Osgoode Hall Law Journal

Volume 13, Number 2 (October 1975) Article 3

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IN THE LAST RESORT: A CRITICAL STUDY OF THE SUPREME COURT OF CANADA

A review symposium of PAUL WEILER'S IN THE LAST RESORT (Toronto: Carswell/Methuen. Pp. XV. 246).

A POLITICAL SCIENTIST'S VIEW

By PETER H. RUSSELL*

Since the publication in 1968 of his article "Two Models of Judicial Decision-Making,"[1] Paul Weiler has been emerging as one of the most systematic critics of appellate court decision-making in Canada. *In the Last Resort*[2] culminates this process. The book builds on a series of articles Weiler wrote between 1970 and 1973 examining the work of the Supreme Court of Canada in major areas of public and private law.[3] Now he has derived from that material a full-blown statement of the legal philosophy which in his view should serve as the standard for assessing the decisions of the Supreme Court. So bold an intellectual enterprise must be expected to provoke criticism and this reviewer will express his share below. But even Weiler's sternest critic should recognize the importance of his undertaking and the thoughtful scholarship and good writing which characterize his effort to carry it to a successful completion.

In the Last Resort is not written exclusively for the scholarly community. It is also addressed to a more popular audience. Weiler is concerned to tell Canadians outside of the legal profession what is wrong with the performance of their Supreme Court and what they can reasonably require of it in the future. In endeavouring to write for this wider public he leaves out much of the scholarly context which has given rise to his ideas. While this certainly

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1 (1968), 46 Can. Bar Rev. 406.

2 P. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974); henceforth cited as *Last Resort*.

3 *Legal Values and Judicial Decision-Making* (1970), 48 Can. Bar Rev. 1; *Groping Towards a Canadian Tort Law: The Role of the Supreme Court of Canada* (1971), 21 U. of T. L. J. 267; *The Supreme Court of Canada and the Doctrine of Mens Rea* (1971), 49 Can. Bar Rev. 281; *The 'Slippery Slope' of Judicial Intervention* (1971), 9 Osgoode Hall L.J. 1; *The Supreme Court of Canada and Canadian Federalism*, in J. Ziegel (ed.), *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973) 39.

makes his book far more readable, it means that he sometimes fails to relate his views to those of other scholars who have been concerned with the same issues.

The essential idea at the heart of Weiler's critique of the Supreme Court is not new. Appeal courts, and above all the nation's highest court of appeal, should be concerned with the broad principles underlying legal rules and not pretend that they can settle legal disputes solely on the basis of the bare words of the rules of law themselves. A growing number of Canadian legal scholars have been arguing this general case for at least a quarter of a century. Not the least of these scholars is the present Chief Justice of Canada.[4] Besides providing a much wider Canadian audience with an intelligible account of the need for an improvement in the jurisprudence of our highest court, Weiler's book makes two important contributions to the scholarly and professional debate. First, his prescription for reform in judicial decision-making moves beyond such rhetorical slogans as "judicial-policy-making", "judicial statescraft", "activism" and "adapting the law to the changing needs of society" and is elaborated much more carefully than previous Canadian writing in this tradition. Secondly, he illustrates his prescription through case studies drawn not from a single field of law but from a cross-section of the Supreme Court's work in torts, criminal law, administrative law, civil liberties and constitutional issues of federalism.

Weiler's prescription for judicial reasoning is designed as a response to the inescapable dilemma which faces an appellate court in our system of justice, especially the nation's final court of appeal. On the one hand, the Supreme Court, as a court, was established not to legislate or administer but to adjudicate disputes. As an appointed adjudicative body, it is expected (especially in a democracy) to apply the law, not create it. But, on the other hand, the disputes the Court adjudicates are disputes about the meaning or applicability of particular rules of law. To clarify an ambiguity in the law, or resolve a conflict between two rules of law, or apply a rule of law to an unprecedented situation, or fill a gap in the law, the Court must go beyond, or behind, or above, or below the plain words of the law itself. Thus "inactivism" is not an option for the Supreme Court; whether judges like to admit it or not the Court must be legislatively creative, and because the Supreme Court functions at the apex of our judicial hierarchy, its legislative creation becomes legal policy for Canada. Much of Weiler's criticism of the Supreme Court is based on the Court's unwillingness to face this dilemma deliberately.

How would Weiler have the Court respond? His central recommendation is a method of opinion-writing in which the rationale of the decision is expressed in terms of underlying "legal principle." Supreme Court judges should justify their decisions in terms of the legal principle underlying the whole branch of law involved in the case. Legal principles, as justifying arguments, should make reference to the amalgam of considerations which

[4] See, for instance, B. Laskin, *Tests for the Validity of Legislation: What's the Matter?* (1955), 11 U. of T. L. J. 114.

a judge may discern as society's reasons for having certain rules or standards in its legal system. By reasoning in terms of principle a judge will consider the "policies" or "values" upon which the principle is based. For instance, the principle of *mens rea* which underlies many of the excuses recognized by our criminal law should point the judge to such considerations as the desirability of enlarging individual freedom, protecting the innocent from criminal punishment and economizing in the use of criminal sanctions. His recipe for legal reasoning would combine in the common law system some of the deductive quality of continental law (particular rules deduced from general principles) with a Cardozo-like search for the social policies implicit in these principles. On the surface at least it seems like a promising solution to the dilemma of judicial law making. The judge who follows it will not close his eyes to the descretionary power he exercises, nor will he decide merely on the basis of personal whim or preference. His reasoning will not pretend that the case may be decided by the iron-clad application of a particular rule of law. But in going beneath or beyond the rules of law the judge will "discover" the "strands of public policy" running throughout a particular area of law and thus preserve the measure of continuity and objectivity required of an adjudicative body.

Weiler acknowledges that his "legal principles" will not yield irrefutable answers. Nothing reveals the validity of this acknowledgement better than his own application of his formula. Readers who accept his general approach to legal reasoning may well differ with his treatment of a number of cases because they are not convinced that he has identified the proper or only underlying legal principle in these cases, or derived the appropriate social policy from the legal principle. Weiler's recommended approach to judicial reasoning does not yield a logical formula whereby it can be objectively determined that a judicial decision is correct. In this sense like earlier efforts in other common law jurisdictions by Julius Stone, Edward Levi, H.L.A. Hart and O.I. Jensen (recently reviewed by Joseph Horovitz in his *Law and Logic*[5]) Weiler's formulation fails to produce a special legal logic. What it does provide might best be described as a special rhetoric or mode of argument — a method and style of opinion writing designed to persuade on the basis of a candid review of the full range of legal and social issues involved in the case.

As a critical standard for evaluating the opinions written by Supreme Court justices, this "special rhetoric" has much to be said for it. Supreme Court decisions will provide a more intelligible and coherent guide for lower courts, lawyers and citizens, if they are argued in terms of the more general principles which can serve as the major premises for a particular set of legal rules. In a more sophisticated age the disclosure and exposition of underlying principles is apt to be more persuasive of the reasonableness of the Court's decisions. This might at least balance the risk that judicial candour about legal policy will expose the creative role of the court to sharper political scrutiny.

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[5] J. Horovitz, *Law and Logic: A Critical Account of Legal Argument* (New York: Springer-Verlag, 1972).

Weiler is particularly effective in applying his standard of legal reasoning to the Court's recent decisions on certain aspects of tort liability and criminal law. In these areas of law, to which legislators and public opinion are relatively inattentive, there is a strong case for the judiciary assuming a special responsibility for the development of the law. Also in these areas there are well established legal doctrines to be judicially discerned and analyzed in the process of evolving our legal system.

A good example of his critique at work is his analysis of the Court's decisions on occupier's liability. He contrasts Mr. Justice Spence's opinion in *Campbell* v. *the Royal Bank of Canada*[6] with Justice Ritchie's in *Brandon* v. *Farley*[7]. In the first decision Mr. Justice Spence followed Mr. Justice Freedman of the Manitoba Court of Appeal and, in considering the extent to which the doctrine of occupier liability should deviate from the basic precepts of tort law, weighed the ease with which an occupier could be expected to take reasonable precautions to mitigate a recurring risk to his invitees. But in the later case, Justice Ritchie writing for the majority simply distinguished the *Campbell* decision by employing a conceptual difference between two kinds of invitees without relating that distinction to the underlying legal doctrines and the social concerns they entail.

Even in these areas of the Supreme Court's work Weiler acknowledges that the arguments he prefers are based on more than "legal principle", and, in part, express his own "order of priority among social values".[8] For instance, he attaches a greater importance to freedom of speech and the press than to protecting candidates for public office from unfounded attacks on their character. Consequently he is critical of the Supreme Court's refusal to extend the general principle in tort law of negligent fault to the law of defamation and so narrow the conditions under which newspapers are liable for defamation.

Weiler is correct, I think, in stressing the role which "social values" must play when the Supreme Court comes to a crossroads in developing a particular branch of the law. In this sense Herbert Wechsler's notion of "neutral principles" of law may seem naive.[9] One might also agree, on balance, with Weiler's own ordering of social values. But Weiler is sometimes less than judicious in giving reasonable consideration to views different from his own. His sarcastic paraphrase of Justice Cartwright's reasons for maintaining a broad liability for journalists' attacks on the character of politicians does not do justice to what might be said on that side of the issue. By way of contrast, he is much more reasonable later on in the book when he expounds the virtues of the majority's libertarian decision narrowing the definition of seditious libel in *Boucher* v. *The King*.[10] Here he probes the weaknesses in Justice Cartwright's dissenting position much more carefully and fairly.

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[6] [1964] S.C.R. 85.

[7] [1968] S.C.R. 150.

[8] *Last Resort* at 80.

[9] H. Wechsler, *Principles, Politics and Fundamental Law* (Cambridge, Mass.: Harvard, 1961).

[10] [1955] S.C.R. 16.

One of the most instructive features of Paul Weiler's study of the Supreme Court is the emphasis he places on the Court's function in settling legal disputes concerning what might be called "lawyer's law"[11] — especially the law of torts and criminal law. He brilliantly illuminates the policy issues embedded in these cases and cogently argues that the Canadian Supreme Court should play a prominent and, in the future, a much more skillful role in developing Canadian law in these fields. On the other hand he is more skeptical of the legitimacy of the Court's assuming a large creative role in the principle branches of public law. In administrative law he is a vigorous apostle of judicial restraint — a position befitting one about to assume the chairmanship of an administrative agency in the labour relations field. On civil liberties, he is no ardent supporter of a Constitutional Bill of Rights. He sees the advantage of a statutory Bill which directs our judges' attention to a set of legal principles which should be given "great weight" in legal reasoning. But he cautions that "for the moment at least, we might place greater trust in the virtue of our legislatures than in the infallibility of our courts." His skepticism is most radical in constitutional law where, ideally, he would like to see the courts vacate this area of adjudication altogether.

All of this is a good medicine for those whose expectations about the Supreme Court's future role in Canadian government are so thoroughly coloured by the United States Supreme Court. These expectations have been particularly pronounced outside of professional legal circles in the press and among popular commentators. It is hoped that Weiler's book makes some impact on this body of opinion. For, as with so many of our institutions, our Supreme Court's destiny is to be molded in the Anglo-American tradition. In Canada there is neither a constitutional basis nor a public mandate for a Supreme Court docket closely resembling that of the Supreme Court of the United States. Our Supreme Court's function will continue to have much in common with that of the English House of Lords.

But having said this much in favour of Weiler's general de-emphasis of "public law" in the Supreme Court's law-making agenda, I must dissent from the extreme position he takes on the Court's role in interpreting the B.N.A. Act. Professor Lederman has already presented a strong rebuttal to Weiler's view that our judiciary should not play an important role in the process of adapting and fleshing out the federal provisions of our constitution.[12] Like Professor Lederman, I am not convinced by Weiler that the division of power under the B.N.A. Act is inherently so "unprincipled" that constitutional disputes between the provinces and Ottawa should be determined exclusively through the political process. The stability of legal principle required by Weiler in this field contrasts sharply with the fluidity of legal doctrine and social policy which he seems willing to accept in other areas of the law. Our constitutional law of federalism through case law evolving over a century, seems to me to present the amalgam of principles, and underlying policy concerns which are for Weiler the proper ingredients of judicial

[11] *Last Resort* at 222.

[12] See his comment on Paul Weiler's *The Supreme Court of Canada and Canadian Federalism*, in J. Ziegel (ed.), *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973) 73.

policy-making. There is, for example, the principle that sections 91 and 92 of the B.N.A. Act must be read together so that broad powers assigned to one level of government do not consume more specific powers assigned to the other and the principle outlawing colourable attempts by one level of government to invade the other's jurisdiction. Underlying these principles is a concern to retain some balance in our federal system through which Canada might avoid the extreme states' rights position which led to the American Civil War (or the crippling of national economic power in Canada during the Great Depression) and the extreme centralization of power which has now all but destroyed federalism in the U.S.A.

There is a more serious flaw in Weiler's argument than a failure to apply his own doctrine properly. He has failed to give sufficient recognition to the requirements of constitutionalism in his theory of Canadian government. This becomes particularly apparent when he recommends that private citizens and corporations be denied the right to challenge the constitutional validity of laws enacted by a representative legislature. Constitutionalism, as the British system reveals, need not entail the enforcement of a written constitution by the courts. But where, as in our country, there is a written constitution limiting governmental authority, the case for judicial review is strong. It would be difficult to understand in what sense the B.N.A. Act is a law defining the limits of Canadian legislatures if there were no remedies available through the courts for Canadian citizens who had good reason to believe that the legislature had exceeded its limits. Canadian constitutional cases, such as *Ottawa Valley Power Co.* v. *Hydro-Electric Power Comm.*[13] and *McKay et al.* v. *The Queen*[14] demonstrate that a private litigant may have what I would certainly regard as a "principled" interest in the judiciary's enforcement of the division of powers. Besides the division of powers there are other clauses in the B.N.A. Act concerning Parliamentary government, the independence of the judiciary, the educational rights of religious minorities, French and English language rights and free trade amongst the provinces any of which, even with strict rules of standing, may provide proper occasion for the judicial determination of a citizen's constitutional rights.

Weiler, I think, can contemplate the termination of judicial review because of his highly centralist orientation. He proposes a revision of the Canadian Constitution under which there would be no fields of jurisdiction exclusively reserved for the provinces. The federal government would be paramount in all areas and could unilaterally decide whether or not provincial laws were unduly impinging on national economic interests. Undoubtedly this would eliminate the need for the Supreme Court to act as an umpire of our federal system, but what would remain of our federal system? Under Weiler's system, a Canadian province, like an English county or municipality, would be constitutionally free to concern itself with any matter so long as the central government permits it to do so. The American Supreme Court's willingness to let Congress decide the extent of national economic power may be acceptable to the American people and consonant with the

[13] [1937] O.R. 297 (Ont. C.A.).

[14] [1965] S.C.R. 798.

reduced constitutional status of the states in the American federal system. But to advocate such a dismantling of the federal system in Canada shows a peculiar insensitivity not only to Canadian history and the realities of contemporary Canadian politics, but also to the benefits this country has derived from maintaining a much more delicately balanced federalism than have the Americans, and the courts' contribution to the legitimatization of that balance.

This is not to deny that there is much to be said in support of Weiler's critique of the Supreme Court of Canada as an umpire of our federal system. Even the Court's most ardent supporters would surely not look upon resort to the Court as the preferred method of settling controversies between the two levels of government. Political bargaining, federal-provincial "diplomacy", as Richard Simeon calls it[15] has been and should continue to be the normal process for negotiating solutions to these disputes. Since the Court's founding a century ago, constitutional cases have reached it in a remarkably even trickle of two or three cases a year. Weiler is right to argue that this trickle should even become tinier if governments would refrain from referring to the courts abstract constitutional questions which are not ripe for adjudication. Further, there are strong grounds for his doubting whether the Supreme Court can continue to be respected as a reasonably impartial arbiter of dominion-provincial disputes, given the federal government's monopoly in appointing its judges and the fact that the federal government has not lost a constitutional case decided by the Court since 1949.[16]

Some reform in the method of appointing judges which gives the provinces an opportunity to participate in the process (but, spare us the ridiculously complex machinery called for in the Victoria Charter!) might increase the Court's legitimacy as a federal umpire, as would more restraint in responding to reference questions. But the basic solution, I believe, lies in the application of something like Weiler's own recipe for judicial reasoning to constitutional law. It is a pity that Weiler himself did not do this more systematically in analyzing the Court's constitutional jurisprudence. If he had, I think he would have noted, for instance, the difference between the opinion of Mr. Justice Martland and that of Mr. Justice Laskin (as he then was) in *A.-G. Man.* v. *Manitoba Egg and Poultry Assoc.*[17] Weiler states that in this decision the Court did not indicate that "it was doing any more than follow a long, unbroken line of decisions."[18] This may be roughly true of the opinion written by Mr. Justice Martland. It is certainly not true of Mr. Justice Laskin's opinion which carefully reviews previous decisions on the Trade and Commerce power with a view to working out a more balanced definition of this exclusive source of federal power consistent with the historic purposes of Confederation. Or, to take another example, he might have remarked upon the difference between Mr. Justice Locke's reasoned case for exclusive national control over the location of airports in *Johannesson* v.

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[15] R. Simeon, *Federal-Provincial Diplomacy* (Toronto: Univ. of Toronto, 1972).

[16] No federal law has been found *ultra vires* the B.N.A. Act since 1949. Twenty provincial acts were found *ultra vires* between 1949 and 1972.

[17] [1971] S.C.R. 689.

[18] *Last Resort* at 160.

West St. Paul[19] and the Court's flat assertion of the national interest in offshore minerals in the Reference case[20] on that subject.

Most of Weiler's book concentrates on legal reasoning by the Supreme Court since 1949. He is able to demonstrate how far some of the Court's decisions during this period fall short of his standard, although he does not provide sufficient evidence to demonstrate that there has been a significant decline in the quality of Supreme Court opinion-writing. (I suspect that the Court has never been very close to his standard.) He has rather little to state about institutional reform of the Court, but what he does recommend, for the most part, makes very good sense. He supports a pattern of reform similar to that originally advocated by the present Chief Justice in 1951[21] which would give the Court more control over its own docket and enable it to devote adequate time to researching and deliberating on major difficulties in the nation's system of laws. Reform of this kind, as Delmar Karlen pointed out some years ago when comparing British and American appellate courts, is appropriate for judges who "place greater stress on their lawmaking functions . . . being at least as interested in laying down guidelines for the future as in deciding correctly the cases before them."[22] Weiler's elucidation of the standard of legal reasoning required of a nation's final court of appeal provides a clear rationale for reform which moves the Canadian Supreme Court in this direction.

There are just two points in Weiler's agenda of institutional reform which I would question. First, he is not pleased with the reduction since 1949 in the number of opinions written per case. While I would agree that it is unfortunate if the increase in the Court's workload has meant the elimination of significant dissenting or concurring opinions, still there may be some gain if a confusing profusion of concurring opinions has given way to a more coherent collegiality. Secondly, Weiler's indifference to the principles of federalism prevents him from giving sufficient attention to the possible benefits to be realized from granting the provinces the right to designate the final court of appeal in matters of provincial law where there is strong reason to believe that a provincial court of appeal may be the most competent judicial law-developer. Such a constitutional reform could be particularly important for Quebec if that province is to maintain its distinctive system of civil law.[23]

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[19] [1952] 1 S.C.R. 292.

[20] *Re Offshore Mineral Rights of British Columbia,* [1967] S.C.R. 792.

[21] B. Laskin, *The Supreme Court of Canada: A Final Court of Appeal of and for Canadians* (1951), 29 Can. Bar Rev. 1038.

[22] D. Karlen, *Appellate Courts in the United States and England* (New York: N.Y.U. Press, 1963) at 157-58.

[23] Two previous judicial decisions, *A.-G. Ont.* v. *A.-G. Can.*, [1947] A.C. 127 (P.C.) and *Crown Grain Co. Ltd.* v. *Day*, [1908] A.C. 504 (P.C.), indicate that the B.N.A. Act would have to be amended if the principle I have previously advocated in this journal is to be realized, namely: "Under a constitution which is to be both federal and flexible the possibility of judicial self-government for the provinces in matters constitutionally assigned to them should be neither mandatory nor impossible." *The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform* (1968), 6 Osgoode Hall L. J. 1 at 33.

It is the mark of an important book, to ask important questions. Weiler has surely done that. His book raises the most fundamental questions about judicial review and judicial decision-making in Canada's highest court. His formulation of an approach to judicial reasoning is an advance on the efforts of previous Canadian writers of his persuasion, although I think he is overly optimistic about the objectivity to be realized through this approach. There is also, on occasion, a partisan quality to his handling of certain issues, which is not well calculated to convince others of the reasonableness of his own position. His extremely negative recommendation for judicial interpretation of the Constitution does not provide a very useful guide for the future of constitutional jurisprudence in Canada. Still, by elucidating these basic questions about the role of our Supreme Court so thoughtfully and so clearly for both law professionals and interested Canadian citizens, his book is a major accomplishment. It is a comment on the colonial and underdeveloped quality of our legal culture that it is only after a century of the Supreme Court's existence that a major work on the Court's jurisprudence has appeared.