

McGill Law Journal ~ Revue de droit de McGill

The Legacy of *Roncarelli v. Duplessis*
1959–2009

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Citation: (2010) 55 McGill L.J. 375 ~ Référence : (2010) 55 R.D. McGill 375

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Introduction: Highlighting a Fiftieth Anniversary

On 27 January 1959, the Supreme Court of Canada handed down its decision in *Roncarelli v. Duplessis*.¹ That decision, and more specifically the opinion of Justice Ivan Rand, left a profound mark on Canadian public law. In constitutional law, it is associated with the emergence of the rule of law, as a constitutional principle that effectively constrains government action without an explicit formal legislative or constitutional provision, and with the idea of the common law *Bill of Rights*. In administrative law, it is systematically invoked in support of the principle that there is no such thing as untrammelled discretionary authority and to assert that a person with public authority cannot refuse to exercise it. On another level, it is equated with the victory of a certain English common law constitutionalism, typical of the style of Justice Rand.

These statements reflect the general meaning and scope of *Roncarelli* today. However, based on the premise that there is still more to be said on this decision and that it could lead to new avenues, fourteen scholars met at the end of the summer in 2009 as part of the symposium entitled “L’héritage de l’affaire *Roncarelli v. Duplessis*—1959–2009—The Legacy of *Roncarelli v. Duplessis*”.² On the fiftieth anniversary of the judgment, the participants attempted to dispel a few myths, unearth certain artefacts, and rediscover the familiar. The texts making up this special issue are the fruit of that symposium.

The purpose of this introduction is twofold. First, to facilitate the authors’ task and avoid duplication, the introduction will outline the facts of the case and provide a sketch of the legal opinions it spawned (Part I). Second, it will present a brief summary of the contributors’ articles, outlining some of the themes discussed at the symposium (Part II).

¹ [1959] S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli (S.C.C.)* cited to S.C.R.].

² In fact, the decision has been the subject of very few doctrinal articles over the past fifty years. See e.g. E.C.S. Wade, “Case and Comment” [1951] 29 Can. Bar. Rev. 665 [Wade, “Case and Comment”]; Benjamin J. Greenberg, “Case and Comment” [1956-1957] 3 McGill L.J. 82; Edward McWhinney, “Case and Comment on *Roncarelli v. Duplessis*” [1959] 37 Can. Bar. Rev. 503; Claude-Armand Sheppard, “*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized” [1960] 6 McGill L.J. 76 [Sheppard, “*Roncarelli*”], an article which the editor-in-chief of the Law Journal had the excellent idea of reproducing in this issue; Luc Huppé, “Une immunité de poursuite civile pour les ministres” (1998) 32 R.J.T. 333 [Huppé, “Immunité”]; David J. Mullan, “Unwritten Constitutional Principles: The Legacy of Justice Rand” (The Ivan C. Rand Memorial Lecture delivered at the Faculty of Law, University of New Brunswick, 2002) [unpublished]; and David Dyzenhaus, “The Deep Structure of *Roncarelli v. Duplessis*” [2004] 53 U.N.B.L.J. 111.

I. The Facts, the Proceedings, the Judgments: A Multi-Layered Saga

In the fall of 1946, Frank Roncarelli was the proprietor of a reputable Montreal restaurant. Like his father before him, Roncarelli held a liquor licence issued by the Quebec Liquor Commission (the “Commission”) and, for almost thirty-five years, the licence for this family business was renewed every year without interruption.

A citizen with an unremarkable background, Roncarelli was a member of the Jehovah’s Witnesses. For some years this religious sect had been causing considerable anxiety to Quebec’s government and ecclesiastical authorities. The Jehovah’s Witnesses were offensively proselytizing and harshly attacking Catholicism, which was the religion of a majority of Quebecers, going so far as to cause riots in certain cities in the province.³

At the peak of the crisis, in 1945 and 1946, in an attempt to limit the impact of the Jehovah’s Witnesses’ activities, the City of Montreal began zealously applying a by-law that required a licence to canvas house to house and to distribute publications.⁴ The Witnesses, believing that such a by-law infringed their freedom of religion, refused to comply. Arrested by the dozens, they were released pending their trial thanks to Roncarelli, who provided bail in the form of a written undertaking.⁵ Over two years, more than 400 members of the Jehovah’s Witnesses benefited from his good will. Most of the members who were released returned to their prose-

³ The visceral reaction of the political and religious authorities to the “propaganda” of the Jehovah’s Witnesses can admittedly be explained by the methods used by its adherents (house to house canvassing, distribution of printed matter in the streets, etc.) as well as by the Jehovist doctrine itself, which advocates that a true religion should not hinder the direct relation adepts may have with God and thereby denounces the resolutely hierarchical nature of the Catholic religion. The impact was all the stronger given the close proximity of Church and State at the time and explains to a great extent the accusations of sedition brought against adherents, and in particular in *R. v. Boucher*, [1951] S.C.R. 265, 2 D.L.R. 369 [Boucher]. For an overview of the situation at the time, see Michel Sarra-Bournet, *L’affaire Roncarelli – Duplessis contre les Témoins de Jéhovah*, coll. Edmond-de-Nevers No. 5 (Quebec: Institut québécois de recherche sur la culture, 1986) at 41ff. [Sarra-Bournet, *Roncarelli*]. See also Thomas R. Berger, *Fragile Freedoms – Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1981) at 161-184, in French under Thomas R. Berger, *Liberté fragile – Droits de la personne et dissidence au Canada*, trans. by Marie-Cécile Brasseur, Cahiers du Québec, Collection Science politique (Ville de La Salle: Hurtubise HMM, 1985) at 171-191.

⁴ During the 1930s, Quebec City had passed a similar by-law to limit the activities of Jehovah’s Witnesses by setting up restrictive conditions for the distribution of their publications. That by-law was struck down in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, 4 D.L.R. 641.

⁵ In his testimony, Roncarelli explained that the security he gave was in the form of a written and signed undertaking, not a payment of cash. Under an agreement with the legal authorities, Roncarelli signed a few in advance, to avoid having to go to Court or be in town whenever security was needed. The agreement seemed to help the authorities out of a quandary, as not everyone who was arrested could be imprisoned.

lytizing, but they were arrested again and released on bail, creating a cycle that congested the courts and took the police away from their other duties. Faced with overloaded court rolls, the authorities decided to demand higher bail, in cash. As a result, Roncarelli stopped giving security on 17 November 1946.

A few days later, the Jehovah's Witnesses began an extensive campaign in Quebec to distribute a blasting pamphlet, *Quebec's Burning Hate for God, Christ, and Freedom Is the Shame of all Canada*, which denounced their persecution by the Catholics and attributed responsibility for it to the domination of the priests.⁶ This campaign stood out so much from the sect's usual activities with its extreme virulence and its incendiary effect on the province that, on 21 November 1946 during a press conference, Premier Maurice Duplessis sent a "solemn" warning to the Jehovah's Witnesses. Having read *Quebec's Burning Hate*, he said he found "certain parts of it intolerable and indeed seditious" and that as a result he was "instructing the Deputy Attorney General to take all necessary steps to discover the guilty parties and not to hesitate to use any means necessary to put an end to these unacceptable practices."⁷

It was during this hunt for offenders that the Commission's General Manager Édouard Archambault learned that Roncarelli had a liquor licence.⁸ Archambault contacted Duplessis to inform him of his plan to cancel Roncarelli's licence, pursuant to the power delegated to the Commission under the *Alcoholic Liquor Act* to "cancel any permit at its discretion."⁹ Archambault said that he had obtained Duplessis's "consent, approval, permission and *order to proceed*."¹⁰ Duplessis testified that it was his "duty, in all conscience, to tell [Archambault] that ... the Government of Quebec could not grant a privilege to an individual such as Roncarelli with his attitude"; that he "approved the general manager's suggestion"; that he told Archambault, "You're right, take away the licence, take away

⁶ Sarra-Bournet, *Roncarelli*, *supra* note 3 at 39. Shortly thereafter, one Aimé Boucher was charged with seditious libel under the Criminal Code for having distributed copies of the pamphlet: Boucher, *supra* note 3.

⁷ Extracts which appeared in *L'Action catholique* and *Le Devoir*, November 21 and 22, 1946 respectively, quoted in Sarra-Bournet, *ibid.*, at 40 [translated by the author].

⁸ The information came from Oscar Gagnon, the senior Crown prosecutor, who had heard that Roncarelli was associated with the distribution of the pamphlet, because hundreds of copies of it had been seized in a building belonging to him. When he learned that Roncarelli had a liquor licence, Gagnon contacted Archambault.

⁹ S.R.Q. 1941, ch. 255, s. 35.

¹⁰ *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 at 690 [*Roncarelli (Sup. Ct.)*] [emphasis in original, translated by author].

the privilege”; and that, in approving a suggestion in this manner as his superior, “we always give an order.”¹¹

Archambault therefore officially cancelled the licence and immediately sent inspectors to seize the alcohol in Roncarelli’s restaurant without notifying Roncarelli about what was being done or informing him what he was accused of. The restaurant owner was shocked. The same day, Maurice Duplessis addressed the press as follows:

On November 21st, in a statement made to the parliamentary correspondents, I reiterated the firm intention of the government of Quebec to take the most thorough and effective measures against those who, under the name of Witnesses of Jehovah, are spreading reprehensible propaganda and distributing circulars which, in my opinion, are not only injurious to the Province of Quebec and its population but, in our opinion, are clearly seditious. [...]

A certain Frank Roncarelli gave security for the Witnesses of Jehovah in several hundred cases. The sympathy this man shows towards Witnesses of Jehovah—in such a clear, repeated and audacious manner—constitutes a provocation of public order, of the administration of justice in the province and is absolutely contrary to the ends of justice. [...]

Today, that same Mr. Roncarelli is identifying with the harmful and odious propaganda of the Witnesses of Jehovah. Accordingly, as Attorney General and Premier, I have issued an order to cancel the licence granted by the Liquor Commission to the restaurant operated by that man at 1429 Crescent Street in Montreal.

Communists, Nazis and all those who are promoting the seditious campaign of the Witnesses of Jehovah will receive their just due. Under the government of the Union nationale, there is not and cannot be any compromise with these people.¹²

Roncarelli reacted strongly. He asked A.L. Stein to represent him and encouraged him to approach Frank R. Scott, a prominent professor of law at McGill University and ardent defender of civil freedoms.¹³

During the following months, Roncarelli had to overcome several obstacles to be able to put forward his rights. By section 12 of the *Alcoholic Liquor Act*, the right to personally sue the manager of the Commission “for acts ... done or omitted in the exercise of his duties” required the au-

¹¹ *Ibid.* at 691-92 [translated by author].

¹² *L’Action catholique*, December 4, 1946 at 9; *Le Canada*, December 5, 1946 at 14; *Le Devoir*, December 4, 1946 at 3, extracts cited in Sarra-Bournet, *Roncarelli*, *supra* note 3 at 44-5 [translated by author].

¹³ Sandra Djwa wrote a biography about him: *A Life of F.R. Scott: The Politics of the Imagination* (Toronto: McClelland and Stewart, 1987), in French under *F.R. Scott – Une vie*, trans. by Florence Bernard (Montreal: Boréal, 2001) [Djwa, *F.R. Scott*]. See also Roderick A. Macdonald, “Francis Reginald Scott 1899 – 1985” [1985] 30 McGill L.J. 635.

thorization of the Chief Justice of the province. Justice Létourneau denied that authorization in a decision dated 5 February 1947.¹⁴ As that provision required, Roncarelli then asked for the consent of the Attorney General to sue the Commission itself. Duplessis, who held that position at the time, never answered him directly; he publicly announced his refusal at a press conference on 7 February 1947.¹⁵ In the same breath, he reiterated his conviction that his action was fully justified, adding, “The permit was cancelled not temporarily but definitely and for always.”¹⁶ In the end, Roncarelli’s attorneys decided to sue Duplessis personally: did A.V. Dicey not teach that, according to the rule of law, everyone is equal before the law? But time was running out: not only was the action prescribed by six months,¹⁷ Duplessis also had to be given thirty days’ notice before proceeding, according to article 88 of the *Code of Civil Procedure*, which required that notice be given in order to sue a public officer for damages “by reason of any act done by him in the exercise of his functions.” On 3 June 1947, without having been able to comply with article 88, Roncarelli sued Maurice Duplessis personally for the illegal cancellation of his liquor licence. Thirteen years later, the Supreme Court of Canada proved him right.

¹⁴ *Roncarelli v. Archambault*, [1947] B.R. 105. In his decision, the judge states at 107 that the provision in question “is for the case where the manager of the Liquor Commission, abusing his functions, acting in bad faith, for perverse reasons or otherwise, personally incurs civil liability under art. 1053 or 1054 C.C.” [translated by author]. However, he says, “the applicant’s motion does not mention anything in this regard” [translated by author]. In fact, “nothing is indicated which could involve the personal liability of Judge Édouard Archambault” as the allegations only relate to “actions which the said manager allegedly carried out in the performance of his duties, but not actions which could engage or lead to his personal liability” [translated by author]. Michel Sarra-Bournet reports that a new application was dismissed the following April 17: Sarra-Bournet, *Roncarelli*, *supra* note 3 at 49. In this regard, the work by Sandra Djwa contains an error. The author suggests that the application for permission to sue was submitted to Judge Archambault, the former manager of the Commission, since promoted to the position of Chief Justice of the province: Djwa, *F.R. Scott*, *ibid.* at 428. In fact, Archambault was never appointed to that position, but to that of chief justice of the Court of the Sessions of the Peace. See in particular *Roncarelli (Sup. Ct.)*, *supra* note 10 at 689.

¹⁵ “The Deputy Attorney General, Édouard Asselin, held on February 6, 1947 that the action of the Commission was in accordance with the powers which the law gave it and, as it was administrative, it did not fall under the jurisdiction of the Superior Court.”: Sarra-Bournet, *Roncarelli*, *supra* note 3 at 49.

¹⁶ *L’Action catholique*, February 8, 1947 at 3, cited in *ibid.*

¹⁷ Under section 5 of *An Act for the Protection of Justices of the Peace*, R.S.Q. 1941, c. 18: “No ... action [in damages] or suit shall be brought against any justice of the peace, officer or any other person [fulfilling any public duty], for anything done by him in the performance of his public duty, unless commenced within six months after the act committed.” To benefit from protection under the law, section 7 adds, the officer must be in good faith “although he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.”

After the Court handed down its decision in 1959, fifteen judges across three levels of courts had decided on this case and no fewer than twelve of them had written their own opinion.¹⁸ Nonetheless, the *Roncarelli* case would quickly become almost exclusively associated with the opinion of Justice Rand. There are many reasons that would explain the prominence of his opinion and the following contributions in this special issue suggest some very interesting ones. However, we will see that the exhumation of the other opinions expressed in this matter not only leads to a more in-depth and nuanced analysis of Justice Rand's decision, but also sheds new light on the socio-political context of the case, the procedural challenges that marked it, the complexity of the relationships between public and private law, and the emergence of a particular approach to constitutionalism.

A. *Victory in the Superior Court*

Roncarelli won in the Superior Court. Justice McKinnon concluded from the analysis of the evidence that Duplessis did in fact give Mr. Archambault an order to cancel Roncarelli's liquor licence and that order was the determining factor in the decision made by Archambault.¹⁹ The judge said that one certainly could not blame Duplessis for having considered the *Quebec's Burning Hate* pamphlet as being seditious and for having attempted to limit its distribution, but he noted that Duplessis could not target Roncarelli to indirectly reach the religious movement as a whole.²⁰ Furthermore, he added, after a close examination of the relevant legislative texts,²¹ no formal source authorized Duplessis to become involved in the process surrounding the granting or cancellation of liquor licences. As for the Commission, it acted arbitrarily when it cancelled the licence for a reason foreign to the liquor licence rules (the fact that Roncarelli belonged to the Jehovah's Witnesses and his role as bondsman for those who shared his religious beliefs) and "disregarded the rules of reason and justice".²² The judge added that, given the principles of English law according to which "acts done in their official character but in excess of their lawful authority"²³ engage the liability of their authors, Duplessis

¹⁸ Of all the judges who wrote an opinion for this case, only Supreme Court justices Judson and Locke, who concurred with the opinions of their colleagues Rand and Martland respectively, did not provide their own reasons, whereas Chief Justice Kerwin, who also concurred with Martland, made a few brief comments.

¹⁹ *Roncarelli (Sup. Ct.)*, *supra* note 10 at 692.

²⁰ *Ibid.* at 682.

²¹ *Ibid.* at 697-9.

²² *Roncarelli (Sup. Ct.)*, *supra* note 10 at 695. Here the judge is paraphrasing Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173 at 179, cited in *Roncarelli (Sup. Ct.)* at 694.

²³ *Ibid.* at 696.

had to answer for his actions as a private citizen. Lastly, Justice Mackinnon held that Duplessis could not argue the absence of the notice prescribed by article 88 C.C.P. because that article applies when an officer is acting “in the exercise of his functions” not, as in this case, “on the occasion” of them.²⁴

B. Setback in the Court of Queen’s Bench

The Court of Queen’s Bench quashed the Superior Court decision by four judges to one, essentially on a different interpretation of the evidence submitted. Justices Bissonnette, Pratte, Casey, and Martineau found that the Commission had already made the decision to cancel the licence when it consulted Duplessis²⁵ and as a result there was no causal link between the latter’s action and the Commission’s decision, which was fatal to the outcome of the action. Whereas Justice Pratte limited himself to this conclusion, his colleagues Justices Bissonnette, Martineau, and Casey pursued the discussion with an analysis of whether the Commission’s decision was well founded.

Justices Bissonnette and Martineau held that, to find that Duplessis had committed a fault, it first had to be shown that the Commission itself exercised its discretion maliciously or without legal or statutory authority and then, according to Martineau, that Duplessis was in bad faith.²⁶ In this case, Duplessis’s good faith was not in doubt, they said, nor was the legality of the Commission’s decision. For Justice Bissonnette, the Commission is an “essentially commercial” business and permit holders are its *serviteurs*. It was therefore “at liberty” to decide to cancel the permit and a court could not examine the basis for it.²⁷ In this case, the judge added, the Commission manager, “if he believed that the plaintiff’s actions were subversive and constituted wrongdoing which his authority could suppress, had the ability, and furthermore the duty, to intervene.”²⁸ For Justice Martineau, the liquor business is “legal but not free,” a permit is “a privilege”, and the Commission had almost unlimited discretion to cancel it, which discretion was only restrained by good faith.²⁹ In this case, Duplessis had conducted himself reasonably in view of “the standards of a typical, normal man, of the place and time when the action was taken”.³⁰

²⁴ *Ibid.* at 700.

²⁵ *Duplessis v. Roncarelli*, [1956] B.R. 447 [*Roncarelli (Q.B.)*] at 455 (Bissonnette J.); at 466 (Pratte J.); and at 485 (Martineau J.).

²⁶ *Ibid.* at 456-7 (Bissonnette J.) and at 482 (Martineau J.).

²⁷ *Ibid.* at 457.

²⁸ *Ibid.* at 458 [translated by author].

²⁹ *Ibid.* at 482 [translated by author].

³⁰ *Ibid.* at 491 [translated by author].

In the context of December 1946, Roncarelli's attitude constituted "a provocation which removed any element of fault from the order to cancel the plaintiff's licence".³¹ Justice Casey held that the Commission had to exercise its discretion "in accordance with *what [it] believes to be* the public interest and welfare".³² Accordingly, if the Commission had reasonable grounds for believing that the Witnesses were engaged in a campaign of sedition, as an active member of the sect, Roncarelli became undeserving of the privilege.³³ The Commission therefore had a duty to cancel the permit and, by ordering the Commission to do so, Duplessis was merely encouraging it to fulfil its duty, and he could not be considered to have done anything wrong.³⁴

In dissent, Justice Rinfret did not see any error which would justify questioning the Superior Court's interpretation of the facts: the cancellation of the permit was in fact the result of the order from Duplessis.³⁵ No legislative provision gave Duplessis a right to oversee the Commission.³⁶ As for the Commission, by acting according to the orders of a third party, it committed an illegality because the holder of discretionary power must exercise it himself.³⁷ The judge acknowledged that these considerations allowed him to dispose of the case, but he went on.

First, he wrote, whereas the discretion to grant, deny or renew a permit is absolute, as "no tangible right" is at issue, the discretion to *cancel* a permit during its validity period is not unlimited. In such a case, there is certainly "some right [...] no matter how small and random it may be", which may only be impaired for reasons relating to the law that grants the discretionary authority, and in accordance with the principles that must guide its exercise³⁸: compliance with the objectives for which the authority was delegated, based on confirmed facts and after allowing the person to defend himself against the accusations brought against him, and examination of relevant considerations.³⁹ Second, to be able to respond to a movement which he might legitimately believe to be seditious, Duplessis had to limit himself to "the means made available to him by the

³¹ *Ibid.* at 490 [translated by author]. Martineau J. revisits the notion of provocation, citing further on Mazeaud who says that, in his opinion "there is no causal link between the fault and the damage when it was caused by the victim's act": *ibid.* at 492 [translated by author].

³² *Ibid.* at 470 [emphasis added].

³³ *Ibid.* at 471.

³⁴ *Ibid.* at 475.

³⁵ *Ibid.* at 502-3.

³⁶ *Ibid.* at 506.

³⁷ *Ibid.* at 507, citing *General Medical Council v. Spackman* [1943] A.C. 627 at 641.

³⁸ *Ibid.* at 508 [translated by author].

³⁹ *Ibid.* at 507.

law and the statutes”.⁴⁰ Instead, he used “another means of repression which the law does not allow”.⁴¹ In addition, if he had verified the facts, Duplessis would have seen that nothing linked Roncarelli to the alleged sedition and Duplessis also could not justify his action by claiming that it was part of the broader campaign to suppress the activities of the Jehovah’s Witnesses. For Justice Rinfret, “to hit one person against whom nothing tangible is established in order to reach another”⁴² further undermines the legitimacy of the action taken by Duplessis.

C. *The Supreme Court and Justice Rand*

Justice Martland, with whom Justices Kerwin and Locke concurred, believed that the cancellation of the permit resulted from an order by Duplessis, who was not acting on the basis of any legal justification: nothing in the law authorized him to act, and his position as Attorney General alone did not give him the freedom “to use any method he chooses; that, on suspicion of participation in what he thinks would be an offence, *he may sentence a citizen to economic ruin without trial*”.⁴³ Justice Martland held that this question was to be determined according to law, not on the basis of good faith or the public officer’s personal appreciation of his functions.⁴⁴ Nothing allowed Duplessis to believe that he was authorized to deprive the plaintiff of his permit. He was therefore not acting in the exercise of his functions when he did so and he could not require the notice prescribed by article 88 C.C.P.

Furthermore, the judge added, the Commission’s statutory authority to cancel a permit at its discretion assumes the existence of a relationship between the reasons given for acting and the intent and purpose of the Act,⁴⁵ and must be exercised without submitting it to a third party.⁴⁶ Roncarelli’s association with the Jehovah’s Witnesses and his furnishing of bail for several members of that sect were entirely lawful and had no relationship to the intent and purposes of the Act. The evidence indicates that the Commission acted under Duplessis’ orders. The judge concluded that

⁴⁰ *Ibid.* at 511 [translated by author].

⁴¹ *Ibid.* at 512 [translated by author].

⁴² *Ibid.* at 515 [translated by author].

⁴³ *Roncarelli (S.C.C.)*, *supra* note 1 at 155 [emphasis added]. As Sandra Djwa reports, Duplessis’ attorney clearly indicated during the hearing before the Court that Duplessis’ goal was to harm Roncarelli financially. See Djwa, *F.R. Scott*, *supra* note 13 at 436.

⁴⁴ *Roncarelli (S.C.C.)*, at 158.

⁴⁵ *Ibid.* at 156.

⁴⁶ *Ibid.* at 157.

Duplessis had intentionally inflicted damage, in the absence of lawful justification, and therefore he was liable for the commission of a fault.⁴⁷

Justice Abbott shared this reading of the evidence, the reasons for the cancellation and the lack of a relationship between those reasons and the intent and purposes of the Act.⁴⁸ At any rate, the judge added, Duplessis was given no power under the act to intervene in the decisions of the Commission, an independent body. His conviction that he was acting in what he conceived to be the best interests of the people had no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority:⁴⁹ “the respondent was acting without any legal authority whatsoever. Moreover, ... he was bound to know that he was acting without such authority.”⁵⁰ This element also meant that Duplessis could not benefit from the notice requirement under article 88 C.C.P.⁵¹

As for Justice Fauteux, he based his entire dissent on article 88, although he indicated that, were it not for that provision, he would have decided in favour of Roncarelli. Although, he said, it cannot be doubted that Duplessis and the manager of the Commission were in good faith, the manager abdicated his authority to decide and Duplessis, “as Premier and Attorney General, ... assumed a right which the *Liquor Act* virtually denied him; he committed an unlawful act”⁵² which entitles Roncarelli to redress.

However, article 88 C.C.P. settles the issue: a prohibitive provision which, if not complied with, leads to nullity under the Civil Code, limits the court’s jurisdiction, as the absence of notice prevents any verdict or judgement from being rendered.⁵³ The issue of whether the act allegedly done by Duplessis was “in the exercise of his functions” must be answered from the standpoint that article 88 gives special procedural treatment to public officers and its application assumes that the officer committed an illegal act, regardless whether in good or bad faith.⁵⁴ In this case, whereas Duplessis committed an illegal act, his good faith was not an issue and he committed the illegal act due to his function.⁵⁵ He should therefore benefit from the protection under article 88 C.C.P.

⁴⁷ *Ibid.* at 159.

⁴⁸ *Ibid.* at 184.

⁴⁹ *Ibid.* at 185.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 186.

⁵² *Ibid.* at 175 [translated by author].

⁵³ *Ibid.* at 176.

⁵⁴ *Ibid.* at 178.

⁵⁵ *Ibid.* at 181.

The dissenting opinion of Justice Taschereau was based on similar arguments: since Archambault consulted Duplessis as Attorney General, not in personal capacity, and even if Duplessis was acting on an erroneous conception of his public duty, his action was nonetheless official and done “in the exercise of his functions”.⁵⁶

Also dissenting, Justice Cartwright stated that Duplessis was only liable for damages if the cancellation of the permit was “an actionable wrong”⁵⁷ which, he said, was not the case. The evidence shows that Duplessis honestly believed that he was fulfilling his duty by ordering the cancellation of the permit of an individual who was using the advantages of a privilege to undermine existing laws. Once it is found that this opinion “was honestly entertained”, the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.⁵⁸ The Legislature had given the Commission absolute discretion untrammelled by any rules, thereby delegating an administrative function. The holder of this type of function is “a law unto itself”.⁵⁹ The judge concluded that there was therefore no remedy for the damages suffered as the cancellation of the permit stemmed from an act of the Commission authorized by law. As the act of the Commission did not constitute a wrong, it followed that Duplessis could not be answerable in damages for directing or approving the doing of that act. It was therefore unnecessary to consider the argument based on article 88 C.C.P.⁶⁰

Justice Rand⁶¹ noted that Roncarelli became involved in this matter as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail in connection with proceedings related to municipal infractions. By ordering the Commission to cancel Roncarelli’s permit, Justice Rand wrote, Duplessis wanted not only to bring a halt to the propaganda campaign of the Jehovah’s Witnesses, but also to punish Roncarelli for the part he had played and to warn other holders of privileges.⁶² The question he posed summarized his reading of the events: “when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy

⁵⁶ *Ibid.* at 130.

⁵⁷ *Ibid.* at 164.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 167.

⁶⁰ *Ibid.* at 170.

⁶¹ Judson J. concurred with the opinion of Rand J.

⁶² *Roncarelli (S.C.C.)*, *supra* note 1 at 133.

the vital business interests of a citizen, is there legal redress by him against the person so acting?”⁶³

Justice Rand noted that as the number of activities requiring a permit grows, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.⁶⁴ The Commission is thus a public service which must manage permits with complete impartiality and integrity, which implies that the discretion of the Commission to deny or cancel a permit “is to be based upon a weighing of considerations pertinent to the object of the administration.”⁶⁵

In one of the emblematic passages from his decision, the judge states:

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 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 citizenship 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 [...W]hat 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

⁶³ *Ibid.* at 137.

⁶⁴ This is what made Rand J. say further on that the Commission breached Roncarelli’s *right to a privilege*: having a permit creates in its holder an interest which generates, on the part of the Commission, a duty to avoid any unauthorized interference: *ibid.* at 143.

⁶⁵ *Ibid.* at 140.

element of intentional punishment by what was virtually vocation outlawry.⁶⁶

Further on he added:

«[G]ood faith ... means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.»⁶⁷

Whatever may be the immunity of the Commission, the judge said, Duplessis had none: he intervened without authorization in the functions of the Commission and committed a fault engaging his liability.⁶⁸ In the context of expanding administrative regulation of economic activities, he added, “that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.”⁶⁹

II. Appraising a Legacy

The circumstances that led to the *Roncarelli* affair form a backdrop that is indivisible from the issues it raised. A profoundly Catholic Quebec in the 1940s was led by a premier whose concept of power was essentially based on the legitimacy of any action designed to preserve the culture and distinctiveness of the French Canadian nation, using audacious means at times, often bordering on disdain for public institutions.⁷⁰ It was also the beginning of the welfare state, and the adjusting of the relationship between political and executive powers. And finally, the years 1945 and 1946 saw a series of confrontations between the public authorities (municipal and provincial) and the Jehovah’s Witnesses, whose proselytizing sparked the anger of the religious majority.

While the circumstances we have just described explain the origin of the dispute between Roncarelli and Duplessis, the Supreme Court judge-

⁶⁶ *Ibid.* at 140-1.

⁶⁷ *Ibid.* at 143.

⁶⁸ *Ibid.* at 141-2.

⁶⁹ *Ibid.* at 142.

⁷⁰ The issue of Duplessis’ legacy and his association with the period described as the “*Grande Noirceur*” [literally, Great Darkness] has been the subject of many studies. We note, among several, the following collective work: Alain-G. Gagnon and Michel Sarra-Bournet (dir.), *Duplessis: entre la grande noirceur et la société libérale* (Montréal: Éditions Québec/Amérique, 1997).

ment, which left its mark as a precedent, is also a product of its time. The composition of the Court, and in particular the presence of Justice Ivan Rand, and the new issues it had to deal with in the aftermath of the Second World War, constitute the breeding ground for new ideas or simply a place for expressing old ones in a new way.

The maturing of this decision over the ensuing decades nonetheless saw prolonged periods of lethargy. The fruits it produced also did not necessarily resemble those which, the day after the decision was handed down by the Supreme Court, Claude-Armand Sheppard predicted in an article published in the McGill Law Journal.⁷¹ In fact, the decision may seem to be the precursor (together with decisions of the time associated with the emergence of the common law *Bill of Rights*) of a constitutionalism which would only take root several years later and, perhaps paradoxically, after the adoption of the *Canadian Charter of Rights and Freedoms*.⁷²

The impulse that led to the holding of the symposium was based both on previous work and our teaching experience, and more specifically the difficulty of untangling the various opinions, claims and conclusions of *Roncarelli*. It seemed to us that, far from being a mere historical oddity,⁷³ *Roncarelli* could help resolve the legal challenges of today, or at least lead to a better understanding of them. We will briefly examine how the contributions of the participants confirmed the relevance of this exercise. We will present a brief synopsis of their work, grouping them more or less freely within three broad themes which retained our attention during our group discussions.

A. *Methodological and Epistemological Challenges*

The issue of the appropriate method for examining a precedent, along with that of whether it is possible to identify what was “actually” decided, are not specific to *Roncarelli*: the methodological and epistemological challenges related to “knowledge” of the jurisprudence are among the main concerns of interpretation theories. However, the effect of the five decades separating us from the judgement was to put these issues at the forefront of discussions at the symposium: can we claim to determine what *Roncarelli* “actually” decided in 1959? If so, how should we proceed? If not, can the decision have different meanings depending on the person reading it?

⁷¹ Sheppard, “Roncarelli”, *supra* note 3.

⁷² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁷³ Yves-Marie Morissette, “Rétrospective et prospective sur le contentieux administratif” [2008-2009] 39 R.D.U.S. 1 at 5, indicating that *Roncarelli* is now “more of a historical oddity” [translated by author].

More generally, what relationship can we or should we have with this decision fifty years later? As was to be expected, neither the texts nor the discussions provided firm answers to these questions, but we note that certain contributions place particular emphasis on the reconstitution of the decision, whereas others insist on a re-reading of it. These two perspectives are not completely foreign as, while giving variable importance to them, they both take seriously the idea that the decision is not built entirely by the person interpreting it; the facts from which it arose are important.

1. Reconstitution: The Relationship to the Time and Context

A better understanding of the socio-historic context allows us to reconstitute the decision and better understand what it may have expressed at the time it was rendered. Along these lines, **Macdonald** argues that such a contextual analysis allows for a more nuanced interpretation of *Roncarelli* than that put forward by the predominant discourse. First, he looks at the socio-demographic and ideological background of the three levels of judges who rendered a decision in this matter, and the impact of language, religion and geography on the outcome. This analysis suggests that the split between the majority and minority judges cannot be explained simply, as a dichotomy representing the first as defenders of the rule of law and the second as conceding the existence of an arbitrary political sphere untouchable by the law. The many influences and the backgrounds of the judges in this case and the analysis of the decisions they rendered suggest that the foundations of their decisions are more complex than it may appear.

Second, Macdonald submits that the arguments put forward by Duplessis in 1946 were supported by plausible social, political and legal theories and that a close examination of those theories indicates that they could just as well have constituted the basis for the Supreme Court's finding. In other words, based on the theoretical foundations relied on by Duplessis, the Court might have asked whether he had breached a fiduciary duty to administer the law according to its purposes and for the benefit of the entire population covered by the rules, and conclude in the affirmative. However, such a finding would not have been due to the weakness of the theories raised, but to the factual context which made Duplessis wrong. For Macdonald, the lack of interest shown by commentators to Duplessis' arguments radicalized the reading of the decision, by associating Duplessis with a morally and legally indefensible position. In addition, by abstracting the decision from its time and place, commentators have ascribed conclusions to it which the context did not support.

Along the same lines, **Adams** also stresses the fact that precedents find meaning when viewed in their "lived contexts". He suggests reconsti-

tuting these contexts, more specifically to demonstrate that the meaning and scope which have been ascribed to *Roncarelli* result from a complex construction process, further to which the decision “became”, for a time at least, a judgement about fundamental rights. Not only was the decision rendered at the time of the birth of a constitutional culture of rights, Adams explains, but the division of the Court in the matter and the difficulty of identifying its rationale encouraged a reading of the decision which only retained aspects relating to the constitutionality of the rights and to citizenship, themes intensely debated in Canada at the time. By removing the issue of civil liability, which was nonetheless the core issue of the case, from the interpretative landscape and resorting to the rule of law to justify the limitations on the authority of the State’s executive branch, the processes of construction of meaning, as well as mutual influences among lawyers, scholars, citizens and others, propelled the culture of rights and sanctified Justice Rand’s stature in the Canadian imagination. But Adams rightly notes that this construction is not static, and that a similar process could certainly explain why the decision does not have the same allure today.

McKee demonstrates how fundamental the dichotomy between the public and private spheres is in *Roncarelli*. In his opinion, by stating the principle that any exercise of “public” power, including discretionary power, has its limits, Justice Rand relied on a concept of the public/private distinction characteristic of nineteenth century economic and political liberalism and classical legal thought. McKee points out the many manifestations of the public/private duality in *Roncarelli* such as, for example, Duplessis’ insistence on characterizing the licence as a privilege, exposing it to public authority. Inversely, Justice Rand refuses to approach the question from the “right/privilege standpoint”, insisting instead on *Roncarelli*’s business interests and the economic consequences of cancellation, relegating them to a private sphere which the State cannot legitimately pierce. According to McKee, this approach overlooks the fact that the defining of the contours of one sphere necessarily affects the other and that, by limiting protection to the exercise of public authority, *Roncarelli* leaves private authority untouched. Thus, the prestige of *Roncarelli*, in conjunction with its determination to limit arbitrariness in the exercise of public authority, must also be seen as confirmation of a private sphere, which judicial authority cannot easily control.

2. Rereading: Contemporaneous Theories Which Shed Light on Its Relevance

Does the full meaning of an older text only emerge progressively, as it is interpreted in new and different contexts? Does the normative meaning of the decision continue to reveal itself as we reflect on what it evokes? How ideas were expressed in the past is important. In this regard, Mac-

donald, Adams and McKee have greatly contributed to our understanding, by putting what the decision had tried to express into its social, historical and political context. But the contributions to the symposium also showed the interest of legal theories that have developed over the past fifty years. Thus, certain theories not well developed at the time of the Supreme Court decision can now elicit a new understanding of it.

In this sense, **Dyzenhaus** asserts that decisions such as *Roncarelli* live on due to their ability to shed new light on the situation today. He suggests that an article written by Rand in 1960 along with his opinion in *Roncarelli* set out the main elements of a republican legal theory. The republican theory postulates that individual freedom is defined by non-domination or mastery of other individuals or the state, as opposed to the liberal view of freedom, associated with the idea of liberty as a lack of interference. More specifically, Dyzenhaus submits that the writings of Justice Rand help us understand why the best interpretation of common law constitutionalism consists of seeing it as a doctrine which protects freedom in the republican sense of non-domination. By using the law as an instrument of domination, i.e. as a means of submitting *Roncarelli* to his will, Duplessis acted without regard to the issue of what would serve *Roncarelli*'s interests. The authority of law is the public expression of our right to govern ourselves and, accordingly, our right, as legal subjects, not to be submitted to the arbitrary rule of men, but only to laws which serve our interest without domination.

Fox-Decent asserts that the vision of public law underlying Justice Rand's opinion affects how we think about the legality of administrative action and the ongoing debate over common law constitutionalism. Justice Rand affirms that public authorities are under a *legal* obligation to use their discretion non-arbitrarily, an obligation which stems from the rule of law, to which Rand ascribes unwritten constitutional status. The challenge is to explain how frontline decision-makers vested with discretionary authority which the statutory law does not expressly limit are subject to a *legal* obligation to exercise unqualified discretion on limited grounds. To acknowledge that the elimination of the arbitrary is a value or even a duty in common law does not necessarily make it a *legal* obligation which is exercised without express language to that effect. How to bridge the gap between value and legal obligation? In the opinion of Fox-Decent, that is possible as part of a relational and democratic approach to public law, which is exactly what the reasons of Justice Rand express in *Roncarelli*. This concept is "relational" to the extent that public actors and individuals subject to their power stand in a fiduciary relationship, which excludes relationships of domination and instrumentalization. And it is the fiduciary nature of these relationships which produces the legal obligation not to act arbitrarily. This conception of public law is also democratic in that its articulation takes seriously into account the actual features of fiduciary

relationships, as they are lived by the actors. For Fox-Decent, such a theory provides solid foundation and a deep structure for Justice Rand's vision of public law in *Roncarelli* and the place he reserves for discretion within legality.

Lewans seeks to identify Justice Rand's sources of inspiration in the formulation of the distinctive brand of constitutionalism that marks his decision. He explains that Justice Rand's conception of "citizenship" helps explain the normative character of his constitutional model, and that his views about citizenship were shaped by his exposure to American law. More specifically, Lewans shows that Justice Rand sought to instil in Canadian law the principles of equality and non-discrimination provided through the "privileges and immunities" clause of the Fourteenth Amendment, but which were given short shrift by a majority of the Supreme Court of the United States. Lewans suggests that the strong dissenting opinions of the American Court shaped Justice Rand's thinking. While noting the complex nature of citizenship and its many aspects, Lewans suggests that the negative and positive aspects of the principle of equality are especially important for Rand, who combines social and economic rights, translated for example as a concern that citizens have access to the "privileges" of citizenship, such as liquor licences, without discrimination (the positive aspect) with the right to non-interference by the State in individual freedoms, including freedom of religion (the negative aspect). Lewans admits that Justice Rand's record is less impressive in immigration matters, where his concept of citizenship seems highly questionable, but he notes that Justice Rand must be understood in light of the context and ideas of his time. And because the context is important, its evolution allowed decisions such as *Baker v. Canada*⁷⁴ to draw on the opinion of Justice Rand in *Roncarelli* to give new life to his characteristic concept of constitutionalism.

Walters suggests that there are two conceptual sides to the legality coin: legality as reason and legality as order. The first approach seeks to describe the particular conditions in which governance occurs through law: the rules and conditions law must meet to constitute a system of rules. The second looks mainly to how the rule of law is instantiated through a form of justificatory interpretation aimed at consistency, coherence or equality of reason: a dynamic process of reasoned justification. Walters suggests firstly a reading of Rand's position as combining not only the two conceptual aspects of the rule of law but also their doctrinal interpretation, so that Rand makes our sense of constitutionalism rich and valued in practice. He also submits that Dicey, understood through certain passages of unpublished writings, including his personal correspondence, may not be that far from the conceptual view of the rule of law

⁷⁴ [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

proposed by Rand, although the two are traditionally presented as incarnating antagonistic positions on the issue.

B. Twofold Contrast: Between Simplicity and Complexity—Between Theory and Practice

At the very beginning of this text, we outlined the broad principles with which the *Roncarelli* decision is traditionally associated. Nonetheless, the symposium participants quickly pointed out the great complexity of this case, noting the contrast it sets up between its apparent simplicity and the clarity of the principles ascribed to it (1). In a similar perspective, some have drawn an at best mitigated description of the impact of the lessons from *Roncarelli*: the peremptory tone in which Justice Rand delivered them contrasts with the hesitations of the courts to put them into practice. Thus, legal control is still absent from many areas where discretionary authority is found, and the prevention of arbitrariness is slow to take root as a concern of legal institutions themselves (2).

1. The Illusion of Simplicity

The complexity of the case is clear in more than one respect: the convoluted procedures to which *Roncarelli* had to resort to be given the right to sue;⁷⁵ the facts, fiercely contested; the essentially private nature of the recourse and the public position of the defendant as well as the legal framework in which several of the arguments were presented; the importance given by the judges to the analysis of the Commission's decision, whereas the action was against Duplessis; the number, scope and style of the opinions written by the judges who heard the case, at all levels. In short, *Roncarelli* is a kaleidoscope, which Mullan, Aronson and Bernatchez clearly note.

In a thorough and nuanced analysis, **Mullan** broaches what may be the most intriguing aspect of *Roncarelli*. The case was presented in the form of a civil liability action and, the day after the decision, Sheppard said that in his opinion, the Court's position on the notion of fault was the key to the decision in that it revolutionized the state of the law on the issue.⁷⁶ However, this aspect of the decision was rarely discussed afterwards.⁷⁷ Through his analysis, which brings to mind the play of influences between the common law and civil law, among other things, Mullan attempts to decipher the various opinions of the Court to understand what it "actually" decided on the issue of the basis for a finding against Duplessis. At the same time, Mullan demonstrates the difficulty of reconcil-

⁷⁵ See in this regard our recital of the facts of the case in Part II.

⁷⁶ Sheppard, "Roncarelli", *supra* note 3 at 92ff.

⁷⁷ See, however, Huppé, "Immunité", *supra* note 2.

ing the opinions of the judges at the three levels, but asserts that a majority of the Supreme Court judges believed that mere illegality was enough to give rise to fault. Mullan also shows how this rule was subsequently changed to require proof of the decision-maker's bad faith. His analysis illustrates the challenge represented by an overall understanding of the decision and points out that, on the merits, the judges at the time were mostly favourable to a broad concept of the liability of public decision-makers, from which contemporary law tends to distance itself.

Aronson presents an Australian perspective of *Roncarelli* through an analysis of the scope of the rule of law principle and the conditions for holding public authorities liable. He begins by noting that Australian judges would have been very reticent to use the rule of law as such to denounce Duplessis' attitude. Australian law does not recognize any direct normative "bite" to this principle, which is invoked in an essentially rhetorical manner by judges who mostly conceive of their role according to a legalistic approach. Furthermore, not only did the statutory law at the time give significant legal protection to permit holders; a string of precedents also established limits to the exercise of discretionary power, several of which could have served as a foundation for a favourable conclusion to *Roncarelli*. In addition, Aronson notes that, from an Australian perspective, the most surprising aspect of *Roncarelli* lies in the order that the Premier pay damages, based on the rule of law and liability rules which are distinguished from those that apply to private law, whereas Australia fails to make such a distinction. Following a close examination of Canadian and Australian jurisprudential trends, Aronson notes that Canadian law seems to be heading towards an open-textured concept of morally blameworthy *public behaviour*, whereas Australian law seems to want to limit itself to penalizing the abuse of *public power*, in minimalist terms intended to maintain the "private" view of the liability of public authorities.

In a slightly different perspective, **Bernatchez** suggests that recourse to the unwritten constitutional principle of the rule of law marks the beginning of a movement which he describes as "reflexive proceduralization" of the devices of democratic governance. This movement expresses on the one hand the fact that the principles (such as the rule of law) can lead to a questioning of the rules of a legal system, and changes to them, where applicable. Secondly, as these principles are often associated with institutional devices encouraging the participation of those involved (such as the right to be heard), they participate in the construction of the meaning of the standards to which they are subject. Furthermore, Bernatchez argues that *Roncarelli* can be seen as the starting point of the "bifurcation" of administrative law toward the logic of rights and freedoms. Through an analysis of the Supreme Court jurisprudence on the issue of the concepts of minimal impairment and reasonable accommodation, he draws our at-

tention to the complexity of the relationship between constitutional law and administrative law, and the corresponding difficulty of identifying which direction to take when the two fields seem to lend themselves to settling a dispute. Bernatchez's contribution leads to broader questions: how to distinguish constitutional law from administrative law? And especially, why distinguish them?

2. An Unfinished Mission

Sossin and Liston propose a measurement of the distance between the theory set out in *Roncarelli* and the resulting practice. Both measure the work that remains.

For **Sossin**, the statement by Justice Rand according to which there is no such thing as untrammelled discretionary power within the executive is the most significant legacy of *Roncarelli* and at the same time emblematic of the rule of law. In his opinion, however, that legacy is threatened by a questionable judicial interpretation of the doctrine of justiciability, which isolates from judicial review important spheres of executive discretion. Sossin submits that the jurisprudence respecting justiciability should be reassessed in view of the principle of the rule of law, in order to reaffirm that no particular type of discretion is free from judicial review. Furthermore, justiciability should not be conceived based on an "all or nothing" approach, but on that of the spectrum, which already governs the degree of intervention to be exercised for judicial review. In Sossin's opinion, this type of review is a necessary bulwark against arbitrary decision-making, but it is not sufficient to fulfil *Roncarelli's* promise: respect for the rule of law must come from within. Internal, executive-driven initiatives related to training, education, mentorship, and supervision must therefore be developed to promote a rule of law culture among executive decision-makers. The full realization of the promises from *Roncarelli* depends on it.

Liston endeavours to define the notion of arbitrariness which, although it constitutes the central idea in *Roncarelli*, is not explicitly articulated in the decision. Liston discusses three dimensions of arbitrariness (normative, functional and sociological), which she applies to the analysis of the decision. Although Duplessis had demonstrated "normative" arbitrariness by ignoring the rule of law, Liston notes that, from a functional perspective, the law or its institutional failings constitute the harm: the overly broad delegation of discretion, the lack of institutional independence, the failure to give reasons, the denial of access to justice, etc. Liston then focuses on a surprising aspect of the case: the various manifestations of *judicial* arbitrariness. She notes in this regard the weak reasons supporting the opinions of certain judges, the fact that issues were not discussed, the confusion caused by the many obiters, etc. Liston concludes

that the notion of arbitrariness, as it stems from *Roncarelli*, still has a positive effect on the consolidation of Canadian public law. She notes, however, the importance of re-reading the decision to draw out its under-acknowledged aspects, to avoid reducing what it fully represents. She also states that the task of eliminating arbitrariness is far from over, as witnessed by the legal and political relations with Aboriginal peoples and the failure to protect their rights. The legacy of *Roncarelli* is profound, she says, but, like Sossin, she hastens to add that the work is not yet fully realized.

C. *The Pre-Eminence of Justice Rand's Opinion*

We suggested earlier that the “*Roncarelli* affair” quickly became “Judge Rand’s opinion”. How can this be explained? Several of the texts making up this work note the solidity of his arguments as well as the strength of his rhetoric, but the predominance of the Rand judgement may have something to do with his propensity for abstraction: he is able to extract the essence of the case and place it in a higher and broader set of principles, facilitating their subsequent application or discussion.

What effect has this predominance had? The reduction of the analysis of the *Roncarelli* case to Justice Rand’s opinion has had two main effects. First, it has relegated to the background considerations which wrongly appeared as secondary or technical, as shown by Leckey. Also, paradoxically, it has deprived this decision of a source of contrasts which could give it even greater weight and value. This is what Dyzenhaus showed in response to Leckey’s arguments.

Leckey asserts that the accepted reading of *Roncarelli* requires revision, as it reduces the case to a simplistic duality between the judges who were the rule of law’s champions, and the others, narrow-minded and formalist, who disposed of the case based on article 88 C.C.P. Through a careful analysis, Leckey dissects the opinion of Justice Fauteux and submits that his approach is just as compatible with the rule of law as that adopted by Justice Rand. Leckey points out the solidity of the arguments made by Justice Fauteux and his particular perspective as a civil law judge in interpreting such a provision. According to Leckey, the disagreements surrounding the interpretation to be given to this article therefore constitute a debate internal to the rule of law, which requires proponents of Rand’s position to explain how the rule of law brought them, under the circumstances, to give to a clear legislative provision an interpretation which strays from that suggested by both its wording and Quebec jurisprudence. The result is a reading of the decision much more in-depth than that traditionally given to it by scholars.

While Leckey’s work places the Rand opinion in a more fair perspective, it also gives Rand supporters an opportunity to respond to the objec-

tions. Thus, Dyzenhaus agrees with Leckey on the structure of the argument, but considers that, on the merits, the rule of law states that in absence of clear words, a legislative provision cannot be construed as protecting public decision-makers from the consequences of their actions committed in bad faith, arbitrarily or out of a spirit of vengeance.

Conclusion: A Discussion to Be Continued

The themes raised in *Roncarelli* are of fundamental importance for any political society that adheres to the ideal of a constitutional state and that questions the respective legitimate roles of the legislator, the executive and the courts. They broach the founding principles of our public law: the issue of the nature and scope of the limitations which could control public powers in order to preserve individual freedom, and the extent to which public authorities may have to compensate the damage they cause.

These issues are not only recurring, they are above all current. At the time of *Roncarelli*, the creation of the welfare state and its repercussions on individuals required a revisiting of the legal principles developed for a police state. Today, the concerns are twofold: not only is the welfare state keeping its place (despite speeches calling for a reduction of its size), but the challenges typically associated with a police state are resurfacing in the aftermath of the events of September 11, 2001. Thus, concerns related to national security frequently translate into the use of discretionary authority by the upper echelons of government (such as security certificates) and they encourage us to return to the sources of our public law and the teachings of *Roncarelli*: will they allow us to face these challenges?

“There comes a time when the mind prefers that which confirms what it knows to that which denies it, when it prefers answers rather than questions. This is when the conservative instinct dominates and spiritual growth ceases.”⁷⁸ Far from drawing up a final report on the legacy of the *Roncarelli* affair, our work has allowed us, fifty years later, to take stock of its depth, complexity and relevance. The debate is therefore still open, a matter of stamping out “the conservative instinct” in favour of enriching the mind.

⁷⁸ G. Bachelard, *La formation de l'esprit scientifique* (Paris : Librairie philosophique Vrin, 2004) at 17 [translated by author].