Frank Scott — Civil Libertarian*

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Introduction

It is difficult to discuss the attainments of Frank Scott in a short lecture, even with respect to civil liberties alone, because he has been so much a Renaissance man — constitutional lawyer, law teacher, man of letters, political activist and, above all, in a combination of all of the previously mentioned manifestations, a civil libertarian. I want to concentrate on Frank Scott as advocate of civil liberties and architect of modern Canadian thought on human rights and fundamental freedoms.

In speaking of Frank Scott's career, I want to speak of irony, because it is ironic that rebellion should be acknowledged. Despite impeccable family background and education, Frank Scott has been a "rebel without pause" and just as Bertrand Russell was perhaps best described as "the passionate sceptic", so Frank Scott could perhaps be best characterized as "the compassionate rebel". For over half a century, he has consistently presented a minority view, as well as a view of minorities, not only with incomparable perspicacity, wit and literary style, but with courage, insight and compassion as well.

I hope to illustrate my characterizations of him by reference to the following specific propositions, determining our appreciation of human rights and fundamental freedoms in Canada, for which he can claim credit:

A. The topic of human rights and fundamental freedoms is not only a legitimate, but an indispensable component of Canadian constitutional law.

B. Within our federal state, there is an important role for the central government in the field of human rights and fundamental freedoms, despite provincial jurisdiction over "Property and Civil Rights" under s. 92.13 of the *British North America Act,* 1867.[1]

C. The Rule of Law is as important a part of our "Constitution similar in Principle to that of the United Kingdom"[1a] as is Parliamentary supremacy.

D. Although traditionally, in Anglo-Canadian constitutional practice, our human rights and fundamental freedoms were realized by restraining governments from interference with matters not within their jurisdiction, we have recognized that some of our human rights can only be realized through the assumption of government responsibility.

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[1] 30 & 31 Vict., c. 3 (U.K.) (as am.) (R.S.C. 1970, App. II No. 5).

[1a] Preamble to the *British North America Act*, 1867.

E. An essential feature of Canadian federalism, unlike the unitary and homogeneous situation of the United Kingdom, is the protection of group rights, *e.g.,* language and religious schools.

Before turning to these topics, however, I must refer to Scott's role as an advocate and an activist in defending the civil liberties of unpopular minorities. This was accomplished not only through legal scholarship, but through more popular writings in such magazines as the *Canadian Forum,* as well as through organizational and counsel work.

Frank Scott, the defender of the civil liherties of persecuted groups

Most students of Canadian history, and especially students of constitutional law, will be familiar with the contributions Frank Scott made to the defence of Jehovah's Witnesses in Québec in the 1950s. It is less well known that his defense of unpopular minorities goes back to a very difficult and tense time in the 1930s, and continued through an equally difficult time, with respect to Japanese-Canadians, at the end of World War II.

Few causes in the early 1930s could have been less pleasing, not just to those in authority, but even to the majority of ordinary citizens, than the defence of Communists and leftists, especially if they were "foreign". Scott did not hesitate to provide this defence by such means as an article on "The Trial of the Toronto Communists", in the *Queen's Quarterly* of 1932,[2] a lecture on "Freedom of Speech in Canada", presented the same year at the Annual Meeting of the Canadian Political Science Association,[3] and a comment on the case of *Wade* v. *Egan,*[4] in the 1936 volume of the *Canadian Bar Review.*[5] In these three essays, Scott expressed his objection to police behaviour which infringed on the freedoms of speech and association during the years of economic crisis, and his criticism of the absence of judicial or executive control of such infringements. Perhaps tlie most important symbols of this oppression were s. 98 of the *Criminal Code*[6] and the deportation provisions under the *Immigration Act.*[7]

Section 98 declared that any association whose purpose was to bring about governmental or economic change within Canada by the use of force, violence or injury to person or property, or which taught or advocated these

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[2] Most of the articles that will be referred to have been compiled and published in a volume entitled *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) [hereinafter *Essays*]. F. R. Scott, "The Trial of the Toronto Communists", *Essays,* 49; (1932) 39 Queen's Quarterly 512.

[3] F.R. Scott, "Freedom of Speech in Canada", *Essays,* 60; CPSA, *Papers and Proceedings* (1933), 169.

[4] (1935) 64 C.C.C. 21.

[5] F.R. Scott, "*Wade* v. *Egan:* A Case Comment", *Essays,* 76; (1936) 14 Can. Bar Rev. 62.

[6] R.S.C. 1927, c. 36.

[7] R.S.C. 1927, c. 93, subs. 42 (3-6); am. S.C. 1928, c. 29.

methods of securing such change, was unlawful. Membership in, or financial contribution to such an association was unlawful. Attendance at meetings or public advocacy of such an association led to the presumption of membership. Further, printing, publishing, circulating or selling literature which advocated the use of force to effect governmental or economic change, or advocacy or defense of such violence, was also unlawful. The maximum penalty under s. 98 was 20 years.[8]

Scott's attack on s. 98 pointed out how much it extended beyond the traditional criminal law restrictions for the protection of public security:

> The common law crimes of treason, sedition, seditious conspiracy and unlawful assembly have always been considered an adequate protection for public security in any situation short of actual or impending rebellion. Yet Canada in 1919 proceeded to graft on to her criminal code a special section — the now notorious Section 98 — which for permanent restriction of the rights of association, freedom of discussion, printing and distribution of literature, and for severity of punishment, is unequalled in the history of Canada and probably of any British country for centuries past.[9]

Not only did Scott impugn the legitimacy of s. 98, but he illustrated its oppressiveness with reference to the trial of eight leaders of the Communist Party arrested in Toronto in August 1931. They were all charged and subsequently convicted of being members of an unlawful association, although there was no evidence that any of them had engaged in violent acts. He summarized the effects of the trial thus:

> What is most striking about the trial is the fact that the eight accused were in effect sentenced solely on account of their opinions, since there was no reliable evidence adduced to show that they or the party to which they belonged had actually occasioned any acts of violence in Canada. The use of force in which they and the party believed was to occur at some future date. It is also to be noted that they were found equally guilty of the crime of seditious conspiracy, which shows that our normal criminal law on these matters is quite adequate to look after the Communist party even without Section 98, if we wish to proceed against it. Just why it should be necessary to outlaw Communists in Canada when it is unnecessary in all civilized countries that have not turned fascist, we have never been told. Nor are we informed why the policy of persecution will have any other than the normal result of spreading the very doctrines it is designed to suppress.[10]

His criticism of the deportation provisions of the *Immigration Act* was even more biting. He suggested that as much as certain aspects of s. 98 were "a sufficiently severe break with our traditional freedoms", the deportation provisions were even more pernicious "because they lead to exile after secret trials, and because they bear most hardly upon the friendless foreign element in Canada".[11] He described deportation by a board of inquiry in the following terms:

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[8] R.S.C. 1927, c. 36, subs. 98 (3).
[9] *Supra,* note 2, 49-50.
[10] *Supra,* note 3, 67-8.
[11] *Ibid.,* 68.

> For the totally different purpose of administering justice to foreigners who have committed certain crimes — for that is what these boards are doing — they are a travesty of everything we profess to believe is proper in the enforcement of criminal law. The accused does not stand a dog's chance. He is tried secretly. He may be whisked away from Winnipeg to be tried in Halifax.... He is not stated to have the right to call witnesses in his own behalf — and the right would be ineffective where long distances intervene between his home and the port of entry. He has no right to refuse to give evidence, but may be questioned. His judges are probably petty officials untrained in the interpretation of statutes and the weighing of evidence, and liable to direct pressure from above. His appeal may be even less a trial than the enquiry: the Minister is not obliged to hear counsel for the defence. And the penalty is the 'cruel and unusual punishment' of exile, as likely as not to a country where further penalties will await the radical deportee.[12]

He argued that "even naturalized aliens cannot feel safe" because the *Naturalization Act* provided for the revocation of citizenship by the Governor in Council of any person who had "shown himself by act or speech to be disaffected or disloyal to His Majesty",[13] or when the Governor in Council was satisfied that the continuation of the certificate was not "conducive to public good".[14] He referred to the fact that, during 1931-32, as many as 239 certificates were revoked or annulled and said:

> No reasons are given. Naturalization thus gives no security in regard to freedom of speech; even sedition seems an exact term beside the words 'disloyalty' and 'disaffection,' and as for the clause protecting the 'public good,' what is this but straight permission to cancel certificates at will?[15]

Scott's advocacy of the need to respect "freedom of speech" in those difficult times deserves to be repeated today. His remarks are timeless:

> The time for defending freedom never goes by. Freedom is a habit that must be kept alive by use. In times like the present, when mankind is hesitating before a bewildering choice of remedies for its afflictions, freedom of discussion is more necessary than ever. There are two ways of attempting to solve our present economic problems. One is to use the sword; this is the Communist and Fascist technique. The other is to think through the difficulties, to decide a policy, and to legislate it into existence. That is what we like to think is the Canadian technique. It cannot work without the utmost freedom of speech and discussion.
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> The achievement of a full degree of personal liberty must await the conquest of the economic system by the democratic principle. But much could be done immediately to widen the area of freedom of speech in Canada, and liberal minds of all parties should unite in this endeavor. In particular the repeal of Section 98, the confining of the immigration boards to their proper functions, a restriction of police control over owners of halls, a reasonable granting of permission for parades, and the setting aside in every city and town of specific localities for outdoor meetings under police supervision, are essential steps toward regaining our traditional freedom. Law and order would be more secure in this atmosphere of tolerance, because tolerance induces a respect for

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[12] *Ibid.*, 69.
[13] R.S.C. 1927, c. 138, subs. 9 (1).
[14] R.S.C. 1927, c. 138, subs. 9 (2).
[15] *Supra,* note 3, 69.

> authority. The well-tried rules of our normal criminal law would still be available to put down violence and to preserve the public peace.[16]

Nothing could better illustrate Frank Scott's defence of unpopular minorities than the open letter he sent to fifty-five newspapers in Canada early in January 1946, protesting the deportation orders of December 1945, against thousands of Japanese and Japanese-Canadians. In retrospect, many people have claimed that they spoke out against the treatment of these people during and after World War II, but it is difficult to find printed evidence of as bold an indictment as that made by Scott:

> The Canadian government is about to deport from this country some 10,000 men, women and children mostly Canadian citizens, for no other crime except that they have a particular racial origin. They are being sent to a land which most of them have never seen, which is too devastated by war to receive them, and where their future is hopeless. Not since the expulsion of the Acadians has such severe treatment been accorded to any social group within our frontiers, and there was at least some military justifieation for that deportation whereas there is none for this.[17]

Scott claimed that the government policy towards the Japanese-Canadians was hypocritical when compared to the treatment given to Canadians of Italian or German descent. He criticized the "trick or device" of asking the Japanese to sign repatriation forms while the war was still on:

> It is like offering a condemned man a pistol so that he may choose swift suicide to a public hanging. Is his death voluntary? Perhaps no one was 'forced' to choose repatriation, but the whole Canadian policy, the extreme racial hatred in British Columbia, the refusal of other provinces to co-operate in resettlement, the long history of deprivation of citizens' rights to people who were Canadian born British subjects, the statement of the Hon. Ian MacKenzie that they could never return to the coast — all this was the compulsion.[18]

His plea on behalf of the Japanese-Canadians is all the more poignant in the light of the development of race relations during and after World War II:

> At the very moment when Parliament is trying to give some secure status to Canadian citizens by the Citizenship Bill, we should not treat fellow citizens in this fashion. It makes a farce of citizenship. We are all immigrants in Canada, except the Indians and Eskimos, and no citizen's rights can be greater than that of the least protected group. Every Canadian is attacked in his fundamental civil liberties by this policy... .
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> The real problem we have to solve in Canada has nothing directly to do with the Japanese at all: it is the problem of racial intolerance. This problem is only aggravated by the deportations. They mean a victory for intolerance and bigotry. We should be generous to this harmless minority whom we previously admitted to our shores, and apply fully to them the principle that race, religion and colour are no bar to full citizenship in this democracy.[19]

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[16] *Ibid.*, 75.

[17] F.R. Scott, "The Deportation of the Japanese-Canadians — An Open Letter to the Press", *Essays*, 190.

[18] *Ibid.*, 191.

[19] *Ibid.*, 192.

Almost immediately after his defence of the Japanese-Canadians, Frank Scott turned his support to the defence of another unpopular minority, the Jehovah's Witnesses in Duplessis' Québec. Since I will return to this topic, I will merely point out here that very soon after Frank Roncarelli had his liquor licence cancelled and his restaurant raided, Frank Scott objected publicly through an article in the Canadian Forum on "Duplessis *versus* Jehovah".[20] The essence of his charge can be found in the following paragraph :

> What Mr Roncarelli really did was not to promote disorder, but to check Mr Duplessis' mass persecution of the Witnesses. Because while the laying of a charge — in this case of peddling literature without a license — is not necessarily persecution, it becomes so when we learn that the number arrested reaches many hundreds, and particularly when Mr Duplessis tries to deny the accused the normal right of every citizen to bail. At the present moment, under a pretence of legal process, and in Mr Roncarelli's case without even a pretence, a small religious sect is being persecuted and indeed martyred in many parts of Quebec.[21]

However, at the same time Scott was concerned that the persecution be seen in perspective and not be a basis for anti-Québec hatred :

> And lastly it may be worth warning too zealous defenders of civil liberties against using this incident as an excuse for another attack upon Quebec. The most serious breach of civil liberties in this country is British Columbia's — and the federal government's — treatment of Canadian citizens of Japanese origin. Beside it the case of Jehovah's Witnesses in Quebec is less reprehensible. For the Japanese-Canadians do not insult their fellow citizens by calling them evil names in widely distributed pamphlets.[22]

In the light of his perceptive analysis of the unjustified oppression of unpopular minorities in the 1930s, through the 1940s and into the 1950s, it came as somewhat of a surprise to those who criticized the invocation of the *War Measures Act*[23] in October 1970, that Frank Scott supported its invocation. In an article on "The War Measures Act in Retrospect", published in May 1971, by the Canadian Association of University Teachers (CAUT) in a *Symposium on the War Measures Act*, Scott claimed that one week after the proclamation on 23 October 1970, he had written in his diary eight reasons why he "had supported the application of the *War Measures Act* to the critical situation in Quebec". These reasons can be summarized in the following excerpts :

> No modern industrial society, where a natural disaster or a determined few can imperil millions, can risk drifting along without forethought and foresight. But the Quebec and federal governments had only the *War Measures Act* to deal quickly with a deteriorating situation. All the evidence pointed, not to a popular insurrection, but to a further erosion of civil government, and to what Gérard Pelletier has called "uncontrollable civil disorders". This is how it looked to me.

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[20] F.R. Scott, "Duplessis *versus* Jehovah", *Essays,* 193 ; (1947) 26 Canadian Forum 222.
[21] *Ibid.,* 195.
[22] *Ibid.,* 196.
[23] R.S.C. 1970, c. 288.

> A shock treatment was needed to restore the balance. It was given, and it worked. There was only one death and it was not caused by the forces of law and order.[24]

For those who would criticize him, however, it should be recalled that by October 25, when the alleged "climate of fear" was such that there was some difficulty in getting legal representation for those arrested or detained, a group of fourteen citizens approached Justice Minister Jerome Choquette to select three of their members to form part of a committee to aid the detainees, with complete freedom to visit all prisons in the province. One of those who participated in visiting the prisoners and providing advice and assistance as part of this committee of investigation, was seventy-one year old Frank Scott.

A. *The topic of civil liberties is a necessary component of Canadian Constitutional Law*

Although Dicey[25] included a discussion of civil liberties in his book on constitutional law before the turn of the century, this was not true of the basic Canadian texts before World War II. Thus, for example, neither Clément,[26] nor Cameron,[27] nor Lefroy,[28] nor Munro[29] so much as mentioned civil liberties. Even that perspicacious and influential constitutionalist, W.P.M. Kennedy, as late as 1938, did not consider the topic deserving of attention in his basic text on *The Constitution of Canada, 1534-1937.*[30] One exception was W.S. Scott who, in his book *The Canadian Constitution Historically Explained,* published in 1918, devoted three chapters to "Magna Carta", "Petition of Right" and "The Bill of Rights and the Act of Settlement" respectively.

Nor was the situation much different among political scientists. For example, as late as 1944, H. Clokie, in his book *Canadian Government and Politics,* did not discuss human rights and fundamental freedoms. Although he listed the *Succession to the Throne Act*[31] and the *Seals Act*[32] in his

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[24] CAUT Newsletter, vol. 2, no. 4, May 1971, 1.

[25] A. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), 10th ed. (1959).

[26] W. Clément, *The Law of the Constitution,* 3d ed. (1916).

[27] E. Cameron, *The Canadian Constitution as interpreted by The Judicial Committee of the Privy Council in its Judgments* (1915).

[28] A. Lefroy, *Canada's Federal System* [,] *being a Treatise on Canadian Constitutional Law under the British North America Act* (1913), and *The Law of Legislative Power in Canada* (1897-8).

[29] J. Munro, *The Constitution of Canada* (1889). Munro does speak of "freedom of speech" and "freedom from arrest" at p. 69 but this is only with reference to the protection set out for members of provincial legislative assemblies.

[30] W. Kennedy, *The Constitution of Canada, 1534-1937* [,] *An Introduction to its Development, Law and Custom,* 2d ed. (1938).

[31] S.C. 1937, c. 16.

[32] S.C. 1939, c. 22.

Appendix, he made no reference to, *e.g.*, the *Bill of Rights Act*, 1688,[33] or the *Act of Settlement*, 1700.[34] R. Dawson, in *The Government of Canada,* first published in 1946, did devote five or six pages to "fundamental liberties", but by the fourth edition, in 1963, this had only expanded to ten pages.

After the 1940s, although there were still some works on Canadian constitutional law[35] which did not include a discussion of civil liberties, the trend was reversed when Professor Bora Laskin (as he then was) included a chapter on "Constitutional Guarantees" in the very first edition of his basic text on *Canadian Constitutional Law* in 1951. In subsequent editions this became a chapter on "Civil Liberties and Constitutional Guarantees". However, when the late Professor Albert Abel revised a fourth edition of Laskin's *Canadian Constitutional Law* in 1973, he deleted the chapter on "Civil Liberties". The reaction among constitutional law teachers was so strong that within two years the publisher engaged John Laskin to reintroduce a special chapter on "Civil Liberties, Consitutional Guarantees and the Canadian Bill of Rights" at the end of the book. Today, all of the standard works, such as those of Professors Whyte and Lederman,[36] and Hogg,[37] invariably include chapters on civil liberties.

This survey implies what I want to suggest directly, namely, that the various writings of Frank Scott on human rights and fundamental freedoms, commencing in the early 1930s and continuing through the 1940s, assured a place for the topic in future works on constitutional law in Canada. This influence might be said to have culminated in 1949 when he set out, for the first time, the extent of "Dominion Jurisdiction over Human Rights and Fundamental Freedoms".[38]

B. *The role of the central government with respect to human rights and fundamental freedoms*

Perhaps the best way to illustrate the influence of Scott's 1949 article on "Dominion Jurisdiction" is to refer to a report presented in 1944 to the Canadian Bar Association by the Civil Liberties Section,[39] summarizing its propositions with respect to legislative jurisdiction in relation to "liberties and property rights":

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[33] 1 Wm. & Mar., sess. 2, c. 2.

[34] 12 & 13 Will. 3, c. 2.

[35] See, *e.g.*, F. Varcoe, *The Constitution of Canada,* 2d ed. (1965).

[36] J. Whyte & W. Lederman, *Canadian Constitutional Law,* 2d ed. (1977).

[37] P. Hogg, *Constitutional Law of Canada* (1977).

[38] F.R. Scott, "Dominion Jurisdiction over Human Rights and Fundamental Freedoms", *Essays,* 209; (1949) 27 Can. Bar Rev. 497.

[39] *Report of Committee on Civil Liberties* (1944) 22 Can. Bar Rev. 598.

1. Civil and property rights proper, which are more in relation to civil law as distinct from the criminal law, and cover:
   (a) liberty of religion and language;
   (b) liberty of opinion including freedom of speech, or writing and of the press;
   (c) liberty of enterprise, including freedom of private initiative and industry;
   (d) freedom of work;
   (e) freedom of association;
   (f) the right to private property;

2. The protection of the person of the subject, which is more or less in relation to criminal law; and

3. The presentation of political institutions under which liberties have been acquired and appear to be guaranteed.[40]

The report went on to state that the first group is under provincial jurisdiction, the second is federal, and the third is divided, some items falling within the jurisdiction of the provinces and some within the jurisdiction of the federal Parliament.

Space does not permit setting out in detail how inaccurate this summation would be considered today. Suffice it to say that following Frank Scott's article in 1949 no one would again assert that the first group is only under provincial jurisdiction. The jurisdiction of the federal Parliament is now accepted to be at least as extensive with respect to these rights and liberties as that of the provincial legislatures. With respect to thc second group, the jurisdiction is not solely federal because the provinces have jurisdiction with respect to the administration of justice, including enforcement of the *Criminal Code*,[41] as well as their own penal provisions in support of provincial laws otherwise within provincial jurisdiction.

In his article, Scott set out the argument for an "implied Bill of Rights" in the *British North America Act*, first hinted at in the *Alberta Press Bill* case,[42] and subsequently picked up by members of the Supreme Court of Canada in the Jehovah's Witnesses cases of the 1940s and 1950s. Scott also set out the basic argument, since referred to and amplified both by authors on constitutional law and judges, distinguishing between the matter of "civil liberties" and the subject of "property and civil rights" within s. 92 of the *British North America Act*.[43] He asserted that federal powers over human rights and fundamental freedoms were extensive enough that "there does not seem to be a single article in the Universal Declaration of Human Rights of

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[40] *Ibid.*, 599.
[41] R.S.C. 1970, c. C-34.
[42] *Reference Re Alberta Statutes* [1933] S.C.R. 100.
[43] *Supra*, note 38, 218.

1948 on which Ottawa may not take some positive action if the government so wishes".[44]

C. *The Rule of Law is as important a part of our constitution as Parliamentary supremacy*

In the previous section attention was drawn to the fact that Scott's 1949 article on "Dominion Jurisdiction" included a suggestion that the *British North America Act* did contain specific and implied limitations on the basic principle, inherited from the United Kingdom, of the sovereignty of Parliament. It was not so much in his writings, however, as in his arguments before the courts in *Roncarelli* v. *Duplessis*,[45] that he established the importance of the Rule of Law which forms the basis for the teaching of this principle in constitutional law courses in Canada.

The background to the case, and its importance in Canadian constitutional history, is probably best described in Scott's introduction to his *Canadian Forum* article on "Duplessis *versus* Jehovah":

> On 4 December 1946, Mr Duplessis, then Prime Minister of Quebec, ordered the liquor license of Frank Roncarelli to be cancelled by the Quebec Liquor Commission because he persisted in giving bail for his co-religionists, the Witnesses of Jehovah, in the Montreal courts. The long saga of his fight for justice, ending thirteen years later in the Supreme Court of Canada, provides an important affirmation of the Rule of Law in Canadian jurisprudence... But though Roncarelli established a great legal principle, his restaurant was closed, his social status in Montreal undermined, and he was obliged to earn his living elsewhere. The Witnesses of Jehovah, however, now practise their religion unimpeded by the Quebec police.[46]

Frank Scott was co-counsel in the *Roncarelli* case. The principle of the Rule of Law was outlined, in the arguments submitted to the Supreme Court of Canada, in the following terms:

(1) Under the public law of Québec, which derives from English law, public officers, including the respondent, are personally liable for their

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[44] *Ibid.*, 211-2. He must have had in mind the fact that Canada almost did not vote in favour of the Universal Declaration due to a fear that too many of the rights and freedoms therein referred to were within the jurisdiction of the provincial legislatures rather than Parliament. He suggested that federal powers over human rights and basic freedoms are created and exercised through such powers as those over the criminal law; under the peace, order and good government clause; as a result of jurisdiction with respect to the post office, broadcasting and telecommunications; in relation to citizenship rights; with respect to the functioning of Parliament; in relation to such persons under federal control as the Armed Forces, the RCMP, Indians and Inuit, and federal employees and civil servants; because of unemployment insurance and employment offices; resulting from such spending power projects as family allowances, housing and health measures; by means of cultural services like the National Gallery, the National Film Board, CBC, *etc.*

[45] [1959] S.C.R. 121.

[46] *Supra*, note 20.

delictual acts, whether committed in the exercise of their public functions or outside them.

(2) The measure of fault is determined by article 1053 of the Civil Code.

(3) The official who orders an illegal act is equally liable with the person who carries it out.

(4) It is a delict or quasi-delict for a public officer to usurp a power that does not belong to him and to act in a manner not authorized by some positive text of law.

It is this last argument which summarizes the principle of the Rule of Law. The brief explained the argument thus:

> This is a fundamental principle of the English and Canadian Constitutions. It is the foundation of the supremacy of the law over the state and over every state official. With us, all officials possess a limited jurisdiction only, which some statute or text of law defines.[47]

In line with this proposition it was suggested that:

> No statutory or other text of law relating to the offices held by the Respondent justified the several acts and omissions which caused damage to appellant.[48]

The brief referred to the fact that the respondent held only two offices to which any public rights and duties might attach, *i.e.*, that of Prime Minister and Attorney General, and asserted:

> There are no special functions or powers attached to the office of Prime Minister at common law. It is a purely political position conferring *per se* no legal powers or immunities. The only statutory reference to the office in Quebec is found in the *Executive Power Act*... . Nowhere is the Prime Minister given any right of interference in the administration of the Liquor laws of the province, a right to defame citizens or to punish them for giving bail, or to commit any of the other acts which damaged Plaintiff... .
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> The rights and powers attaching to the office of Attorney General are set out and analyzed in sufficient detail in the trial judgement below... . There is a total absence of any grant of power to order the cancellation of licences or to act as Respondent acted toward Appellant.[49]

As a result, it was submitted, since Duplessis failed to show any provisions in the law giving him the authority to interfere with the administration of the Quebec Liquor Commission and to order it to cancel a licence, he was acting outside his statutorily defined functions and therefore committed a fault causing damage for which he should be held personally liable.

The 1950s was the great decade of the protection given to civil liberties by the Supreme Court of Canada. Three cases were decided which illustrated

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[47] Appellant's factum in the case of *Roncarelli* v. *Duplessis*, 48.
[48] *Ibid.*, 50.
[49] *Ibid.*, 51.

the Rule of Law — *Roncarelli* v. *Duplessis,*[50] *Chaput* v. *Romain*[51] and *Lamb* v. *Benoit.*[52] In a lecture to the Ontario Branch of the Canadian Bar Association in February 1960, Scott summarized these three cases in the following terms:

> You remember the proud boast of Dicey when he said: 'With us every official, from a Prime Minister down to a constable or a collector of taxes [below which, apparently, his imagination could not sink], is under the same responsibility for every act done without legal justification as any other citizen.' The *Roncarelli* case involved the liability of a Prime Minister, and the *Chaput* and *Lamb* cases involved the liability of constables, and all the officials sued were held liable for acts done without legal justification. Only the tax collector was missing to make Dicey's picture complete. So the great principle of the supremacy of the law was re-affirmed, and in situations, be it noted, involving liability under the Civil Code of Quebec.[53]

Almost a decade later, during the dinner address at the official opening of the University of Windsor law building, Frank Scott defined the essence of the Rule of Law in terms of "two basic rules underlying our constitutional structure, which entitle us to say that we live in a free society":

> The first is that the individual may do anything he pleases, in any circumstances anywhere, unless there is some provision of law prohibiting him. Freedom is thus presumed, and is the general rule. All restrictions are exceptions. The second rule defines the authority of the state, and places the public official (including the policemen) in exactly the opposite situation from the private individual: a public officer can do nothing in his public capacity unless the law permits it. His incapacity is presumed, and authority to act is an exception. Duplessis, for instance, could not find any legal authority to justify his order to cancel Roncarelli's liquor licence: so he paid personally.[54]

D. *Although the traditional civil liberties were realized by restraining governments from interference with matters not within their jurisdiction, some of the new human rights can be realized only through the assumption of government responsibility*

At the same time that Scott explained how the fundamental protections of our traditional civil liberties resulted from the application of the Rule of Law, *i.e.,* that the private individual is free to do anything which is not forbidden, while the government official may not do anything to restrict that freedom unless specific authority can be found in law, he also recognized that this approach did not apply to the realization of all forms of human rights. During the 1930s, Frank Scott spoke out frequently on the need for economic reform in Canada. I would like to quote briefly from one of his

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[50] *Supra,* note 45.

[51] [1955] S.C.R. 834.

[52] [1959] S.C.R. 321.

[53] F.R. Scott, "Expanding Concepts of Human Rights", *Essays,* 353, 354; 1960 3 Can. Bar J. 199.

[54] Unpublished paper.

essays of that period, "Freedom of Speech in Canada", to illustrate his comprehension that impediments to the free discussion necessary to economic reform came not just from governments, but from those with private economic power as well.

> [T]here is a widespread feeling in Canada today that if a man wants to hold his job he had better not talk too much... . Its existence is a fine commentary upon the nature of our social life, implying as it does that the person who works for a living is owned body and soul by the employers, and that these are unscrupulous enough to penalise a man for his opinions. It largely explains our public apathy in the face of manifold provocations. How often we hear it said of someone that he is in favor of this or that reform, but of course he 'cannot say anything.' He cannot say anything, the other man cannot say anything — no one can say anything, except the Communist, and he is promptly deported. So the leading British Dominion drifts along in this year of grace 1933, frightened out of its all too diminutive wits. Our captains of industry are firm believers in individual initiative and private enterprise, but they are the first to deny the application of their pet principles in the field of freedom of speech. In fairness to them, however, it must be admitted that this sense of fear may equally be due to a lack of courage on the part of the employee.[55]

This is, however, merely a description of the importance of the traditional civil liberties in permitting the issues of economic reform to be raised and discussed. Acceptance of government responsibility for the welfare of its citizens involves a further step urged by Scott at an early date. Perhaps his best summation of what is involved comes in his 1949 article on "Dominion Jurisdiction over Human Rights and Fundamental Freedoms":

> 'Human Rights'... embodies the idea of economic rights and claims to welfare services such as the modern state is being increasingly asked to provide. We are more aware today of the foolishness of pretending that a man is 'free' when he is unemployed and without income through no fault of his own, or when he cannot pay for good health or good education for his children. Thus we hear today that a man has a 'right' to a job or to maintenance when out of work, that children have a 'right' to education and health; and President Roosevelt was true to his age when he included in his four 'freedoms' the freedom from fear and from want.[56]

In the same essay he indicated that since social security was one of the rights proclaimed in the Universal Declaration of Human Rights, it was not surprising that the federal government had undertaken its responsibility by taking the initiative in the fields of old age pensions, family allowances and hospital insurance. At the same time, Scott suggested that much more could be done:

> If there is need for a national housing plan to relieve the serious shortage throughout the country, to provide for the progressive elimination of sub-standard dwellings and slums, and thus to give security and decency to family surroundings throughout the country, it is less constitutional law than political hesitancy which prevents it. Without arguing for any particular plan or policy, it is evident that the field of social security

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[55] F.R. Scott, "Freedom of Speech in Canada", *Essays,* 60, 75; CPSA, *Papers and Proceedings* (1933) 169.

[56] *Supra,* note 38, 218.

offers wide opportunities for the federal government to fulfill its responsibilities as a signatory to the Declaration of Human Rights.[57]

Perhaps his most eloquent statement of the need to support these newly recognized human rights came in his 1960 address to the Ontario Branch of the Canadian Bar Association on the topic of "Expanding Concepts of Human Rights".[58] While commending the legal profession for its role in keeping government under the law and assuring "liberty against government", he suggested that in recent times this concept has been supplemented by "liberty through government":

> Certain human rights... can only be realised through governmental action. This should not surprise us, for government action means the making and enforcing of laws, and we are all accustomed to say that without law there is no liberty. We are not so traditionally accustomed, however, to say that without an unemployment insurance law, or without an old age pensions law, or laws providing for free universal education, there is no liberty. Particularly among members of the legal profession are these newer forms of human rights apt to be either forgotten or neglected, because these social insurances require administration through government commissions and enforcement in administrative tribunals rather than consultation with lawyers and actions in the regular courts. Lawyers tend to pay attention mostly to judicial review over administrative agencies.... Yet this, though of great importance, is not the central issue. The object of these laws is to free men and women from known and certain risks which exist in our industrialised society, and which if not insured against can destroy so much liberty among so many individuals as to make Bills of Rights to them a hollow mockery. The hungry man must be fed, the sick must be attended to, the old must be provided for, the young must have a chance to enter to the fullest degree into our cultural heritage through education. To deprive people of these essentials to the good life, or to allow the still unresolved problems of our economic system to deprive them of them without taking steps to alleviate the deprivations, is to take away human rights.[59]

Scott went on to reassert his support for a Bill of Rights, and to indicate that essentially a Bill of Rights is concerned with "liberty against government". But, he suggested, "I would be happier if we also included some words or phrases, if not in the text of the constitution then in its preamble, expressing the now universally accepted notions of social security and human welfare."[60]

E. *An essential feature of Canadian federalism is the protection of group rights to, e.g., language and religious schools*

As Frank Scott pointed out in 1959, in four lectures for CBC Radio on "The Canadian Constitution and Human Rights", although the Rule of Law principle and the freedoms of speech and of the press were part of Canada's inheritance from the United Kingdom, "freedom of conscience was certainly

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[57] *Ibid.*, 234.
[58] *Supra*, note 53.
[59] *Ibid.*, 356-7.
[60] *Ibid.*, 358.

not one of our inherited rights in Canada".[61] He went on to show that Catholics and Jews gained a recognition of their religious rights and, more importantly, of the right to participate in public life despite their religion, before this occurred in the United Kingdom.[62] The acceptance of religious and of language rights is, for Scott, essential to Canadian federalism. Even if this were not so, his lifelong defense of minorities would have provided the basis for his defense of French language rights. When Scott's concern with civil liberties was combined with his historical approach to the constitution, it was not surprising that he should be one of the earliest and most consistent English-speaking defenders of bilingualism in Canada. In an article published in the *Queen's Quarterly* in 1947,[63] he combined civil liberties arguments with pragmatic ones in his advocacy of accepting the bilingual reality of Canada :

> Just why so many people in Canada should resist the idea that French should be officially recognized it is difficult to understand. Quite apart from the erroneous view it represents of the actual situation, plain democratic justice and common-sense would seem to indicate that the mother tongue of one-third of the population of any country has a claim to recoguition which cannot be denied.
>
> If every Canadian could be brought to realize that the possession of these two languages is a great national and international asset and not a liability, not only would we have more national unity in this country, but our delegates to international conferences would be better equipped.[64]

In view of Frank Scott's lifelong defense of the rights of the individual and his position as a Québec anglophone who felt strongly Canadian, it is not surprising that he has never been sympathetic to the view of many francophone Quebecers today, and especially their governments — whether Liberal, Union Nationale, or Parti Québécois — that language rights should be a matter of provincial responsibility and that the language rights of a collectivity could override the language rights of individuals. In 1957 — well before the series of language laws enacted by the various Québec governments mentioned — Scott asserted :

> Unless Quebec is to become an independent state outside Confederation, which virtually no one in Quebec seems to desire, the limitation of legislative and executive powers imposed by the present constitution on the Quebec government would seem to make it wholly inadequate as the *exclusive* defender of French culture, even if all French minorities in other provinces are disregarded. The elevation of this government as the sole champion of the race has therefore grave dangers for that race : it might have the unexpected effect of imprisoning the vital energies of the French-Canadian people.[65]

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[61] F.R. Scott, *The Canadian Constitution and Human Rights* (1959), 7.

[62] *Ibid.*, 7-13.

[63] F.R. Scott, "Canada, Québec and Bilingualism", *Essays,* 197; (1947) 54 Queen's Quarterly 1.

[64] *Ibid.*, 200.

[65] F.R. Scott, "Areas of Conflict in the Field of Public Law and Policy", *Essays* 302, 308 ; (1957) 3 McGill L.J. 29.

He went on to deal with the position of the French-Canadian in Canada, illustrating the dilemma posed by relying upon the province of Quebec to protect the rights of the French-Canadian community, and subsequently isolating the French minorities in the other provinces:

> The French Canadian is at home in Quebec. So is the English Canadian in the province, though some other minorities are perhaps not so secure. The French Canadian wants to feel as much at home when he lives in Ontario; that is, he wants his own language, his own school, his church and parish, and his French Canadian way of life. To some extent he has achieved this in districts adjacent to Quebec. But his minorities farther from the homeland have not achieved it, and the English speaking inhabitants of other provinces are surprised, if not startled, to discover that they are expected to adapt their local laws (*e.g.*, as to separate schools) so as to make possible the steady development of a French-speaking cultural minority as an island colony in the midst of their already heterogeneous population. Meeting this resistance, the French minorities look to Quebec for help, which in turn reacts with stronger claims. The fact that an exaggerated provincial autonomy may actually weaken the outside minorities by subjecting them still further to local majorities and depriving them of the protection of Ottawa does not deter the nationalists in Quebec. An "autonomous" Quebec is a fortress in a dangerous land, without which the struggle for survival seems hopeless. Thus a strong Quebec government seems necessary to pry loose more freedom for its minorities outside as well as within, using at the same time provincial autonomy, influence at Ottawa, and pressures of every kind to achieve the single purpose.[66]

In 1970, in giving the sixth annual Manitoba Law School Foundation Lecture[67] on his work as a member of the Royal Commission on Bilingualism and Biculturalism, Scott suggested:

> Canadians must approach the language question with two special qualities: realism and goodwill. Realism means accepting facts. French-Canada is a fact, and English-Canada is a fact. The English minority in Quebec now numbers one million, the French minorities outside Quebec also number about one million. If Canadian federalism is to survive, it must accept bilingualism sensibly applied, in Quebec as well as in Canada as a whole. It is *one* of the essential conditions of our survival. It is not the only one, for economic benefits must come to all Canadians from our association. We must believe we are worthwhile as a nation. But it must be a bilingual nation.
>
> We must also have goodwill. We must see the plus as well as the minus, the great advantages as well as the difficulties. To accept bilingualism means a greater respect for human rights, a greater domestic tranquillity, and,above all, the development within our country of the richness and creative ability that have made England and France two of the great centres of western civilization. That it will give Canada a national identity unique in the Americas goes without saying... .
>
> [M]y experience convinced me that an equal partnership between the two cultural communities in Canada was a workable concept, and one which would help Canada make a distinctive contribution to world history and world peace. Whether Canadians will accept the idea and bring it steadily into being is their decision. I for one have faith that they will accept the great challenge rather than fall back into obsolete forms of the nation state.[68]

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[66] *Ibid.*, 309.

[67] F.R. Scott, "Language Rights and Language Policy in Canada", *Essays,* 375; (1971) 4 Manitoba L.J. 243.

[68] *Ibid.*, 388-9.

In the light of this, it is no wonder that Frank Scott has consistently opposed the language policies of the last three Québec governments, *i.e.*, those of Premiers Bertrand, Bourassa and Lévesque, while favouring a policy similar to that of the federal governments of Prime Ministers Pearson and Trudeau.

Because of the many ways in which Frank Scott has contributed to our understanding of human rights and fundamental freedoms, it would be impossible to sum up this tribute in a few words. But there is no better way to conclude than to quote him. In a frontispiece to his volume entitled *Events and Signals*[69] he wrote the following:

> Between the event and the observer there must pass a signal — a wave, an impulse, or perhaps a ray of light.

It is certain he did not have himself in mind. However, there can be no doubt that he *has been* the "ray of light" that has enabled Canadians to observe the human rights issues in the events since the 1930s.

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[69] F.R. Scott, *Events and Signals* (1954).