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## BOOK REVIEWS

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### CHRONIQUE BIBLIOGRAPHIQUE

Sandra Djwa. *The Politics of the Imagination: A Life of F.R. Scott*. Toronto: McClelland & Stewart, 1987. Pp. 528 [\$39.95]. Reviewed by Kenneth McNaught.\*

“Two poets”, wrote Frank Scott to a publisher who was interested in a biography in 1977, “have already been asked to take on the assignment; one refused, the other lasted a year and then withdrew. Both could face the poetry side, but were fearful of my law and politics. I don’t blame them.”<sup>1</sup> In the upshot Scott approved a literary historian for the job. Sandra Djwa understood perfectly the implications of Scott’s remark. She knew that probably no one in twentieth-century Canada had come as close as did Scott to being *uomo universale*: a Renaissance man who had in him not only the humanist artist but also the unmistakable aura of Savonarola and, at the end a strong whiff of the Prince.

Djwa has adopted, to some extent, Scott’s own formula for synthesis: a constant endeavour to reconcile his insatiable thirst for creativity and to understand why he must always “ride off in all directions.” He himself once expressed the resolution of his many interests thus: “Politics is the art of making artists. It is the art of developing in society the laws and institutions which will best bring out the creative spirit which lives in greater or less degree in everyone of us. The right politics sets as its aim the maximum development of every individual. Free the artist in us and the beauty of society will look after itself.”<sup>2</sup> What a splendid emphasis from the man who helped write the Regina Manifesto<sup>3</sup> and *Social Planning for Canada*.<sup>4</sup> In the end one wonders, why attempt to unify the astonishing Scott varieties? — except that he himself tried constantly to do just that; and in one moment of self-doubt mused, “I’ve spread myself too thin.”<sup>5</sup> But that brief quaver was more about missing goals than about inner unity.

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<sup>1</sup>S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McLelland & Stewart, 1987) at 440.

<sup>2</sup>*Ibid.* at 269.

<sup>3</sup>Reprinted in K. McNaught, *A Prophet in Politics: A Biography of J.S. Woodsworth* (Toronto: University of Toronto Press, 1959) at 321-30.

<sup>4</sup>(1935) (Toronto: reprinted by University of Toronto Press, 1975).

<sup>5</sup>Djwa, *supra*, note 1 at 286.

Sandra Djwa went about her ten-year project with the enthusiasm of a skilled researcher. To the dozens of interviews with the Scotts and people who knew them, she added a formidable mass of material from archival collections and some diligent forays into Canadian history, law and politics. The result is a long book which could — and perhaps should — have been longer. That Djwa has balanced her treatment of Scott meticulously means that each of her readers will wish that more had been written about particular aspects. Yet, while there remains room for more specialised studies, Scott does emerge from this first biography a towering figure — one who knew what it means to be Canadian.

Perforce, a biographer proceeds from back to front. In the case of Scott, his biographer must have been first attracted by what was very much up front: the poet whose writing (and omniverous reading) helped introduce Canadians to modernist poetry, whose restless imagination appropriated the North for our collective understanding and who enshrined satire as a prime Canadian art form while never underrating therapeutic doggerel; the political thinker-doer who saw beyond the mere existence of Canada to what it could and should be and who did more than anyone else to pillory pomposity, smug self-interest and indifference and to domesticate democratic socialism; the reluctant lawyer who sloughed off trade-school wrappings, taught his students to see the law as a supremely creative tool, and left them tingling with such potent notions as “social engineering” and the “just society”; the improbable courtroom advocate winning blockbuster victories for civil liberty — at least in part to prove the validity of his own telling constitutional analyses. And all this encompassed in that elegant pinetree of a man whose life articulated our solitudes, both collective and individual, and whose work was an unremitting exercise in building bridges.

To explain the Scott phenomenon Sandra Djwa dug deep into the family record and that of Scott's formative years. Born into privileged Anglicanism in the rectory of Quebec City's St. Matthew's Church, Scott grew up in an ambience exuding Rudyard Kipling, G.A. Henty and the idea of service. But if empire and duty loomed large in the family dominated by a very Victorian father, that same father, Canon F.G. Scott, tempered austerity with a vibrant love of letters and of what can only be called the “common people”. As a chaplain in the first world war (when he was in his mid-fifties) Canon Scott was seldom far from the front with “his boys”. In 1919, the year that his son graduated from Bishop's College, the Canon went to Winnipeg during the general strike to lend his support to veterans' groups. There he announced that he would “dedicate the rest of his life to fighting labour's battles.”<sup>6</sup>

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<sup>6</sup>*Ibid.* at 206.

Djwa observes that Canon Scott's "socialism, a social manifestation of his religious faith, was always tied to "his boys" — (the returned soldiers) and that Frank's socialism was "undeniably different".<sup>7</sup> I think she minimizes here two important continuities. While Frank would abandon formal religion and garnish his poetry with images from science and philosophy, he found more than spiritual beauty in northern rocks and rivers and the waters of the Eastern Townships. There was no *non sequitur* when, towards the end of his life he sat beside Lake Massawippi humming "Praise God from whom all blessings flow ...."<sup>8</sup> There was, of course, a difference from his father (about whom he certainly had mixed feelings) in that the elder Scott remained a military person, very much *grata* in Mount Royal establishment circles while the son became acerbically anti-militarist, anti-imperialist and duly reviled in those same circles. But there was in common a deep conviction of *noblesse oblige*. In religious terms this translates into "stewardship"; in both contexts it meant a duty to place one's privilege and competence at the service of society — especially of the underprivileged. In the language of the 1960s both Scotts were "elitist" and it is this unbroken thread which seems to puzzle Djwa who stresses the differences rather than the similarities. It is the similarities which make sense of Scott's life; similarities which are made dissimilar by the son's more intense awareness of beauty and design. But even in his most rational poetry Frank sought the force that lay behind the beauty, the regularities, the evolution.

The "flaming radical" who consorted with Norman Bethune and the avant garde groups around the *McGill Fortnightly Review*, *Preview*, *Canadian Forum* and the CCF, castigated the philistines who ran universities, governments and business, not because those people were conservative but because they were ignorant of the civilized legacy they should have defended and enhanced. They were indifferent to the suffering they caused, unappreciative of the precarious heritage of liberties and justice they should have felt obliged to sustain. In short, Scott feared and fought them because they were the new vandals. Such a man could never, and never did become a Marxist — as did so many of his counterparts in the United States. Yet, in her careful treatment of the October Crisis (during which he supported proclamation of the *War Measures Act*) Djwa writes that, like others of his generation in the 1930s, Scott "tended to see social revolution as a necessary liberation from oppression"<sup>9</sup> and thus his 1970 stand for law and order shocked many of his friends; while Louis Dudek wrote in a review that the October Crisis revealed "the revolutionary turned anti-revolutionary."<sup>10</sup> It

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<sup>7</sup>*Ibid.*

<sup>8</sup>National Film Board (ref. no. 106C0182098), (dir. D. Winkler'od. T. Daily & B. Howell, 1982).

<sup>9</sup>Djwa, *supra*, note 1 at 416.

<sup>10</sup>Louis Dudek, Book Review, *The [Toronto] Globe & Mail* (21 November 1987) C23.

is the misconception of Scott as revolutionary rather than as *castor rouge* or Tory democrat that makes plausible the “contradictions” in his last years. His uneasy perception of Canada falling apart for lack of courageous defenders, of an assault on historic anglophone rights in a democratic Quebec under the rule of law, marked the continuities, not the contradictions in him. It is a tribute to Djwa, nevertheless, that she presents enough raw material to enable her readers to reach an understanding slightly at variance from her own.

The best passages in this book are those which describe the various milieux of Scott's life — especially his Oxford years, the Montreal poetry circles and the Mackenzie River canoe trip with Pierre Trudeau. In his diary Scott calls his time at Oxford “my great adventure”; Djwa depicts with skill the young Rhodes scholar who arrived at Magdalen College in the autumn of 1920 to read modern history.<sup>11</sup> Scott was one of the most distinguished amongst several generations of Canadians who discovered at Oxford the roots of British (and therefore Canadian) law, government and liberties. Like Frank Underhill who had gone to Oxford in 1911 and David Lewis who was to go there in 1932, and King Gordon, Graham Spry or Terry MacDermot whose Oxford years overlapped with his, Scott perceived and was captured by the evolution of democratic socialism out of nineteenth century utilitarian-liberal thought. Like many of these young colonials he became a Fabian socialist as well as a more thoughtful nationalist. Unlike Underhill and Lewis, who would become his close political colleagues and who hewed intellectual-political paths almost exclusively while at Oxford, Scott exploited fully the social and aesthetic life of the university from rowing and hockey to long evenings of music and discussions of poetry and art. Also unlike the others, his closest friends at Oxford were Englishmen with the exception of Raleigh Parkin, who was like himself the offspring of a conservative-imperialist Canadian family.

Again, the continuities in Scott's life are impressive. Unlike Underhill, for example, Scott brought to his socialism a religious warmth which remained unimpaired after he shucked off liturgical piety. Thus, while Underhill would see in J.S. Woodsworth primarily a dedicated prairie progressive Scott found a preacher of the social gospel — so compelling in his passion for social justice that (as Djwa observes) Woodsworth became almost a father figure replacing Scott's own father as the two drifted apart in the twenties and thirties. Moreover, Scott's socialism remained heavily influenced by the Anglican version of the social gospel which he imbibed in study groups of the Oxford Student Christian Union. There he read the fifth Lambeth Report, *Christianity and Industrial Problems*, and listened to

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<sup>11</sup>Djwa, *supra*, note 1 at 44ff.

R.H. Tawney, George Lansbury and G.D.H. Cole, whose concept of industrial democracy would continue to temper Scott's Fabianism — to give it a more humane quality than that of Underhill whose sympathy with David Lewis's unionists was rather quick to flag. Indeed, one might suspect that the passion which Lewis brought to his Canadian socialism was very much akin to the religiously tinged commitment of the young faculty members of the McGill Labour Club in the late twenties and early thirties — Eugene Forsey, King Gordon, Frank Scott. While Underhill deplored those who "thought with their hearts instead of their heads",<sup>12</sup> Scott held to "right reason" which allowed his heart full play and gave to his poetry as it did to his nationalism, politics and legal-historical writing a passion and constancy quite different from the chillier, if sparkling astringency of the Toronto Grit. Scott could never have said, as did Underhill to me on one occasion, that he held "enthusiasm" suspect, whether in politics, religion or sex. Djwa misses some of the nuances which, I'm inclined to think, explain quite a bit about the history of the CCF-NDP, the League for Social Reconstruction and the continuing close collaboration of Scott and Lewis. But then, so have several others who have written about these matters.

The foundations for Scott's analytical and practical contributions to the evolution of constitutional Canadian law and poetry were securely laid at Oxford, where constitutional law was still the backbone of historical study — but only the backbone, well-fleshed with social, economic and literary history as well as political theory. Not surprisingly, Scott paid as close attention to Aristotle's Poetics as to Anson and Dicey. When he returned to Montreal in 1923 he saw the city and the country with freshly critical eyes. "So many things about me", he told his diary, "in our civic and national life here simply make me angry — McGill, American influence blindly copied, rotten press ... dirty civic official life and very questionable politics in Ottawa, C.P.R. officials being directors of McGill and generally considered to be worthy of authority in education because they have made money in other lines, the whole acceptance of business as an end in itself — all these things weigh upon me, as though they were my own wrongs (as in a sense they are) and I find it hard to be cheerful at heart." Djwa describes well Scott's conscious selection of friends, his rejection of the Mount Royal Hotel life of dances, jazz and gin, and his choice of "the little leaven of decent people from the lump of money-seeking, pleasure-satiated babbits [sic]."<sup>13</sup>

That "little leaven" Scott put together in overlapping circles of poets, academics and politicians. As with most social leavens an aura of elitism (a word now curiously in disrepute) clung to the coterie of Scott's choice.

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<sup>12</sup>Personal interview, June 20, 1969.

<sup>13</sup>Djwa, *supra*, note 1 at 68 and 70.

As he moved from a disastrous year of teaching at Lower Canada College to student and then teacher in the McGill law faculty (1928) he acquired the "radical" reputation which, to some extent, bemuses Djwa. His radicalism was always, and essentially, a search for new ways of expressing and exercising his conception of conservative (or deep-rooted) values; his most vicious attacks were upon those who sought merely to protect privilege rather than use it to advance the social good. That good included freedom of expression, social security (total equality Scott always recognized as impossible) and encouragement of artistic perception. What brought down upon him the thunderbolts of St. James Street was the accuracy with which he pilloried its philistinism, its parochialism, its unthinking support of irresponsibility — in short, its lethally flawed conservatism.

One aspect of an elitist conservative is sureness of one's own values — which normally will include the right to be eccentric and experimental. I suspect that Djwa, when depicting Scott hacking away at bourgeois social imperatives and promoting new approaches in poetry, art and politics, misses some of what might be called "the Mitford factor" — the "aristocratic" knowing what's "U" and what's "non-U". And nothing is more infuriating to an establishment than being snubbed and sneered at. Sir Arthur Currie tried to muzzle Scott, as well as A.J.M. Smith, Leon Edel and the other youngsters of the *McGill Fortnightly Review* not because they promoted Yeats, Joyce, T.S. Eliot, H.L. Mencken, D.H. Lawrence or Eugene O'Neill, but because they belittled the colonial-minded capitalists of McGill's government. Again, Scott's wonderful satire "The Canadian Authors Meet" (1927) was similarly provoking to the romantic, self-serving nationalists of the Canadian Authors' Association. Yet Scott, drawing heavily upon pre-Cambrian imagery, as well as upon modernist and older English poetry, was himself indisputably a romantic nationalist. He was pronounced an upstart literary radical largely because of his sophisticated appropriation of traditional and experimental forms, and because he wrote of the CAA meeting:

The air is heavy with Canadian topics  
And Carman, Lampman, Roberts, Campbell, Scott,  
Are measured for their faith and philanthropies,  
Their zeal for God and King, their earnest thought.<sup>14</sup>

Who would not bridle at being the butt of such dreadful superiority?

Djwa catches a good deal of this. She draws deft vignettes of Scott's expanding literary circles of the 1940s and later, and she records the generous support he offered to young poets and the substantial contributions he made

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<sup>14</sup>*The Collected Poems of F.R. Scott* (Toronto: McClelland & Stewart, 1981) at 248 [hereinafter *Collected Poems*].

towards the eventual establishment of the Canada Council. Her accounts of the rambunctious relations amongst the groups around the little journals *Preview*, *First Statement* and *Northern Review* provide a convincing framework within which to assess Scott's own role and those of poets such as Klein, Dudek, P.K. Page, Layton and others. So, too, her portrayal of the frequent poetry-discussion evenings at the Laytons' and the Scotts' give a vivid impression of a take-off point in Canadian letters. Surprisingly, however, in her special field of literary analysis, Djwa drops her otherwise fluent style to mount the lecture podium. After each of the poetry quotations one is drawn up short by a pedantic paragraph "explaining" what Scott has written. After reading Scott's marvellous "Lakeshore", one is instructed, superfluously, that "the need for air forces man back up through the water to dry land — the earth that is neither his first home nor his first love. There, as Scott wittily remarks, he is forced into a new mould, that of a 'landed gentry, circumspect'."<sup>15</sup>

In 1962 Scott replied to a student who had asked if poetry had been the chief concern of his life: "It is certainly not the activity which takes up most of my time; indeed, I've had very little time for it. It is, however, my deepest concern in the sense that I believe it to be the activity that most expresses what I feel and think and desire."<sup>16</sup> But, as the biography makes clear, that word "most" is the key; one feels that he might equally have declared that writing poetry was what he most *liked* doing. Certainly his work in law and politics expressed his thoughts, feelings and desires as unequivocally as did his poetry freedom tempered by order and equity; nationalism linked to internationalism; reason warmed by faith and feeling. As a law teacher Scott never stopped at asking questions; he suggested answers and became that dreaded social danger, an "activist" academic.

Djwa weaves these legal-political threads into her story competently and she recounts with verve Scott's public defence of freedom of speech, religion and assembly against the combined pressures of the *Gazette*, the Montreal police, Principal Currie and, ultimately that lowering incubus himself, Maurice Duplessis. Disgusted by the paranoia of bishops, newspapers and governments as the depression called forth radical criticism, Scott wrote in April, 1938 of "Embryo Fascism in Quebec",<sup>17</sup> and supported meetings to aid the Spanish Loyalists. For lawyers and their students his benchmark victories in the *Roncarelli* and "Padlock" cases<sup>18</sup> are familiar tales; set in the context of the perils of his position at McGill and, indeed, in Quebec

<sup>15</sup>Djwa, *supra*, note 1 at 241-2; *Collected Poems, supra*, note 14 at 50-51.

<sup>16</sup>Djwa, *supra*, note 1 at 286.

<sup>17</sup>(1938) 16 Foreign Affairs 454.

<sup>18</sup>*Roncarelli v. Duplessis* [1959] S.C.R. 121, 16 D.L.R. (2d) 689; *Switzman v. Elbling* [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337.

itself, they become moving stories of courage. They are also *sui generis*: the controversial teacher became courtroom star. Djwa rightly stresses the "larger social and historical perspectives" from which Scott argued these cases.<sup>19</sup> While, particularly in *Switzman v. Elbling*, the federal division of powers was an important issue, the core in each case was the rule of law and the cumulative structure of civil liberty and political responsibility. What Scott really accomplished, one might suppose, was to demonstrate the effectiveness of that structure of common law *cum* parliamentary custom. Yet he also asserted the desirability of an entrenched bill of rights in a "patriated" BNA Act. In this complex matter Djwa notes the difficulty of assessing Scott's influence upon students and colleagues from Le Dain to Trudeau; but she does not pursue the question very far and intimates an identity of views between Trudeau and Scott which might not be endorsed by a legal theorist. Certainly Scott and Trudeau saw the BNA Act as a flexible instrument, and one which had been severely damaged by the Judicial Committee of the Privy Council; there is probably not much in Scott's *Essays on the Constitution* with which Trudeau would disagree. But on the question of written constitutions and charters of rights future biographers are likely to discern differences. Djwa does not record, for example, Scott's reaction to the Trudeau government's Bill C-60 with its Gallic-republican flavour, nor does she spend much time on the relative importance to the two men of minority and individual rights in the Charter.

Djwa does relate well Scott's legal-constitutional interests to his political activities. One quotation from Scott's diary illustrates why he could never have become a quietist lawyer. Indeed the entry bears a striking resemblance to J.S. Woodsworth's reflections upon "the system": "I was in a palatial mansion this evening. All that wealth could purchase of beauty in pictures, hangings, carpets, furniture, china — all that was there. Not a chair but would sell for enough to feed a slum family for a month: not a picture but would provide a home for every beggar in Montreal. In the house was a little, tired woman, with a magnificent gown and necklace of large pearls. She had a cross pendant. And down in the Railway Shops men toiled half-naked round roaring fires .... And whenever he wanted to do so, the husband of the tired woman with the pendant cross would tell these men there was no more work." As Djwa writes: "Direct action would have to be taken, the genuinely Christian action of the cross militant..."<sup>20</sup> She does not exaggerate. Throughout the dirty thirties Scott grew very close to Woodsworth and threw himself into the political and propaganda work of the League for Social Reconstruction and the CCF. Scott's role in the LSR and CCF is

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<sup>19</sup>Djwa, *supra*, note 1 at 316.

<sup>20</sup>Djwa, *supra*, note 1 at 95.

legendary to democratic socialists and has been put in context by Michiel Horn<sup>21</sup> and Walter Young.<sup>22</sup> Djwa's biography adds much warmth and understanding. In the group of young intellectuals who committed their learning and consciences to the job of creating Canada's version of the Fabian Society and the Labour Party, Scott was *primus inter pares*. From Djwa one gains a greater respect for the commitment and the extraordinary co-operation of these sensitive, individualistic professionals. Without benefit of union funds, travel grants or foundation support they kept meeting, planning, writing and lecturing — the expenses coming largely out of their own pockets. Scott drove to Regina for the 1933 CCF founding convention in his air-cooled Franklin. And out of it all came the Regina Manifesto, *Social Planning for Canada*, a host of pamphlets, radio broadcasts. In short, what emerged was the legitimizing in Canada of democratic socialism and a distinctive multiparty system.

Scott was national chairman of the CCF from 1942 to 1950, but his direct contribution to the party's life and purpose was continuous from 1932 on. In addition to consulting with Woodsworth frequently and briefing the CCF caucus on such matters as interpreting and "patriating" the BNA Act (and, especially defending federal authority) Scott was highly effective as a committee chairman, a job to which he brought a fine sense of fair play and, when required, an intimidating *hauteur*. Through it all, as in his teaching and poetry, runs the sense of excitement and even joy in the process itself. Especially clear is Scott's stress upon the person in politics — the counterpart, I think, of the relationship in his poetry of people to abstractions and forms. Writing a "post-Regina" letter (as Sarah Binks might say) to King Gordon, he observed that "Old J.S.'s power in Canada has come from his vision and there is no political cunning or tactic which is a substitute. The objective of a good society, which is all that socialism is, must be clarified and stated simply to this baffled generation ... 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 society, 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 program. It is latent in the Regina Manifesto but buried under blueprints."<sup>23</sup>

If there was something "unresolved" in Scott I suspect that it was not the tension between poetry and politics (or law), or between revolution and anti-revolution; rather, it was a conflict between two givens which was to

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<sup>21</sup>*The League for Social Reconstruction: Intellectual Origins of the Democratic Left 1932-42* (Toronto: University of Toronto Press, 1980).

<sup>22</sup>*The Anatomy of a Party: The National C.C.F., 1932-1961* (Toronto: University of Toronto Press, 1969).

<sup>23</sup>Djwa, *supra*, note 1 at 141-2.

culminate in his last years and which he was powerless to affect. This was the apparently intractable conflict between those who would make his Quebec unilingual, even unicultural, and his own conception of a tolerant society in which his own heritage could find a just regard. This ornament of bilingualism could briefly blurt out: "I'm damned if I'll speak French!"<sup>24</sup> But only after *il avait gagné ses épauettes*. The man who had tried hard to enlist in the first world war to defend the empire, who had fiercely opposed Canada's joining a second war which he believed was caused by vestigial imperialism, who most effectively promoted and engaged in the interpenetration of French and English poetry, who had served with distinction on the "B and B" commission and had done more than anyone else to secure basic freedoms for the people of Quebec, found himself reviled for supporting the rule of law in 1970 and opposing the succeeding endeavour to obliterate his province's anglophone component. But he had not suddenly become an "anti-revolutionary"; no more than had Eugene Forsey; no more than had Pierre Trudeau who asked "Who will speak for Canada?"

I suspect that Djwa, like some of those who expressed surprise and dismay in the 1970s, has missed the essential optimism of Scott's underlying conservatism. For it is the optimist who is most severely disappointed. Scott, in fact, was in most respects a reluctant radical who sought always to discover and sustain the best — in the British tradition, in Canada, in Quebec. His most scathing criticisms, like his most vigorous crusades, were against those who would debase the values, the goals he hallowed. It is no accident that the single most important source of imagery in his poetry is the pre-Cambrian shield.

But it would be wrong to end an essay on Scott's biography with self-conscious profundity. While, like many Quebec authors, Scott was frequently preoccupied with death, he was more often ready to consider truth through absurdity. After he had struck a blow for artistic freedom, by arguing, without success, before the Quebec Court of Queen's Bench, Appeal Side (1961) that *Lady Chatterley's Lover* was a work of art, and not "unduly" suffused with sex,<sup>25</sup> he wrote:

I went to bat for the Lady Chatte  
Dressed in my bib and gown.  
The judges three glared down at me  
The priests patrolled the town.

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<sup>24</sup>Djwa, *supra*, note 1 at 427.

<sup>25</sup>*Brodie v. R.* [1961] B.R. 610, 36 C.R. 200, rev'd [1962] S.C.R. 681, 32 D.L.R. (2d) 507; Djwa, *supra*, note 1 at 340-48. The appeal, argued by Scott and Manuel Shacter before the Supreme Court of Canada, was allowed.

My right hand shook as I reached for that book  
 And rose to play my part.  
 For out on the street were the marching feet  
 Of the League of the Sacred Heart.

...

I tried my best, with unusual zest,  
 To drive my argument through.  
 But soon got stuck on what rhymes with "muck"  
 And that dubious word "undue."

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Then I plunged into love, the spell that it wove,  
 And its attributes big and bold  
 Till the legal elect all stood erect  
 As my rapturous tale was told.

The judges' sighs and rolling eyes  
 Gave hope that my case was won,  
 Yet Mellors and Connie still looked pretty funny  
 Dancing about in the sun.<sup>26</sup>

Djwa's book contains rather too many slips in usage and fact, most of which should have been caught by the editor. Her study, nevertheless, is immensely stimulating and puts us all in her debt.

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*On 7 April 1988 the F.R. Scott Chair in Public and Constitutional Law was inaugurated at the Faculty of Law of McGill University as the result of an initiative sponsored by the 1934 graduating class. The Chair, which was established "to ensure that his concept of university life and scholarship is continued," has received contributions from former students and colleagues throughout Canada, the United States and Europe. Those interested are invited to contact the office of the Dean for further information.*

*Le 7 avril 1988, la Chaire F.R. Scott en droit public et constitutionnel était inaugurée à la Faculté de droit de l'Université McGill, aboutissement d'une initiative des diplômés de la promotion de 1934. La Chaire, qui a été établie [traduction] « dans le but d'assurer la continuité de sa conception de la vie et des études universitaires », a bénéficié de dons de la part d'anciens étudiants et de collègues à travers le Canada, les États-Unis et l'Europe. Toute personne intéressée est invitée à communiquer avec le bureau du doyen de la Faculté pour le plus amples renseignements.*

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<sup>26</sup>Collected Poems, *supra*, note 14 at 264.

A. Lajoie et P.A. Molinari, éd., *Pour une approche critique du droit de la santé*. Montréal, Presses de l'Université de Montréal, 1987. Pp. xviii, 331 [32.00]. Commenté par Hélène Gnay\*.

*Pour une approche critique du droit de la santé* est un ouvrage ponctué de tableaux, de schémas et d'annexes, qui invite le juriste et toute personne qui s'intéresse au domaine de la santé et des services sociaux à constater les « écarts » entre les politiques énoncées aux termes du mandat de la Commission d'enquête sur la santé et le bien-être social (Castonguay-Nepveu) et le droit adopté, d'une part, et le droit tel qu'adopté et le droit appliqué en cette matière, d'autre part.

Coordonné par le Centre de recherche en droit public, dans le cadre d'un projet subventionné et réalisé par une équipe multidisciplinaire, le travail qui a permis la publication de cet ouvrage démontre que la recherche en droit peut conduire à la mise en lumière des forces qui ont contribué à créer le droit. Contrairement à son caractère traditionnel de remorque, il ressort de cette étude que le droit peut se transformer en « véhicule d'un certain changement social, comme un instrument de réaménagement des rapports sociaux<sup>1</sup>. » L'ouvrage se divise en deux parties.

## I. Émergence des normes juridiques

Le choix des thèmes de la première partie prend appui sur les caractéristiques de la réforme de 1971, dont le lecteur aura pris connaissance par le biais du *Traité de droit de la santé et des services sociaux*<sup>2</sup>. L'écart entre les politiques énoncées et le droit adopté est défini dans un premier chapitre qui examine le droit aux services<sup>3</sup>.

L'analyse démontre d'abord un écart réel entre les propositions formulées par les commissaires et le droit exprimé à l'article 4 de la *Loi sur les services de santé et les services sociaux*<sup>4</sup>. Pourtant cet écart s'avère fictif, souligne l'auteur de ce chapitre, puisque le droit aux services préexistait à la réforme de 1971. L'écart se résume ainsi à la transformation d'un droit existant en un droit exigible, par l'adoption d'articles subséquents de la Loi

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\*B. Sc. inf. (Montréal), B.C.L. (McGill).

<sup>1</sup>A. Lajoie et P.A. Molinari, éd., *Pour une approche critique du droit de la santé*, Montréal, Presses de l'Université de Montréal, 1987 à la p. 11.

<sup>2</sup>A. Lajoie, P.A. Molinari et J.-M. Auby, *Traité de droit de la santé et des services sociaux*, Montréal, Presses de l'Université de Montréal, 1981. La Commission Castonguay-Nepveu recommandait, de manière générale, la réorganisation du système de santé au Québec à partir des trois principes suivants, à savoir, la détermination de niveaux de soins, l'établissement de centres de santé et la régionalisation des soins.

<sup>3</sup>A. Lajoie, « L'émergence d'un droit social : Le droit aux services » dans Lajoie et Molinari, *supra*, note 1, 21.

<sup>4</sup>L.R.Q. c. S-5, art. 4.

qui octroient l'efficacité au droit aux services<sup>5</sup>. L'importance des intervenants sociaux est soulignée dans cette analyse qui rapporte par ailleurs les propos des ministres en place lors des auditions.

Dans le deuxième chapitre<sup>6</sup>, l'écart entre le droit professionnel proposé et celui adopté s'exprime différemment. L'auteure souligne la résistance des intervenants gouvernementaux à accorder aux milieux professionnels les pouvoirs revendiqués lors de la commission parlementaire à l'étude sur le projet de Code des professions. D'une part, les pouvoirs des milieux professionnels, dont l'Office des professions du Québec, s'accroissent grâce à un assouplissement de la réglementation des corporations professionnelles et à la participation du public au sein des corporations. Ces écarts par rapport aux propositions gouvernementales en matière de législation professionnelle sont analysés, d'autre part, en fonction des débats en commission parlementaire et en chambre.

L'auteure procède d'abord à l'analyse des interventions des groupes représentés et des partis politiques qu'elle regroupe en fonction de leur option quant au degré d'implication de l'État. Elle fait de même quant aux modèles de participation du public en examinant la position respective des parties. Elle conclut que les pressions des intervenants quant à la décentralisation du pouvoir étatique ont conduit à l'écart entre le droit proposé et le droit adopté. C'est ainsi que l'intervention de l'opposition parlementaire permettra l'adoption d'une participation du public au sein des organisations professionnelles plus grande que celle formulée dans les recommandations de la Commission Castonguay-Ncpveu.

L'évolution du droit relatif aux services de santé et services sociaux, de l'État-providence jusqu'à l'adoption de la réforme de 1971, sert d'introduction au troisième chapitre<sup>7</sup>. Suit une interprétation des modifications apportées au régime par le biais de la *Loi sur les services de santé et les services sociaux*<sup>8</sup>. Les écarts entre les propositions gouvernementales et le texte de loi adopté se manifestent par autant de concessions et de reculs du législateur.

Recul dans le maintien des anciennes corporations propriétaires, dans l'exclusivité des activités bénévoles, dans l'élargissement des modes de fi-

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<sup>5</sup>Sur l'exigibilité du droit aux services, voir l'article de A. Lajoie, P.A. Molinari et J.-L. Baudouin, « Le droit aux services de santé : Légal ou contractuel ? » (1983) 43 R. du B. 675 ; et la réponse de S. Nootens, « La remise en cause du contrat hospitalier » (1984) 44 R. du B. 625.

<sup>6</sup>P. Mulazzi, « L'émergence d'un nouveau régime professionnel » dans Lajoie et Molinari, *supra*, note 1, 57.

<sup>7</sup>J.-M. Fecteau, « L'émergence d'un réseau public d'établissements : Régulation monopoliste et contraintes locales » dans Lajoie et Molinari, *supra*, note 1, 102.

<sup>8</sup>*Supra*, note 4.

nancement du secteur privé, dans la procédure discrétionnaire d'attribution des permis, chacun étant mis en lumière par les dispositions légales telles qu'adoptées. Recul également dans la centralisation étatique, le pouvoir de contrôle de l'administration des institutions : normes budgétaires, participation aux conseils d'administration. Les concessions se traduisent par autant d'amendements au projet de loi que l'auteur attribue à « la force des pressions auxquelles l'État a dû faire face<sup>9</sup> », telles qu'exemplifiées par des extraits des représentations faites en commission parlementaire.

L'auteur va plus loin. Il examine les modifications apportées à la Loi au cours des cinq années qui suivent son adoption. En dernier lieu, il fait ressortir les répercussions de la crise financière des années 1979-1982 sur l'accroissement des pouvoirs étatiques dans le réseau des établissements. L'auteur conclut que la réforme de 1971 n'aurait fait que mettre en lumière les contradictions inhérentes dans la gestion des institutions du réseau des services de santé et de services sociaux.

À titre de postface à la première partie, un texte d'une linguiste analyse étroitement les propos échangés au cours des débats en commission parlementaire et décrit dans un langage coloré l'ambiance qui régnait à cette époque<sup>10</sup>. L'auteure nous fait revivre des débats qui n'étaient pas télédiffusés à cette époque.

En dépit de quelques répétitions<sup>11</sup>, l'auteure illustre abondamment comment la lutte pour le temps de parole, le fonctionnement de la déférence — illocutoire intentionnel — et les perturbations au code — incidents, gaffes, scandales — conduisent à une opposition entre les interlocuteurs qui ont un capital politique important, d'une part, et ceux qui sont moins représentés à l'époque comme les groupes économiquement déficients et les femmes, d'autre part.

À la question de savoir si la commission parlementaire a tenu compte de ces aspects du débat dans la préparation de son projet de réforme, l'auteure répond tout d'abord que les intervenants qui auront le plus influencé le processus d'interaction verbale en commission auront été les « milieux issus du travail social ». Elle conclut que la commission parlementaire constitue un théâtre, une tribune, un lieu public où officiels et groupes de pression jouent « *la et le politique au vu et au su de tous*<sup>12</sup>. »

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<sup>9</sup>Fecteau, *supra*, note 7 à la p. 129.

<sup>10</sup>R. Robin, « L'émergence du droit en commission parlementaire : La circulation de la parole publique et ses risques » dans Lajoie et Molinari, *supra*, note 1, 154.

<sup>11</sup>*Ibid.* à la p. 164.

<sup>12</sup>*Ibid.* aux pp. 192-93.

## II. Application des normes juridiques

La seconde partie de l'ouvrage vise la mesure de l'écart entre le droit adopté par la réforme en matière de services de santé et de services sociaux et le droit appliqué, tel qu'observé dans la pratique. Dans son introduction, l'auteur analyse la notion de norme juridique, selon qu'elle produit des effets avec ou sans l'intervention des personnes et selon sa finalité<sup>13</sup>. L'écart concerné, soit la marge entre les deux faisceaux de normes que sont le droit adopté et le droit appliqué, est évalué au moyen de trois études qui rendent compte de faits survenus à une époque donnée.

Le premier chapitre se fonde sur un sondage réalisé auprès de 1 100 répondants environ et porte sur l'utilisation des recours disponibles aux bénéficiaires, qui reconnaissent avoir eu des problèmes à l'occasion de services fournis ou refusés<sup>14</sup>. L'auteure procède à une analyse des résultats du sondage en fonction tout d'abord des caractéristiques personnelles des répondants. Cette première analyse démontre une nette surreprésentation en faveur des femmes que l'auteure explique par « le degré 'd'exposition' plus élevé des femmes<sup>15</sup>. » L'examen comparatif des problèmes subis tient lieu de deuxième analyse. La qualité des soins et l'attente constituent à ce titre les deux grandes catégories de problèmes, lesquels surviennent plus souvent lorsque des professionnels de la santé sont mis en cause.

Face à ces problèmes, les comportements varient. La plupart des bénéficiaires cherchent solution en changeant d'établissement ou en utilisant la voie de la négociation, plutôt qu'en se prévalant des recours judiciaires et administratifs mis à leur disposition. Qui plus est, plus les bénéficiaires ont un revenu familial important, plus ils adoptent une attitude revendicative. Au-delà des comportements, l'auteure cherche à dégager les composantes des problèmes auxquels font face les bénéficiaires afin d'expliquer leur comportement. L'application de « l'analyse nominale hiérarchique » permet à l'auteure de mettre en relation la sévérité des conséquences du problème, l'antériorité du problème et l'agent désigné comme responsable du problème avec les comportements adoptés par les bénéficiaires. Les résultats révèlent que l'intervention active, soit une démarche de consultation, une tentative de négociation ou le dépôt d'une plainte, du bénéficiaire dans la solution de son problème est liée à la gravité du préjudice, au sexe féminin, au haut niveau de scolarité et à un revenu supérieur à la moyenne.

Le deuxième chapitre est le fruit d'une étude « sur le terrain » du droit de recours des usagers auprès des centres régionaux de services de santé et

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<sup>13</sup>P.A. Molinari, « Présentation » dans Lajoie et Molinari, *supra*, note 1, 203.

<sup>14</sup>C. Gosselin, « L'exercice du droit aux services : L'utilisation des recours administratifs et judiciaires » dans Lajoie et Molinari, *supra*, note 1, 216 à la p. 218.

<sup>15</sup>*Ibid.* à la p. 220.

de services sociaux (C.R.S.S.S.)<sup>16</sup>. À partir de l'analyse des 2 326 dossiers disponibles, pour les années 1980 et 1981, l'auteur mesure l'écart entre le droit énoncé par la loi et le rôle de médiateur des C.R.S.S.S. dans l'application des normes.

Après une brève description de la structure interne de traitement des plaintes, l'auteur aborde les éléments attributifs de juridiction des C.R.S.S.S. Six conditions sont minutieusement analysées : (1) la juridiction personnelle des établissements, (2) la juridiction territoriale ou l'origine de la plainte et la juridiction matérielle qui rassemble quatre conditions, soient (3) les services, (4) qui n'ont pas été fournis, (5) à une personne, (6) que la loi lui donne le droit de recevoir. De manière générale, les C.R.S.S.S. interprètent largement le critère attributif de juridiction, au bénéfice des usagers.

L'étude du traitement des plaintes indique que le mandat du C.R.S.S.S., qui couvre des intérêts autres que purement privés, se traduit par une application qui risque de mettre en danger l'exercice des droits des bénéficiaires<sup>17</sup>. Les chiffres démontrent des pratiques contraires au mandat reçu, telles l'incitation de l'usager à s'adresser d'abord à l'établissement avant de porter plainte au C.R.S.S.S., le refus des plaintes lorsque des procédures judiciaires sont entamées et le renvoi des plaintes aux corporations professionnelles lorsqu'elles concernent leurs membres.

Quant à l'exercice du pouvoir administratif des C.R.S.S.S. d'entendre les plaintes, conféré dans la loi habilitante, il ressort de l'étude trois grandes conclusions. D'abord, il n'existe pas de traitement formel de la plainte qui se règle souvent par un simple coup de téléphone. Ensuite, les cas d'interruption de plaintes concernent le plus souvent celles adressées à des professionnels. Et enfin, dans le traitement des plaintes fondées, l'établissement cherche généralement à régler la situation. En pratique, et en dépit des pouvoirs qui leur sont conférés, les C.R.S.S.S. formulent rarement des recommandations aux établissements. Et les recommandations au ministre se font exceptionnelles.

À la question de savoir comment les C.R.S.S.S. contribuent à satisfaire les besoins des usagers par leur interprétation et l'exécution de leurs fonctions, l'auteur répond que le traitement des plaintes demeure une préoccupation secondaire des C.R.S.S.S. et se traduit le plus souvent par le refus de traitement de la plainte ou l'exclusion des plaignants. L'écart assez important entre la pratique adoptée par les C.R.S.S.S. dans le traitement des

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<sup>16</sup>J.-P. Ménard, « L'application du droit aux services : La portée juridique et sociale du recours devant le C.R.S.S.S. » dans Lajoie et Molinari, *supra*, note 1, 241.

<sup>17</sup>*Ibid.* à la p. 266.

plaintes et leur rôle véritable tel que conféré par la législature se trouve ainsi confirmé par cette étude<sup>18</sup>.

Le troisième chapitre analyse la participation des bénéficiaires au sein de la gestion des établissements de santé et de services sociaux<sup>19</sup>. Profitant des résultats d'une enquête sociologique réalisée au printemps 1982 auprès de 340 personnes, l'auteure relève dans un premier temps la représentation du public à la gestion des établissements. La comparaison s'effectue de manière rigoureuse et des conclusions sont tirées à partir des pourcentages, qu'il faut toutefois tempérer en raison du faible échantillonnage.

Il ressort notamment que les ménages à revenus élevés sont surreprésentés au sein des conseils d'administration, que les représentants adhèrent à un poste principalement par motivation professionnelle et qu'une connaissance du cadre législatif constitue un dénominateur commun aux représentants. L'auteure souligne de plus que les caractéristiques personnelles des représentants, telles l'âge, le sexe et l'état civil, diffèrent largement selon que les représentants sont nommés ou élus.

L'exercice du droit de participation fait preuve d'un accès inégalitaire. Les représentants ont plus de chance d'accéder aux postes s'ils sont nommés — plutôt qu'élus — ou s'ils font partie de catégories sociales supérieures. Cette dernière caractéristique se révèle également déterminante dans l'analyse du taux de satisfaction des représentants. La conclusion appert inévitable à l'auteure : il n'existe pas de représentants du public, mais plutôt des groupes sociaux qui oeuvrent à différents degrés d'efficacité au chapitre de la participation.

### III. Une approche critique

L'« approche critique » du Centre de recherche en droit public a pour objet un des volets du droit de la santé, à savoir l'organisation administrative des services de santé et des services sociaux. Or, le domaine du droit de la santé déborde, à notre avis, le volet administratif et couvre également ceux de la responsabilité des professionnels de la santé et de la protection de la santé, pour ne nommer que ceux-là. Le lecteur comprendra que cette précision vise simplement à mettre en lumière l'écart entre le titre adopté et le contenu du volume tel que publié.

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<sup>18</sup>*Ibid.* à la p. 293: « Tout se passe comme si, pour acquérir le niveau de crédibilité essentiel à leur action, les C.R.S.S.S devaient respecter la distribution des rapports de force et concéder aux corporations professionnels [*sic*] ou aux établissements une partie du pouvoir que le législateur leur avait confié. »

<sup>19</sup>P. Mulazzi, « L'exercice du droit de participation dans les établissements » dans Lajoie et Molinari, *supra*, note 1, 294.

Signalons également des éléments de présentation matérielle. En vain, le lecteur cherchera un répertoire analytique permettant un repérage rapide des sujets traités ou des intervenants cités. Cette omission volontaire pourrait être justifiée par des questions d'ordre financier. Par ailleurs, l'ouvrage est sous forme dactylographiée. Ce choix de présentation, moins agréable au lecteur, aura permis de couper les coûts de photocomposition dans l'ouvrage dont le nombre de pages est important, mais dont le public serait insuffisant pour les amortir.

On pourrait par ailleurs reprocher à l'étude l'absence de conclusion générale ou de synthèse globale portant par exemple sur le poids des propositions de réforme sociale, ou sur le pouvoir des individus au sein de groupes sociaux, devant une commission parlementaire ou par leur participation au sein de conseils d'administration. Le lecteur devra s'attarder à chacune des parties afin d'y lire les conclusions des recherches menées dans l'analyse des textes de la commission parlementaire ou sur le terrain des services de santé et des services sociaux.

On espérait depuis 1981 la publication d'un ouvrage qui donnerait suite au *Traité de droit de la santé et des services sociaux*<sup>20</sup>. Au lendemain du dépôt du Rapport de la Commission Rochon<sup>21</sup>, à l'aube d'une restructuration possible de l'administration du réseau de la santé et des services sociaux, *Pour une approche critique du droit de la santé* apporte un éclairage sur les forces en présence lors des commissions parlementaires et mérite une attention des personnes intéressées au domaine des services de santé et de services sociaux en raison de la qualité des recherches qui ont conduit à sa publication.

Par son approche multidisciplinaire, l'ouvrage démontre que la critique du droit bénéficie du recours aux sciences humaines<sup>22</sup>. Il rehausse du même coup la qualité de la recherche juridique dénoncée il y a cinq ans par le Rapport Arthurs<sup>23</sup>. Cette critique de la mise en oeuvre de normes, adoptées et appliquées, contribue de façon significative à la littérature juridique et sociologique. Elle pourrait être prise en compte à l'étape de la réforme dans ce domaine du droit.

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<sup>20</sup>*Supra*, note 2.

<sup>21</sup>*Rapport de la Commission d'enquête sur les services de santé et les services sociaux : Commission Rochon*, Québec, Éditeur officiel, 1988 (Président : J. Rochon).

<sup>22</sup>Voir les commentaires sur le recours aux autres disciplines dans la critique du droit positif de G. Trudeau, « Le refus d'exécuter un travail dangereux : Aux confins du droit et des sciences sociales » (1986) 18:2 *Sociologie et sociétés* 87 aux pp. 88-89.

<sup>23</sup>Groupe consultatif sur la recherche et les études en droit. *Le droit et le savoir : Rapport au Conseil de recherches en sciences humaines du Canada*, Ottawa, Conseil de recherches en sciences humaines du Canada, 1983.

William I. Innes, *Tax Evasion in Canada*. Toronto: Carswell, 1987. Pp. xviii, 326 [\$60.00]. Reviewed by Wilfrid Lefebvre.\*

In the preface to his book, *Tax Evasion in Canada*,<sup>1</sup> Mr Innes candidly concedes that "a fit of exasperation" rather than a spirit of scholarly reflection was the driving force behind his endeavour.<sup>2</sup> His impatience is quite understandable by anyone who has been confronted with the task of preparing a trial brief in a tax prosecution case: no basic reference work exists, or rather existed until the publication of Innes' work. His book will thus be a welcome addition to the library of any counsel interested in tax prosecutions.

Tax evasion is, of course, a matter of great concern to any government not only for the lost revenues it represents but also with respect to the public's easily developed perception that the tax burden is not shared fairly by all citizens. As a result, one which many would argue is quite understandable, Revenue Canada has adopted an aggressive attitude, in terms of both the investigative powers it wishes enacted as well as the exercise of these powers.

However, that is not to say that the breadth of these measures is not or ought not be closely scrutinized and curtailed. For example, the audit provisions,<sup>3</sup> and the right given to Revenue officials to request, for any purpose related to the administration or enforcement of the Income Tax Act, any information or any document<sup>4</sup> and, of course, the search powers<sup>5</sup> constitute important and direct intrusions into the lives and affairs of taxpayers. Thus it is imperative that an equilibrium be struck between the private and fundamental rights of these citizens, and the need, in a self-assessing system, for the administering body to possess wide powers.

*Tax Evasion in Canada* is divided into nine chapters and three appendices. A concise index introduces each chapter and, as a result, easy access to all subjects is insured.

In chapters 1 and 2, the author reviews the history of the audit and search and seizure provisions and, more particularly, he discusses the legislative changes that were introduced in 1986 to what was then subsection 231(4) of the Act.<sup>6</sup> I must confess that I was most curious to see how Mr Innes would approach this subject since I was intimately involved in im-

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\*Of Ogilvy, Renault.

<sup>1</sup>W.I. Innes, *Tax Evasion in Canada* (Toronto: Carswell, 1987).

<sup>2</sup>*Ibid.* at v.

<sup>3</sup>*Income Tax Act*, R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c.63, s. 231.1.

<sup>4</sup>*Ibid.*, s. 231.2.

<sup>5</sup>*Ibid.*, s. 231.3.

<sup>6</sup>*Ibid.*

plementing these changes, in my former capacity as a lawyer with the Department of Justice. On 30 August 1984, the Federal Court of Appeal rendered its decision in *Kruger Inc. v. M.N.R.*,<sup>7</sup> in which the court ruled that former subsection 231(4) was unconstitutional as against section 8 of the *Charter*.<sup>8</sup> Interestingly enough, it will be recalled that a new government was elected on 4 September 1984, and Perrin Beatty who, for the previous two years, had vigorously attacked the sweeping search and seizure powers contained in the income tax legislation at that time, was appointed Minister of National Revenue. One of his first major decisions involved whether to seek leave to appeal to the Supreme Court of Canada in the *Kruger* matter. To his credit, the new Minister rejected that idea and decided instead to promote the legislative amendments which now have the force of law.

However, these changes did not solve all of the problems. In chapter 9 (entitled "The *Charter*"), the author expresses the view that the new section 231.3 of the *Act* does not, on its face, offend section 8 of the *Charter* (which guarantees "the right to be secure against unreasonable search or seizure"). In my view, although this represents the correct legal position, it does leave open a number of possible attacks, such as:

(a) The Breadth of the Authorization

In many instances, the Revenue Department obtains a search warrant on the basis of allegations of specific violations (for example, that there has been an appropriation of funds by a shareholder). However, the warrant authorizes the search for, and the seizure of, documents which are supposed to assist in the reconciliation of taxable income for a given taxation year. In executing the said warrant, the tax authorities take the position that they are entitled to seize all documents pertaining to that taxation year rather than limiting themselves to those documents that may afford evidence of the alleged, specific violation. There are strong and convincing arguments that such an approach goes beyond the intended scope of the search warrant which has been issued and, if not, amounts, in most cases,<sup>9</sup> to an unreasonable search and seizure.

(b) The Necessity of the Search

For example, subsection 231.5(1) of the *Act* authorizes officials of the Department of National Revenue to make copies of any document that is being examined. The legislation then provides that such copy is "evidence

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<sup>7</sup>[1984] 2 F.C. 535, [1984] C.T.C. 506, 84 D.T.C. 6478.

<sup>8</sup>*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c.11.

<sup>9</sup>One notable exception, perhaps, is the case of an alleged violation based on a net worth approach.

of the nature and content of the original document and has the same probative force as the original document ...".<sup>10</sup> A powerful argument can be made that before issuing a search warrant, a judge should satisfy himself that, in the given circumstances, this is the only remedy available to the Department.

Chapters 3 to 6 review, respectively, procedural matters, the nature of the parties involved, the elements comprising the various offences and the question of evidence. For those firm in their belief that the Crown is always correct and that errors in judgment do not occur, the tales involving Mr Simons,<sup>11</sup> Mr Trudeau<sup>12</sup> and the Acme Slide Fastener Company<sup>13</sup> supply interesting and worthwhile reading. The *Trudeau*<sup>14</sup> case is particularly enlightening. The facts, as recited by Mr Innes, were as follows:

*R. v. Trudeau* was a very early prosecution under section 80 of the *Income War Tax Act* for the alleged making of false statements in a return of income. Mr. Trudeau had sold shares of a corporation known as Automobile Owners' Association Ltd. in 1932 for \$1,150,000. He received that amount as well as two additional cheques totalling \$25,000 which, on the evidence, he regarded as part of the purchase price of his shares. He did not report the \$25,000 item when he filed his 1932 income tax return in May of 1933. Some months later, he realized his omission and discussed the matter with an Income Tax official. Later he wrote to the Inspector of Income Tax in Montreal, explaining the matter and his belief that the \$25,000 was part of the proceeds from the sale of his shares. He had no further communication with the Tax Department until this information was laid in September of 1934.<sup>15</sup>

What is most telling about the case is not that Mr Trudeau was acquitted, but rather the very fact that a prosecution was allowed to proceed.

Chapter 7, while making ample reference to the relevant jurisprudence, reviews the defences most frequently invoked in tax evasion cases. Although I hasten to point out that this was not among the author's objectives, it would have been most interesting if the subjects of negotiations and trial tactics had been more fully discussed. For example, should Revenue Canada be approached in an attempt to settle these types of cases and, if so, at what time and costs should these negotiations be conducted? Is a more aggressive approach, such as attempting to quash the search warrant, or cross-examining Revenue Officials at the time a report is made,<sup>16</sup> ever warranted, and in what circumstances?

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<sup>10</sup>*Supra*, note 3, s. 231.5(1).

<sup>11</sup>*R. v. Simons*, [1977] C.T.C. 371, 77 D.T.C. 5232 (B.C. Prov. Ct.).

<sup>12</sup>*R. v. Trudeau* (1934), [1928-34] C.T.C. 310 (Que. Sess. Ct.).

<sup>13</sup>*Acme Slide Fastener Co. v. Knott* [1962] C.T.C. 320, 62 D.T.C. 1261 (Que. Sup. Ct.).

<sup>14</sup>*Supra*, note 12.

<sup>15</sup>Innes, *supra*, note 1 at 102.

<sup>16</sup>Pursuant to subsection 231.3(7) of the Act.

Appendices B and C<sup>17</sup> will be of great assistance to any student or practitioner. In a very simple and convenient manner, these appendices set out the vast majority of penal and related provisions found in federal statutes, as well as the more significant offences (and related provisions) under provincial and territorial jurisdiction.

In summary, *Tax Evasion in Canada* is a reference book well done and worth reading.

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<sup>17</sup>Innes, *supra*, note 1 at 263-319.

Hugh M. Kindred, Jean-Gabriel Castel, Donald J. Fleming, William C. Grabam, Armand L.C. de Mestral, Ivan A. Vlastic, Sharon Williams, eds, *International Law: Chiefly as Interpreted and Applied in Canada*, 4th ed. Toronto: Emond Montgomery, 1987. Pp. xlix, 958 [\$96.00]. Reviewed by Maxwell Cohen.\*

When Castel's first edition<sup>1</sup> emerged as a pioneer effort in 1965, it was the first major volume in "cases and materials" style, to be published in Canada covering public international law issues, as classically taught, since Mackenzie and Laing had produced their earlier effort in 1938.<sup>2</sup> But Castel, a Francophone-European trained scholar and a steadily rising success in Canada, did not catch the full flavour of the case book as a largely self-contained teaching instrument. Castel's volume should perhaps be related also to his editorial methods more generally, to be found in his publications on Civil Law and Private International Law. But it does remain obvious to anyone who tried to use that first edition that it was much more documentary *vade mecum*, an invaluable source book for Canadians, than it was a usable classroom tool.

Of course, this was perhaps even more true of Mackenzie and Laing, whose virtues also were their concentration on available Canadian materials. But its usability, in the North American case book tradition, proved to be conceptually less effective than its authors had doubtlessly hoped — even though it, too, was a valuable Canadian source book for its day.

This fourth edition<sup>3</sup> amounts to a virtual revision of Castel's publications. There are such substantial pedagogical differences between the first three editions and this fourth one that it must be assumed the role of the other six editors became, in fact, extremely influential, although they could not ignore the broad lessons of editorship arising from those first three editions. But the co-operation of the six reflects their wider experiences in a variety of pedagogical settings including Dalhousie University, McGill University, the University of New Brunswick, the University of Toronto and Osgoode Hall; and to that extent, the fourth edition is the culmination of an evolutionary process that is perhaps unique among Canadian public international law case book exercises at this time. Of course, this is not to minimize individual efforts at the University of British Columbia by L.G.

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<sup>1</sup>J.-G. Castel, *International Law: Chiefly as Interpreted and Applied in Canada* (Toronto: University of Toronto Press, 1965).

<sup>2</sup>N. Mackenzie & L.H. Laing, *Canada and the Law of Nations* (Toronto: Ryerson Press, 1938).

<sup>3</sup>H.M. Kindred *et al.*, eds, *International Law Chiefly as Interpreted and Applied in Canada*, 4th ed. (Toronto: Emond Montgomery, 1987).

Jahnke and Charles Bourne;<sup>4</sup> at the University of Alberta by the prolific Leslie Green whose own case book is now in the fourth edition;<sup>5</sup> by George Alexandrovich and his traditional/experimental approaches at Queen's University; and by Anne Bayefsky whose mimeographed materials at the University of Ottawa may one day be a temptation to print, should there be a wider audience for her particular approach. Bayefsky's methodology reflects technical skills in the human rights field at both the national and international levels as well as her general constitutional law capabilities and several years of growing competence in the jurisprudence/legal theory areas. Other faculties may also have quietly "published" teaching materials for public international law courses; hence it must be stressed at once that the opportunities and choices for teaching materials have become much richer and more dynamic in a subject now coming into its own as an almost indispensable sector of serious legal education.

When this writer began to teach from a case book in 1946, it is unlikely that he had many competitors in the use of Manley Hudson's early and classical efforts, since his second edition had appeared in 1936, just before World War II.<sup>6</sup> The "risk" was taken at McGill to employ case book methodology in a first-year class of anxious and often skeptical, returned servicemen all recently demobilized and determined to leap rapidly from the war years into the inviting world of private law practice. Here, the cares of clients would be primary; but international law was also a matter of introducing a teaching process where heavy pre-class reading, leading to a teacher-student technical dialogue, was not paralleled in most other McGill classrooms at the time. Hence, in 1946 there was the double burden of teaching while employing a heavy, time-consuming pre-class homework method, as well as dealing with the anxieties of students about day-to-day performance *in the class*. All were contrasted with other teaching methods more closely related to the classical lecture hall rather than to variations of a Socratic forum. Moreover, the combination of an international law case book with a heavy United States orientation, and a teaching process largely unrelated to the demand of most other courses at McGill in those years, complicated the life of both students and teachers. Even the move from its position as a first-year course (where it didn't belong) to a place in second or third year, where it was obviously more appropriate, did not in those post-war years resolve the double dilemma of a course that included everything from procedure to substance to jurisprudential challenges as well as a classroom-

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<sup>4</sup>C.B. Bourne & L.G. Jahnke, eds, *Cases and Materials on Public International Law*, rev'd ed. (Vancouver: University of British Columbia, 1972).

<sup>5</sup>L.C. Green, *International Law Through the Cases*, 4th ed. (Toronto: Carswell, 1978).

<sup>6</sup>See e.g. M.O. Hudson, *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest, Beginning With the Covenant of the League of Nations* (Washington: Carnegie Endowment for International Peace, 1931).

experience that seemed neither related to "bread and butter" on the one hand nor to the often less demanding lecture method classically used in most courses, on the other.

Forty years later, how changed is the status of public international law as a course worth taking — it was "always" compulsory at McGill — and how extensive are the classroom offerings to satisfy the mounting richness of the field and the pedagogical materials provided today to meet that richness and its professional relevance!

This fourth edition should be viewed, therefore, in that Canadian evolutionary context. Indeed, the general editor, Professor H.M. Kindred, in his modest preface, indicates the double use to which the volume can be put, namely, that it is "primarily designed for our students . . . who experience the world from a Canadian perspective" and that "[a]n additional purpose of this book is to provide a reference of first resort for anyone who has need of international legal sources."<sup>7</sup>

The principal chapters reflect for the most part the basic structure of the subject as it has evolved since the great texts were written and became the "classics", from Grotius' day onward. However, the nuances dealing with old topics as well as quite significant new fields disclose at once that a modernity has begun to reshape the statics of the older headings. And so "International Legal Persons"<sup>8</sup> does not confine itself to debates over the definition of "subjects" in international law and related matters, but plunges into the principles of non-intervention and self-defence in explaining the "Rights and Duties of States".<sup>9</sup> While the breadth of "Legal Personality" reaches out now to include self-determination, international organizations, corporations and, of course, the individual. Here, both the laws of war on the one hand, and modern human rights, customary and conventional rules on the other, have finally made it impossible to persist with the fiction that states "only and exclusively" (as Oppenheim and Lauterpacht would have it until the fifth edition),<sup>10</sup> were the subjects of international law. The elusive "subject/object" debate is now mostly history.

The volume spends much effort on the Canadian component under each of the principal headings and for this reason, it uses, as Castel already had done, not only Canadian cases and treaties *et al.* but parliamentary and ministerial statements, as well as extracts from academic analyses in pub-

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<sup>7</sup>*Supra*, note 3 at iii.

<sup>8</sup>*Ibid.*, c. 2 at 10-108.

<sup>9</sup>*Ibid.* at 15-54.

<sup>10</sup>L. Oppenheim, *International Law: A Treatise*, 5th ed. (edited by H. Lauterpacht) (London: Longmans, Green & Co., 1935).

lished articles that clarify and stimulate and indicate the scholarly creativity at work throughout the many topics of the volume.

Finally, the editors raise useful questions at the end of each chapter and the linkage between this editorial activity and the valuable volume in textbook form produced by two of the editors, Professors Williams and de Mestral,<sup>11</sup> give the case book a dimension of practitioner-usable materials that adds to its dual function as both teaching instrument and practitioner reference text. Ironically, the contrast between Castel's first edition and this fourth is that it was the documentation *as reference* that made Castel valuable, but its structure and detail rendered it less manageable as a teaching device.

What is interesting, of course, is to consider the new areas that demand fresh perspectives on the entire field of public international law. It may be argued that the immediate post-war years stimulated teachers to examine the *Charter of the United Nations* and the jurisdiction of the specialized agencies, all in relation to public international law more generally. The study of these relationships and their effects created perhaps the most important immediate post-war dimension to the teaching and delineation of the subject. A number of areas, however, began to intrude by the 1950s and 1960s so as to alter existing proportions and perceptions: human rights, and its international protection and municipal responses; air and space law where the latter, the law of outer space, virtually introduced an essentially new area of study; the immensely enlarged area of international economic activity and organization with the General Agreement on Tariffs and Trade,<sup>12</sup> the rules governing the operations of the World Bank and the International Monetary Fund, and the later roles of UNCTAD and UNCITRAL all added to the enlarged institutional structure governing the burgeoning international private sector activity; the new international humanitarian law of armed conflict and the interaction of the nuclear weapons and warfare issues with the older classical laws of warfare and weaponry; and finally, the immense concern with the seas and the environment leading to the 1972 *Stockholm Declaration on the Human Environment*<sup>13</sup> and to the 1982 *United Nations Convention on the Law of the Sea*.<sup>14</sup> All this has resulted in a fresh approach to international environmental standards and resource management which is so much on the minds of those who today worry about the planet and its future.

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<sup>11</sup>S.A. Williams & A.L.C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada*, 2d ed. (Toronto: Butterworths, 1987).

<sup>12</sup>30 October 1947, 55 U.N.T.S. 187.

<sup>13</sup>U.N. Doc. A/CONF. 48/14 (1972), 11 Int. Leg. Mat. 1416.

<sup>14</sup>U.N. Conference on the Law of the Sea, *Official Records*, vol. I-XVII, (1973-84) at vol. XVII, 151-221, 21 Int. Leg. Mat. 1261.

It is also arguable that these new areas too often raise the level of traditional student skepticism that surrounded so much of public international law, particularly with respect to compliance. The psychological centre-piece of every classroom debate generally turns on the ability of the teaching process to have the student accept the nature of the international legal order and its rules as essentially similar, professionally and technically, to the principal domestic legal regimes that occupied the great majority of his training hours throughout a three-year law school program. It was not only the sometimes exotic subject matter, but also the sense that this increasing volume of rules, matched by an increasing number of headlines about international disputes from sub-nuclear warfare (Iraq-Iran) to complex trade disputes, often presented compliance (and its avoidance) as a deliberate policy, thus challenging the credibility of the system as a whole. Notwithstanding the quite obvious — when properly explained — fact that thousands of transnational transactions as well as the great majority of applicable rules were following the governing procedures and substantive law, day in and day out, both as public and private sector phenomena, dubiety too often remained a primary student reaction. To the student, the areas of property, contracts, torts, taxation and company law, along with the major public law areas of constitutional, administrative and criminal law, seemed to present much less onerous insecurities of compliance when compared with public international law. At the same time, however, those same students were daily witnesses to major and minor domestic disobedience, particularly in labour disputes where illegal strikes, walkouts and lockouts challenged the very basis of judicial or administrative orders, leading to contempt proceedings to fines and, ultimately, to jail.

Certainly, international law has had a weaker formal compliance record in its institutions of enforcement. But given the extraordinary advantages of national legal orders, and given also the conspicuous headline status of international disorders, these comparisons, juridically, were often quite superficial, for the student generally relied upon the simplistics of discrete disobedience to replace a more sober judgment of the whole.

What does this seven-editor, five university volume do for Canadian law students that its rivals or predecessors have not done? Probably, it is fair to say that because there is a somewhat unique multi-university approach, the combination of Dalhousie, New Brunswick, McGill, Toronto and Osgoode provides the basis for a truly national case book because of the “reach” of those involved. This does not in any way diminish the quality of the competition. It is, however, to suggest that the seven co-authors from five law schools, and their correlation with a new Canadian textbook, (de Mestral and Williams),<sup>15</sup> however “introductory” it may be, all add to the

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<sup>15</sup>*Supra*, note 11.

level of intrinsic sophistication in materials, approach and practical classroom utility for whatever variation of Socratic models may satisfy a particular teacher and student body.

Ironically, instruction by “cases and materials” method has been the subject of controversy in Canada over many years. However, the high proportion of Canadians obtaining post-graduate degrees from American law schools, for the past thirty years or more, has now intensified the temptation to use such materials in almost every course — public or private law — however different the actual day-to-day utilization may be in the hands of over 600 Canadian law teachers in 21 law schools or departments of law.

Almost everyone stands on his predecessor’s shoulders. Each scholar has his debts that can never be fully repaid to the long line of labourers in the same vineyard of the footnotes. A radical shift in a whole analytical and teaching process such as Dean Langdell was able to undertake at Harvard a century ago may not be experienced too often in a profession such as the law with its extraordinary inputs of substance and method from the highest abstractions of “justice” to the daily demands of courtrooms, negotiators and teachers alike. This new volume, therefore, inaugurates no revolution, but it is a finely constructed Canadian instrument, the heir of artisans who have shaped with their peers elsewhere the format within a system of world law that can be taught from the vantage point of a national experience. It is no small ambition to embrace a planetary perception within a national memory to the enrichment of both the global and the particular and, finally, to the enrichment of teacher and student alike.

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