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Roncarelli v. Duplessis: Art. 1053 C.C. Revolutionized

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L'héritage de l'affaire *Roncarelli c. Duplessis*, 1959-2009

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RONCARELLI v. DUPLESSIS:[1] ART. 1053 C.C. REVOLUTIONIZED

Claude-Armand Sheppard*

I. THE FACTS.

How it began. Late diners are finishing their lunch at Frank Roncarelli's fashionable café on Crescent Street, in Montreal. It is almost two o'clock in the afternoon of this fourth day of December, 1946. Suddenly, the comfortable hum in the room turns to consternation as burly constables of the Quebec Liquor Police erupt and proceed to the seizure and removal of all the liquor they can find. Then, they vanish.

The same day, in Quebec City, Maurice Lenoblet Duplessis, lawyer, Attorney-General and Prime Minister of the Province of Quebec, convokes a press conference. He is quoted the next day by all leading French and English Montreal dailies as revealing he had ordered the Quebec Liquor Commission to cancel Roncarelli's liquor licence because of the restauranteur's support of the Witnesses of Jehovah in Quebec, and particularly his "audacious" and "provocative" practice of posting hundreds of property bonds for the release of Witnesses arrested while distributing religious tracts.

During the next few weeks, the Prime Minister reiterates to newspapermen that the cancellation was his doing and that it was designed to strike a blow, through Roncarelli, at the Witnesses of Jehovah, whose activities he considers seditious and not less nefarious than those of Communists and Nazis.

Roncarelli, whose high-class restaurant cannot endure without serving liquor and wine at meals, has thus received a mortal blow — indeed, it shuts after six months — and attempts to sue in damages the manager of the Quebec Liquor Commission, Edouard Archambault. But permission to sue, as required

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[1][1959] S.C.R. 121, also reported at (1959), 16 D.L.R. (2d) 689; commented on by Edward McWhinney in (1959), 37 Can. Bar Rev. 503: [1956] Q.B. 447; comment by Benjamin J. Greenberg in (1957), 3 McGill L.J. 82; [1952] 1 D.L.R. 680 (Superior Court); comment by E.C.S. Wade in (1951), 29 Can. Bar Rev. 665.

by section 12 of the Alcoholic Liquor Act,[2] is refused on rather flimsy grounds, by Chief Justice Sévérin Létourneau.[3] Roncarelli's attorneys, Stein & Stein, then seek to sue the Quebec Liquor Commission itself, and since section 12 of the Alcoholic Liquor Act[4] also requires the consent of the Attorney-General to any action against the Commission, they petition Duplessis for leave to sue. Not unexpectedly, the Attorney-General refuses. He tells a press conference, held on February 7, 1947, of his refusal and that Roncarelli's licence has been revoked, not temporarily, but "forever". After learning of this refusal through the newspapers, Roncarelli's attorneys — now assisted by John Ahern and F. R. Scott as counsel — again petition the Chief Justice for permission to sue Archambault personnally. The Chief Justice is adamant, and rejects the petition.[5]

Thwarted in their attempt to prosecute the Commission or its manager, Roncarelli's attorneys, in a fateful move, institute action against Maurice Lenoblet Duplessis personnally to recover damages in the amount of $118,741.00.

Thus began the notorious "Roncarelli case" which, for twelve years, crept through our courts before being finally disposed of by the Supreme Court in a controversial, puzzling and divided judgment rendered on January 27, 1959.[6]

The reason for the cancellation. Since the avowed reason for the cancellation — publicly acknowledged, never denied nor doubted — was Roncarelli's active support of the Witnesses of Jehovah in Quebec, it is

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[2]R.S.Q. 1941, c. 255, s. 12: "No one appointed under this act as manager of the Quebec Liquor Commission may be sued, for acts done or omitted to be done by him in the exercise of the duties vested in him under this act, except by the government of this Province, or with the authorization of the Chief Justice of the Province or, if he be prevented from granting such authorization, by the senior judge of the Court of Appeal".

[3]*Roncarelli v. Archambault,* [1947] K.B. 105.

[4]R.S.Q. 1941, c. 255, s. 12, second paragraph: "The Commission itself may be sued only with the consent of the Attorney-General".

[5]Court of Kings Bench No. 176 (M). April 30, 1947, Unreported. In the course of his judgment, Mr. Justice Bissonnette, of the Court of Queen's Bench, as an *obiter dictum* reported in [1956] Q.B. 447 at p. 456, expresses considerable doubt on the constitutionality of section 12: "En passant, je désire souligner que je doute fort de la constitutionalité de cette disposition qui exige l'autorisation au préalable du Juge en Chef, pour pouvoir intenter une action délictuelle. Je ne sache pas, qu'il soit permis de commettre un délit et que sa répression soit laissée à l'arbitraire ou à la discrétion d'une personne, si haute son autorité soit-elle, quand, de fait, celle-ci n'est pas l'émanation de l'autorité d'un tribunal. Aussi, peut-être que par une diligente initiative, le demandeur aurait pu quand même poursuivre le gérant Archambault et soulever, à l'encontre de toute exception préjudicielle qu'on aurait pu opposer à l'action, l'inconstitutionalité ou l'inapplication de la loi qu'on lui opposait."

[6][1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689. Comment by Edward McWhinney in (1959), 37 Can. Bar Rev. 503.

important to determine the nature and extent of his participation in that movement.

The sect was not welcome. It made uncompromising attacks on the Roman Catholic Church and on the institutions of the Province. The authorities, rightly confident that they enjoyed the approval of the Roman Catholic majority in taking measures against the Witnesses, were not always too scrupulous about the methods used to try and extirpate them. A number of unequivocal decisions of the courts were necessary to remind the authorities of their duties.[7]

The sect began its aggressive campaign to convert Quebec sometime in 1945. Its indefatiguable adherents distributed tracts, books and Bibles; held services in homes and organized public lectures. There were disturbances and riots. Meetings were broken-up. Witnesses were mistreated, beaten, thrown out of town or even, in one case, out of the Province.

The Witnesses considered that under the Quebec Freedom of Worship Act[8] and under the Charter of the City of Montreal, they were ministers of the Gospel and had the right to distribute their literature and visit homes without municipal licence. Montreal civic authorities obviously did not think so and proceeded systematically to arrest and re-arrest hundreds of Witnesses on the ground they were violating City by-laws numbers 270,[9] 1643[10] and 1693,[11] by peddling and distributing circulars without licence and "interfering" with pedestrian traffic. The maximum fine for each such violation was $40.00 and costs, or sixty days of imprisonment.

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[7]*Lamb v. Benoit,* (1959), 17 D.L.R. (2d) 369; Comment by Edward McWhinney in (1959), 37 C.B.R. 503; *Chabot v. Les Commissaires d'Ecoles de la Morandière,* [1957] Q.B. 707; Comment by Donald Johnston and Marvin B. Gameroff in (1958), 4 McGill L.J. 268; *Chaput v. Romain,* [1955] S.C.R. 834; Comment by Lawrence Capelovitch in (1956), 2 McGill L.J. 128; *Perron v. School Trustees of the Municipality of Rouyn,* [1955] Q.B. 841; Comment by John Ciaccia in (1955), 2 McGill L.J. 42; *Saumur v. City of Quebec,* [1953] 2 S.C.R. 299; [1953] 4 D.L.R. 641; Comment by Fred Kaufman in (1953), 1 McGill L.J. 233; *Boucher v. R.* [1951] S.C.R. 265; [1951] 2 D.L.R. 369; (1951), 11 C.R. 85; 99 C.C.C. 1; [1949] K.B. 238.

[8]R.S.Q. 1941, c. 307.

[9]S. 18: "It is forbidden to carry or distribute any posters, advertisements, prospectuses, circulars or papers in, near or on the streets, alleys, sidewalks and public places of the City.

Nevertheless, the Executive Committee of the City, on recommendation from the Director of the Police Department, may, at its discretion, allow, by resolution, the carrying or distribution of such placards, advertisements, prospectuses, circulars or papers in, near or upon the streets, lanes, sidewalks and public places of the City, on conditions which it shall deem it advisable to impose, providing that nothing in the above-mentioned objects be of a Commercial nature or against good order, morals, the religious, racial, political or social convictions of certain classes of society or of such a nature as to provoke gatherings, rioting, or to spread subversive ideas or disturb the peace and, in case of the distribution of such, this be entirely gratis."

[10]Art. 5 (s. 13 k). Now by-law number 1862 (s. 12 j).

[11]Art. 5 (al. 17). Now included in by-law number 1413.

Roncarelli was a devout Witness and, although not directly involved in proselytizing, he supplied property bonds to release the arrested "ministers". He did so 41 times in 1944, 105 times in 1945 and 244 times in 1946, a total of 390 times. These bonds were accepted by the City's attorneys and by the officials of the Recorder's Court.[12] There was an agreement between the lawyers for the City and the Province on the one hand, and the defence on the other, to proceed first with a few test cases. The result was a considerable accumulation of undecided cases. On or about November 4, 1946, it was decided that property bonds were no longer acceptable, and from then on, Roncarelli ceased to post bail at all. It must be noted that in *all* of the cases where he stood bail, the complaints were either dismissed or withdrawn. They all involved alleged violations of City by-laws. None were for sedition.

This, according to the evidence accepted by all three Courts, is the extent to which Roncarelli was "participating" in the activities of the Witnesses of Jehovah. This is the conduct which the Prime Minister proclaimed as "audacious" and "a provocation to public order, to the administration of justice and . . . definitely contrary to the aims of justice".[13] This is the direct reason for the cancellation of Roncarelli's liquor licence.[14]

There was no evidence to link Roncarelli directly or indirectly with the notorious and allegedly seditious article: "Quebec's Burning Hate". The article began to be circulated on or about November 25, 1946, *after* Roncarelli had ceased to provide bonds and after consultations had begun among government officials about the prospective cancellation of his licence.[15] Moreover, the Prime Minister, in his public explanation for the cancellation, referred only to Roncarelli's giving of bonds and not to the allegedly seditious pamphlet. As Mr. Justice Rand of the Supreme Court was to put it:[16]

> It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

How Duplessis became involved. Sometime in November, 1946, Oscar Gagnon, then Joint Crown Prosecutor in Montreal, notified Edouard Archambault, the manager of the Quebec Liquor Commission, that the Frank Roncarelli

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[12]Now known as the Municipal Court of the City of Montreal.

[13]As quoted in the Montreal *Gazette* of December 5, 1946.

[14]Cf. Duplessis' written argument in Superior Court, as quoted at [1952] 1 D.L.R. 680 at p. 684. There was never any question as to the conduct of Roncarelli's restaurant. It was a high-class establishment and enjoyed an unblemished reputation. As McKinnon J. described it, *ibid* at p. 687: "Quebec Liquor Laws were carefully and meticulously observed". See in the same sense Rinfret J. in appeal, as reported at [1956] Q.B. 447 at pp. 499 and 512, and in the Supreme Court: Rand, Martland and Abbott J.J., *passim*.

[15]Cf. Martineau J. in appeal — as reported in [1956] Q.B. 447 at p. 479.

[16][1959] S.C.R. 121 at p. 133.

who supplied numerous bonds to release the Witnesses arrested for violating City by-laws, and was a Witness himself, also held a liquor licence. Archambault, after verifying the facts, telephoned the Prime Minister in Quebec. He relayed to Duplessis the information he had received and mentioned his intention to cancel Roncarelli's licence. Duplessis told him to be careful and to make sure that it was the same Roncarelli who gave bonds. Secret agent Y-3 confirmed Roncarelli's identity. Archambault then called Duplessis and it was decided to cancel the permit. Whether Duplessis actually ordered the cancellation or was its "determining cause" or whether he merely approved a decision already made by Archambault was to become the major issue of facts before the courts. To establish his *lien de droit* with Duplessis, Roncarelli had to allege and prove that the order came from the Prime Minister.

II. THE ISSUES BEFORE THE COURTS

The Courts principally concerned themselves with five main issues, one of fact and four of law, the last of which was a procedural one. The question of fact was:

(i) who in effect ordered or caused the cancellation?

The questions of law were:

(ii) if Duplessis did, had he the authority to do so?

(iii) whoever exercised it, was the discretion to cancel properly used?

(iv) was Duplessis, as officer of the Crown, immune from prosecution?

The question of procedure was the following:

(v) was the failure to give Duplessis the notice required by article 88 of the Code of Civil Procedure an absolute bar to the action?

III. THE SUPERIOR COURT JUDGMENT

On May 2nd 1951, the first of the fifteen judges who were to consider this action, Mr. Justice Mackinnon of the Montreal Superior Court rendered his decision.[17] (i) On the question of fact, after reviewing the testimony of Archambault and Duplessis about their telephone conversations, and citing Duplessis' uncontradicted statements to the press, he ruled[18] that it was evident that it was defendant who gave the order to cancel. (ii) Holding that English authorities govern Quebec public law, citing the well-known principle that a Crown officer, even a Prime Minister, may do nothing other than what

[17]Reported in [1952] 1 D.L.R. 680, and commented upon by E.C.S. Wade in (1951), 29 Can. Bar Rev. 665. Not one of Quebec's official or private reports saw fit to publish this important judgment which contained a stinging, undaunted denunciation of Duplessis' conduct. The Queen's Bench judgment which reversed MacKinnon J. was reported *in extenso*, as was Chief Justice Létourneau's judgment refusing permission to sue Archambault. *Sans Commentaires.*

[18][1952] 1 D.L.R. 680 at p. 692.

he is authorized to do by some rule of common law or statute,[19] and then examining all the relevant statutes,[20] Mackinnon J. ruled[21] that there was no provision of law giving the defendant any authority to interfere in the administration of the Alcoholic Liquor Act. Such interference would defeat the purpose of the Alcoholic Liquor Act, which is to remove the licensing power from political influence. (iii) Although section 35 of the Alcoholic Liquor Act gives the Commission discretion to cancel a licence and does not stipulate any criterion by which this discretion is to be governed, the Court, citing leading jurisprudence,[22] decided that such discretion cannot be construed as absolute and must be exercised according to "reason and justice", be "legal and regular", be exercised "in good faith for the purposes for which (it) was given", be exercised "on proper legal principles . . . upon some sound reason". This was not the case here since, by cancelling his licence for the extraneous reason that Roncarelli was acting as a bondsman for arrested Witnesses, the Commission acted "arbitrarily" and in disregard of "the rule of reason and justice".[23] (iv) As to the claim of ministerial immunity, the trial judge rejected it categorically.[24] (v) Article 88 of the Quebec Code of Civil Procedure states:

> No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

Mr. Justice Mackinnon held that defendant was not entitled to such notice as the acts complained of were not "done by him in the exercise of his functions", so that defendant was "outside his functions" in ordering the cancellation.[25]

Judgment was granted against defendant for $8,123.53, considerably less than the $118,741.00 claimed in the action.

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[19]6 Halsbury, 2nd ed, p. 389 s. 435.

[20]Executive Power Act, R.S.Q. 1941, c. 7, ss. 5, 6, and 8; Attorney General's Department Act, R.S.Q. 1941, c. 46, ss. 4 and 5; Public Department Act, R.S.Q. 1941, c. 43, s. 2; Alcoholic Liquor Act, R.S.Q. 1941, c. 255, s. 148.

[21][1952] 1 D.L.R. 680 at p. 699.

[22]*Sharp v. Wakefield,* [1891] A.C. 173 at p. 179; *R. v. Vestry of St. Pancras,* (1890), 24 Q.B.D. 371 at pp. 375-76; *Pioneer Laundry & Dry Cleaners Ltd. v. M.N.R.,* [1939] 4 D.L.R. 246; [1939] S.C.R. 1; [1939] 4 D.L.R. 481 at p. 485 (Privy Council); [1940] A.C. 127 at p. 136; *Jaillard v. City of Montreal,* (1934), 72 S.C. 112 at p. 114; *Leroux v. City of Lachine,* [1942] S.C. 352.

[23][1952] 1 D.L.R. 680 at p. 695.

[24]*Ibid.,* at pp. 683, 693 and 696; cf. Wade, *op. cit.,* at p. 665.

[25]*Ibid.,* at p. 700.

IV. DECISION OF THE COURT OF APPEAL

Duplessis appealed. Dissatisfied with the award, Roncarelli cross-appealed. Both appeals were heard on April 12, 1956, by a bench composed of Justices Bissonnette, Pratte, Casey, Rinfret and Martineau. The Court upheld the appeal, Rinfret J. dissenting, and unanimously dismissed the cross-appeal.[26]

(i) ***Question of fact.*** On the issue of who gave the order to cancel; who, in other words, constituted the *causa causans,* the Court ruled that it was not the Prime Minister but the manager of the Commission, Edouard Archambault. Bissonnette J. concluded that the evidence did not prove that Archambault had deferred to any "order" of the defendant or acted in a spirit of subordination; that juridically it was impossible for defendant to give an order he did not have the authority to give; that the allegation of *de facto* authority by reason of the power to remove Archambault at will was unfounded. Pratte J.[27] disagreed with his colleagues, and followed Mr. Justice MacKinnon's finding that Duplessis had ordered Archambault to cancel Roncarelli's permit, but stated that it was necessary to prove, besides the order, that the order was the *cause* of the cancellation. Archambault had already decided to cancel before consulting the Prime Minister. Like Bissonnette J., he found the allegation that Archambault would have been dismissed had he disagreed with defendant, to be both speculative and irrelevant. Casey J. also held that Duplessis' "order" was not the "determining factor" for the cancellation, or, at least, was not proved so to be, since Archambault had already made his decision before telephoning Quebec City. Mr. Justice Martineau agreed with his brother Casey, at least on this point.[28] Dissenting from the majority and agreeing with the trial judge, Rinfret J. declared that the order issued from defendant who thus was the "determining factor".[29]

(ii) ***Did Duplessis have authority to interfere?*** Bissonnette J.[30] and his dissenting colleague, Rinfret J.,[31] agreed categorically with the lower Court: as a Crown officer, Duplessis possessed no authority other than that specifically granted by law and none of the relevant statutes created such authority. The other three Appeal judges were silent on this point.

(iii) ***The exercise of discretion.*** Mr. Justice Bissonnette distinguished between an "organisme exécutif et administratif" and one "essentiellement commercial", such as the Quebec Liquor Commission, whose discretion he held to be as absolute as that of an employer over his employee or a mandator

[26] [1956] Q.B. 447; Comment by Benjamin J. Greenberg in (1957), 3 McGill L.J. 82.
[27] [1956] Q.B. 447, at p. 465.
[28] *Ibid.,* at p. 485.
[29] *Ibid.,* at pp. 499-503.
[30] *Ibid.,* at pp. 451-52 and 455.
[31] *Ibid.,* at pp. 503-6, 509 et seq.

over his mandatory.[32] Its exercise, consequently was not subject to being held faulty or illegal. Moreover, in this instance there was not only a right but also a *duty* to cancel. Pratte J. did not consider the issue pertinent. His brother Casey declared[33] that the Commission's discretion, complete though it was, could not be exercised "arbitrarily or capriciously", it had to be exercised in accordance with what the Commission believed to be the "public interest and welfare". And the Commission in November 1946, had reasonable grounds to believe that Roncarelli was a "participant" in what — to it — seemed "subversive and seditious" activities.[34] Mr. Justice Martineau, in an argument parallel to that of his colleague Bissonnette, held[35] the discretion of the Commission to be neither judicial nor administrative but of a "caractère quasi illimité", only restricted by the necessity of good faith in its exercise. He felt that there was no doubt of Duplessis' good faith.

Rinfret J. in his dissent argued that administrative discretion is never absolute but must conform to the following four criteria: (1) it must be exercised by the body in which it is vested,[36] (2) for the purposes for which it is given, (3) on proper legal principles,[37] and (4) after verification of the facts and adherence to the rule *audi alteram partem.*[38] Moreover, even if the discretion to grant or to refuse a licence were absolute, because an applicant would then have no 'acquired right' in a licence, this is not the case with respect to *cancellation,* since, although a licence is a privilege, the holder possesses some semblance of an acquired right in virtue of his having had it.

(iv) ***Immunity of Crown Officers.*** Not one of the five judges in appeal accepted Duplessis' claim that, as Prime Minister, Attorney-General, and officer of the Crown, he was immune from prosecution for damages caused by reason of any act arising out of his functions. Neither Bissonnette J. nor Mr. Justice Casey pronounced on the matter, although implicitly they rejected this argument. Pratte J., holding that English authorities govern this aspect of our public law, added that those authorities establishing the personal liability

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[32]*Ibid.,* at p. 457. But it has been held repeatedly that even an employer can be held liable for abuse of his right to fire. See: *Traité de Droit Civil du Québec,* Vol. 12, *Du Louage,* by Léon Faribault, Montreal, 1951, at p. 317.

[33]*Ibid.,* at p. 470.

[34]*Ibid.,* at p. 477. This is a questionable finding of fact, since the evidence disclosed that the allegedly subversive pamphlet "Quebec's Burning Hate", only appeared after Roncarelli ceased to give bonds.

[35]*Ibid.,* at p. 481.

[36]*General Medical Council v. Sparkman,* [1943] A.C. 627 at p. 641.

[37]*Pioneer Laundry & Dry Cleaners Ltd. v. M.N.R.,* [1940] A.C. 127 at p. 136; *Lower Mainland Dairy Products Board v. Turner,* [1941] S.C.R. 573 at p. 577; *R. v. Vestry of St. Pancras,* (1890), 24 Q.B.D. 371 at p. 375; *R. v. Board of Education,* [1910] 2 K.B. 165 at p. 178; *Alward v. McIntosh,* [1938] 2 D.L.R. 522 at p. 532.

[38]*Leroux v. Lachine,* [1947] S.C. 352.

of Crown officers for their torts are too numerous to be all cited.[39] Plaintiff's right to proceed against the Crown, by Petition of Right under article 1011 of the Code of Procedure, did not, in the least, limit his personal recourse against defendant. Martineau J. also rejected Duplessis' argument with the pithy statement:

> Tout homme, quel qu'il soit, est responsable des conséquences de ses fautes à moins d'un texte de loi qui l'en libère, ce qui n'existe pas dans l'espèce.[40]

Rinfret J. also clearly admitted the principle of personal responsibility.[41]

(v) ***Article 88 of the Code of Procedure.*** The majority, because of its ruling on the merits, did not consider it necessary to discuss this issue. Dissenting Judge Rinfret dismissed the article as irrelevant since it is predicated upon the condition that the officer be in the "exercise of his functions", and this was not the situation here.

V. THE SUPREME COURT DECISION

Roncarelli decided to bring his case before the Supreme Court. For five days, from June 2nd to 6th 1958, the lawyers argued before Kerwin C. J., Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ. On January 27, 1959, the Supreme Court rendered its decision,[42] maintaining the appeal and increasing by $25,000.00 the amount granted by the trial judge. Three of the nine members of the Court, Taschereau, Cartwright, Fauteux, JJ., dissented.

(i) ***Question of fact.*** On this question, both majority and dissenting judges agreed with Mr. Justice MacKinnon. Kerwin C. J., echoing a criticism of the Appeal Court made in this Journal,[43] declared:[44]

> No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal side) setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel appellant's licence.

Martland J. agreed with the Chief Justice.[45] Mr. Justice Rand, speaking both for himself and his brother Judson, also expressed the view[46] that the cancellation had been dictated by Duplessis who used his *de facto* power over Archam-

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[39][1956] Q.B. 447, at pp. 460-462. An impatience shared by Mr. Justice Abbott of The Supreme Court: see [1959] S.C.R. 121 at p. 181.

[40]*Ibid.*, at p. 480.

[41]*Ibid.*, at p. 515 *et seq.*

[42]Reported at [1959] S.C.R. 121 and (1959), 16 D.L.R. (2d) 689. The latter contains the official translation of Mr. Justice Taschereau's French judgment and an apparently unofficial translation of Mr. Justice Fauteux's decision. The judgment of the Court is commented upon by Edward McWhinney in (1959), 37 Can. Bar Rev. 503.

[43]By Benjamin J. Greenberg, *op. cit.*, at p. 90.

[44][1959] S.C.R. 121, at p. 125.

[45]*Ibid.*, at p. 151.

[46]*Ibid.*, at pp. 133 *et seq.*

bault — an appointee at will — in order to put a halt to the activities of the Witnesses, punish Roncarelli for his participation therein, and warn others. Abbott J. also saw Duplessis as the "determining cause",[47] an opinion shared by Cartwright and Fauteux JJ.,[48] the two dissenting judges who pronounced on the question.

(ii) ***Did Duplessis have authority to interfere?*** No, answered the majority, supported in this by dissenting judge Fauteux. The other two dissentients remained silent on this issue. Martland J., speaking also for the Chief Justice, reviewed the relevant statutes and concluded[49] that there were no "official powers" vested in Duplessis authorizing him to order the cancellation. The judgment of Judson J. was rendered by Mr. Justice Rand, who, while making no clear statement on this point, can at least be understood to implicitly deny the existence of any such authority. Abbott J. was more emphatic, ruling[50] that respondent was

> . . . acting without any legal authority whatsoever . . . (and) was bound to know that he was acting without such authority.

Fauteux J., dissenting on procedural grounds, nevertheless went even further on this question of law, saying[51] of the respondent that

> . . . il s'est arogé un droit que lui nie virtuellement la *Loi des Liqueurs Alcooliques;* . . .

(iii) ***The exercise of discretion.*** On the question of discretion, Rand J. whose views, as we saw, were subscribed to by his brother Judson, pointing out the economic importance of a licence to the holder, whose dependence on it grows as time goes by, rejected[52] the notion of untrammelled discretion in the following eloquent terms:

> The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.
>
> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the

[47] *Ibid.*, at p. 183.

[48] *Ibid.*, respectively at pp. 164 and 175.

[49] *Ibid.*, at p. 155.

[50] *Ibid.*, at p. 185.

[51] *Ibid.*, at p. 175.

[52] *Ibid.*, at pp. 140-141.

> Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.
>
> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizensbip status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*. There is here an administrative tribunal wbich, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray*, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.[53]

Martland J., with whom Kerwin C. J. declared himself to be in agreement, also refused[54] to allow the possibility of an absolutely unlimited discretion. While, in view of the decision of the Privy Council in the case of *Nakkuda Ali v. Jayaratne*[55] "it would appear somewhat doubtful whether the appellant had a right to a personal hearing", he was entitled to expect that the discretion would be exercised for relevant motives and by those to whom it was entrusted. On this requirement of relevancy, which Rand and Judson JJ. also stipulated, Mr. Justice Martland wrote:[56]

> . . . the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act.

The association of Roncarelli with the Witnesses and his giving bail "had no relationship to the intent and purpose of the Alcoholic Liquor Act". With respect to the second requirement — exercise by those in whom the discretion is vested — Martland J., after citing the Earl of Selborne[57] and Chief Justice Greenshields,[58] and stating that the power to cancel was conferred upon what the statute contemplated as an independent commission, ruled[59] that

> That power must be exercised solely by that corporation. It must not and cannot be exercised by anyone else.

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[53] *Ibid.*, at pp. 140 *et seq.*

[54] *Ibid.*, at pp. 156 *et seq.*

[55] [1951] A.C. 66; see footnote 63.

[56] [1959] S.C.R. 121, at p. 156.

[57] *Spackman v. Plumstead Board of Works*, (1885), 10 A.C. 229, at p. 240.

[58] *Jaillard v. City of Lachine*, (1934), 72 S.C. 112.

[59] [1959] S.C.R. 121, at p. 156.

Mr. Justice Abbott also castigates[60] respondent's assertion that an administrative discretion can be so absolute as to be susceptible of being exercised arbitrarily or for irrelevant motives:

> The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question, had no connection whatsoever with obligations as the holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without legal justification. Moreover, the religious belief of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purpose of the *Alcoholic Liquor Act* and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provision of said Act.

Among the three dissentients, only Cartwright J. deals with the problem of discretion and he comes to the exactly contrary conclusion: the Commission, fulfilling an 'administrative' rather than a 'judicial' or 'quasi judicial' function, has an "unfettered discretion", except in so far as that discretion is taken away by the Act.[61] Among other authorities, he cites with approval the statement of Mr. Justice Masten of the Ontario Court of Appeal:[62]

> . . . an 'administrative' tribunal, within its province, is a law unto itself (and can decide on the basis of) policy and expediency.

Appellant had no right to invoke the rule of *audi alteram partem* since the cancellation of a licence is a purely "administrative act" whose motives are not open to review by the courts.[63] Even if the decision had been of a "quasi judicial" nature, it would have been necessary to prove fraud, collusion or malice.[64]

(iv) ***Immunity of Crown Officers.*** Only Mr. Justice Abbott saw fit to discuss respondent's contention that he was immune from prosecution. Referring to Dicey's famous passage, which we cite later, he declared[65] he did

> . . . not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification.

(v) ***Article 88 of the Code of Procedure.*** The issue of the notice of article 88 C.P., largely ignored in the Court of Queen's Bench, was the source of two of the three dissents in the Supreme Court.

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[60] *Ibid.*, at p. 183.

[61] *Ibid.*, at p. 167.

[62] *In Re Ashby et al* [1934] O.R. 421 at p. 428; [1934] 3 D.L.R. 565; 62 C.C.C. 132.

[63] [1959] S.C.R. 121, at p. 168, citing *Nakkuda Ali v. M.F. De S. Jayaratne* [1951] A.C. 66, and *Calgary Power Limited et al v. Capithorne* [1959] S.C.R. 24; (1959), 16 D.L.R. (2d) 241, per Martland J.

[64] *McGillivray v Kimber,* (1915), 52 S.C.R. 146; 26 D.L.R. 164; Halsbury, 2nd ed., vol. 26, pp. 284-85; *Bassett v. Godschall,* (1770), 3 Wils. 121 at p. 123; 95 E.R. 967, per Wilmot C.J. and Gould and Blackstone JJ.

[65] [1959] S.C.R. 121, at p. 184.

The majority generally held that, since the right to notice was predicated upon the public officer being within the "exercise of his functions", and Duplessis had been clearly outside them, he could not raise the lack of such notice. Rand J. said[66] that, having committed an act

> . . . quite beyond the scope of any function or duty committed to him, so far so that that it was one done exclusively in a private capacity, however much in fact the influence of public office and power carried into it

he was not entitled to the protection of art. 88 C.P. This also was the view of Martland J. and Kerwin C.J.,[67] who ruled out good faith as a mitigating circumstance:

> The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law.[68]

In this connection it is interesting to recall Mr. Justice Abbott's view, cited earlier, that Duplessis was bound to know he was acting without authority.[69] Agreeing with the trial judge and dissenting Appeal Court judge Rinfret, and citing two older decisions of the Quebec Court of Queen's Bench,[70] Abbott J. wrote:[71]

> In my opinion before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform . . . In the instant case . . . the respondent was bound to know that the act complained of was beyond his legal authority.

The two French-Canadian members of the Supreme Court based their dissent on art. 88 C.P. The third dissenter, Mr. Justice Cartwright decided on the merits. Mr. Justice Taschereau's dissent was entirely based on the argument that Duplessis, being a public officer, did not cease to be an officer in the exercise of his functions because of a possible error as to the nature and extent of these functions. He was thus entitled to notice:

> L'intimé est sûrement un *officier public*, et il me semble clair qu'il n'a pas agi *en sa qualité personnelle*. C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme *officier public* chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: *Loi concernant le Département du Procureur Général*, S.R.Q. 1941, c. 46, art. 3, *Loi des liqueurs alcooliques*, S.R.Q., c. 255, art. 138.
>
> Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppresion de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlè-

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[66] *Ibid.*, at p. 144.

[67] *Ibid.*, at p. 158.

[68] *Ibid.*, citing Lopes J. in *Agnew v. Lobson*, (1877) 47 L.J.M.C. 63, 13 Cox C.C. 625.

[69] *Ibid.*, at p. 185.

[70] *Lachance v. Casault*, (1902), 12 Q.B. 179 at p. 202; *Asselin v. Davidson*, (1914), 23 Q.B. 274 at p. 280.

[71] [1959] S.C.R. 121, at p. 186.

vement du permis de l'appellant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un *officier public,* en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans l'*exécution de ses fonctions.*[72]

The most thorough discussion of art. 88 C.P. is found in the judgment of Fauteux J. who admits that, but for art. 88 C.P., he would have ruled in favor of Roncarelli's appeal. He attributes the restrictive interpretation of the article to a confusion resulting from the similarity of its language with that of art. 1054 C.C.:

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés.* On est dès lors porté à donner aux expressions plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent, — ce qui n'est pas le cas en l'espèce, — dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9e ed., p. 322 *et seq.* Les considérations présidant à l'établissement, la fin et la portée de l'art. 88 C.P.C., d'une part, et de l'art. 1054 C.C., d'autre part, sont totalement différentes. Sanctionnant la doctrine *Respondeat superior,* l'art. 1054 C.C. établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics . . . je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C.[73]

Art. 88 C.P. presupposes the commission of an illegality on the part of the public officer:

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de détruire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ai perdu tout droit à l'avis.[74]

Mr. Justice Fauteux then reviews the history of the judicial interpretation of art. 88 C.P. and distinguishes two schools. The first one held that as soon as bad faith is alleged, the defendant loses his right to notice. This jurisprudence was superseded in 1933 by the Appeal Court decision in *Charland v. King,*[75] which held that the right to notice is absolute, irrespective of good or bad faith, since, moreover, good faith is always presumed under art. 2202 C.C. Fauteux

[72]*Ibid.,* at p. 130.

[73]*Ibid.,* at pp. 177-78.

[74]*Ibid.,* at p. 179.

[75](1933), 50 K.B. 77. Fauteux J. also cites: *Chaput v. Crépeau,* (1917), 57 S.C. 443.

J. declared that the jurisprudence has since been settled.[76] This school of thought finds its historical basis in the argument that art. 88 C.P., formerly art. 22, is derived from the Act for the Protection of Justices of the Peace,[77] wherein the right to notice was subordinated to the existence of good faith. When this section was transferred to the new Code of Procedure as art. 22, the requirement of good faith was left out. This, to Mr. Justice Fauteux, appears to be the "peremptory" argument.[78]

The Supreme Court thus reversed the Court of Appeal. Moreover, it increased the award to $33,123.53, with interest from the date of the judgment of the Superior Court and costs. Although Duplessis could have gone before the Privy Council — since the action was originally instituted before the abolition of appeals to the Judicial Committee — he did not do so within the delays and the Supreme Court decision is final.

VI COMMENT AND CRITICISM

Stated concisely, the action arose out of the allegation by Roncarelli that Duplessis, as Prime Minister and Attorney-General of the Province, had caused a nominally independent Commission to exercise its discretion to cancel a license, on the avowed ground that Roncarelli had helped the Witnesses of Jehovah by systematically bailing out those adherents of the sect who were arrested for violating municipal by-laws.

Of the five issues which presented themselves to the minds of the judges, the question of fact was the crucial one. It resulted in the unusual reversal of a trial court by the Appeal Court on the appreciation of the facts, followed by the not less abnormal reversal by the Supreme Court of the Court of Queen's Bench's finding on the facts. It was on this issue that judicial disagreement focused.

In connection with the second issue, neither the Court of Appeal, nor the dissenting judges in the Supreme Court, accepted the argument that Duplessis had the authority to interfere in the operations of the Commission. Similarly, not one among the fifteen judges deigned to receive Duplessis' contention that a Crown officer, in the exercise of his duties, is immune from civil prosecution. On this point, the decisions of all three courts leave no doubt. They have held that English authorities govern Quebec's public law. These authorities are unanimous and explicit. Again and again the courts referred to Dicey's classic statement:[79]

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[76]To prove this statement, the learned judge cites: *Corporation de la Paroisse de St. David-de-l'Auberivière v. Paquette et autres,* (1937), 62 K.B. 143; *Houde v. Benoît,* [1943] K.B. 713.

[77]Consolidated Statutes of Lower Canada, c. 101, s. 8.

[78][1959] S.C.R. 121, at p. 178.

[79]*Law of the Constitution,* by A. V. Dicey, 9th ed., p. 193. See authorities cited there. For a criticism of this view as too sweeping, cf. *Public Authorities and Legal Liability,* by G. E. Robinson, London, 1925, at p. 2 *et seq.,* and *passim* and *Principles of Administrative Law,* by J. A. G. Griffith and H. Street, London, 1952, p. 239.

> Every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.

This principle is so fundamental to our public law that it is not difficult to understand Abbott J.'s exasperated statement:[80]

> I do not find it necessary to cite from the wealth of authority supporting the principle that a public officier is responsible for acts done by him without legal justification.

In the more recent reports we find actions against a Prime Minister,[81] a Dominion Minister of Agriculture,[82] a South Australian Minister of Agriculture,[83] the Lords of the Admiralty,[84] and a Secretary of State.[85] In other words, there is no special immunity resulting from elevation in the hierarchy of Crown office.

All three courts devoted considerable attention to the nature of the discretion given to the Quebec Liquor Commission. It seems to have escaped their attention that, as a matter of strictly legal logic, this issue was *entirely irrelevant*. Indeed, on the one hand, it was admitted by all judges that Duplessis had no discretion to exercise, and on the other, the Commission, which possessed it, was explicitly accused and held to have abdicated it. It is rather paradoxical to see the highest court, respectively in the Province and in the country, explain at length how discretion should be exercised which they unanimously declared to be vested in hands other than defendant's! In effect, the courts first decided that Duplessis had no discretion to cancel a liquor license, and then proceeded to decide how he should have exercised such discretion. A psychologist rather than a lawyer is needed to explain the astonishing mental mechanism which produced such confusion.

Compelling though the Supreme Court's views on administrative discretion might be, the justices had a duty to segregate them from the relevant grounds of decision. It is not for us to decide whether it is within a court's functions to lecture the country in cases of this type. But opinions on matters which strictly speaking are extraneous should be clearly isolated. The importance of realizing the irrelevancy of the holdings on discretion lies in the probability that they will be frequently cited in the future. Their highly *obiter* nature must be understood and the real *ratio decidendi* be found, if we are to avoid erroneous derivations from this decision.

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[80] [1959] S.C.R. 121, at p. 184.

[81] *Literary Recreations v. Sauvé*, [1932] 4 D.L.R. 553.

[82] *Smith v. Christie*, (1920), 55 D.L.R. 68.

[83] *James v. Cowan*, [1932] A.C. 542.

[84] *Raleigh v. Goschen*, (1898) 1 Chancery 73.

[85] *Liversidge v. Anderson*, [1942] A.C. 206.

These *obiter dicta* can be summarized as follows. The discretion granted by a statute to an independent administrative body, no matter how unlimited its language, is never absolute. It must be exercised only for the purposes contemplated by the statute, and for no other end whatever, no matter how worthy or desirable. It must never be exercised by, or under dictation from, someone in whom it is not vested. On the other hand, the Supreme Court inclines to the view that the rule *audi alteram partem* does not apply, when the discretion is administrative. It must be noted that the Supreme Court's views on administrative discretion, eloquent and pertinent though they are, do not add anything to the principles established by the leading English jurisprudence and part of our law.[86] At any rate, the principles which are to govern the exercise of administrative discretion and which the Supreme Court will enforce in the future are now clear. Mr. Justice Cartwright's dissent on this point, it is submitted with due respect, does not conform with the law nor with the ideals of our society.

As a corollary to its discussion of administrative discretion, the Supreme Court considered Duplessis' extraordinary contention that the large-scale giving of bail for members of a sect alleged to be guilty of distributing seditious literature, was itself seditious and rendered one unfit to enjoy a "privilege" such as a liquor licence. This constituted a very disturbing assault upon one of the fundamental institutions of our law, implicitly tainting the bondsman with guilt by association. If adopted, this view could have severely curtailed the right to give bail and caused thousands of impecunious offenders of the most innocuous type, unable to secure a bondsman willing to incur opprobrium by association, to languish in jail until their trial. Despite the Appeal Court's almost complete silence on the matter, the Supreme Court unanimously rejected this extraordinary suggestion. Rand J. called the right to give bail "unchallengeable" and one for whose exercise a citizen cannot be punished.[87] Mr. Justice Martland described[88] Roncarelli's actions in this respect as "entirely lawful." To Abbott J.,[89] they were "perfectly legal." And yet, Court of Queen's Bench judge Martineau, while nevertheless agreeing[90] with the view that Roncarelli's putting up bonds was utterly legal, still advocated the remarkable view that a citizen, exercising such an "unchallengeable" right, could thereby so provoke the authorities as to excuse them in law from committing a wrong:

> Mais cette indignation quasi générale, que partageait le défendeur, ne démontre-t-elle pas que le demandeur fut bien mal avisé, même très imprudent en s'associant à cette propagande, même s'il ne l'a fait qu'indirectement, lui qui détenait un privilège spécial de la Commission des liqueurs, donc de la Province de Québec

[86] Griffith and Street, *op. cit.*, pp. 214-19, for a summary thereof.

[87] [1959] S.C.R. 121, at p. 141.

[88] *Ibid.*, at p. 156.

[89] *Ibid.*, at p. 185.

[90] [1956] Q.B. 447 at p. 488.

> qui était si cruellement prise à partie dans le livre *La Haine ardente du Québec*. N'aurait-il pas dû, dans les circonstances, non pas renier sa foi, non pas la cacher, mais agir de façon que son nom ne fût en aucune façon associé à des actes, qui devaient nécessairement blesser les susceptibilités légitimes et les croyances respectables de la majorité des citoyens de la province? Je le crois, et il me semble que *sa conduite, bien qu'elle n'eût rien d'illégale, était dans les circonstances une provocation qui aurait enlevé tout élément de faute à l'ordre de révoquer le permis du demandeur*, si le défendeur avait donné de telles instructions à M. Archambault.[91]

The Supreme Court could not and did not subscribe to this surprising opinion. It might be said that even if Roncarelli had stood bail twice, ten times, as often as he did, his conduct would neither have been reprehensible in law, nor contrary to the ends of justice, nor relevant to the administration of the Liquor Act. Moreover, it must not be forgotten that in his alleged defiance of the ends of justice Roncarelli was abetted by Quebec's judicial authorities since they accepted each and everyone of the 390 bonds he posted. And, in passing, it should be mentioned that the right to give bail derives from the law of England, under which the refusal to permit bail to any person bailable is an offence against the liberty of the subject.[92]

The ruling of the Supreme Court on art. 88 C.P. is not surprising. It does not entirely dispel the difficulties raised by contradictory schools of jurisprudence. Lack of space, however, does not permit a review of the abundant jurisprudence on the point. The writer hopes to undertake it at a later date. The prevailing view today, reflected in the judgments of the majority in the Supreme Court, holds that, in order to benefit from the protection of that article, a public officer must have committed the wrong complained of of "in the exercise of his functions." The "functions" of any particular Crown officer are never clearly determined and conflicting interpretations are inevitable. But such doubts should not exist where there is no authority at all. Duplessis was not accused of *abusing*, but of *usurping* authority. Even though the inaccurate thinking often prevalent in the legal profession prevents many from realizing the distinction, it is a fundamental one. On the other hand, the well-reasoned dissent of Fauteux J. shows how compelling and real are honest differences of opinion on this matter, since he dismissed the appeal on this procedural ground alone, while stating that on the merits it should succeed. The deep misgivings of the Supreme Court in interpreting such provisions is further evidenced in the contemporaneous decision of *Lamb v. Benoit*.[93]

In the course of its judgment, the Supreme Court acknowledged the principle that, while our public law is determined by English authorities, liability for damages occasioned in its breach is governed by our civil law, and particurlarly by art. 1053 of the Civil Code. This article reads:

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[91] *Ibid.*, at p. 490. Italics by the writer.

[92] *R. v. Badger*, (1843), 4 Q.B. 468; Archibald, *Pleading and Practice*, 32nd ed., p. 71, *Allen v. Flood*, [1898] A.C. at p. 92. Hawkins, *Pleas of the Crown*, 7th ed., vol. III, p. 189.

[93] (1959), 17 D.L.R. (2d.) 369. Comment by Edward McWhinney, (1959), 37 C.B.R. 503. Comment by B. Lacombe, (1959-60), 6 McGill L.J. 53.

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Resort to public law disclosed absence of authority. The Court was then faced with the problem of formulating the juridical principle under which defendant's illegal actions constituted a fault falling within the scope of art. 1053 C.C. It had to bridge the gap between the public law which established a breach and conversely a right in the victim, and the civil law in which the remedy must be found. In other words, if we adopt the formula of Carl Goldenberg[94] that a "positive act constitutes a *'faute'* when it is the doing of an act prohibited by law," we must, in the case of Crown officers, examine our public law of English origin to establish whether the act complained of is prohibited or not. The public law rule is that every act not specifically authorized is prohibited. This relationship of civil and public law is comparatively simple and fundamental. The principle could have been formulated so as to apply to the facts of this case of which it would then have been very easy to dispose. But, as Edward McWhinney pointed out in his thought-provoking, though occasionally too shallow comment,[95] the Supreme Court failed entirely to do so, let alone to display even a mere awareness of the problem. McWhinney's accusation of lack of lucidity and superficiality on the part of the Court is not undeserved.

A scrutiny of the individual judgments for an explanation of the civil law basis of Duplessis' liability is not very fruitful. If we look at the judgments in the Court of Appeal, we find Bissonnette J. declaring[96] that, even assuming Duplessis had given the order — which Mr. Justice Bissonnette denied — his liability would depend on the existence of an illegality on the part of the Commission in cancelling the permit. In other words, as in the case of art. 1054 C.C., the principal could not be at fault unless the agent was. Martineau J. adopted a similar view:[97] if Duplessis were responsible for the cancellation, the Court would still have to determine whether such order, under the circumstances, was "reasonable". Pratte and Casey JJ. seem to agree with Bissonnette J. But if we look at Mr. Justice Rinfret's dissent, we find an entirely different view. It is worth citing in full:

> Le concept de responsabilité chez l'officier public n'est pas en tous points semblable à celui qui régit les individus; si, sous certains aspects, ses règles en sont moins rigoureuses, à certains autres égards, elles sont plus sévères.
>
> Tout comme l'individu, l'officier public devra répondre de ses actes malicieux, des actes faits de mauvaise foi, de ses délits, même s'ils sont commis dans l'exercice de ses fonctions; il est également responsable de ses actes faits en dehors de ses fonctions, même sans malice ni mauvaise foi.

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[94] *The Law of Delicts*, Montreal, 1935, p. 11.

[95] (1959), 37 Can. Bar Rev. 503, at pp. 504-5.

[96] [1956] Q.B. 447 at p. 455.

[97] *Ibid.*, at p. 493.

> Hors les cas de malice, de mauvaise foi, de délit, l'officier public n'est pas soumis aux dispositions de l'art. 1053 C.C.; il n'encourra aucune responsabilité personnelle en tant qu'il reste dans l'exercice de ses fonctions.
>
> Dans ce cas, techniquement du moins, et sujet à la théorie de: *The King can do no wrong*, et de la pétition de droit, la Couronne répond des actes de son préposé en vertu d'un principe similaire à celui de l'art. 1054 C.C.
>
> Toute circonstance ou série de circonstances qui exonéreraient le maitre et le commettant sous l'art. 1054 C.C. font perdre à l'officier public l'immunité qu'il aurait eue s'il eût agi dans les limites de ses fonctions, engendrent sa responsabilité personnelle et son obligation d'indemniser le dommage causé.
>
> L'officier public se double de l'individu; comme individu, tout lui est permis sauf ce qui est défendu, *provided he does not transgress the substantive law, or infringe the legal rights of others;* mais comme officier public, tout lui est prohibé sauf ce qui est permis, *(he) may do nothing but what (he is) authorized to do by some rule of common law or statute* (Halsbury, *Laws of England* (1932), t. 6, n. 435, p. 389).
>
> S'il transgresse sont autorité, *for acts done in (his) official character but in excess of (his) lawful authority, (he may) be brought before the Courts and made in (his) personal capacity, liable to punishment or to the payment of damages* (Dicey, *Law of the Constitution*, 9th ed., p. 193).

He summarizes his conclusions as follows:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes prohibés, des actes commis hors des limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.[98]

Here are thus two conflicting theories. (1) On the one hand the majority of the Appeal Court ruled that there is no liability for giving an unauthorized order unless such order by its very nature is unlawful, *i.e.* would constitute a fault even if emanating from the depositary of the discretion; (2) on the other hand, Rinfret J. declared that there is liability due to the mere usurpation of authority, irrespective of whether there would have been fault on the part of the Commission had it acted *proprio motu*. This second view in effect means: if you cause damage without authority you are liable and it does not matter whether someone else could have inflicted such damage lawfully.

The Supreme Court did not display much more perspicacity than the Appeal Court in dealing with this dilemma. Mr. Justice Rand wrote:[99]

> The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute . . . Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec . . .

This is an ambiguous statement which is subject to interpretation both ways. In fact, a little later, Rand J. explicitly refused to decide this point:[100]

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[98] *Ibid.*, at p .518.

[99] [1959] S.C.R. 121, at pp. 141-42.

[100] *Ibid.*, at p. 144.

> Mr. Scott argued further that even if the revocation were within the scope of the discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally at fault . . . I express no opinion for or against (this view).

Martland J. was equally cryptic,[101] although he seemed to favor the view urged by Rinfret J. Mr. Justice Abbott might also be said to side with the latter view:

> The respondent is . . . liable under art. 1053 of the *Civil Code* for the damages sustained by the appellant by reason of the acts done by respondent in excess of his legal authority.[102]

The opinion of Mr. Justice Fauteux (diss.) is even more elusive. After first stating[103] that

> . . . l'annulation du permis est exclusivement imputable à l'intimé et précisément pour cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appellant d'obtenir réparation pour les dommages lui en résultant

he writes[104]

> En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité, mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C.

Contradictory and enigmatic though this is, it has at least the merit of bringing out the difficulty of fitting Duplessis' actions within the scope of art. 1053 C.C. As for Cartwright J., he implicitly adopted the view that the cancellation must have been an actionable wrong on the part of the Commission to render Duplessis liable.[105]

It is evident from this examination that the problem was never clearly formulated in the minds of the learned justices. This is regrettable, especially in view of the inescapable implications of their judgment. The question that had to be answered was this: did, in civil law, the fault lie in causing damages without authority or did it consist in causing damages which, even if there had been authority, would still have constituted an actionable wrong? By adopting the second alternative, the Court would in effect sanction the right of Crown officers to interfere in the operations of independent bodies. For if the fault of the officer is predicated upon the existence of fault on the part of the body whose authority he usurps, it would also mean the obverse: no liability for usurpation when the body itself would not be liable. Such principle would defeat the policy of the law. Moreover, public officers have no powers other than those specifically granted them by law. If there is no text of law exonerating them from liability for causing damages, they should

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[101] *Ibid.*, at p. 159.

[102] *Ibid.*, at p. 185.

[103] *Ibid.*, at p. 175.

[104] *Ibid.*, at p. 181.

[105] *Ibid.*, at p. 170

be accountable. The rule, stated in its broadest terms, is given as follows in a leading English textbook on constitutional law:[106]

> In the absence of statutory immunity, every individual is liable for the commission of wrongful acts and for such omissions of duty as give rise to actions in tort at common law or for breach of statutory duty.

Officers cannot arrogate to themselves — even for the worthiest of motives — a power they do not hold under a specific text of law. The general rule underlying art. 1053 C.C. could be paraphrased as follows: anyone causing damages is liable unless authorized by law to inflict them. A judge, a Crown officer, an executioner, are, under certain circumstances, exonerated from liability for the obvious damages they cause in the exercise of their functions. Hence the fault or innocence of the Commission would have been irrelevant. The Commission became only the *instrument* by which defendant damaged plaintiff. In strict logic, one must conclude that Duplessis would have been liable even if he had ordered the Commission to exercise its discretion in a manner which by itself would have been lawful and would not have constituted a fault on the part of the latter. In other words, while the Appeal Court in effect held: it is an actionable wrong for a public officer without authority to cause another to *commit a fault*, the Supreme Court's *ratio decidendi* would be: it is an actionable wrong for a public officer to cause another to *cause damage* (i.e. whether by a fault or not). The root of the liability lies in the usurpation of authority, not in the manner in which the usurped authority is exercised. So the Supreme Court can be held to have established the principle that no one without authority can order another to cause damage to a third party, and fault on the part of the author of the damage is not a prerequisite of liability in the defendant. This distinguishes it radically from vicarious liability under 1054 C.C. requiring fault in the agent.

This rule can be rephrased to cover ordinary cases where authority is not an issue. Since private persons normally have no authority to cause damage in any capacity whatever, the proposition could be generalized so as to state: no one can induce another to cause damages. Again, the existence of fault in the immediate author need not be established. It would place the burden on the possessor of a *de facto* power to show he had authority to induce the author to damage the victim. Far-fetched as this may sound, it is the logical result of the Supreme Court decision. Anyone using persuasion or a *de facto* power of any type to induce another to damage a third party should be liable to the latter. Individuals have a right to expect that they will not be damaged at the instigation of another. Thus a spiritual counsellor advising the cancellation of a contract, a licence, or a dismissal, might be liable in damages to the creditor,

[106] Wade and Phillips, *op. cit.*, p. 300.

the holder or the employee.[107] The principle has been unwrittingly applied in two Quebec decisions. A priest using his moral authority to restrain a woman from cohabiting with her husband was recently condemned in damages even though on the part of the wife there was no wrong actionable under art. 1053 C.C.[108] A municipal corporation whose council procured an administrative body to cancel a dance hall licence was condemned in damages.[109]

Thus a mistress or a jealous wife causing the dismissal of too attractive a secretary could be held liable for damages to the latter even if her employer would have been justified in law to dismiss her for other reasons. A principle akin to the one just outlined lies at the basis of all condemnations of correspondents in actions for alienation of affection. Under the Criminal Code the mere counselling of an offence, whether the offence is actually committed or not, can itself constitute an offence.[110]

This expansion of the notion of fault under art. 1053 C.C., implicit in the decision of a Supreme Court majority consisting in five common law judges and one English-speaking Quebec judge, none of whom formulated the principle on which they applied art. 1053, may not be easily accepted in Quebec. Its repercussions in constitutional, administrative, and labor law, as well as its effect on the relations between individuals could be immense. It is nonetheless the most significant, though controversial, contribution of this memorable case to our law. The other holdings did not constitute departures from established rules nor clarifications of doubtful ones and derived their impact mainly from such non-legal factors as the circumstances of the case and the personalities in conflict. In the perspective of history, *Roncarelli v. Duplessis* may be looked upon as a milestone chiefly in the interpretation of art. 1053 C.C.

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[107]This has actually been held in French law: D.1896.2.496: it is a fault to use influence to induce a curé to dismiss an organist who is a free-mason; D.1910.1.148 and D. 1905.1.349: it is a fault to use manoeuvres to induce another to dismiss a worker. See also Mazeaud, *Traité de Responsabilité Civile*, 4th ed., vol. II, p. 526 and 529; Savatier, *Traité de Responsabilité Civile*, 2nd ed., vol. II, pp. 20-21.

[108]*Nicol v. Collette*, [1950] S.C. 117.

[109]*Leroux v. City of Lachine*, [1942] S.C. 352.

[110]Cf. ss. 212 and 407.