Supreme Court asserts, as the majority have just done in *Hogan v. The Queen,*[13] that the common law prevails to allow in evidence obtained through deliberate disobedience to an Act of Parliament, we can only assume great confusion concerning the rôle of the Supreme Court and the place of civil liberties in constitutional theory and jurisprudence.

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13. Judgment pronounced June 12, 1974.

Weiler examines the Supreme Court decisions in *Drybones, Wray,*[14] and *Osborne,*[15] and concludes that the risk of judicial decisions that are "both unwise and irreversible" outweighs the desirability in principle of judicial review.[16] If Weiler is not here advocating repeal of the Canadian Bill of Rights, then he is urging that the Supreme Court render it a dead letter by giving it little or no effect in law. Given that the Bill of Rights is law, and is now contained in the Appendix to the Revised Statutes of Canada along with constitutional documents, I regard the latter course of action as a dangerous subversion of the authority of the elected legislature.

Chief Justice Laskin, dissenting in the *Burnshine case,*[17] has demonstrated an approach to the Bill of Rights that is responsive to the legislative intent while avoiding the *Drybones* result of holding federal enactments inoperative. There is an interesting precedent for this approach in the dissenting judgment of Cartwright, J. in *Klippert v. The Queen,*[18] where the *Interpretation Act* was invoked as authority for an interpretation of the law on dangerous sexual offenders that avoided a serious abrogation of the liberty of the subject.

While I find Weiler's analysis stimulating and persuasive, I disagree with him here, and would urge that the Supreme Court adopt a pragmatic approach to the Bill of Rights as simply an additional source of authority for protecting basic rights and freedoms, regard *Drybones* as an exceptional and dramatic application of the Bill, and take a more positive approach to the Bill as a tool for protecting citizens from executive and administrative power. The dissent in *Burnshine* shows how this can be done in a way that balances judicial responsibility under the Bill of Rights with legislative supremacy under the Constitution.

Another *Drybones* or two might arise, but the value of this approach is that the judicial responsibility would be directed, as it should be, largely at the exercise of executive and administrative power, leaving it to Parliament to ensure that federal laws are such as to be capable of construction and application in a manner that does not violate basic rights and freedoms.

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14. *Regina* v. *Wray* [1971] SCR 272.
15. *Regina* v. *Osborne* [1971] SCR 184.
16. Pages 221-2.
17. *Regina* v. *Burnshine* [1974] 44 DLR (3d) 584.
18. [1967] SCR 822.

In Part III, a brief chapter on the future of the Supreme Court, Weiler demonstrates an awareness of the complexity of the judicial process and the risks inherent in judicial reform of the law. He clearly intends the book more as a mind-expanding experience than as a debating brief. It deserves to be judged and used accordingly.

The flavour of the book can be well sampled from the following passage on the role of principle in the legal reasoning of a nation's highest court:

> Now the point of *legal* principles can be seen. Judges must develop and settle the law in the light of the policies believed appropriate for that area. However, these value judgments need not simply reflect the personal attitudes of the judges who happen to sit on that appeal panel. Instead, the court should be able to discern a series of policy judgments already embodied in existing legal standards. The judges must articulate a theory which explains how these many judgments form a systematic whole, a theory which is summarized in the legal principle. The principle expresses the theme by which a society has gradually resolved the competing interests and values which are the common strands of this area of life. Once such a theory is articulated, it may become the fundamental reality of the law which governs the judges. If a new question arises, a court can and should appeal to this principle to justify its new legal rule. If one of the existing rules seems incompatible with the thrust of the law's evolution that same principled argument will justify a revision. (p. 51)

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The Judge in a Communist State: A View From Within.
By Otto Ulč. Athens, Ohio: Ohio University Press, 1972. Pp. xiv, 307. Price: $8.75.

Professor Ulč, a reluctant recruit to the Czechoslovak bench at age twenty-three, has penned an anecdotal memoir of his six-year judicial career from 1953-1959. It is an intimate, candid, and often unflattering behind-the-scenes account which he contends was typical of the other European people's democracies of the period. Ulc chose this approach because, he said, he wished to focus on "individuals" rather than "legal formulae" (p. ix). He abandoned his original intention of undertaking a project similar to one

conceived by Professor Harold J. Berman two decades earlier. (Berman had persuaded Professor B. A. Konstantinovsky, who practised and taught law in Odessa before the Second World War, to recollect cases in which he was involved. A selection of these published in 1953 was illustrative of the extent to which a viable legal system functioned side by side with a regime of coercion in Stalinist Russia.)[1]

Although some of Ulč's remarks are illuminating in this connection, on the whole his contribution to the law-in-action literature offers the comparatist far less than a systematic data-oriented approach that would enable one to test generalizations in Konstantinovsky or some of the useful empirical studies emanating from the socialist countries in recent years. For example, a Polish study of people's assessors (lay judges) has shown that contrary to popular belief in Poland the assessors have an explicit influence on court judgments in 40% of the cases, although 46% of the Polish judges questioned in the project believed that the assessors had no influence whatever.[2] Ulč depicts the assessor as having virtually no influence in Czechoslovakia during his years on the bench and maintains that he and many other judges manipulated the assignment of assessors to cases for that purpose (a practice also reported in Poland). Different periods? Different countries? Incompatible samples? Reconcilable data? Who can say?

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1. See B. A. Konstantinovsky, Soviet Law in Action: The Recollected Cases of a Soviet Lawyer (ed. H. J. Berman). Cambridge, Mass., 1953.
2. S. Zawadzki and L. Kubicki (eds.), Udzial lawnikow w postepowaniu karnym. Opinie a rzeczywistosc. Studium prawnoempiryczne. Warsaw, 1970. (English summary). Abbreviated accounts of this study have appeared in several places, including: "Lay Assessor Judges in Penal Proceedings," 1969 *Polish Round Table* 97-111; Zawadzki and Kubicki, "L'Element populaire et le juge professionnel dans la procédure pénale en Pologne," *Droit polonais contemporain,* no. 17/18 (1972), pp. 31-42. Also see M. Rybicki, "La participation des citoyens a l'administration de la justice en Pologne et dans les pays socialistes," 23 *Revue internationale de droit comparé* 553-565 (1971). For a recent Soviet inquiry into the professional qualifications of people's judges, see N. V. Radutnaia, "Kriterii professional'noi podgotovlennosti sudei," *Sovetskoe gosudarstvo i pravo* no. 1 (1974), pp. 96-102. On Hungarian experience, see A. Racz, "People's Assessors in European Socialist Countries," 14 *Acta Juridica* 395-413 (1972).

Ontario Labour Relations Board Practice. By Jeffrey Sack and Martin Levinson. Toronto: Butterworth and Company (Canada) Ltd., 1973. Pp. xviii, 549. Price: $15.00 (paperback).

For the practitioner of labour law the substantive and procedural doctrine developed by the labour relations board in his jurisdiction is perhaps the main body of relevant law. The rulings of arbitrators are of great practical importance and the decisions of the courts deserve special attention because both arbitrators and labour relations boards must bow to them. It is, however, the practice of the labour relations boards, charged with the certification of unions and the protection of employees', unions' and employers' rights, that puts the most important gloss on the labour relations legislation in each jurisdiction in Canada.

Of the eleven labour boards in Canada the Ontario Labour Relations Board is the most important, not only because Ontario is the largest and most heavily industrialized province, but also because the Ontario Board has administered its legislation rationally, developing a coherent and responsive Board jurisprudence. It alone among Canadian labour relations boards has, since its creation in 1944, consistently published reasons for its decisions. However, the mode of publication has left a lot to be desired, and for that reason alone the carefully ordered and comprehensive compilation of Ontario Board decisions in *Ontario Labour Relations Board Practice* by Sack and Levinson will be of great use to practitioners, particularly those new to the field, and to researchers and students.

The approach is functional. Except in the first chapter and the closing two chapters the issues are dealt with in order as they might arise in proceedings before the Board. Three parts of the first chapter are devoted to the history of the Board and the Ontario Labour Relations Act, a general comment on the scheme, purpose and powers of the Board under the Act and its make-up, including the names of members. The other part of chapter one deals with the constitutional jurisdiction of the Board. The authors set out straightforwardly and succinctly, with footnote references to any relevant Board rulings and court decisions, the substantive and procedural rules which might concern a practitioner faced with that issue before the Ontario Labour Relations Board. There is no reference to secondary sources in any of the footnotes. The same approach is followed throughout the rest of the book.

Chapter two deals with the sometimes difficult question of "persons to whom the Act applies" and therefore cuts across all the various proceedings before the Board. Chapter three deals with "Certification" and takes, quite appropriately, over one third the total number of pages in the text. The next six chapters are each devoted to a particular type of proceeding before the Ontario Board. Chapter ten deals with minor proceedings which do not merit a chapter to themselves and chapter eleven is entitled "Matters of Practice of General Application", which means that its practical importance is considerable. In chapter twelve the authors depart from their functional method of taking matters of procedure and substance as they would arise in proceedings before the Board to consider the law relating to judicial review of Board decisions. Finally, there is a "Supplement on the Construction Industry", in which Board practice and decisions relating to the construction industry part of the Ontario Labour Relations Act are noted.

Each chapter is divided by a good number of subheads, although only the major headings within a chapter appear in the Table of Contents. This gives quite generous guidance to one seeking references. There is also a reasonably full index and a "Table of Cases Dealt with in the Courts" at the back of the book. Nevertheless, since the greatest use for *Ontario Labour Relations Board Practice* will be as a reference text, the inclusion of a more fully analytical Table of Contents, in which all sub-heads appeared, might have been wise. The usefulness of the book might also have been improved by greater cross-referencing through footnotes.

Ontario Labour Relations Board Practice is intended to be a practitioner's text. The authors, therefore, may be assumed to aspire to accuracy, completeness of coverage combined with business-like conciseness, and ease of use for reference purposes. Each of these good qualities they have achieved in more than ample measure, and in spite of the technicality of the material and the mass of detail the text is consistently readable because it is well written. But the best legal texts manage, without sacrificing these aims, to lay bare for their readers the unifying themes of the subject, to criticize, to speculate and to press for improvement in the law. At the start of each chapter Sack and Levinson do state, concisely, the thrust of the Board's treatment of the subject matter of the chapter, but apart from that these creative functions are really never attempted.

Within the uncritical framework the authors have set for themselves their treatment of Ontario Board practice could have

been more satisfactory in two respects. First, there could be more generalizations, more pulling together of the Board decisions which are so voluminously footnoted. Trends in Board jurisprudence, both general and in relation to particular issues such as employer interference in the selection of bargaining agents, might have been identified. Second, the authors could have infused the text with more of their understanding of how the law applies in fact. For example, it is surely very useful in discussing successor rights upon the sale of a business [p. 195] to explain briefly, as they do, the circumstances under which the determination of such rights reaches the Labour Relations Board. But then, just a few pages later they note that the section empowering the Board to deal with successor rights "does not include the contracting out of work" but "does include the sale of part of a business" without any discussion of the difficulties that this distinction may give rise to in practice.

Sack and Levinson are active practitioners on the labour side and it is perhaps for this reason that they are careful to do no more than state the law directly as it comes from Board rulings, judicial decisions and legislation. It may be unfortunate that they have avoided all critical comment or suggestions for change, but the result undoubtedly is that they have provided no basis whatever upon which the accuracy of their text can be attacked.

In spite of their value-free stance, the authors have in one respect taken a most welcome approach to administrative law. They have concentrated on what the administrative tribunal with which they are dealing has itself said, rather than upon what the courts have said about it. Apart from a very brief statement on judicial review in chapter twelve, they have concentrated on weaving the major judicial pronouncements affecting the Ontario Labour Relations Board into the fabric of the Board practice within the subject area of each chapter.

The heavy caseload of the Ontario Board means that inevitably that Board has dealt with many matters upon which other labour relations boards, particularly in the small provinces, have never had occasion to rule. Moreover, what rulings there have been in other provinces may not have been systematically published or reasons may not have been given. Practitioners outside as well as in Ontario will therefore find in *Ontario Labour Relations Board Practice* a useful framework of decisions within which labour law problems can be tackled. They must bear in mind, of course, that there are a great many differences between the labour relations legislation of

Ontario and other provinces, and that even where the legislation is similar Ontario Board policy may not be adopted by the boards of other provinces. That is to say that while this new text will be a considerable aid to the careful lawyer outside of Ontario, it may be something of a trap for the careless one.

The personnel of the Ontario Labour Relations Board has undergone a dramatic change since this book went to press. There are rumblings which indicate that there may also be changes in the policies and practices of the Board and perhaps amendments to the Ontario Labour Relations Act and the Regulations under it. Even so, Sack and Levinson have done an excellent service in bringing together the Ontario legislation, judicial pronouncments and, most important, the Board's own rulings on its practice. The Board's Monthly Reports and the recently implemented Butterworth's series, which will report the decisions of labour boards across the country, are available to anyone who wishes to keep up to date.

In its hard-cover edition *Ontario Labour Relations Board Practice* has been padded with five statutory appendices: Sections 91 and 92 of the B.N.A. Act, the Statutory Powers Procedure Act, 1971, and the Judicial Review Procedure Act, 1971 of Ontario, as well as the whole of the Ontario Labour Relations Act and the Rules of Practice, Regulations and Practice Notes of the Board. This material, which can be obtained elsewhere free, or virtually so, constitutes in all 227 pages out of the total of 570 pages in the book. Butterworth is not alone among Canadian law book publishers in including a mass of public documentary material between the covers of an expensive law book, but that does not excuse the practice. It is particularly objectionable where the result is a negative first impression of what is, in fact, a very fine book. Happily, the soft cover "student" edition is relieved of the burden of these statutory appendices.

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The New Law of the Sea. By Karin Hjertonsson. Leiden: Sijthoff. 1973. Pp. 187. Price: Dfl. 33.00
The Law of International Spaces. By John Kish. Leiden: Sijthoff. 1973. Pp. xi, 236. Price: Dfl. 300.00.

The Third U.N. Conference on the law of the sea has drawn attention not only to the complexity of current problems in the law of the sea, but also to the special role of the Latin American countries in developing the "new law of the sea". It will be recalled that it was Argentina that first claimed sovereignty over an extensive continental shelf and that it was the Central and Latin American states that first put forward a claim to a 200-mile territorial belt. Dr. Hjertonsson's *New Law of the Sea* is especially concerned with Latin American contributions to the emerging consensus on extension of coastal jurisdiction, which has proved to be one of the central features of the Conference.

The author points out that the Latin American countries — and this is true of others too — are not specific in the language they employ to describe their claims, but she rightly states that "the important element, for the purpose of analysis, is the purpose behind each act of legislation" [p. 46]. "From a pragmatic view point, a coastal state's use of its adjacent sea and sea-bed consists of various functions. Such functions include, for example, fishing, extraction of minerals and other resources from the sea-bed and subsoil, security, enforcement of neutrality, control of navigation and protection for sanitary, fiscal and customs purposes. If all possible imaginable functions a state could assert in this area were bundled together, the area would be under total control of the coastal state and the jurisdiction would equal the jurisdiction the state asserts over its land territory — in other words, sovereignty" [p. 76]. However, states often are only desirous of claiming some of these functions, in which case "the concept of the territorial sea based on sovereignty is not adequate. The result is that states, in order to pursue their national interests, either make excessive claims to territorial seas when they are only interested in controlling certain functions, or they create new concepts of the law of the sea to apply to these particular functions" [p. 77]. The Canadian attitude towards pollution control which has gradually been adopted by a large number of other littoral states is a good example of this.

In the author's opinion — and this may be tested at Caracas — the territorial sea, viewed by most Latin Americans as merging with

the "patrimonial sea", may come to be fixed at twelve miles, while many jurisdictional functions will be exercised to much further distances. In the author's words "we can realistically conclude that customary international law on coastal jurisdiction is unambiguously moving in the direction of wider coastal jurisdiction over resources in adjacent sea and sea-bed. Many states have accepted or are likely to soon accept the Latin American position, perhaps in a modified form but in substance the same, expressing the right to economic resources beyond the territorial sea" [p. 116]. The author describes what has taken place as "a good example of the phenomenon of creeping jurisdiction. The study of the evolution of the law of the sea in Latin America has made it clear that developing coastal states group together in common interest and in a common feeling of solidarity against the developed world, and by their large number dominate the law-making process and codification of the law of the sea within the framework of the United Nations" [p. 177]. This factor became apparent in the early days of the Caracas Conference with regard to the voting procedure but is by no means confined to law of the sea issues.

While pressure has been accumulating in the evolving new sea law, there has been an increasing awareness of other extra-territorial areas in which states may have a real or imagined interest, frequently leading them to assert sovereign rights or claims which are confined to specific jurisdictional interests. The areas in which such claims have developed have been broadly described as "space". In his Ph.D. thesis entitled *The Law of International Spaces,* Dr. Kish includes within this rubric the high seas, polar regions and cosmic space. His monograph is concerned with delimitation, prohibition of territorial sovereignty, jurisdiction of a flag state, and the use of force in each of these international spaces. There will probably be little argument with his statement that "the law of international spaces requires the establishment of new international institutions. The common legal regime of international spaces manifests the necessity of adopting a multilateral treaty on international spaces, establishing an organization for international spaces, and agreeing on the adjudication of disputes concerning international spaces. The international implementation of these objectives would create viable legal institutions for international spaces" [p. 3]. However, anybody who considers this to be an easy task, or a practical programme, is sanguine in the extreme.

In so far as delimitation of marine space is concerned, Dr. Kish seems to support a twelve-mile limit, which would "eliminate the present disadvantageous position of states insisting on the three-mile limit, [while] such a regulation would preclude the legality of any unilateral extension of the territorial sea beyond the twelve-mile limit" [p. 15]. It is perhaps unfortunate that he does not examine the problem of functional extension and adopts instead the traditional view with regard to the limitation or exclusion of sovereignty, accompanying this idea with a call for an international regime over the whole of the high seas and regulating the public order therein [p. 67].

As to the Arctic, Dr. Kish mentions that the United States, the Soviet Union, Norway, Denmark and Canada all have arctic territories, and he states *simpliciter*, that "Arctic lands are subject to the sovereignty of the sector state" [p. 27], without examining the reality of the sector principle. He goes on to say that the territorial sovereignty of the sector state extends to the seabed and subsoil, airspace of the territorial sea, the continental shelf and the contiguous zone, while "all parts of the Arctic Ocean that are not included in the territorial sea or in the internal waters of a state, form part of the high seas" [Pp. 27-8], but he gives no hint as to where such high seas are, and when dealing with the prohibition of sovereignty in this area, he bluntly states that "international law recognizes the freedom of the Arctic Ocean . . . . [and] the practice of states justifies the application of the law of the high seas to the areas of the high seas of the Arctic Ocean" [p. 70], which is tantamount to defining sovereignty as that which is enjoyed by a sovereign. It is perhaps unfortunate that, in examining the problems of the Arctic, Dr. Kish did not go into the same detail as he has done with Antarctica, although in this connection he may feel that the international status is more significant in view of the existence of the Antarctica Treaty. To some extent his task with regard to celestial objects is equally facilitated by the existence of the Outer Space Treaty, although his idealistic approach to international control breaks through in this connection too: "The delimitation of outer space and celestial bodies requires a concrete international regulation. While the lower orbit of spacecraft around celestial bodies may be adopted as the governing rule of delimitation, the actual height of this limit varies around each celestial body. The establishment of such a boundary would secure the delimitation of

the different international regimes of outer space and celestial bodies'' [p. 48].

Both books contain much material of interest and overlap to some extent. Of the two, that by Dr. Hjertonsson on the *New Law of the Sea* is perhaps the more practical, while Dr. Kish's survey of the *Law of International Spaces* serves to remind us of the nebulous state of the law where at least some of these are concerned, while at the same time illustrating the distance between public order and present realities.

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