

10-1-1989

## The Charter of Rights and the Legalization of Politics in Canada

H Archibald Kaiser  
*Dalhousie University*

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

H Archibald Kaiser, "The Charter of Rights and the Legalization of Politics in Canada" (1989) 12:2 Dal LJ 588.

This Book Review is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

# Book Reviews

---

Sandra Djwa, *The Politics of the Imagination: A life of F.R. Scott*. McClelland & Stewart, 1987. 529 pages, ISBN 0771028253. Price \$39.95.

The task of a biographer is a challenging one at best. And when the subject is one who has achieved distinction in many fields the difficulties are magnified many times. Better, perhaps, to settle for a *Festschrift* where colleagues and friends in fields in which the subject has excelled join together to pay their separate tributes.

So in the case of Frank Scott and his biographer, Sandra Djwa. She is a professor of literature and has achieved recognition for the work she has done on the writings and life of E.J. Pratt. It was undoubtedly Frank Scott, the distinguished Canadian poet, who originally became the focus of her attraction. But F.R. Scott was also distinguished as a creative political thinker, an expert in constitutional law, an active exponent of human rights, and a Canadian nationalist who, looking ahead, could say: "the world is my country."

Sandra Djwa was aware of this and felt that Frank Scott should receive wider recognition. The result was the F.R. Scott Conference in Vancouver in February 1981. The symposium brought together a wide range of Canadians who had shared with him and been influenced by him in one or more of his fields of endeavor. Sandra Djwa commented: "In many ways, the Scott Symposium was an index to Canadian history and culture of the past sixty years."

One fact that emerged at the Vancouver conference, and in large measure is confirmed in the biography, is that Frank Scott the poet, the political thinker, the constitutional authority, and the battler for human rights are one person. Djwa cites Scott's poem, *Creed*:

The world is my country  
The human race is my race  
The spirit of man is my God  
The future of man is my heaven.

Then she says: "Scott's moral vision, his politics, and his poetry are so tightly interwoven that *Creed* may be read as a statement of belief, a political manifesto, or as an aesthetic credo."

One other thing might be noted: The author is an academic and, as an academic, she has been indefatigable in her research. There are pages and pages of notes — 47 in all. Many of them — the majority, in fact — contain quotations from Frank Scott's writings, his diary, his poetry. In large measure, the book becomes the medium through which Frank Scott expresses his view of life. An autobiography, in fact.

Frank Scott's father, Frederick George Scott, was a high Anglican Church priest who had also developed something of a reputation as a poet. His mother, Amy Brooks Scott, had come out from England in 1878 to stay with a friend of her mother's in Montreal. She was a quiet, highly intelligent woman, with a great love for music, and an accomplished pianist. She met Fred Scott through the young people's society of St. George's Church which they both attended. They were married in 1887.

That was just three months after Fred Scott had taken over his first clerical charge in Drummondville, Quebec. They remained there with their growing family when Scott was invited to take over as rector of St. Matthew's Church in Quebec City. By this time the family numbered five, four boys and a girl. Frank was born in 1899, Arthur in 1900.

Djwa emphasizes with justification the influence of a dynamic and charismatic father on the enquiring mind and spirit of his son. Canon Scott's deep faith as an Anglo-Catholic priest, his strong commitment to his British heritage, his identification with the needs of working people, his refusal to acknowledge any cultural gap separating him from his French-speaking fellow-Canadians — these characteristics along with his love for poetry undoubtedly had a deep effect on Frank.

And there was something else: Fred Scott's devotion to the Canadian wilderness. Frank tells of a weekend expedition with his father into the Laruentian mountains near Quebec. His father called to him: "Frank, come here. Stand on this stone and look north: there's nothing between you and the North Pole." Frank commented with a smile: "Father never thought of the Indians!"

I wish the author had told us more about his mother, Amy Brooks Scott. There was a quiet, highly subjective austerity in Frank Scott — and, incidentally, a very personal attachment to the piano — that may have had a source more intimate than his father.

World War I had a profound and lasting effect on the Scott family. Two days after its outbreak on August 4, 1914, Canon Scott announced to an astonished congregation that he was going to the front. As chaplain of the 8th Royal Rifles he was soon enroute for England. Somehow he managed to break away from the prescribed route, made his own way to France where he attached himself to the Canadian 15th Battalion and was soon assigned to front-line duty.

Frank's eldest brother, William, enlisted with his father and went overseas. His two older brothers, Harry and Elton, both enlisted in 1916. Frank meanwhile had completed his Quebec high school and in the autumn of 1916 left home to enroll in Bishop's College in Lennoxville. William had already been wounded and returned. In October came the

tragic news that Harry had been killed in action. Frank made several attempts to enlist after he became 18 in August 1918. But a misdirected attempt to celebrate Elton's enlistment with fireworks had cost him the sight of one eye and blocked his efforts.

Frank Scott graduated from Bishop's in June 1919. Chosen to give the valedictory address he entitled it: "The Brotherhood of Man." In it he said:

"The Armistice placed the College at the parting of the ways, but it does more than this. . . Bishop's has always aroused in the students a patriotic love for their nation and Empire. But now there is a higher duty for her to discharge: she must instill into those who study within her walls that love of humanity as a whole, that feeling of the brotherhood of man, that universal human spirit, which alone can make the League of Nations possible."

### *Oxford: My Great Adventure*

When Frank Scott graduated from Bishop's, his brother, Elton, had been awarded the Rhodes Scholarship and that autumn took up residence in Magdalen College to study theology. Encouraged by friends, Frank applied for the Rhodes for the following year and, to his great surprise, received it. In September 1920, he accompanied his brother who was returning to Oxford after a summer at home. He noted in his diary: "My great adventure has begun."

Sandra Djwa begins her Oxford chapter: "The world that Frank Scott entered when he and his brother, Elton, went past the porter's lodge at Magdalen College, Oxford, under the great stone arch with the effigy of Mary Magdalen, had changed little since medieval times." They walk around the vaulted quadrangle of the old Cloisters. And suddenly we find them out in the sunshine, a green meadow opening up before their eyes, to the left the deer park, to the right the quiet-flowing little Chernell with Addison's walk alongside. It was to be a favorite retreat for Frank Scott during the next three years.

The Oxford approach to learning differed markedly from the Canadian university pattern of compulsory lectures and term examinations. It was a shared experience of search and discovery in friendly association with a competent tutor. Lectures there were, but attendance was a matter of choice, usually, but not always, on the advice of one's tutor. At the end of the prescribed period of study — usually two years — one wrote the university examinations and was given a grade. But, looking back, it was the time spent in the reading room of the Bodleian or the college library, the weekly essays, the sessions with one's tutor and fellow collegians that added up to an Oxford education.

There was much more, of course. Scott joined the Bach Choir under the direction of Sir Hugh Allen. The 1921 work was Mozart's Requiem Mass. He joined the Oxford Musical Society and got an introduction to chamber music. His reading extended well beyond the authors relevant to his History course. Thomas à Kempis, George Moore, H.G. Wells, Rupert Brooke, Aldous Huxley were among those he explored. And then there was the Magdalen Branch of the Oxford Student Christian Movement. Scott became deeply interested.

The group was studying the report of the Committee of Anglican Archbishops on Christianity and Industrial Problems. Members of the Committee included R.H. Tawney and George Lansbury and the Report's bibliography listed writings by Beatrice and Sidney Webb, G.D.H. Cole, John Ruskin, and Karl Marx. In a strong conclusion, the Report affirmed that "society should aim at making the spirit of cooperation for public service the dominant motive — in place of the spirit of competition for private gain." It might be considered a rather dangerous document today in Mrs. Thatcher's England — or even in Canada!

R.H. Tawney, as we mentioned, was a member of the Archbishop's Committee. His book, *The Acquisitive Society*, had just been published and the OSCM decided it would be a good focus for next year's study. When Tawney himself came up from London to take part, the discussion was held in Elton and Frank Scott's room. Fifty-five years later, Frank Scott, commenting on his experience in the Magdalen group, said: "I see that I derived from that the basic ideas which were to permeate the remainder of my life, and which I still hold as firmly today as when I first discovered them."

We have perhaps been painting too serious a picture of Frank Scott's Oxford. There was a scrupulously observed tradition that afternoons were designed for relaxation, preferably for the friendly pursuit of some sport. If you were looking for Scott on almost any afternoon, rain or shine, you would probably find him in a long pointed boat on the Isis — as the Thames was called in Oxford — with a twelve foot oar in his hand. Frank Scott was an enthusiastic oarsman and had the privilege of rowing in one of Oxford's best eights.

We can't be too hard on Sandra Djwa for not having a complete grasp of Oxford rowing. Put briefly, the Isis at Oxford is too narrow for several boats to race side by side. In consequence the eights of the twenty-odd colleges — and some have two — line up one behind the other in three divisions, with a boat length of open water between each boat. When the pistol goes, all boats start, the purpose being to catch the boat ahead and keep away from the boat behind. Your success or failure determines your

position next day. The races go on for six days during Eights week each year.

Frank Scott was an enthusiastic oarsman. He eventually rowed in Magdalen's First Eight which was Head of the River. In 1922, following a successful Eights Week it was decided to send the Magdalen Eight to the great regatta at Henley. Frank was deeply involved in new literature and took a copy of George Moore's "Confessions" with him. And he composed a little poem — I suspect with tongue in cheek:

No problem can be worse than mine  
 My state is quite pathetic  
 One half my soul's a Philistine  
 The other half's aesthetic.

Apart from — or in addition to — rowing, the aesthetic opportunities of Oxford were endless. London with its theatre, its ballet, its art was just 60 minutes away. And the vacations — six weeks at Christmas, six weeks at Easter, three months in the summer — opened up Europe. You were expected to do some reading for your course and you usually did. But that didn't exclude the possibility of a few weeks in Paris with visits to the Louvre and the Jeu de Paume and l'Orangerie and Notre Dame — and even an occasional detour toward Montmartre. And Rome is waiting with the Sistine and the ancient stones of the Forum. And Florence with the Uffizzi and the Pitti and Santa Croce and the Duomo and San Marco and Giotto, Botticelli, Massacio, Michelangelo, Leonardo — where do we stop? And then there is Switzerland and Murren and Mont Blanc and Geneva and the League of Nations. For a Canadian in the 1920s, it was all part of Oxford.

On November 3, 1923, Frank Scott, surrounded by friends, said goodbye to Magdalen, with his oar strapped to the side of the taxi. He was on his way back to Montreal.

### *Canadian Discovery*

In the biography, Frank Scott's return to Montreal is pictured as a plunge from light into darkness. In contrast with Oxford, Montreal is so primitive, ugly, dominated by the greed of big business. And Montreal, with its St. James Street is the business centre of Canada. What a contrast with the civilized life he had grown accustomed to, the cultural richness of London. "He greatly missed the intellectual companionship and the civilized beauty of England and Europe."

On the other hand, the Scott who returned to Montreal was the Scott who had been greatly influenced in his thinking by the report of the Anglican Archbishops on Christianity and Industrial Problems and by

Tawney's *The Acquisitive Society*. And where did Tawney discover his acquisitive society if not somewhere beneath "the civilized beauty of England and Europe" and wherever untrammelled capitalism held its sway.

My feeling is that the author has exaggerated a bit Scott's dejection on his return to his uncivilized homeland. Certainly you miss Oxford. But there is some satisfaction in rediscovery and recognition and a desire to get into work for which your Oxford experience has given you some qualifications.

And that was probably the main cause of Frank Scott's unhappiness. At Oxford he had tried for a job in External Affairs and been turned down. Instead, he had to settle for a posting to a private boy's school, Lower Canada College. There was some satisfaction in the fact that he would be accompanied by his close Oxford friend, Terry MacDermot. But schoolteaching was not his bent and those seven months at LCC were not happy ones.

It was at the suggestion of his father and eldest brother, William, a lawyer, that Frank Scott decided to enter the McGill Faculty of Law. There was much to be said for it. The Dean of Law was a former Rhodes Scholar, Percy E. Corbett, who had recently come to McGill after four years as legal adviser to the ILO in Geneva. The other two faculty members were H.A. Smith and Stuart LeMesurier. All three were progressive thinkers, seeing law as an active ingredient in an evolving society seeking justice in the fulfilment of human needs and aspirations.

By the autumn of 1924 when he entered McGill he was already feeling more at home in Montreal. An important reason was that he was now a member of a congenial group who shared a common approach to life. There was a certain nostalgic recall, since most members had been together at Oxford. But, more importantly, there was a lively interest in the new post-war Canada — a new position in the Commonwealth, new writers, new art in the School of Seven, new labour relations and human rights following the Winnipeg General Strike. The Group were avid readers of the anti-establishment *Canadian Forum*. Some of its members arranged with a Montreal bookstore to handle the Medical Society's prints of Renaissance paintings from Florence and Venice.

For Frank Scott, the big excitements came in November 1925 when the *Literary Supplement* of the *McGill Daily* was suppressed for an article it had carried that proved offensive to the university authorities. Scott was invited by A.J.M. Smith, a science student, and Allan Latham, a young economist, both previous editors of the *Literary Supplement*, to join them in starting a new magazine. A young British history student, A.P.R. Coulborn, and Leon Edel, a third-year student in English, completed the

board. On November 21, the first issue of the McGill *Fortnightly Review* appeared.

It described itself as a journal of “independent opinion” and announced the entrance of “a new and more lively spirit of criticism.” Avant garde writers such as Yeats, Joyce, and T.S. Eliot received serious attention in review and editorial. Faculty members Eugene Forsey and Stephen Leacock contributed articles — Forsey writing “a whimsical summary of Mackenzie King’s dilemma” following the disastrous 1925 election, Leacock commenting on the role of the little magazine.

A contributor writing under the pseudonym “Nordic” asserted Canadian nationalism was a myth; Canadians had an inferiority complex, looking south rather than east and west. As it happened “Nordic” turned out to be F.R. Scott. Nor were the administration and education practices of McGill exempt from criticism. And that brought editors A.J.M. Smith and Frank Scott into the presence of the “Lord Rector”, Sir Arthur Currie.

Many years later on the eve of a symposium honoring A.J.M. Smith, Scott wrote to Leon Edel:

“I find it hard to exaggerate to myself the value of what I may call the whole *Fortnightly* experience. It helped me escape from the shell of my Victorianism, which Oxford may have cracked somewhat, but within which I was still neatly folded. This release was of course brought about not only by our own influences on each other, but by the whole range of modern literature to which I was for the first time introduced.”

The year following the winding-up of the *Fortnightly* in the spring of 1927 contained three events — perhaps four — which together changed the whole set of Frank Scott’s life. The first began two years earlier at a skating party and dance at a handsome home in upper Westmount. There he met Marian Dale, an aspiring young painter studying at l’Ecole des Beaux Arts. They danced and talked and found they had a good many things in common. Marian had been in Europe the previous year and they compared notes on familiar galleries and pictures they both liked. The conversation continued on the walk back to Marian’s home on Pine Avenue near Cote des Neiges.

This was but the first of many meetings and many talks. It was decided that Marian would go to the Slade School in London in 1926. That summer the Scotts holidayed at Coucouna on the north shore of the St. Lawrence not far from Montreal, where the Dales also had a home. By this time Frank and Marian had discovered a shared approach that went beyond art and literature. When Marian left for a year at the Slade an understanding had been reached. They were married in April 1928.



The second important event at this period in Frank Scott's life was his meeting with J.S. Woodsworth. Elected to Parliament in 1922 following his courageous defence of the workers during the Winnipeg General Strike, the former Methodist minister was recognized as the leading advocate of a just social order in Canada. Early in 1927, he wrote an article for the *Fortnightly* and some time later addressed the McGill Labour Club, a meeting which Scott attended. Shortly after, Scott invited Woodsworth to the Dale home on Pine Avenue and Marian was introduced. After an exciting evening's discussion they discovered that they shared much in common in terms of moral and aesthetic values.

Sandra Djwa devotes considerable time to the impact of Woodsworth on Scott's outlook. She writes: "J.S. Woodsworth had much to offer Frank Scott: a faith reshaped by the modern age; a modern view of war; and a blueprint for a new order of society. Significantly, this new order rested on the Christian social ideals Scott had absorbed from his father and from R.H. Tawney and the Fabians. And Woodsworth was a strong Canadian. He believed a Canadian socialism must be shaped by Canadian conditions and grow from Canadian soil."

The third event began badly. Scott had now completed at McGill the course in law that qualified him to take up his work as a barrister. On August 12, 1927, he was inducted into the law firm of Lafleur, MacDougall, MacFarlane and Barclay, in which his brother William served. It did not take him long to reach the conclusion that the legal profession was not for him. Sandra Djwa writes: "He was quickly disillusioned in his belief that the private practice could change society or lead towards any ideal system of justice."

The next five months offered little relief from his disillusionment. A dozen years of university to prepare for this! He had enjoyed his work at the university but it had not occurred to him that it might represent a career. And he must have expressed these sentiments somewhere in the law school and someone must have heard him — perhaps the Dean himself. When a letter from McGill arrived just a month before his marriage, Scott had a good idea what it was about before he opened it — an invitation to join the Faculty of Law as a professor. He was still not sure, but he wrote a letter of acceptance and held it before an open mail box. It slipped from his fingers. And the basic pattern of his future life was settled.

### *Enter, The League for Social Reconstruction*

I suppose that in any biography there are coincidences that have an exceptional impact on the course of a life. For example, the coincidental arrival of Percy Corbett and Frank Scott in McGill Faculty in Law in

1924, Corbett as Dean, Scott as student. Both graduates of Oxford. Corbett, older by several years with war experience, an All Souls' fellowship capping a brilliant grade in jurisprudence, and leading to an International Labour Office appointment in Geneva. Scott, covering some basic constitutional law in his Oxford history course — Stubbs, Bryce, Anson and Dicey on his reading list — and some critical analysis of British society. And then a special interest on the part of the dean, in this outspoken Oxonian student with a literary flair finding expression in an erudite student magazine to the exasperation of the authorities.

And this meant that when Scott saw no future for himself in the legal profession, Corbett welcomed him as associate professor of constitutional law, not as a rescue operation, but as an inspired opportunity of strengthening the Faculty. And later that year, 1923, we see Corbett welcoming Scott into the newly-founded Canadian Institute of International Affairs and giving him substantial support in a leadership role in an international approach to a new appreciation of an independent Canadian nationality.

The Depression raised issues closely linked with the need for a new concept of the Canadian nation, with power to meet desperate social and economic needs through parliamentary action, action which was frequently judged unconstitutional under the current interpretation of the BNA Act. The impact of the Depression on Scott's thinking was to reinforce his appreciation of contemporary society which had come to him through the Magdalen study group and R.H. Tawney and had been reinforced by his recent association with J.S. Woodsworth. An independent Canada had to be defined and built. And it had to be a just Canada. Many of his friends in Montreal were beginning to think and talk like this. And the *Canadian Forum*, with a Toronto history professor named Underhill increasingly vocal, was taking a strong line.

And it was at this point that Percy Corbett got news of a conference on World Economic Planning being held in Williamstown, New York. The date was August 1931. He was interested in attending and invited Frank Scott to come with him as his secretary. There would be a number of other Canadians there as well as distinguished Americans. And the issues concerning Canada's status and Canada's international relations would certainly be raised. Scott accepted the invitation with alacrity and accompanied Percy Corbett to Williamstown.

And this brings us to Underhill. Frank H. Underhill was professor of history in the University of Toronto. A graduate of that university, he had proceeded to Oxford on a scholarship and enrolled in Balliol. There he had carried on his studies in history under A.D. Lindsay, a distinguished scholar who later was to become Master of Balliol. In Underhill's day,

Lindsay had a rather special reputation as being President of the Oxford Fabian Society. And so it came to pass that Underhill had the privilege of coming under the influence of such distinguished thinkers as Macaulay and John Stuart Mill, resting quietly in the Bodleian, but also the lively presence of George Bernard Shaw, Sidney and Beatrice Webb, and G.D.H. Cole.

He had hoped to be offered a Toronto appointment on the completion of his work at Oxford in the spring of 1914 but instead had to settle for a post in history in the comparatively new University of Saskatchewan in Saskatoon. Here Walter Murray was providing effective academic leadership in creating a centre of learning relevant to the emergent needs of the new society in Western Canada.

War had just broken out when Underhill arrived on the Saskatchewan campus. The following year he enlisted. He returned in 1919 after a prolonged period of service on the western front. Underhill was determined that the history he taught would be based on the evolving political, social, and cultural life of Canada. And looking out his window onto a wheat field that came right up to the walls of the university, he decided that the view of Canada in Saskatoon was different from the view in Toronto.

For one thing it was livelier. In the three prairie provinces a strong cooperative movement gave the farmers some protection against the greedy denisons of the grain trade. In Edmonton, the United Farmers of Alberta furnished a progressive government. And in Winnipeg, the 1919 General Strike had taken its toll of human rights and ensured that Winnipeg North and North Centre would send representatives of the Winnipeg Independent Labour Party to Ottawa.

And then there was J.S. Woodsworth. Underhill had met him first in 1915 when Woodsworth was delivering a lecture for the Welfare League at the University. And during the extended period of Underhill's tenure from 1919 to 1927 the two men saw a great deal of one another and became close friends. Later Underhill was to say that two men had the most profound influence on his life: John Stuart Mill and J.S. Woodsworth.

When Frank Underhill joined the teaching staff of the University of Toronto in 1927, he was not quite the quiet, scholarly type they had expected. Soon he was writing a regular column for the dangerously outspoken magazine, *The Canadian Forum*, and joining the public protest against section 98 of the Criminal Code, inserted after the Winnipeg General Strike to save right-thinking Canadians from the evils of Communism. It was during a conversation sometime in 1929 that

Woodsworth dropped the suggestion that it might be a good idea to form a Canadian equivalent of the British Fabian Society.

And Underhill was brooding about this idea of a Canadian Fabian Society when he met Frank Scott and Percy Corbett at the conference on World Economic Planning in Williamstown.

The opportunity to talk came during a conference break when Underhill, Scott and Corbett were taking a walk in the Berkshire mountains. Underhill raised the question of a Fabian Society for Canada. It did not require much spelling out since all three were Oxonians with first-hand contact with British Fabians. Moreover, all three were concerned about the grim impact of the Depression on the lives of Canadians and the lack of evidence that the Government was taking action to meet the most serious of human needs — let alone formulating policies that would guarantee stability, security and social justice in post-depression Canada.

The Fabians were considering social and moral issues in the context of British society. Canadian society was different in many respects and Canadian Fabians would have to state their aims in terms relevant to Canadian needs and resources. Underhill proposed that he and Scott should bring together small groups in Toronto and Montreal that would give serious thought to those issues and, in consultation, work on a draft Manifesto for a Canadian Fabian Society. They would aim to come together during the Christmas vacation, put the finishing touches on the Manifesto, and talk about programme. So it began.

When I arrived in Montreal in September to teach Christian Ethics in the United Theological College, I was invited to join the working group. I had been doing graduate work in the Union Theological Seminary in New York.

The group met in Frank and Marian Scott's home on Oxenden Avenue and included Eugene Forsey, teacher of economics at McGill, Jacques Bieler, engineer and brother of André Bieler, a painter, Joe Mergler, a labor lawyer, David Lewis, third-year law student, about to be awarded a Rhodes Scholarship, and Frank Scott himself.

In Toronto a similar group was active. For the most part they came from the University of Toronto complex: Frank Underhill, history; H.M. Cassidy, social science; J.F. Parkinson and Irene Biss, economics; Eric Havelock, Victoria; George Grube, Trinity. Later they were joined by Graham Spry, now busy promoting the birth of the CBC in Ottawa.

At the start, each group produced a draft manifesto, Frank Scott being chosen to undertake the Montreal version. On November 11, 1931 Underhill wrote Frank Scott to say he would be in Montreal that weekend and went on:

“There is general agreement that your draft, as being shorter and more concise, was more satisfactory. We are now trying to make a draft based on yours which I shall have with me also. The general criticism of yours was that the paragraph detailing the evils of the present system has not enough direct reference to the Canadian conditions, and that the paragraph giving the proposed policy of the League should be a little more specific and concrete. About the name of the baby, all the parents have their own ideas.”

The two groups met in Toronto in January 1932 to reach final agreement on the text of the Manifesto and discuss the program for the new League for Social Reconstruction. The approved Manifesto began:

“The League for Social Reconstruction is an association of men and women who are working for the establishment in Canada of a social order in which the basic principle regulating production, distribution and service will be the common good rather than private profit.”

After a brief review of the injustice and inhumanity that marked the existing system, the Manifesto enumerated the first steps that should be taken towards the realization of the new order. As you read that Manifesto today, you think of the authors not as academic ideologues but as men and women who perceive with understanding the symptoms and causes of Canada’s social malaise and are prepared to formulate the minimal measures which a democratic government would take.

It is interesting to recall that establishment spokesmen of the time described the social measures called for as “radical”, even “communistic.” They included provision for minimum wages, the right of collective bargaining, insurance for workers against accident, illness and old age, unemployment insurance, and publicly organized and financed health, hospital, and medical services. There would have to be a measure of public ownership, particularly in the areas of utilities and monopoly concentration and also provision for government economic planning in the interest of justice as well as efficiency.

The League for Social Reconstruction was launched.

### *The CCF 1932, 1933*

It soon became evident that the League for Social Reconstruction was something more than a Canadian version of the British Fabian Society. A Toronto branch of the League was launched in February 1932 to be followed by a Montreal branch in March. In both cases, the LSR originals — Underhill, Havelock, Cassidy, Biss, Parkinson, Grube, Isabel Thomas in Toronto and Scott, Forsey, Bieler, Mergler, Gordon and Lewis in Montreal — took the initiative in branch organization and were

placed on the executives. The original membership of each branch was about seventy-five.

In the first instance, the educational role of the LSR was expressed through public meetings of the branches, frequently addressed by a speaker with something to say on the current economic and social situation. In 1932 the Montreal LSR welcomed Woodsworth from Ottawa, Reinhold Niebuhr from New York, and Sir Stafford Cripps from Britain's Labour Party. It was not long before the national LSR was producing its own pamphlets and talking about the production of a book.

It came as a discovery to many in the original LSR that so far from being pioneers in new and advanced social and economic thinking the LSR was articulating an approach that received strong support right across the country. Underhill had discovered that reality in Western Canada. And in the East as well it was evident in the active social criticism of the churches — particularly the United Church — based on the imperative of the Christian ethic, in the thinking and action of students, and in the trade unions. And farther east in Cape Breton, one heard of the Antigonish Movement, giving new hope to miners, fishermen and farmers, through adult education and co-operation under the extraordinary leadership of Father Moses Coady and Father Jimmy Thompkins.

It is not surprising that this widespread social unrest should find political expression. Sandra Djwa, after a brief reference to the birth of the LSR, describes a meeting in Ottawa of members of parliament in the "ginger group" led by J.S. Woodsworth, at which it was decided to take steps to establish a Canadian labour party. Woodsworth and Robert Gardiner, head of the United Farmers of Alberta, were named to take appropriate steps. At a meeting of representatives of farmer and labour organizations in the four western provinces in July 1932 it was decided to launch a movement to be known as the Cooperative Commonwealth Federation.

The appearance of the CCF had an immediate impact on the LSR. In fact, some commentators put it the other way and suggested that the appearance of the LSR was an important contributing factor in the decision to form a national social democratic party. Djwa quotes a letter of Frank Scott to Underhill dated September 7, 1932 saying that the CCF seemed like "the long looked-for article," that they had anticipated. He thought that the LSR should help the CCF but "I am doubtful whether any sort of official connection should be established. . . . At the present I rather favour keeping the LSR at its educational job alone."

Djwa goes on to cite another letter to Underhill in October in which Scott refers to a recent visit from Woodsworth who "practically invited

us to write out a proper program for the party, and this is the sort of work which we could certainly do without involving the League as a whole." A letter from Underhill to Scott in December suggests the proposal had not been carried out. After describing a packed meeting launching the Toronto CCF, Underhill reported that Woodsworth wanted a draft of a CCF manifesto by the end of the year. Then he went on: "I propose to try a draft of my own unless I hear that you have made progress with one of yours. I could submit it to you for revision and to our inner group here."

And so it came about that Underhill's draft of the CCF manifesto, duly vetted and polished by LSR pundits in Toronto and Montreal, arrived in Regina in time for the opening of the founding convention of the Cooperative Commonwealth Federation. Present at the convention, on invitation from the National Council of the CCF, were four representatives of the LSR: Frank Scott, Eugene Forsey, King Gordon and J.F. Parkinson. They were asked to take full part in examining, amending and ratifying what became the Manifesto of the CCF. Underhill's manifesto bore an interesting resemblance to the LSR manifesto which had originally been drafted by Frank Scott.

J.S. Woodsworth always referred to the Cooperative Commonwealth Federation as a movement, not a party. In a letter dated August 11th, 1937, immediately following a CCF convention in Winnipeg which I had attended, Frank Scott wrote me and talked about Woodsworth. He said: "Old J.S.'s power in Canada has come from his vision, and there is no political cunning or tactic which is a substitute. . . It seems to me that we have to express through the CCF the idea that our people came to North America to build a fair city, so to speak, and that we have obviously fallen down lamentably on the job. This sense of purpose I am sure is a more cohesive force than any detailed programme. It is latent in the Regina manifesto, but buried under blueprints."

It came as a discovery to many in the original League for Social Reconstruction that so far from being the pioneer in new and advanced social and economic thinking the LSR articulated an approach that was already receiving strong support right across the country. Underhill had discovered that reality in Western Canada. And in Eastern Canada, as well, it was evident in the active social criticism of the churches — particularly the United Church — based on the imperative of the Christian ethic, in the social radicalism of students, and, increasingly, in the trade unions. Farther east, in Cape Breton, one encountered the Antigonish Movement, giving new hope to miners, fishermen and farmers through adult education and cooperation under the dynamic leadership of Father Jimmy Tomkins and Father Moses Coady of Saint Francis Xavier University.

In parliament, some expression of this critical economic and social thinking was to be found in a group of representatives of independent labour, farmer, and farmer-labour organizations that had come together under the leadership of J.S. Woodsworth. As we have noted, Woodsworth had exerted a profound influence on the thinking of Underhill and Scott and had been chosen as Honorary Chairman of the LSR. On May 23 1932, a meeting of members of Woodsworth's "ginger group" met in William Irvine's office to consider bringing together their independent organizations into a single national federation. Woodsworth and Robert Gardiner were named as a committee of two to initiate the necessary action.

The Ottawa meeting had positive results. On August 1 in Calgary, representatives of a wide range of farmer and labour groups, mainly from Western Canada, came together in the Labour Temple to lay the basis of a political movement that would give united expression to commonly held social democratic goals. The conference was unanimous in acknowledging J.S. Woodsworth as national leader of the new organization to be known as the Cooperative Commonwealth Federation. An 8-point program stating program objectives was drafted. A founding convention was called for the following year in Regina.

The response to the proposals coming out of the Calgary conference far exceeded the hopes of its participants. Not only did all existing farmer and labour groups make plans to be represented at Regina, but thousands of Canadians, not members of such groups, demanded the establishment of CCF clubs to make it possible for them to attend. The significance of this response was not missed by members of the political establishment.

In his Biography of J.S. Woodsworth, Kenneth McNaught had this to say: "The 1932 Calgary Conference was held in the Labour Temple under the lowering regard of R.B. Bennett, who was ensconced in the C.P.R.'s Palliser Hotel on the opposite side of the tracks." It is not surprising to hear the Conservative prime minister addressing a meeting of the faithful in Toronto early in November to denounce socialism and communism and advise good Canadians to apply "the iron heel of ruthlessness" against propaganda of this kind. The Ottawa Journal commented on the speech under the headlines: "BENNETT URGES RUTHLESS WAR ON SOCIALISM; Premier says Communists Sowing Their Seeds Everywhere ... Being Led By Cooperative Commonwealth Movement."

Sandra Djwa reports that three days later Frank Scott speaking at the People's Forum in Ottawa commented: "If the Prime Minister does not know the difference between socialism and communism he might learn it from any university graduate ... Things are coming to a pretty pass



when the Prime Minister of this country incites the people to ruthlessness.”

A few days later The Ottawa Journal came out with a strong editorial attack on “McGill’s professor of constitutional law.” The prime minister had not confused socialism and communism: the “iron heel of ruthlessness” was to be directed at foreign agitators aiming to destroy Canadian institutions. Scott replied immediately, insisting he was right in charging that Bennet had lumped together socialism and communism.

“May I refer you to your own report of Mr. Bennett’s speech in your issue of November 10th? The headline is BENNETT URGES RUTHLESS WAR ON SOCIALISM and the subtitle is PREMIER SAYS COMMUNISTS SOWING THEIR SEEDS EVERYWHERE. Clearly your reporter was confused even if Mr. Bennett was not . . . All the other press reports I have seen treated Socialism and Communism together in the same way”

And then, as Sandra Djwa reports, the professor of constitutional law asserted himself. “In any case . . . there was nothing illegal about foreigners seeking to alter or even abolish Canadian institutions as long as legal means were employed.”

Scott welcomed the advent of the CCF. On September 7, 1932 he wrote to Underhill that the CCF seemed like “the long-looked for article” that they had anticipated. He thought the LSR should help the CCF, but “I am doubtful whether any sort of official connection should be established . . . At the present I rather favour keeping the LSR at its educational job alone.” In a further letter to Underhill in October Scott refers to a recent visit from Woodsworth who “practically invited us to write out a proper program for the party, and this is the sort of work which we could certainly do without involving the League as a whole.”

The impact of the new CCF movement was much more widely felt in Ontario than in Quebec and members of the Toronto LSR were deeply involved. A letter from Underhill to Scott in December described an overflow meeting in Hygeia Hall launching the Toronto CCF. Then he reported that Woodsworth wanted a draft of a CCF Manifesto by the end of the year and went on: “I propose to try a draft of my own unless I hear that you have made progress with one of yours. I could submit it to you for revision and to our inner group here.”

In her biography of her father, J.S. Woodsworth, Grace MacInnis describes the activity of leading members of the LSR in preparing the draft program which earned them the title “the CCF Brain Trust.” She then cites a statement of Frank Scott in 1951: “But it was that acute critic of Canadian politics, that most Shavian of the Canadians, F.H. Underhill, who alone in the recesses of his Muskoka retreat, produced the first

complete draft of the Manifesto in the early summer of 1933. This was revised by other members of the LSR and then gone over by the National Executive of the CCF, before being submitted to the Regina Convention.”

Frank Scott, along with three other members of the LSR executive — Forsey, Parkinson and Gordon — had been invited to attend the Regina Convention, with particular emphasis on the pre-convention meeting of the CCF National Executive which would review the draft manifesto. Underhill had kept very close to the LSR Manifesto model — which, it will be recalled, had been originally drafted by Scott — and the statement received general support. Not unexpectedly the policy on agriculture called for substantial revision. For the rest, the changes introduced were minor and when the convention came into full session on August 19 the Regina Manifesto received almost unanimous approval.

It was at this point that George Ferguson of the Winnipeg Free Press, looking over his shoulder at the Roosevelt advisory team, referred to the LSR as the “brain trust of the CCF.” However it was originally intended, the designation received increasing justification. At Regina, the LSR members were warmly welcomed and their contribution deeply appreciated. And in the subsequent months the constructive thinking of the LSR was being conditioned by its association with the political movement and the practical social and economic problems it faced. And nowhere was this more apparent than in the book its members were committed to produce.

Serious talk on producing a book, spelling out the program — social, political, economic — necessary to give effect to the goals of the LSR Manifesto. H.M. Cassidy was named as editor, Graham Spry as associate editor. The advent of the CCF was making its production urgent and it was hoped that it might be available at the time of the Regina Convention in August. But the making of such a book turned out to be a bigger chore than anticipated and on 27 April, two dozen people, mostly LSR members, gathered at the farm of Mrs. W.B. Somerset near Burlington, to discuss shape and contents. Three members of parliament — Woodsworth, E.J. Garland, who was to chair the Regina Convention, and G.G. Coote — were present.

The Burlington meeting was a great success. The book in progress was now seen by its authors as something more than a well-researched thesis in support of the Manifesto. A new political movement was in being which, if successful, would change the shape of the country and contribute to the well-being of the majority of its people. And it was this that provided the context within which the analysis and advocacy of Social Planning for Canada was being shaped. Woodsworth is quoted as

saying: "Garland and I felt greatly elated over the conference. It will mean everything to have this book as a guide to our actions."

Publication was planned for the end of the year. Unfortunately, the number and preoccupations of the contributors produced regrettable delays and the book did not see the light until two and a half years later in September 1935, much too late for the election that brought the Liberals back into power. In general, *Social Planning* was well-received. It was naturally subjected to attack from the radical fringe group led by Wally Lefeaux in Vancouver as being a gross violation of socialist orthodoxy. But the most serious onslaught came from the establishment on the right. A 40-page pamphlet credited to P.C. Armstrong, public relations officer for the C.P.R., damned the book as "a Marxist-inspired document in which misinformation and faulty logic were put to the service of a sermon preaching class hatred."

Underhill was furious. But Scott — partly, no doubt, to calm his friend and colleague — wrote simply: "I am delighted the incident has occurred. The vicious style of the document, its use of contempt for argument, its complete failure to answer the main thesis of our book, are the admissions of great weakness. On the whole, our prestige — and our sales — should go up considerably."

Support for Scott — and the book — came from a highly-respected source. Professor R.A. MacKay, Eric Dennis Professor of Political Science at Dalhousie University and later a distinguished Canadian diplomat, wrote: "If past experience in our politics is a guide to our future, we may expect many of the proposals of *Social Planning* for Canada to be quietly appropriated, item by item, by the traditional parties. The real function of the minority parties in Canada is to provide the older parties with platforms."

Frank Scott was appointed Professor of Constitutional Law in 1928. It happened to be the same year a new Canadian organization, The Canadian Institute of International Affairs, appeared. A branch was established in Montreal and Percy Corbett invited Scott to accompany him to the organization meeting in the home of the McGill Principal, Sir Arthur Currie.

The contribution of the Dominions to the war effort and the Allied victory obviously called for the recognition of new status and new relationships with Britain and with one another. To achieve this goal a series of Imperial Conferences were held beginning in 1923. The Balfour Declaration, named after the conference chairman, Lord Balfour, was issued in 1926 and affirmed that Britain and the five Dominions — the Irish Free State was now included — were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to

another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”

It is obvious that the hand of a gifted Briton drafted this Declaration. Who, but the graduate of one of the better Public Schools, well-versed in Latin, could reconcile “autonomous” with loyalty to the prior demands of Empire? And what if the Crown — acting on the advice of its British ministers — decided to declare war on a designated enemy, would all the Dominions, “freely associated as members of the British Commonwealth of Nations,” be committed to war, with or without the decision of their respective parliaments? It was to find a satisfactory answer to this and related questions that the Canadian Institute of International Affairs came into being. And it was the search for an answer to such questions that was to be one of Frank Scott’s chief preoccupations during the next decade.

#### *Chief Preoccupations during the Next Decade.*

The Williamstown Conference of 1931 produced Scott’s first assignment in his new field of concern. It will be recalled that this same conference produced the setting for the casual encounter between Frank Scott and Frank Underhill that led to the formation of the League for Social Reconstruction. Scott was there as secretary to the McGill Dean of Law, Percy Corbett. It was his responsibility to produce a paper on “The Determinants of Canadian Foreign Policy.” This he had done after consultation with Lester B. Pearson of the fledgeling Department of External Relations. Later, in slightly expanded form, it was to appear in Foreign Affairs as “The Permanent Bases of Canadian Foreign Policy.”

The summer of 1932 saw Scott in London, primarily to visit Chatham House, home base of the Royal Institute of International Affairs which claimed a paternal interest in the CIIA. At a meeting on the Balfour Report, attended by members of the Royal Institute, Scott found himself alone in stressing national autonomy rather than imperial solidarity as the dominant Canadian interpretation. Djwa reports that the meeting’s chairman, Sir John Power, administered a sharp rebuke and “hoped that the other colonials would not share Scott’s views.”

In September 1933, a conference sponsored by the Royal Institute was held in Toronto and brought together some 50 delegates from Commonwealth countries. Once more the subject was the new status of Commonwealth members and once more the split between the British and the Canadians, with the majority of Canadians taking the position that in crucial decisions on peace and war, “the policy of the Dominions, as of the United Kingdom, would ultimately be determined by the interests of each country.”

J.W. Dafoe, editor of the Winnipeg Free Press and a powerful voice not only in the CIIA, but in the higher ranks of Liberal government policy-makers, saw a distinctly Canadian view emerging at the conference. Canada was a North American nation, a country with a history of democratic institutions, which held a unique position in the British Commonwealth. Scott appeared to share Dafoe's point of view and it became more prominent in his writings. As the decade progressed, Canada's international status became more than an interesting question for political scientists and international lawyers. Fascism and Nazism were growing in power and members of the League of Nations were showing few signs of a willingness to honour commitments under the Covenant to combine their efforts to maintain international peace and security. The threat of war was increasing.

It was in 1937 that Escott Reid, secretary of the CIIA and future Canadian diplomat, wrote to Percy Corbett to report that a prominent member of the Institute had suggested that the most pressing piece of research needed now was a book on Canada's right to neutrality in a war in which Britain was engaged. Reid shared this opinion and what could be done? Would Corbett pass along this letter to Frank Scott? It so happened that the Royal Institute was planning a conference on Commonwealth affairs to be held in Australia in September 1938. Frank Scott was asked to write the Canadian position paper. It was published in book form under the title "Canada Today" in August 1938, just a month before the opening of the Sydney conference. In the book, Canada's right to neutrality is argued on the grounds of its isolation from European conflict issues, the rift in thinking between English-speaking and French-speaking communities in Canada on the question of involvement in a European war, the Canadian tradition of democratic institutions, and Canada's status as an autonomous member of the Commonwealth.

Since the Conference opened the very week of the acceptance of the Munich Agreement it is not surprising that little attention was paid to the rational proposals of "Canada Today". And despite the fact that day by day war seemed more inevitable, serious discussion on Canada's right to neutrality continued through 1939, right up to Germany's invasion of Poland. Scott himself wrote an article, "A Policy of Neutrality for Canada," that appeared in the January issue of *Foreign Affairs*. Djwa reports that Scott claimed that the feeling of dissociation from Great Britain was inspired not just by Canadian patriotism, but by the fact that at least half of the Canadian population had no racial links with Great Britain, which resulted in serious concern about the problem of national unity. Then she quotes directly:

“If an idea is to be found great enough to evoke a common loyalty amongst all races in Canada and to overcome those differences sufficiently to make stable political union possible, it can only be found in the idea of Canada, the nation. The building of an orderly and just society within this vast territory, the elimination of poverty through a wise utilization of natural resources, the development of arts and sciences, of political liberty and spiritual freedom — all of this while maintaining fine balance between the claims of racial and religious minorities — that is a task . . . that can hardly be achieved, however, except at the expense of the old imperialist foreign policy.”

His nationalism and strong opposition to what he regarded as an imperialist war brought him close to Woodsworth and they stood together during a critical meeting of the CCF National Council on September 6 1939. The majority felt that Canada must stand by Britain in a war that meant the defence of democracy. Scott contributed to the adoption of a compromise position that “Canada must be prepared to defend (its) own shores, but (that) assistance overseas should be limited to economic aid and must not include conscription of manpower or the sending of any expeditionary force.”

Woodsworth’s anti-war stance and particularly his unshakeable pacifism, proclaimed in Parliament, brought him great personal respect, but ended his leadership of the CCF.

J. King Gordon, O.C.

*Founding member of the C.C.F., editor, journalist, correspondent at the United Nations, international civil servant with the United Nations in Korea, Egypt, the Congo, and the Gaza Strip, professor at the United Theological College in Montreal, at the Universities of Alberta and Ottawa, advisor to the International Development Research Center in Ottawa, founding member of the Group of 78, Mr. Gordon died in Ottawa on Friday, February 24, 1989. The review that appears above, on which he was working intensively at the time of his death, is the last piece that King Gordon wrote. The Editors of the Dalhousie Journal are honoured to publish this precious fragment by one of the greatest Canadians of our time.*

Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Wall and Thompson, 1989), 368 pages.

Prospective readers would be forgiven were they to react in a dismissive manner to yet another book about the Charter. For any contribution in this now over-cultivated field, the question must immediately be asked: "Has the author brought a new vision, a fresh insight to his or her inquiries?" The answer in the case of *The Charter of Rights and the Legalization of Politics in Canada* is an unhesitant "Yes".

Professor Michael Mandel has written a book which is uncompromising in its critical spirit and unrelenting in its attack on the "ordinary religion"<sup>1</sup> presently promulgated in many law school classrooms, the scholarly journals, the courts and the popular press. This will no doubt make many people uncomfortable as they reflect upon their complacent liberal reassurances over the Charter. For others, it will simply enrage; it offends the conventional discourse to hear such disparaging comments on the fully-clothed (perhaps overdressed) Charter icon. None the less, for anyone who is seriously interested in the impact of the Charter on the quality of juridical and political life in Canada (and who can afford to be excluded?), this volume belongs on the "Required Reading" list.

In his preface, the author reveals his instinctive reaction to the legalization of politics, to politics taking on the distinctively legal form which it has shown since 1982. He derides legal politics "for its fundamental *dishonesty*", indeed for its doubly dishonest character:

"It goes one better the ordinary expected dishonesty of conventional politics in the central pretense that it is *not politics at all*, in other words that power has nothing to do with it . . . [It] disguises itself as *interpretation* and then takes us through a maze so complicated that we lose track of what it was we were actually talking about in the first place." (p. ix)

The great strength of Professor Mandel's book is that he does not become lost in the conceptual labyrinth that the courts have been so busily erecting at the instigation of agile lawyers. In his overall approach and in his discussion of the illustrations he has carefully chosen (as he specifically states at p. ix, that comprehensiveness is "an impossible quest"), he maintains a crystal vision: to "cut down to size" the courts (p. x), to expose the undemocratic nature of the Charter and to show legalized politics as "the quintessential conservative politics" (p. 4). This is no doubt an ambitious agenda, but the author makes an estimable effort at bringing it to fruition.

---

1. Roger Cranton, in "Beyond the Ordinary Religion" (1987), 37 *J. of Legal Education*, 509. discusses "the unarticulated (and usually unexamined) value system of legal education" (at p. 509). It is surely part of the Canadian ordinary religion to extol the virtues of the Charter of Rights and Freedoms.

The book commences with a “Brief History of the Charter”, taking one quickly through a Canadian vision of parliamentary sovereignty (it “did not mean the judiciary was apolitical” (p. 5)), the Canadian Bill of Rights, the pivotal influence of Quebec politics on the “Entrenchment Project” (p. 21), and the later epochal significance of the decision on the convention question in *Re Constitution of Canada* ((1981), 125 D.L.R. (3d) 1), which “should be regarded as the inauguration of a new era in which the judiciary is to play a central role in the political life of this country” (p. 32). Professor Mandel draws many lessons from this survey (at pp. 32-33). The Charter has always been seen as an expedient by its proponents, to fight Quebec independence, or the Cold War or the disruptions allegedly caused by immigration. The Charter is part of an ongoing historical process in which judicial forms of political power assume a pivotal role and the legal profession relishes its political centrality. This “growth in judicial forms of power has been at the expense of and in direct opposition to other more popular forms of power” (p. 33).

In Chapter II, “The Charter and Democracy” the author develops the theme of the opposition between popular politics and judicial review, by noting the controversial nature of constitutional rights and “the great differences in “interpretation” that can result from differing ideological points of view among judges” (p. 38). Charter rights are seen as departures “from the democratic rule of law in every important respect”, making it clear that “we are closer to the rule of *lawyers* than the rule of law” (p. 39). Professor Mandel decries “the vaunted impartiality of the courts” (p. 47) and their supposed ability to make “the *right* decisions, precisely because they are not subject to popular pressure” (p. 48). He maintains that the courts are merely purveying “a distinctive way of making things acceptable, a distinctive *form of legitimation*” (p. 52), which necessarily involves “ignoring the ugly facts of concrete power” (p. 58). He concludes that legalized politics can be seen “as a defence mechanism to preserve the status quo of social power from the threats posed to it” by the phenomena of: the expansion of the suffrage, the deep involvement of the state in the economy and the increasing tendency to malfunction of Western industrial economies (p. 71).

Successive chapters build on this critical base by scrutinizing more closely the issues of language, legal rights, labour-business relations and the equality provisions of the Charter. Each section merits consideration. However, in the interests of brevity, due to this author’s teaching concentration and in recognition of some special conundrums created by the courts, only Chapter 4, “Principles of Fundamental Justice: The Charter’s Formal Values” will be examined separately in this review.



Sections 7 through 14 of the Charter seem to have generated most of the cases in the law reports, which Professor Mandel sees as a function of the large number of prosecutions and the fact that the Charter is another refuge for otherwise hopeless cases. Rulings in criminal procedure, at first glance, present a threat to his thesis that the legalization of politics is conservative, strengthening the status quo of unequal social power. However, he responds by observing that crime which receives police attention is intra-class, that is the victims “come overwhelmingly from the same powerless social classes as their victimizers” (p. 134), so even if there is some hampering of the law enforcement under the Charter (which he doubts), it is mainly the poor who suffer. Next, he recalls that in the United States, the supposed cataclysmic effects of the exclusionary rules have been exaggerated, by reason of non-compliance by police, changes in investigative techniques and the basic social facts of criminal law — its systemic bias against the lower class offender. In Canada, the author predicts a similar course for Section 24(2) decisions, complicated by the specific dedication of the Charter to protect the system from disrepute, as opposed to protecting people from the system. He also posits a selective intervention by the courts, so that no actual long-term obstacles to law enforcement would be presented. In the same vein, the impact of *Oakes* (which struck down a provision of the Narcotic Control Act which reversed the burden of proof, (1986), 26 D.L.R. (4th) 20 (S.C.C.)), is seen as likely to result in more rather than less punishment for drug use. Finally, the right to counsel decisions are explained as providing an additional disguise for the actual inequality inherent in the system of class power.

Professor Mandel’s outlook on the cases which have gone beyond the procedural realm to address questions of substance is just as bleak. For example, *Re Motor Vehicle Act (B.C.), 1985* (which ruled unconstitutional a provincial law that imposed a mandatory jail term on anyone found driving while his or her licence was suspended, (1985), 24 D.L.R. (4th) 536 (S.C.C.)), is presented as merely dealing with the form of the legislation having to be recognizably legal. The Supreme Court, as in *Oakes*, is said to have asserted its own particular logic over that of the legislature, “by dressing it up in constitutional clothing” (p. 152), without inhibiting the exercise of power by police and prosecutors, even if the decision may reduce the potential for abuse. Likewise, the *Smith* case, (which ended the minimum punishment of seven years for importation of narcotics, (1987), 34 C.C.C. (3d) 97 (S.C.C.)), is analysed as simply shifting discretionary power to the courts, while preserving the right to levy harsh sentences against offenders.

In these (and other) precedents which Professor Mandel assails there is no shift in the balance of power — rather there is a subordination of the bureaucratic apparatus to the values of the legal profession, not a purely liberal or humanitarian limitation on official power (pp. 157-158). The author contends that the constitutionalization of criminal procedure has gone hand in hand with greatly expanded repression, indeed that it has legitimated this pernicious trend, that “It is in fact its form.” (p. 165).

The formal values of the Charter as enshrined in section 7-14, do have a winner in Professor Mandel’s eyes: the legal profession. “What has happened in criminal procedure is that the prestige and indeed power of judges and lawyers has been enormously enhanced vis-a-vis all other criminal justice agents.” (p. 167). The judicial answer to “what is fundamental?” was “judicial authority authorized by judge-made law” (p. 170), which would result in the application of rules equally to the puny street criminal and the mighty billion dollar corporation (e.g., *Hunter v. Southam*, (1984), 11 D.L.R. (4th) 112). Professor Mandel urges that this form of equality, giving business the full protection of the Charter, accords powerful interests further advantages and makes the pursuit of business criminals more difficult. He presents the same trenchant criticisms of the *Singh* case (which insisted upon a full oral hearing for refugee claimants, (1985), 17 D.L.R. (4th) 422) as being the farthest thing from humanitarianism. In the detachment of *Singh* from its context it looks fine, but the “right to a hearing turned out to be no more than a consolation prize for our stinginess” (p. 182). So much for the ersatz progressiveness of the decisions on the legal rights provisions of the Charter, at least in the author’s eyes.

The difficulty raised by his savaging these cases is the same problem which many readers will have with the *Legalization of Politics* as a whole. The author anticipates this disorientation in his closing chapter, but he never really comes to grips with the dilemmas which his insights expose. In fact he admits the inadequacy of his responses to the inevitable question of “What can we possibly do about the Charter?” “Generally I am unable to come up with a satisfactory answer . . .” (p. 308).

Such an honest response should not result in outright condemnation of this lively work. Rather, it should exhort the author to extend his study and the reader to reconsider his or her analysis and praxis. In his final paragraph Professor Mandel maintains that, “conditions have to be right”, for the project of the challenge of the authority of the courts and authoritarianism in general. He would “bring democratic politics into the courtroom. To undermine legal politics at its source”. “We have to deepen and strengthen the democracy of our politics so that we have something to bring into court, something to compete with legalized politics, to make it seem absurd and irrelevant. . .” (p. 311). The search

for this “something” may well elude the author and the country as a whole. Further, one may have doubts about the courts as the appropriate forum for this struggle.

To hearken to the pre-Charter era and become nostalgic for the democracy which has now been lost would surely be quixotic, as Professor Mandel notes early in his book: “Canadian representative democracy did not command great respect in the days before the Charter” (p. 2). However, where does one look for democratic inspiration, for a political culture which is not banal, deferential and obfuscating? It may well be that one can find a vital democracy only in history, and then only for moments, on specific issues and in other places. Perhaps turning his historical sense and analytical powers to writing about these flourishings of democracy may assist in filling the lacunae left by this generally thoughtful work.

Liberal ideals have been criticized before, in Canada<sup>2</sup> and elsewhere<sup>3</sup> and of course the legal and political system maintains its momentum. For the most part, it is only those in academe who become exercised, although this is clearly not the primary intended audience for Professor Mandel’s work. Similarly, the Charter and its political excrescences will withstand the force of his arguments, but the serious student of Canadian law and politics must be given pause by the *Legalization of Politics*. One’s faith in the ability of the powerless to genuinely benefit from Charter-based litigation is likely to falter after reading this book, yet should one abandon hope of hijacking the Charter for progressive purposes? What might be lost if resort is not had to the Charter? Or should one move to the as yet unspecified more democratic territory to which the author would have us migrate? Michael Mandel may yet provide some answers to these troubling questions as may his readership, invigorated by this book. At the very least, despite the frustrations caused by his perspectives or by the current Canadian legal and political landscape or both, he has done a favour for those who want to rise above the analytical commonplace. The reader will surely savour the ideologically oxygenated air which the *Legalization of Politics in Canada* exudes.

H. Archibald Kaiser  
Dalhousie Law School

---

2. For example, see Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Carswell, 1988), esp. Chapter 7, “Charter Cuttings”, or Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Carswell, 1987), esp., Hutchinson and Monahan, “Democracy and the Rule of Law”, p. 97-123.

3. See Bob Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques*, (Pluto, 1984), for a strong Marxist critique of classical western jurisprudence.

B.G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1989).

John P. Humphrey, the first Director of the Human Rights Division of the United Nations, in his preface to *The Concept and Present Status of the International Protection of Human Rights — Forty Years after the Universal Declaration*, observes that the question of the international protection of human rights “has received far too little attention from scholars, statesmen, diplomats and human rights activists”.<sup>1</sup> There “has so far been no attempt . . . to provide a comprehensive account” of the concept of “protection” within the international law of human rights.<sup>2</sup> In his new book,<sup>3</sup> Dr. B.G. Ramcharan, the distinguished lawyer-adviser in the office of the Secretary General of the United Nations in New York, confronts this very issue.<sup>4</sup>

Dr. Ramcharan offers several reasons for considering the question of the protection of human rights. While national legal systems protect the individual rights of citizens, to varying degrees, many governments are confronted with situations of unrest or crisis, whether economic, social or political in origin, which are used to justify the derogation of rights.<sup>5</sup> When the legal framework of government breaks down, violations of human rights are likely to occur and there may be no remedy available at the national level for such violations. Even if remedies are available, these may vary greatly between national and international levels. To Dr. Ramcharan, the continuing human capacity to inflict injury on other human beings and to select particular groups of individuals to bear the

---

1. *The Concept and Present Status of the International Protection of Human Rights — Forty Years after the Universal Declaration* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1989), at x.

2. *Supra* note 1, at 15.

3. In lieu of a dedication, quotations from resolutions of the General Assembly, and the Commission on Human Rights, and statements by Secretary General U. Thant and Theo C. van Boven, a former Director of the Human Rights Division of the U.N. placed at the beginning of Ramcharan's book, seek to underscore the necessity of his “Quest for Timely and Effective Human Rights Protection”.

4. Earlier publications include B.G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1982); B.G. Ramcharan, *Humanitarian Good Offices in International Law* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1983); B.G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985).

5. See *The Second Annual Report and List of States which, since 1 January, 1985, have proclaimed, extended or terminated a state of emergency* of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1988 and Add. 1-2.

brunt of such action demonstrates all too clearly the need for international mechanisms to protect individual rights.<sup>6</sup>

In Chapter One, Dr. Ramcharan traces the historical and philosophical underpinnings of the idea that all individuals within a state's jurisdiction enjoy certain human rights which must be protected from abuses of power by the state. He sees the concept of "protection" as deriving from basic notions of law and justice, and as being embodied in early international legal institutions, treaties, and principles of international law. His examples include the institution of diplomatic protection, the doctrine of humanitarian intervention, the protection of religious equality in the Treaty of Westphalia of 1648, the principle of equality between nationals and aliens, the obligations on racial, linguistic, and religious minorities in the peace treaties of World War I, and the language of Charter of the United Nations and the practice that has developed thereunder.<sup>7</sup>

Generally speaking, "protection" with respect to human rights may include physical protection, legal protection, or more intangible forms of protection, such as the use of publicity or the interventions of governmental and non-governmental organizations which rely on the effect of political pressure on governments to create change.<sup>8</sup> Noting that the existing definitions of "protection" vary, Dr. Ramcharan adopts the distinction between direct and indirect protection of human rights. Direct protection means "the intercession of an international entity either at the behest of a victim or victims concerned, or by persons on their behalf, or on the volition of the international protecting agency itself to halt a violation of human rights". Indirect protection is defined by reference to the nature of the activities it encompasses, namely, "the creation of an international environment which is conducive to the realization of human rights; the elaboration of norms and standards; education, teaching, training, research and the dissemination of information, and the provision of advisory services in the field of human rights".<sup>9</sup> Though direct and indirect protection can be distinguished, for maximum effect they may and frequently should be employed together.<sup>10</sup>

---

6. *Supra* note 1, at 11.

7. *Supra* note 1, at 9-17.

8. Report submitted to the Security Council by the Secretary-General in Accordance with Resolution 605 (1987), U.N. Doc. S/19443, 21 January 1988, p. 10, para. 28, cited in *Supra* note 1, at ix.

9. *Supra* note 1, at 18; Though mentioned only "in passing", Ramcharan notes that the protection of economic, social and cultural rights is presently "confined mainly to . . . indirect protection", while the civil and political rights are protected both directly and indirectly. *Ibid.*

10. *Ibid.*, at 38.

Protection may be further classified as either preventive, mitigatory, or compensatory (at 17-18). Preventive international protection consists of measures, such as the sending of telegrams or other forms of appeals on behalf of victims of violations of human rights, by various international organizations, such as the Security Council, the Commission on Human Rights and, on occasion, the Secretary General himself. In the author's view, additional measures of preventive protection need to be created. One possibility, in this connection, is to highlight the competence of the Secretary General to approach governments directly on human rights questions, in the manner of the practice of the Director General of the International Labour Organization. According to Dr. Ramcharan, this type of protection "represents one of the major gaps in the arrangements for the international protection of human rights".<sup>11</sup>

The various complaints procedures within the United Nations, the ILO, UNESCO, the European Convention on Human Rights, and the American Convention on Human Rights, among others, are classified as curative or mitigatory types of protection. The petition systems, the judicial remedies under the European and American conventions, and the mechanisms of compensation or "reconstruction assistance" to countries or individuals that have suffered the effects of extensive violations of human rights fall within the category of remedial or compensatory protection.<sup>12</sup> A useful table outlines the methods of protection employed by a number of international bodies. Having presented his framework for discussion, Dr. Ramcharan devotes the remainder of this chapter to an examination of the measures of direct protection of eleven different international organizations, among them the United Nations, the ILO, and the Commission on Human Rights.<sup>13</sup>

International protection must not only be available but must also be effective. Importantly, Dr. Ramcharan emphasizes that "current measures of international protection . . . are still at a relatively primitive stage and . . . can hardly be said to satisfy . . . the test of effectiveness".<sup>14</sup> Noting that traditional methods of diplomacy still have a role to play, he nevertheless challenges participants in the search for effective human rights protection to develop new approaches. These will include the adoption of traditional diplomatic approaches and methods to make them responsive to humanitarian problems, the development of "forms of urgent action", of "ways and means of bringing an international presence

---

11. *Ibid.*, at 19.

12. *Ibid.*, at 19-20.

13. See *Supra* note 1, at 20-36.

14. *Ibid.*, at 37.

to bear upon a situation as soon as possible”, of “appealing to international opinion”, and of “utilizing non-governmental actors, particularly non-governmental organizations as much as possible”.<sup>15</sup> In this way, violations of human rights can be anticipated, prevented, verified, investigated and, perhaps, remedied as soon as possible.<sup>16</sup>

After reviewing the work of the General Assembly and the Commission on Human Rights, among others, Dr. Ramcharan underlines the fact that “international practice” has confirmed the notion that the International Bill of Human Rights (the Universal Declaration of Rights and the two International Covenants) contains “unequivocal world standards of human rights”, which give it a distinctive legal status in contemporary law.<sup>17</sup> The role of the Universal Declaration of Human Rights in the interpretation of the UN Charter has now been widely accepted and its provisions recognized as general principles of international law.<sup>18</sup> Dr. Ramcharan believes that “some parts” of the Universal Declaration (thus presumably not the whole), as well as certain provisions of the International Covenants, “represent international customary law and, to that extent, are binding on States”.<sup>19</sup> Interestingly, Dr. Ramcharan hints that “some provisions might even constitute norms of *jus cogens*”,<sup>20</sup> but he does not delve further into this issue to determine which of the many provisions might be norms of *jus cogens*.

Dr. Ramcharan maintains that the norms contained within the international instruments referred to above are not merely binding as treaty obligations or as part of customary international law, but are also universal standards of conduct. However, as such, their application “. . . leads to the expression of views which do not necessarily give rise to questions of [state] responsibility”.<sup>21</sup> Later, in chapter 5, the author explores in more detail the nature of treaty obligations, relevant issues of state responsibility, and these universal standards of conduct, topics which he has explored elsewhere.

It is now generally agreed that if the United Nations is to move forward into its second phase of development, the organization must, in addition to its normative functions, seriously address questions of enforcement and implementation.<sup>22</sup> To do so, the present status of

---

15. *Ibid.*, at 38.

16. *Ibid.*, at 37.

17. *Ibid.*, at 40.

18. *Ibid.*, at 58-59.

19. *Ibid.*, at 59.

20. *Ibid.*, at 59.

21. *Ibid.*, at 58-61.

22. *Ibid.*, at x-xi.

measures of implementation must first be examined. In this connection, Chapter Three of Dr. Ramcharan's book will be invaluable to the practitioner and to the individual or the group acting on behalf of a victim of an alleged violation of human rights.

Chapter Three examines various "strategies of protection" within the UN system. In addition to the legal texts themselves, extensive practice notes discuss the specific procedures of particular UN organs as well as the "good offices" of the Secretary-General.<sup>23</sup> Documents originating from or brought before these international legal bodies are reproduced. For example, with respect to the Commission on Human Rights, Dr. Ramcharan examines its competence, the practice of the Commission, the nature of information that can be brought before it, and the types of action that can be taken by the Commission, such as the sending of telegrams to countries where violations of human rights have taken place. A number of these telegrams are reproduced. Similarly, sample oral interventions, as well as guidelines for oral and written statements of NGOs before the General Assembly or other U.N. bodies, are included. From the extensive files of the United Nations, the author provides a wealth of extremely useful information for those seeking to take action with respect to a specific violation of human rights or a consistent pattern of gross violations.

The great utility of this book as a resource tool is further evidenced by the material in its Appendixes. Many of the international instruments in the field of the protection of human rights to which one may wish to refer have been included. In addition, a paper entitled "New Avenues for the Promotion and Protection of Human Rights: Advisory Services and Technical Assistance", recent statements of the Secretary General and other members of the United Nations Secretariat, and evaluations of the human rights program since 1975, have been reproduced.

As already mentioned, Dr. Ramcharan reviews the Secretary-General's exercise of "good offices" in the case of specific violations of human rights in Chapter Three. In his opinion, the current Secretary General, Perez de Cuellar, has used the office of the Secretary-General to "reinforce the role of his office as one of the principal institutions" in the settlement of international disputes.<sup>24</sup> Other approaches to dispute settlement and conflict resolution employed by Secretary General Perez

---

23. Note that Chapter Four, at 243-267, also considers the different UN organs which provide or may provide protection for human rights among them, the Security Council, the Economic and Social Council, the Commission on Human Rights and the Sub-Committee on the Prevention of Discrimination and the Protection of Minorities. For the benefit of the reader, it may have been more useful to include this material in Chapter Three.

24. *Ibid.*, at 331.



de Cuellar are examined in greater detail in Chapter Six. These include improved systems for the collection of information, the use of inquiries, verification and follow-up commissions,<sup>25</sup> rulings by the Secretary General on specific issues, and joint missions with regional organizations.

However, despite the various methods of protection for human rights currently available, the Secretary General in his report to the forty-first session of the General Assembly, detailed on-going problems, such as torture, slavery, and genocide, which face the United Nations in the field of human rights.<sup>26</sup>

Unfortunately, the international protection of human rights continues to be hampered by "the discernable lack of commitment on the part of many governments" for the protection of human rights at the national level. When this is combined with the lack of resources, the predominance of governmental, as opposed to non-governmental, representatives to United Nations bodies, and the ideological differences between states, the human rights program suffers.<sup>27</sup>

Dr. Ramcharan acknowledges that the development of international protection rubs against contemporary notions concerning the inter-state system and the traditional rules of diplomatic behaviour. Nevertheless, he recognizes that there is a very real need to develop modalities of action which can overcome the constraints of inter-governmental structures.<sup>28</sup> Dr. Ramcharan's new book is an invaluable source for international lawyers and others involved in the field of human rights, to aid them in the creation of an effective system for the international protection of human rights.

Annemieke Holthuis  
Research Associate  
Dalhousie Law School

---

25. In Chapter Seven Dr. Ramcharan examines whether the methods of verification developed with respect to disarmament and arms control agreements can be used a model for similar methods of verification in the field of human rights.

26. *Ibid.*, at 235-243.

27. *Ibid.*, at 268-273.

28. *Ibid.*, at 357.

# **DALHOUSIE LAW JOURNAL**



**Volume 12 Number 3, January 1990**



---

---

# COMMISSIONS OF INQUIRY

---

*Edited by*

*A. Paul Pross*

DIRECTOR

SCHOOL OF PUBLIC ADMINISTRATION  
DALHOUSIE UNIVERSITY

*Innis Christie*

DEAN

FACULTY OF LAW  
DALHOUSIE UNIVERSITY

*John A. Yogis*

PROFESSOR OF LAW

EDITOR

DALHOUSIE LAW JOURNAL

1990

CARSWELL

Toronto • Calgary • Vancouver

## Canadian Cataloguing in Publication Data

Main entry under title:

Commissions of inquiry

Includes bibliographical references.

ISBN 0-459-33887-0 (bound) ISBN 0-459-33897-8 (pbk.)

1. Governmental investigations — Canada. 2. Lawyers — Canada. I. Christie, Innis, 1937- .
- II. Pross, A. Paul, 1939- .

KE4765.C65 1989            342.71'066            C90-093029-2

All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in any retrieval system of any nature, without the prior written permission of the copyright holder and the publisher, application for which shall be made to the publisher, The Carswell Co. Ltd., 2330 Midland Avenue, Agincourt, Ontario, Canada, M1S 1P7.

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences — Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

# The Dalhousie Law Journal

## Editorial Committee

### *Faculty*

John A. Yogis, Q.C.

Chairman and Editor

Alastair Bissett-Johnson

Associate Editor and Articles Editor

Hugh Kindred

Comments Editor

Jennifer Bankier

Book Review Editor

R.St.J. Macdonald, O.C., Q.C.

C.L. Wiktor

### *Students*

R. Steven Baldwin

Editorial Assistant

Susan MacKay

Jim Hornby

---

The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

The Journal gratefully acknowledges the assistance of the Social Sciences and Humanities Research Council of Canada.

The Dalhousie Law Journal is financed in part from a fund established by McInnes, Cooper & Robertson, Barristers & Solicitors of Halifax, to honour Donald McInnes after 60 years of service as a legal practitioner in Nova Scotia. Among honours and activities too numerous to list here, Mr. McInnes was president of the Canadian Bar Association in 1960-61 and for 22 years was Chairman of the Board of Governors of Dalhousie.

All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is \$24.00. "Indexed": Index to Canadian Legal Periodical Literature.

