BOOK REVIEWS

RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW. By Paul Weiler. Carswell, 1980. Pp. xi, 335. ($35.00)

Seldom is a book regarded by those who disagree with it as sufficiently important to warrant the circulation of a written rebuttal to potential readers. But that was one of the responses to *Reconcilable Differences*. A minority union was so concerned about the possible impact of Professor Weiler's views that it decided to circulate its own critique[1] to various members of the industrial relations community whom it presumably thought might be influenced. This concern was not misplaced. *Reconcilable Differences* is quite simply the most comprehensive discussion of contemporary labour policy to appear in a decade.

Professor Weiler himself probably needs no introduction. For some years he was a professor of law at Osgoode Hall, a popular labour arbitrator, and a critical commentator on labour law developments. His articles are widely published, and his book on the Supreme Court of Canada[2] remains one of the best commentaries on that institution and its work. But Weiler is no ivory tower academic. In 1973 he helped to draft the (then) new British Columbia Labour Code,[3] which is still the most comprehensive statute of its kind in Canada. He then went on to become the first Chairman of the British Columbia Labour Relations Board[4] — which no doubt gives one a certain advantage in ascertaining legislative intent, and, incidentally, illustrates the kind of movement between the government policy-making apparatus and the Labour Relations Board which is not at all unusual in this field. It is hardly surprising that Professor Weiler saw the Board as a policy-making body which should not be confined to a strictly quasi-judicial model.

Professor Weiler remained on the Board for five years, guiding it through the troubled waters of British Columbia labour relations. During that period, the Board had to address just about every critical issue in contemporary industrial relations policy. It is perhaps indicative of the soundness of its work that a change of government did not result in any significant change in the law. Meanwhile, Professor Weiler himself has moved on to Harvard Law School where he teaches while still engaging in such practical and applied endeavours as (at the behest of the Ontario Government) drafting a comprehensive plan for the reform of workers'

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[1] H. ANTONIDES, NEW DIRECTIONS IN LABOUR RELATIONS: IN CRITIQUE OF PAUL WEILER (Christian Labour Association of Canada)(June 1981).

[2] P. WEILER, IN THE LAST RESORT: A CRITICAL STUDY OF THE SUPREME COURT OF CANADA (1974).

[3] S.B.C. 1973 (2d sess.), c. 122.

[4] Between 1973 and 1978.

compensation in Ontario. Professor Weiler is therefore in a unique position to express an informed opinion on the development of labour relations policy, and I suspect that this will be the book's chief interest for non-lawyers.

In true pedagogical fashion each of the chapters begins with a story — a concrete labour dispute which illuminates a policy dilemma and choice. The organization of bank workers becomes the vehicle for examining the value of collective bargaining as an institution and the way in which the law can encourage or inhibit union growth.[5] The 1976 general strike becomes a spring board to discuss the logic of industrial conflict in the free collective bargaining system, and the restraints which the law should, or realistically can, place upon it, through such devices as compulsory strike votes and the regulation of picketing.[6] A strike at Vancouver General Hospital initiates a discussion on the right to strike in the public sector, the identification of "essential" industries where that right should be restricted, and the efficacy of interest arbitration as an alternative to strike action.[7] The plight of a union dissident provides the background for an exploration of the role of the individual in the *collective* bargaining regime, the limits of majority rule, the "right to work" debate, and the union's statutory duty of "fair representation" in the negotiation and administration of collective agreements.[8] In this way, Weiler seeks to analyze the practical, political and philosophical underpinnings of our collective bargaining system, moving with equal facility from the role of the arbitration process as a means of providing industrial justice on the shop floor, to the role of the Anti-Inflation Board in achieving national economic objectives. Each chapter is really a self-contained essay on the legal dimensions of a labour relations problem, as seen through the eyes of a lawyer determined that the law-making process should not artificially cut across the human and economic relationships subject to regulation. It is this effort to "peel away the surface legalities"[9] which epitomizes Weiler's "administrative" approach and which will make the book particularly useful to students of industrial relations.

For those of us in the labour law community who till these fields, the book provides a rare opportunity to reflect upon our own work and examine its underlying premises. For those with an interest in administrative law the book provides a window on the administrative process — the real administrative law as opposed to the common law administrative law (jurisdictional facts, asking the wrong question, *etc.*) so beloved by law teachers. Here is the chance to examine the administrative process, from an "insider's"[10] perspective, to understand its dynamics, and to see how the administrative mechanism can transform the bare bones of a statute

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[5] P. 15.
[6] P. 57.
[7] P. 209.
[8] P. 121.
[9] P. 292.
[10] P. v.

into a coherent regulatory policy. For, as Chief Justice Laskin has recently reminded us, an administrative tribunal can only be understood against the background of its institutional setting, arrangements, inclinations and concerns (see *Tomko v. Labour Relations Board (Nova Scotia)*).[11] It is a jurisprudential fallacy to conceive of an administrative tribunal as solely quasi-judicial or to over-emphasize its legal features. A labour relations board cannot act like a legislature, but neither can it act like a traditional court, and Professor Weiler is entirely candid about the values and premises which should inform a labour board's decision-making.[12] He is concerned to explain not only the underlying labour relations issue, but also the alternative policy responses to it. And lest it be thought that the book is too narrowly focused on the experience of British Columbia, it must be remembered that the same problems are apparent in other jurisdictions, and, to some extent, the same options are available to the legislature or the board. If only there was a similar book illuminating the internal workings of other tribunals (FIRA, for example)!

By this point the practitioner will have recognized that *Reconcilable Differences* is not a text book to which one turns for an answer on a particular legal point. No doubt some may conclude that the book is so clearly about "policy" that it will have little direct relevance in his or her daily practice. It is something to get around to after reading the basics of the law — the statutes, regulations and judicial decisions. This reaction is understandable, but shortsighted.

In the first place, as the minority union predicted,[13] Weiler's book has been immensely influential in labour law circles, precisely because of its penetrating analysis of issues which continue to surface on the industrial relations scene. As I write this Review, Parliament is considering a legislated end to an essential industry dispute, the Ontario Legislature is debating wage control legislation, and the Ontario Labour Relations Board may have to consider once again the ambit of its jurisdiction to regulate secondary picketing. Whether or not one agrees with the decisions taken in British Columbia, Weiler's book carefully analyzes the policy options and the balance of competing interests which must be struck. Those issues are as alive today as they were in the 1970's, and the book provides all sides with valuable insight and ammunition.

Perhaps more important, however, is the aspect of the book to which I have already referred: what it reveals about the nature of decision-making by a labour relations tribunal, and consequently, how cases should be approached by counsel.

In the adversary process, counsel are primarily concerned to win a particular case for their client, and are only secondarily concerned about the kind of general legal doctrine which may emerge for the future. Indeed, such concern may not even be particularly relevant in some

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[11] [1977] 1 S.C.R. 112, 69 D.L.R. (3d) 250 (1975).

[12] *See, e.g.*, pp. 287-89.

[13] *Supra* note 1.

forums. A court of general jurisdiction may see cases of the kind at issue only sporadically, and may not even be fully aware of the context in which it could be inserting a new legal rule. Moreover, the rules of evidence may severely restrict the kind of background material which can be put before a court to clarify the practical significance of its decisions.

An administrative tribunal is very different. It is not deciding legal questions or dispensing justice in the abstract; nor does it exercise a detached jurisdiction whose parameters can be ascertained solely by reference to the statute. An administrative tribunal was created precisely because the legislature sought a more sensitive and realistic elaboration of statutory policy by a tribunal with a specialized jurisdiction which would be able to see issues as part of an integrated whole. The tribunal's purported expertise is not grounded solely on the training, talent or experience of its members. It also arises from the consideration of literally hundreds of cases, each of which yields a decision which becomes part of the regulatory mosaic. The tribunal quickly discovers that it must learn from its own mistakes and that it ignores the "big picture" at its peril —not least because the problems created by a faulty decision are likely to appear inconveniently back on its own doorstep.

In appearing before a labour relations tribunal, counsel must be prepared to show that his or her client's position makes the most industrial relations sense, best accommodates the values encompassed by the statute, or provides the most appropriate balance among competing collective bargaining and other interests.[14] To ignore the tribunal's own systemic concerns is to neglect a dimension of the case upon which the board's very reason for existence is grounded. It is because Professor Weiler so carefully explores this dimension of a tribunal's decision making that *Reconcilable Differences* deserves the attention of labour lawyers.

I have one stylistic quibble. As might be expected with its focus on policy rather than simply adjudication, the analysis is supported by a wide range of references which span the whole field of industrial relations literature. The references are not restricted solely to legal materials; nor can they be. How can one understand the legal aspects of a wage control programme without referring to the economic structure of which collective bargaining is a part, and the institutional or market forces (or absence of them) which are an important part of the problem? And how else can one measure the success of this federal foray into the realm of collective bargaining regulation — and, incidentally, provincial jurisdiction? Lawyers have no monopoly on insight, and the reference to the work of economists and other social scientists gives a perspective which is all too often absent from judicial pronouncements. The footnotes, therefore, make interesting reading. And that is the point. It is annoying to find important parts of the discussion relegated to footnotes at the bottom of the page, and other parts of the discussion in a second series of footnotes

[14] *See* pp. 290-92.

at the end of the book.[15] The footnotes are worth reading. Why did the publisher make it so difficult?

It is neither possible nor appropriate in a short review to set forth Professor Weiler's analysis in any detail, much less debate those aspects with which I disagree. The value of the book lies in the range of its insights into contemporary labour relations problems. One need not be a lawyer or labour relations specialist to recognize the importance of these issues. One need only pick up the daily newspaper. For the intelligent layman, *Reconcilable Differences* provides a lucid introduction to contemporary collective bargaining problems by an individual uniquely qualified to write about such matters. For the labour lawyer or student of industrial relations it should be compulsory reading.

*Rick MacDowell**

DIVISION OF MATRIMONIAL ASSETS IN ONTARIO. By John De Pencier Wright. Canada Law Book Ltd., 1982. Pp. xxxviii, 400. ($45.00)

This book is essentially a research tool for the family law practitioner in Ontario. It consists almost exclusively of brief descriptions, collected under various headings, of decided cases. The cases themselves are quoted extensively. Critical analysis is non-existent. As the author himself notes in the Preface: "Editorial comment is kept to a minimum. Where there are varying authorities, these are given without presuming to judge which are 'right' and which are 'wrong'."[1] Consequently, the reader is sometimes confronted with diametrically opposed positions each of which is accorded a heading and supported by case-law. All case-law is treated as equally authoritative; appellate level decisions are merely presented as part of a series of cases on any specific issue.

The coverage of the case-law prior to 1 June 1982 is comprehensive. The author has included not only reported cases, but also those noted in the All Canada Weekly Summaries. Such topics as the definition and division of family assets, claims to non-family assets under section 8 of the Family Law Reform Act,[2] and the division of non-family assets under subsection 4(6) are obviously covered. But the book also has separate chapters on domestic contracts,[3] procedure,[4] interim preservation of

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[15] Pp. 315-29.

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[1] P. vii.

[2] R.S.O. 1980, c. 152.

[3] P. 10.

[4] P. 101.