

## Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture

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

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Article abstract

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But *Roncarelli*'s meaning also took shape in press accounts and editorials, radio broadcasts, case comments, and law school lectures. Exploring these often-neglected sources, this article exposes the role of constitutional culture in creating jurisprudential meaning. In turn, it also calls for greater recognition of the pre-Charter Supreme Court of Canada in contributing to Canada's intellectual history of rights.

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BUILDING A LAW OF HUMAN RIGHTS:  
*RONCARELLI V. DUPLESSIS* IN  
CANADIAN CONSTITUTIONAL CULTURE

*Eric M. Adams\**

This article reveals how audiences, especially in anglophone Canada, initially received and interpreted *Roncarelli v. Duplessis* as a case, above all, about human rights. Ignoring the judgment's myriad complexities, commentators eagerly situated the case within the Supreme Court of Canada's "implied bill of rights" jurisprudence then taking shape. Part of the reason for the emphasis on Roncarelli's rights can be traced to the manner in which Frank Scott and Louis Stein argued the case, and the language of rights employed by Justice Ivan Rand's iconic judgment.

But *Roncarelli's* meaning also took shape in press accounts and editorials, radio broadcasts, case comments, and law school lectures. Exploring these often-neglected sources, this article exposes the role of constitutional culture in creating jurisprudential meaning. In turn, it also calls for greater recognition of the pre-Charter Supreme Court of Canada in contributing to Canada's intellectual history of rights.

Cet article montre comment le public, notamment celui du Canada anglais, a initialement reçu et interprété l'arrêt *Roncarelli c. Duplessis* comme étant une affaire ayant trait avant tout aux droits de la personne. Laissant de côté les innombrables complexités du jugement, les commentateurs se sont empressés de situer l'arrêt dans la jurisprudence de la Cour suprême du Canada qui se formait à l'époque sur la « charte des droits implicite ». L'accent mis sur les droits de Roncarelli s'explique en partie par l'approche adoptée par Frank Scott et Louis Stein pour plaider la cause ainsi que par le langage utilisé par le juge Ivan Rand dans son jugement emblématique.

Toutefois, la signification de l'arrêt *Roncarelli* s'est aussi formée à travers des comptes rendus de presse et des éditoriaux, des émissions de radio, des commentaires d'arrêt et des cours dans les facultés de droit. En explorant ces sources trop souvent négligées, cet article expose le rôle de la culture constitutionnelle dans l'interprétation jurisprudentielle. De plus, il lance un appel pour une plus grande reconnaissance de la contribution de la Cour suprême du Canada à l'histoire intellectuelle des droits au Canada avant l'avènement de la *Charte canadienne des droits et libertés*.

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\* Faculty of Law, University of Alberta. In particular, I would like to thank Geneviève Cartier, Robert Leckey, Sarah Krotz, and Andrea Willey for her excellent research assistance.

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## Introduction

A few months after his momentous victory as co-counsel in *Roncarelli v. Duplessis*,<sup>1</sup> Frank Scott spoke to an audience of lawyers at the mid-winter meeting of the Canadian Bar Association. “I find it interesting to observe how in the field of constitutional law,” Scott began, “certain parts of the total structure seem to become floodlighted and to stand out from the rest at particular periods of time.”<sup>2</sup> It was true that in the past, “[m]ost of the great cases in Canadian constitutional law ... have turned on questions of jurisdiction under sections 91 and 92 of the BNA Act, and these we have always with us,” but, he continued, a “short look backward over the past dozen years” revealed courts and legislatures grappling with a new set of constitutional issues and concerns.<sup>3</sup> “Constitutionally speaking,” Scott declared, “the 1950s was predominantly the decade of human rights.”<sup>4</sup>

To prove his point, Scott turned his audience’s attention to a series of cases already on their way to being regarded as the “golden’ moments of the civil liberties decade”:<sup>5</sup> *Boucher v. R.*,<sup>6</sup> *Saumur v. Quebec (City of)*,<sup>7</sup> *Switzman v. Elbling*,<sup>8</sup> and *Roncarelli*. Collectively, these cases—or, rather, certain judgments within them—had become famous for their articulation of a constitutional theory known as the “implied bill of rights”.<sup>9</sup> Although judges on the Supreme Court of Canada never used that expres-

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

<sup>2</sup> Frank R. Scott, “Expanding Concepts of Human Rights” in *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 353 at 353 [*Essays*].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 354.

<sup>5</sup> Max Cohen, “The Judicial Process and National Policy—A Problem for Canadian Federalism” (1970) 16 McGill L.J. 297 at 301. See also Dale Gibson, “And One Step Backward: The Supreme Court and Constitutional Law in the Sixties” (1975) 53 Can. Bar Rev. 621.

<sup>6</sup> [1951] S.C.R. 265, [1951] 2 D.L.R. 369.

<sup>7</sup> [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641 [*Saumur* cited to S.C.R.].

<sup>8</sup> [1957] S.C.R. 285, 7 D.L.R. (2d) 337 [*Switzman* cited to S.C.R.].

<sup>9</sup> The implied bill of rights cases also typically include the following cases: *Reference Re Alberta Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 [*Ref Re Alberta* cited to S.C.R.]; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, [1951] 4 D.L.R. 529 [*Winner* cited to S.C.R.]; *Smith & Rhuland Ltd. v. Nova Scotia* [1953] 2 S.C.R. 95, [1953] 3 D.L.R. 690; *Henry Birks & Sons v. Montreal (City of)*, [1955] S.C.R. 799, [1955] 5 D.L.R. 321; *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241; *Lamb v. Benoit*, [1959] S.C.R. 321, 17 D.L.R. (2d) 369. For recent treatment, see Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80 Can. Bar Rev. 699; Andrée Lajoie, “The Implied Bill of Rights, the Charter and the Role of the Judiciary” (1995) 44 U.N.B.L.J. 337.

sion to describe their jurisprudential efforts, a legion of admirers adopted and promulgated the phrase in the years that followed.<sup>10</sup> In grouping the implied bill of rights cases together, scholars and commentators flattened vast and subtle differences among a diverse body of jurisprudence in an effort to find transcendent constitutional meaning in the decisions of the Supreme Court of Canada. Most important to Scott and most of his contemporaries, the implied bill of rights had, even in the absence of an entrenched bill of constitutional rights, elevated human rights and fundamental freedoms into core features of Canadian constitutional law.

From the moment he first encountered the story of Frank Roncarelli, Frank Scott saw the issue as one of individual rights and freedoms. As he often did, Scott took his arguments first to the readers of the leftist magazine, *Canadian Forum*. In his pithy 1947 article, “Duplessis *versus* Jehovah”, Scott accused Duplessis of seeking “to wreck all civil liberty in Quebec” by punishing Roncarelli for exercising “this ancient guarantee of human liberty,” the “legal right” to provide bail.<sup>11</sup> Throughout his short article, Scott raised the postwar spectre of authoritarian state power directing “gang[s] of policemen” in the “mass persecution” of “a small religious sect.”<sup>12</sup> Of the lessons to be drawn from these events, Scott suggested the need “for active civil liberties associations,” not just in Montreal, but across “this country.”<sup>13</sup> And lest the incident serve as “an excuse for another attack upon Quebec,” Scott reminded that 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.”<sup>14</sup> By

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<sup>10</sup> F. Andrew Brewin was, I believe, the first to use the phrase in his *Switzman* case comment: F. Andrew Brewin, Case Comment on *Switzman v. Elbling*, (1957) 35 Can. Bar Rev. 554 at 557 [Brewin, *Switzman*]. A decade later, the term “implied bill of rights” had become common: Dale Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1966–67) 12 McGill L.J. 497.

<sup>11</sup> F.R. Scott, “Duplessis *versus* Jehovah” *Canadian Forum* 26:312 (January 1947) 222 at 223, republished in *Essays*, *supra* note 2, 193 at 193, 195.

<sup>12</sup> *Ibid.* at 195.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 196. The Japanese deportation was fresh on Scott’s mind. Just as Scott penned his article in *Canadian Forum*, the Privy Council upheld Canada’s proposed deportation orders of Japanese Canadians. “The interests of the Dominion are to be protected,” the Judicial Committee held, “and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge”: *Co-operative Committee on Japanese Canadians v. Canada (A.G.)* (1946), [1947] A.C. 47 at 101, [1947] 1 D.L.R. 577 (P.C.), *affg Reference Re Persons of the Japanese Race*, [1946] S.C.R. 248, [1946] 3 D.L.R. 321 [*Japanese Reference*]. Alongside Scott’s article in *Canadian Forum* appeared Edith Fowke’s article, “Justice and Japanese Canadians”, and her dispirited conclusion that “we can never depend upon laws or constitutions to defend our rights”: Edith Fowke, “Justice and Japanese Canadians” *Canadian Forum* 26:312 (January 1947) 225. For a history of the movement against deportation, of which Scott and Fowke were key parts, see Stephanie

casting the *Roncarelli* affair as an issue of individual rights national in scale and scope, Scott placed the battle between a Montreal restaurateur and Quebec's premier in Canada's emerging constitutional politics of rights.

Today, however, *Roncarelli* connotes a different constellation of meanings. Although perhaps the best known of the implied bill of rights cases, its jurisprudential authority is now more closely tied to the limited authority of government officials and "rule of law" constitutionalism, propositions for which it is routinely cited,<sup>15</sup> and even more frequently taught.<sup>16</sup> Of course, the norms inherent in the ideals of the rule of law—even if notoriously slippery and ambiguously multifaceted—are themselves derived from notions of individual liberty, as A.V. Dicey himself well recognized.<sup>17</sup> But while the rule of law, evocatively spare and malleably abstract, has offered a rich vein for contemporary constitutional theorists, *Roncarelli*'s initial audiences tended to overlook the judgment's complexities in search of more accessible and immediate constitutional meaning. Largely ignoring or downplaying the case's *ratio decidendi* and private law dimensions under Quebec's *Civil Code of Lower Canada*, commentators in anglophone Canada in the late 1950s and early 1960s read *Roncarelli* through a lens shaped by contemporary debates about the nature of constitutional rights and citizenship. For them, *Roncarelli* was a case about the evolving role of individual rights in Canadian constitutional law. In the process, *Roncarelli*, like the other implied bill of rights cases before it, came to express meaning in Canadian constitutional culture not altogether synonymous with its holdings at law.

In general, Canadian legal scholars have tended to neglect the richer and more dynamic cultural histories of our constitutional jurisprudence. It was not the black letters of the *Supreme Court Reports* that gave life to the cases contained within them, but the reactions of civil society—politicians, lawyers, scholars, students, media, social movements, and

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Bangarth, *Voices Raised in Protest: Defending Citizens of Japanese Ancestry in North America, 1942–49* (Vancouver: UBC Press, 2008); Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930–1960* (Toronto: University of Toronto Press, 2005) at 106–42.

<sup>15</sup> See e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53, 174 D.L.R. (4th) 193.

<sup>16</sup> See Neil Craik *et al.*, *Public Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2006) at 91; The Constitutional Law Group, *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 640; Joseph Eliot Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. (Edmonton: Juriliber, 2001) vol. 1 at 193.

<sup>17</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London, U.K.: MacMillan, 1959) at 183–205.

citizens—to the formal judgment handed down by the Court.<sup>18</sup> And just as *Roncarelli* contributed to ongoing debates about the place of rights in Canadian constitutional law, so too did those debates influence the members of the Supreme Court of Canada in the 1950s. As Robert Post argues, “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”<sup>19</sup> We catch glimpses of the processes of mutual influence and construction in an array of formal legal and informal cultural sources: Roncarelli’s factum, press reports, editorials, case comments, law review articles, parliamentary debates, classroom discussions, and personal correspondence, among other less easily accessible nooks and crannies of Canadian constitutional discourse. We should, of course, continue to puzzle over and debate the doctrinal implications and theoretical dilemmas posed by a great case like *Roncarelli*, but so too must we widen our gaze to view the case in its lived contexts. Not only in the courtroom, but also in Canadian living rooms and classrooms, we see the way in which *Roncarelli* became—even if partially and momentarily—a case about human rights.

## I. *Roncarelli* at the Supreme Court of Canada

Just as Scott’s article on Roncarelli appeared in *Canadian Forum*, Montreal lawyer Albert Louis Stein approached Scott, at Roncarelli’s urging, to see if he would join Roncarelli’s legal team. Though worried about the transition from classroom to courtroom, Scott nonetheless agreed.<sup>20</sup> Ten years later, preparing their factum for their appeal to the Supreme Court of Canada, Scott continued to view the case as a matter of individual rights and freedoms, notwithstanding the essentially private law character of his client’s claim. To be sure, Scott and Stein comprehensively addressed the issues of fault, causation, and damage under the *Civil Code of Lower Canada* in their factum and over the course of a remarkable five days of argument before the Supreme Court of Canada. Yet

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<sup>18</sup> On the idea of constitutional culture, see Robert C. Post, “Fashioning the Legal Constitution: Culture, Courts, and Law”, *Forward*, (2003) 117 *Harv. L. Rev.* 4; Günter Frankenberg, “Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative” (2006) 4 *Int’l J. Const. L.* 439; David Schneiderman, “Property Rights and Regulatory Innovation: Comparing Constitutional Cultures” (2006) 4 *Int’l J. Const. L.* 371 at 375; Reva B. Siegal, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA” (2006) 94 *Cal. L. Rev.* 1323.

<sup>19</sup> Post, *supra* note 18 at 8. Almost a century ago, Benjamin Cardozo pointed out that “[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by”: Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 168.

<sup>20</sup> At the time, Scott explained his involvement in the case to McGill’s Principal by claiming he needed the money. See Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Vancouver: Douglas & McIntyre, 1989) at 307 [Djwa, *Politics of the Imagination*].

rights rhetoric remained a critical feature of the argument, and a compelling framing device for Scott's presentation of the sympathetic facts. As their factum declared, "[t]his case raises grave questions of fundamental freedoms and human rights namely, freedom of religion and the right to give bail."<sup>21</sup>

In his oral argument, Scott granted Roncarelli's rights claim even greater prominence. "This case," Scott stated in his opening remarks, "involves the right of a citizen to give bail."<sup>22</sup> Bail performed a critical role in a free society, Scott argued, because it underpinned the workings of the criminal justice system, especially the presumption of innocence.<sup>23</sup> But Roncarelli had other rights at stake, too. Wishing to avoid possible prejudices on the Court, Scott downplayed Roncarelli's religious freedoms, focusing instead on the property and procedural rights the common law had always taken pains to protect.<sup>24</sup> Scott stressed that Duplessis had sought to punish Roncarelli for a non-existent crime (providing bail to others) by executive fiat, without an opportunity for Roncarelli to know the case against him or to defend himself. Such "pre-trial punishment," Scott argued, amounted to an "inversion of judicial rights" because it purportedly cloaked the wrongdoer with legal authority, while denying the victim his common law rights of due process.<sup>25</sup> Worse still, Duplessis imposed a sentence of "economic death"<sup>26</sup> by seizing and destroying Roncarelli's property and wrongfully revoking his liquor permit, "not temporarily but definitely and for always."<sup>27</sup> Throughout his argument, Scott repeatedly invoked the images of a law-abiding citizen exercising his rights versus the mendacious "administrative lawlessness"<sup>28</sup> of Duplessis and the bureaucratic officials acting under his command. In closing, Scott accused Duplessis of subverting "the roots of our constitution and basic human rights," by in-

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<sup>21</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (Factum of the Appellant at 80) [*Roncarelli FOA*]. See also *ibid.* at 72, 81 (references to the "right to give bail").

<sup>22</sup> "Right to Give Bail, Roncarelli's Case" *Montreal Gazette* (3 June 1958) 25.

<sup>23</sup> For an elaboration of Scott's argument, see F.R. Scott, *Civil Liberties & Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 49 [Scott, *Civil Liberties*].

<sup>24</sup> For John Willis's complaints about the "common law Bill of Rights", see John Willis, "Administrative Law and the British North America Act" (1939) 53 *Harv. L. Rev.* 251 at 252, 274-75.

<sup>25</sup> "Doomed By Duplessis to 'Economic Death'" *The Halifax Chronicle-Herald* (3 June 1958) 1 at 2.

<sup>26</sup> *Ibid.* A French version of the Canadian Press story also appeared in *La Presse*. See "M. Duplessis veut 'punir' F. Roncarelli" *La Presse* (3 June 1958) 21. Scott's phrasing obviously captured the attention of Rand J., for he repeated the phrase (in slightly altered form) in his judgment. Duplessis, Rand J. wrote, had sought the "destruction of [Roncarelli's] economic life" (*Roncarelli*, *supra* note 1 at 141).

<sup>27</sup> *Roncarelli FOA*, *supra* note 21 at 18. The quotation was attributed to Duplessis.

<sup>28</sup> "Lawyer Calls Duplessis Lawless" *The Globe and Mail* (7 June 1958) 4.



fringing the “the right to a fair trial, the right to enjoy the ownership of property, [and] the right to provide bail.”<sup>29</sup>

Scott employed the language of rights and citizenship deliberately. The idea of national citizenship offered the means to attach individual rights to the legal subject, notwithstanding the absence of a formal constitutional bill of rights. The concept of citizenry rights particularly attracted Scott because it configured two constructs central to his constitutional theory: individuals holding rights and freedoms equally among fellow citizens; and a national community of citizens whose rights fell under exclusive federal jurisdiction. The former appealed to Scott’s civil libertarian leanings, while the latter spoke to his pan-Canadian nationalism and preference for constitutional centralism.<sup>30</sup> In *Roncarelli*, Scott used Roncarelli’s status as a citizen to gesture to both of these constitutional visions. As a citizen, Roncarelli possessed the liberal rights to give bail, to exercise autonomy in his private life, and to enjoy the due process protections of the common law. As rights shared and defined by a national community, Scott argued, they lay beyond the constitutional reach of provincial legislatures and executives. Neither of these arguments had the advantages of settled law, but they did draw upon nearly two decades of writing, thinking, and debate on the idea of individual rights and citizenship still unfolding in Canadian constitutional law.

Most famously, Chief Justice Duff and Justice Cannon had expressly linked ideas of individual rights and citizenship in *Ref Re Alberta*.<sup>31</sup> In widely celebrated *obiter*, Chief Justice Duff argued that Canada’s parliamentary institutions must function “under the influence of public opinion and public discussion” since democracy itself required “the freest and fullest analysis and examination from every point of view.”<sup>32</sup> Because the powers necessary to protect the constitution “as a whole” fell to the federal government, the “working” of legislatures and Parliament—including the expressive freedoms on which they depended—must be “vested in Parlia-

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<sup>29</sup> *Ibid.*; “Duplessis Under Fire As Damage Suit Ends” *The Halifax Chronicle-Herald* (7 June 1958) 1 at 2.

<sup>30</sup> See generally Frank R. Scott, “Centralization and Decentralization in Canadian Federalism” in *Essays*, *supra* note 2, 251.

<sup>31</sup> *Supra* note 9. The proposed bill would have required Alberta’s newspapers to publish government statements and disclose the names and addresses of writers, editorialists, or unnamed sources on demand. Breaches of the act were punishable with fines of up to one thousand dollars, or an order suspending the paper’s operation. See generally Dale Gibson, “Bible Bill and the Money Barons: The Social Credit Court References and their Constitutional Consequences” in Richard Connors & John M. Law, eds., *Forging Alberta’s Constitutional Framework* (Edmonton: University of Alberta Press, 2005) 191.

<sup>32</sup> *Ref Re Alberta*, *supra* note 9 at 133.

ment.”<sup>33</sup> Justice Cannon preferred to find the constitutional jurisdiction for parliamentary institutions and their auxiliary rights in the federal government’s jurisdiction over criminal law, but he also stressed that provinces could not disable the “fundamental right” of “Canadian citizen[s] ... to express freely his untrammelled opinion about government policies and discuss matters of public concern.”<sup>34</sup> Such arguments drew the attention of John G. Diefenbaker who frequently cited *Ref Re Alberta* to support his postwar demands for a federally enacted bill of rights to protect fundamental freedoms, habeas corpus, and the right to counsel, “without regard to racial origin.”<sup>35</sup>

International and domestic postwar developments only furthered the connection between Canadian citizenship and human rights. The *Charter of the United Nations* pledged its signatories, including Canada, to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”<sup>36</sup> While the international community strove to capture those ideals in the *Universal Declaration of Human Rights*,<sup>37</sup> Canadian parliamentarians debated the prudence and practicality of entrenching a bill of rights, constitutional or otherwise, at home.<sup>38</sup> Against this backdrop, the Japanese deportation controversy accelerated demands that citizenship status entail protection for formal equality.<sup>39</sup> Scott himself highlighted the irony that the government had proposed race-based deportation “[a]t the very moment when Parliament is trying to give some secure status to Canadian citizens by the Citizenship Bill.” The deportation, Scott argued, “makes a farce of citizenship. ... Every Canadian is attacked in his fundamental civil liberties by this policy.”<sup>40</sup> Across Canada, newspapers, labour unions, social clubs, lawyers, and politicians engaged in a wide-ranging debate on the nature of rights

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<sup>33</sup> *Ibid.* at 134. In this respect, Duff C.J. adapted Lord Haldane’s dictum on emergency powers from *Fort Frances Pulp & Paper v. Manitoba Free Press*, [1923] A.C. 695, [1923] 3 D.L.R. 629 (P.C.).

<sup>34</sup> *Ref Re Alberta*, *supra* note 9 at 146.

<sup>35</sup> *House of Commons Debates*, vol. 1 (2 April 1946) at 514 (Mr. Diefenbaker). See also *House of Commons Debates*, vol. 1 (2 May 1946) at 1146 (Mr. Diefenbaker); *House of Commons Debates*, vol. 1 (16 May 1947) at 3157 (Mr. Diefenbaker).

<sup>36</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Preamble.

<sup>37</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>38</sup> See Special Joint Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, vol. 1 (Ottawa: King’s Printer, 1947); Special Joint Committee of the Senate and House of Commons on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, vol. 2 (Ottawa: King’s Printer, 1948).

<sup>39</sup> See Patricia E. Roy, *The Triumph of Citizenship: The Japanese and Chinese in Canada, 1941–67* (Vancouver: UBC Press, 2007).

<sup>40</sup> Frank R. Scott, “The Deportation of Japanese Canadians: An Open Letter to the Press” in *Essays*, *supra* note 2, 190 at 192.

and citizenship in Canadian constitutional law.<sup>41</sup> Such debates often took on a different hue in francophone Quebec, but there, too, the rumblings of the Quiet Revolution among artists, intellectuals, and unions raised questions of individual liberty vis-à-vis ecclesiastical and state power.<sup>42</sup> “One of the most important questions before the Canadian public at the moment,” the *Canadian Bar Review* reported in 1948, “is the question of human rights and fundamental freedoms.”<sup>43</sup>

It was within this context that Justice Rand entered the fray. Undoubtedly, Justice Rand borrowed much of his “rights of the Canadian citizen” concept from the moribund American constitutional privileges and immunities doctrine that he had encountered during his time at Harvard Law School.<sup>44</sup> Nevertheless, Justice Rand always left that influence implicit, partly to avoid the disapproval of several of his judicial colleagues who frowned, in principle, on the use of American case law, but mostly because there was ample opportunity to develop his ideas about rights within lively and ongoing Canadian constitutional debates. There were hints of the particular significance Justice Rand attached to citizenship in his partial decision in the *Japanese Reference* case, but more substantial elaborations in the implied bill of rights cases that followed. “The first and fundamental accomplishment of the constitutional Act,” Justice Rand asserted in *Winner*, “was the creation of a single political organization ... the basic postulate of which was the institution of a Canadian citizenship.”<sup>45</sup> For Justice Rand, Canadian citizenship granted entitlement to a never fully defined constellation of rights and freedoms, including equality before the law,<sup>46</sup> freedom of movement,<sup>47</sup> freedom of religion,<sup>48</sup> and

<sup>41</sup> See generally Eric M. Adams, *The Idea of Constitutional Rights and the Transformation of Canadian Constitutional Law, 1930–1960* (S.J.D. Thesis, University of Toronto Faculty of Law, 2009) [unpublished].

<sup>42</sup> See Michael D. Behiels, *Prelude to Quebec’s Quiet Revolution: Liberalism versus Neoliberalism, 1945–1960* (Kingston, Ont.: McGill-Queen’s University Press, 1985). See also Michael Gauvreau, *The Catholic Origins of Quebec’s Quiet Revolution, 1931–1970* (Montreal & Kingston: McGill-Queen’s University Press, 2005). On the distinctiveness of Quebec constitutional thought as they pertained to the Roncarelli affair, see Roderick A. Macdonald, “Was Duplessis Right?” (2010) 55 McGill L.J. 401.

<sup>43</sup> “The Joint Committee on Human Rights and Fundamental Freedoms” (1948) 26 Can. Bar Rev. 706 at 706.

<sup>44</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1872). See Matthew Lewans, “Roncarelli’s Green Card: The Role of Citizenship in Randian Constitutionalism” (2010) 55 McGill L.J. 537; Edward McWhinney, Case Comment on *Winner v. S.M.T. (Eastern) Ltd.*, (1952) 30 Can. Bar Rev. 832 at 837; Randall P.H. Balcome, Edward J. McBride & Dawn A. Russell, *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 52.

<sup>45</sup> *Winner*, *supra* note 9 at 918.

<sup>46</sup> *Japanese Reference*, *supra* note 14.

<sup>47</sup> See *Winner*, *supra* note 9. See also *Black and Co. v. Law Society of Alberta*, [1989] 1 S.C.R. 591 at 607-608, 58 D.L.R. (4th) 317.

freedom of speech.<sup>49</sup> Such rights found expression, Justice Rand averred, not by virtue of an explicit constitutional bill of rights, but by operation of the constitutional “pattern of limitations, curtailments and modifications” inherent in federalism and necessary for modern democracy.<sup>50</sup> Justice Rand thought it unquestionable that rights of citizenship (national in scope and importance) lay beyond provincial control. More basic still was the suggestion that “freedom of speech, religion and the inviolability of the person” represented “original freedoms,” which were “at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within the legal order.”<sup>51</sup> While the positive law might curtail the consequential actions of such freedom, the freedoms themselves should be unburdened by “prior or antecedent restraint.”<sup>52</sup>

By the time the Supreme Court of Canada heard argument in *Roncarelli* in the spring of 1958, the outlines of Justice Rand’s constitutional vision of individual rights lay roughly sketched but incomplete. *Roncarelli* seemed an opportune moment to push Justice Rand and the Court to clarify and to affirm the role of individual rights in Canadian law. Clearly, *Roncarelli*’s legal claims raised distinct matters of Quebec law, but the protagonists themselves made the connection to earlier implied bill of rights cases unavoidable: *Boucher*, *Saumur*, and *Chaput* all involved the Jehovah’s Witnesses fighting persecution in Quebec, and all had been pitched by the Jehovah’s Witnesses as battles for constitutional rights.<sup>53</sup> Scott, in addition to assisting William Glen How (general counsel to the Jehovah’s Witnesses) in drafting arguments in those earlier cases, had recently appeared before the Supreme Court of Canada in *Switzman* to challenge Quebec’s infamous *Padlock Act*.<sup>54</sup> In that case, Scott drew heavily on *Boucher* and *Saumur* to argue that freedom of speech was among the “fundamental rights of Canadian citizens” beyond provincial constitu-

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<sup>48</sup> See *Saumur*, *supra* note 7.

<sup>49</sup> See *Switzman*, *supra* note 8.

<sup>50</sup> *Ibid.* at 303. Given its “national” character and significance, Rand J. concluded that citizenship and its constitutive rights and freedoms must fall under federal jurisdiction, although he also wondered whether, in some respects, “in our federal organization power absolute ... resides in *either* legislature” (*ibid.* at 302 [emphasis added]). While Rand J. remained content to leave the proposition suggestive, Abbott J. appeared to adopt it fully. See also Ivan C. Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 Can. Bar Rev. 135 at 155.

<sup>51</sup> *Saumur*, *supra* note 7 at 329.

<sup>52</sup> *Ibid.*

<sup>53</sup> See William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989) [Kaplan, *State and Salvation*].

<sup>54</sup> *Padlock Act*, R.S.Q. 1941, c. 52, discussed in *Switzman*, *supra* note 8.

tional jurisdiction.<sup>55</sup> With Scott and the Jehovah's Witnesses returning to demand judicial protection of individual rights, and Quebec defending the authority of its provincial government, it was difficult not to view *Roncarelli* as a further skirmish in the battle over the implied bill of rights.

But that is not how most judges on the Supreme Court of Canada viewed the matter. The majority, which allowed the appeal and found for Roncarelli, essentially consisted of three opinions: Justice Martland (joined by Justice Locke, and largely adopted by Chief Justice Kerwin), Justice Abbott, and Justice Rand (joined by Justice Judson). In Justice Martland's decision, Roncarelli and his liberties received scant attention. Roncarelli's claim under the *Civil Code of Lower Canada* turned, after all, on the legality of Duplessis's actions, their causal relationship to Roncarelli's damages, and the applicability of statutory defences. For Justice Martland, Duplessis acted wrongfully simply because there existed no statutory authority "to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the *Alcoholic Liquor Act*."<sup>56</sup> Justice Abbott's reasons shift the focus only slightly. He too regarded Duplessis's order to cancel Roncarelli's licence as "without any legal authority whatsoever," but noted that "[t]he religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question" were irrelevant to his fitness to hold a liquor permit.<sup>57</sup> Nonetheless, like Justice Martland, Justice Abbott held that Duplessis was not "authorized in law to interfere with the administration of the Quebec Liquor Commission."<sup>58</sup> Liability, like the alcohol from the broken liquor bottles of Roncarelli's Quaff Café, flowed from the wrongfully cancelled liquor permit.

Justice Rand's reasons—widely celebrated and oft-cited—followed a similar rationale, although the discursive nature of his decision enabled his judgment to be carried into an altogether different terrain. "Discretion," Justice Rand reminded, "necessarily implies good faith in discharging public duty. ... Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair?"<sup>59</sup> Public law demanded, Justice Rand held, that the government administer its statutory discretion according to reason; denying an application on ac-

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<sup>55</sup> *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R.(2d) 337 (Factum of the Appellant at 32). Writing to congratulate W.G. How on his victory in *Boucher*, Scott hoped "that this may make our task easier in the Roncarelli case, the judgment in which has been long overdue": Letter from F.R. Scott to W.G. How (20 December 1950) in Francis Reginald Scott fonds, Ottawa, Library and Archives Canada (MG 30-D211, R5822, vol. 10).

<sup>56</sup> *Roncarelli*, *supra* note 1 at 154.

<sup>57</sup> *Ibid.* at 185, 183.

<sup>58</sup> *Ibid.* at 185.

<sup>59</sup> *Ibid.* at 140.

count of hair colour was as objectionable (and wrongful) as doing so because of her skin colour, religious beliefs, gender, or any other marker of discrimination. At heart, Justice Rand's rule of law was premised on judicial enforcement of administrative rationality, not human rights.<sup>60</sup>

Nonetheless, Justice Rand did not allow the opportunity to pass without commenting further on the place of individual rights within Canadian law. Justice Rand accused Duplessis of "deliberately and intentionally ... destroy[ing] the vital business interests of a citizen" to punish him for exercising "an unchallengeable right."<sup>61</sup> Emphasizing both the economic and liberty interests of citizenship that he had articulated in *Winner*, his concept of constitutional citizenship in *Roncarelli* ran deeper still. What Duplessis had taken away, Justice Rand held, was "the right[] of a citizen to enjoy a public privilege."<sup>62</sup> If there was something incongruous about a right to a privilege, Justice Rand untangled the paradox with the word *enjoy*. Citizens like Roncarelli possessed a constitutional right not to liquor licences per se, but rather to the administration of such privileges on a rational basis—that is, according to the bounded discretion of Justice Rand's substantive conception of the rule of law. And yet, by shifting the focus from Duplessis's fault under the private law to Roncarelli's rights as a citizen, Justice Rand enabled his reasons to be interpreted as a further chapter in his jurisprudence of implied constitutional rights.

Where did such rights come from? Justice Rand was as keen as any judge to lend the legitimizing weight of history to his decisions. Hence, in his famous turn of phrase, he cast the rule of law as "a fundamental postulate of our constitutional structure."<sup>63</sup> But what legal scholars and lawyers of the period especially admired was Justice Rand's recognition that "new conceptions of government call[] for new jural conclusions."<sup>64</sup> Broadly inspired by the tenets of sociological jurisprudence, Justice Rand had always been a constitutional presentist. Two years before *Roncarelli*, Justice Rand held that constitutional decision-making necessarily involved "revising or restating" the application of "basic principles" in response to the "particularized and evolving features" of national life.<sup>65</sup> Un-

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<sup>60</sup> Mark Walters compellingly unpacks Rand J.'s "legality as reason". See Mark D. Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55 McGill L.J. 563.

<sup>61</sup> *Roncarelli*, *supra* note 1 at 137, 141. Elsewhere, Rand J. described Roncarelli as "a private citizen" (*ibid.* at 133), but his reasons also referred more abstractly to the concerns of "citizens" (*ibid.* at 140), "rights of a citizen" (*ibid.* at 143), incidents of "citizenship status" (*ibid.* at 141), and "ordinary activities of citizens" (*ibid.* at 144).

<sup>62</sup> *Ibid.* at 143.

<sup>63</sup> *Ibid.* at 142.

<sup>64</sup> F.A. Brewin, Case Comment on *Boucher v. The King*, (1951) 29 Can. Bar Rev. 193 at 200.

<sup>65</sup> *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198 at 212-13, 7 D.L.R. (2d) 257.

doubtedly, the Second World War and its aftermath had accelerated developments in the size and scope of the administrative state. “The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally,”<sup>66</sup> Justice Rand explained, especially given expansions in the “administrative regulation of economic activities.”<sup>67</sup> Justice Rand was nowhere near as hostile to administrative government as some of his professional contemporaries,<sup>68</sup> but he nonetheless regarded constitutional protection of the individual as a necessary counterweight to the expanding and centralizing powers of government. Justice Rand’s conception of the constitutional rights of citizens was very much driven by what he appreciated as the democratic imperatives of the changing nature of administrative government. And in this, he found common ground with the thinking of Frank Scott and other Canadian constitutional scholars eager to embrace the progressive potential of the state,<sup>69</sup> while also preserving the historic role of the law in shielding the individual from potentially repressive use of state power.<sup>70</sup>

Despite the fact that Justice Rand represented only one strand of the majority (and not even the opinion that commanded the most support), his reasons in *Roncarelli* quickly became iconic. Why this is the case has usually led scholars to the qualities of the reasons themselves—and that is certainly part of the story. But Justice Rand’s earlier decisions in the implied bill of rights cases, and their popularity in influential quarters, helped to ensure the immediate impact of his judgment in *Roncarelli*. Moreover, the divided nature of the majority—a common feature of the 1950s Supreme Court of Canada—created sufficient uncertainty in the *ratio decidendi* to allow subsequent commentators to emphasize the particular elements of the judgments that most appealed to them; that meant Justice Rand’s ideas of rights, citizenship, and the rule of law received pride of place in most treatments of *Roncarelli*. The process of turning *Roncarelli* into a case about human rights was already well underway when the Supreme Court of Canada heard the arguments of Scott and Stein in the late spring of 1958. Among those watching the hearings form

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<sup>66</sup> *Roncarelli*, *supra* note 1 at 140.

<sup>67</sup> *Ibid.* at 142.

<sup>68</sup> See Eric M. Adams, “Guardians of Liberty’: R.M.W. Chitty and the Wartime Idea of Constitutional Rights” in Constance Backhouse & W. Wesley Pue, eds., *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) 173.

<sup>69</sup> Frank R. Scott, “Constitutional Adaptations to Changing Functions of Government” in *Essays*, *supra* note 2, 142.

<sup>70</sup> See Ivan C. Rand, “The Role of an Independent Judiciary in Preserving Freedom” (1951) 9 U.T.L.J. 1; Ivan C. Rand, “Except By Due Process of Law” (1961) 2 Osgoode Hall L.J. 171.

the gallery was Scott's friend, Pierre Trudeau.<sup>71</sup> He, and many other Canadian lawyers, would have well understood *Roncarelli's* connection to two decades of debate in Canadian law and politics about constitutional rights and citizenship. Justice Rand wrote his reasons in *Roncarelli* in the language of individual rights—a language Canadians were speaking with increasing ease.

## II. *Roncarelli* in Living Rooms

In 1959, as now, most Canadians learned about decisions of the Supreme Court of Canada through the media. As Florian Sauvageau, David Schneiderman, and David Taras point out, “[a]lthough their power over legal interpretation is uncontested, judges do not have the last word in communicating the nature of their decisions to the public. Once a judgment is handed down, journalists rather than judges control the message.”<sup>72</sup> In fact, the process of shaping *Roncarelli's* message had begun before the case had been decided. With Justice Rand's previous jurisprudence in mind, the *Winnipeg Free Press* forecast that *Roncarelli* would turn, like the decisions in *Saumur*, *Chaput*, and *Switzman* before it, on the judicial protection of “fundamental freedoms”.<sup>73</sup> After the decision was released, the press continued this trend by devoting particular attention to Justice Rand's reasons among those of the majority.<sup>74</sup> In an era in which the judges of the Supreme Court of Canada were at best dimly known by the general public, Justice Rand's earlier judgments in the implied bill of rights cases had distinguished him in and out of legal circles. That attention, in turn, tended to confer upon his opinions greater status than those of his colleagues. The tendency to equate the majority decision of *Roncarelli* with Justice Rand's reasons—still in evidence today—began in newsrooms following the judgment's release.

In the days that followed, newspaper editorials in central Canada reinforced the link between the *Roncarelli* decision and individual rights, although with differing points of emphasis. For the *Montreal Gazette*, the decision was essentially about the still-undetermined scope of religious freedom—“the right not only of freedom of worship but freedom to attack

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<sup>71</sup> John English, *Citizen of the World: The Life of Pierre Elliott Trudeau, Volume One: 1919–1968* (Toronto: Alfred A. Knopf, 2006) at 324.

<sup>72</sup> Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) at 227.

<sup>73</sup> Grant Dexter, “Two Fundamental Freedoms Involved” *Winnipeg Free Press* (4 June 1958) 23.

<sup>74</sup> See Harvey Hickey, “Duplessis Loses Case To Roncarelli” *The Globe and Mail* (28 January 1959) 1; “Roncarelli Victor Against Duplessis In Supreme Court” *Montreal Gazette* (28 January 1959) 1; “Duplessis devra payer \$33,000 à M. Roncarelli” *Le Devoir* (28 January 1959) 1 (granting Rand J. his own subheading, “Le juge Rand”).



and offend the religious feelings of others.”<sup>75</sup> Citing *Boucher* and *Saumur*, the *Ottawa Citizen* condemned Duplessis’s authoritarianism and warned that “civil liberties will not be safe in Quebec while such actions characterize government.”<sup>76</sup> *The Globe and Mail* worried about the administrative state more generally, and hoped that *Roncarelli* might serve as “a milestone in the long and often arduous defense of individual rights against an ever-encroaching State.”<sup>77</sup> The liberally inclined *Winnipeg Free Press* celebrated the decision as a victory for “fundamental human rights”—“freedom to worship as you please; freedom to sue an authority which arrests you wrongly; and freedom to sue a public official when he violates the law in the exercise of his public functions.”<sup>78</sup> Long a champion of the need for a constitutional bill of rights, the *Free Press* argued that “only a Bill of Rights that guarantees the fundamental freedoms of Canadian citizens—no matter in which province they happen to live—will prevent the possibility of similar cases in future.”<sup>79</sup> Despite the differing conceptions of the nature of rights at stake, each of these editorials was linked by a sense that the case had pronounced on a question of individual constitutional rights.

Certainly the Jehovah’s Witnesses wanted *Roncarelli* told as a story of rights. On the day of *Roncarelli*’s release—although Scott and Stein refused to comment since Duplessis might still exercise his right of appeal to the Privy Council—W.G. How stood upon the steps of the Supreme Court of Canada declaring victory for “the rights of the individual.”<sup>80</sup> For W.G. How, the implied bill of rights cases were really about using “the law of tort to enforce the law of the constitution”<sup>81</sup>—a constitution that, in his view, shielded Canadian citizens from legislative or executive infringement of all forms of religious practice. “Jehovah always wins,” was how *Roncarelli* described his victory on CBC’s *Front Page Challenge* several years later, “especially when we fight cases on civil rights and religious freedom.”<sup>82</sup> W.G. How and *Roncarelli* spoke freely of rights; neither mentioned the *Civil Code of Lower Canada* or the rule of law.

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<sup>75</sup> “The Supreme Court’s Decisions” *Montreal Gazette* (29 January 1959) 6.

<sup>76</sup> “Mr. Duplessis Loses” *Ottawa Citizen* (28 January 1959) 6.

<sup>77</sup> “In Defense of Freedom” *The Globe and Mail* (29 January 1959) 6.

<sup>78</sup> “Freedom” *Winnipeg Free Press* (28 January 1959) 25.

<sup>79</sup> *Ibid.*

<sup>80</sup> “Duplessis Loses High Court Fight: Decision, 6-3 For *Roncarelli*” *Ottawa Citizen* (27 January 1959) 1.

<sup>81</sup> Letter from W.G. How to F.R. Scott (2 January 1954) in Francis Reginald Scott fonds, Ottawa, Library and Archives Canada (MG30-D211, R5822, vol. 16).

<sup>82</sup> Interview of Frank *Roncarelli* (25 May 1965) on *Front Page Challenge*, CBC Television, online: CBC Digital Archives, <<http://archives.cbc.ca>>.

As one might expect, the media interpreted *Roncarelli* differently outside of anglophone central Canada. In Quebec, editorials by Pierre Laporte and Gérard Filion in *Le Devoir* continued the paper's anti-Duplessis record by situating the decision more firmly within the domain of provincial politics.<sup>83</sup> Shifting the attention from Frank Roncarelli's rights to the strong-arm politics of Maurice Duplessis, editorials celebrated the decision for its hope that the ideals of the rule of law might yet curb Duplessis's hold on power. "*M. Duplessis*," Filion wrote, "*n'a pas le droit de tout faire. Ce n'est pas son caprice, ce n'est pas ses sentiments d'amour ou de haine qui doivent dicter les actes du gouvernement ... [I]l doit être serviteur de la loi.*"<sup>84</sup> For opponents of Duplessis, *Roncarelli* signalled the weakening of Duplessis's grip on the province. As it happened, the Duplessis era ended shortly thereafter, with the prime minister's death on 7 September 1959. In the provincial election held the following June, Jean Lesage and the Liberals swept to power and with them, the official beginning of the Quiet Revolution.

If *Roncarelli* was a story about human rights in central Canada, and about the end of the Duplessis era in Quebec, it was barely a story at all in the West. Although the case drew front-page attention from Winnipeg eastward, the *Edmonton Journal's* treatment of *Roncarelli* indicates something of the case's immediate reception in Western Canada. "Supreme Court Rules on Two Grain Cases," the headline declared, with the small subheading, "Decisions Also Announced On Duplessis, CBC Cases".<sup>85</sup> The Vancouver papers mentioned *Roncarelli* not at all.

Lawyers, judges, and law scholars read the newspapers too, but they would have received more in-depth treatment of the case in law journals. In his case comment for the *McGill Law Journal*, Claude-Armand Sheppard, a recently called Montreal lawyer, dissected the case's private law dimensions with a lawyerly eye, already conscious that initial reactions to the decision had overlooked its most significant doctrinal contributions.<sup>86</sup> Dismissing the eloquent testaments to the rule of law as well-settled and otherwise unremarkable *obiter*, Sheppard canvassed instead the Supreme Court of Canada's "ambiguous", "cryptic", and "elusive"

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<sup>83</sup> Gérard Filion, "Simple réflexions en marge de l'affaire Roncarelli" *Le Devoir* (28 January 1959) 4. Filion explained, "*Ce n'est pas notre intention ... de discuter la valeur des thèses juridiques qui se sont affrontées dans cette affaire. Nous voulons plutôt nous borner à quelques réflexions de nature plutôt politique*" (*ibid.*). See also Pierre Laporte, "Duplessis-Roncarelli : l'affaire transportée sur le plan politique?" *Le Devoir* (29 January 1959) 1.

<sup>84</sup> Filion, *supra* note 83.

<sup>85</sup> "Supreme Court Rules on Two Grain Cases: Decisions Also Announced on Duplessis, CBC Cases" *Edmonton Journal* (27 January 1960) 2.

<sup>86</sup> Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized" (1960) 6 *McGill L.J.* 75, reprinted in (2010) 55 *McGill L.J.* v.

treatment of article 1053—the key provision of civil liability in the *Civil Code of Lower Canada* on which the case turned.<sup>87</sup> Predicting that *Roncarelli*'s private law ideas—inchoate as they may have been—might one day be seen as the truly revolutionary contribution of the case, Sheppard already perceived that, in his own time, *Roncarelli* had become a decision unrooted to the particular legal context of Quebec civilian law. What Sheppard astutely discerned was that *Roncarelli* had already become, by and large, a case about Canadian public law and constitutional rights.

Certainly Edward McWhinney's case comment in the *Canadian Bar Review* left no doubt about *Roncarelli*'s status as a classic case of public law. McWhinney, then teaching constitutional law at the University of Toronto, Faculty of Law, lauded Justice Rand's judgment for "the qualities of mind and style that have made him tower above his contemporaries," and emphasized Justice Rand expansion of "his well-known catalogue of 'Rights of the Canadian Citizen'" to include "a freedom of choice of economic vocation."<sup>88</sup> For McWhinney, as for both Bora Laskin and Frank Scott, Justice Rand represented the epitome of a sociologically minded, philosophically literate, and ambitiously creative jurist. It was Justice Rand, Canadian law scholars believed, who could create a Canadian constitutional jurisprudence freed from Privy Council precedent, sensitive to the need for expanded federal jurisdiction, and scrupulous in its protection of individual civil liberties.<sup>89</sup> Thus, as in earlier implied bill of rights cases, it was Justice Rand who drew McWhinney's lavish praise and the bulk of his case comment's attention. McWhinney was too good a scholar not to recognize the judicial uncertainties, disagreements, and tensions inherent in the "Canadian civil liberties jurisprudence,"<sup>90</sup> but his underlying emphasis on the need for judicial protection of a broad range of constitutional rights reveals the diminishing hold of parliamentary supremacy on the Canadian constitutional imagination. *Roncarelli* affirmed the rise of individual rights as a foundational principle of Canadian constitutional thought.

In the spring of 1959, Frank Scott entered the living rooms of Canadians tuned to his CBC lectures on "The Canadian Constitution and Human Rights".<sup>91</sup> "The constitution of a country grows with the country," Scott in-

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<sup>87</sup> *Ibid.* at 94-95.

<sup>88</sup> Edward McWhinney, Case Comment on *Roncarelli v. Duplessis* (S.C.C.), (1959) 37 Can. Bar Rev. 503 at 505, 506 [footnote omitted, McWhinney, *Roncarelli* (S.C.C.)].

<sup>89</sup> See Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956) at 186 ("Developing a National Constitutional Jurisprudence"); Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038. See also Brewin, *Switzman*, *supra* note 10.

<sup>90</sup> McWhinney, *Roncarelli* (S.C.C.), *supra* note 88 at 514.

<sup>91</sup> Frank R. Scott, *The Canadian Constitution and Human Rights* (Toronto: Canadian Broadcasting Corporation, 1959) at 1.

formed listeners, and “[t]hat process of constitutional adaptation ... will go on into the future.”<sup>92</sup> Although he stressed that rights and freedoms had always been a part of Canada’s constitutional history, this was a moment to decide “just what are the rights we possess as citizens.”<sup>93</sup> The time had come, Scott argued, to entrench a constitutional bill of rights. Scott elaborated upon these themes in greater detail in lectures he gave that same spring at Carleton University. For Scott, the “civil liberties cases”—of which *Roncarelli* was one—symbolized the “awakening concern over civil liberties and fundamental freedoms.”<sup>94</sup> Ultimately, Scott suggested, the strength or fragility of constitutional rights would always depend on judicial interpretation. What *Roncarelli* and the other implied bill of rights cases demonstrated—and here Scott largely ignored the divided nature of the Court’s holdings—was the capacity of the Supreme Court of Canada to protect the civil liberties essential to democratic constitutionalism: freedom of expression, association, and religion, as well as rights of equality. For Scott and the public at large, *Roncarelli* and the implied bill of rights cases signalled not only changing conceptions of Canadian constitutional law, but also a growing cultural faith in the capacity of Canadian judges to limit the powers of the elected branches of governments. In this respect, *Roncarelli* forecast shifts in public acceptance of, and demand for, judicial power under the *Canadian Charter of Rights and Freedoms*<sup>95</sup> and the rights revolution still to come.

### III. *Roncarelli* in Classrooms

The first constitutional class to take notice of *Roncarelli* was, not surprisingly, Scott’s own. The day was especially memorable for Alan Stein, whose father had argued *Roncarelli* alongside Scott. On 27 January 1959, Alan was one of the law students sitting in Scott’s constitutional law class at McGill. Stein remembers Scott taking an urgent call that morning, and returning to class triumphant. “We’ve won, 6 to 3,” Scott announced to the class.<sup>96</sup> As news of the victory spread through the faculty, classes were cancelled, and students and staff gathered to celebrate in a general assembly. Champagne flowed.<sup>97</sup> *Roncarelli* has been a part of Canadian le-

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Scott, *Civil Liberties*, *supra* note 23 at 28.

<sup>95</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

<sup>96</sup> Marian Scott, “How We Recall ‘Le Chef’” *Montreal Gazette* (5 September 2009) B1 at B5 (“In Defense of a Despot”). See also “The Maurice Duplessis Legacy” *Montreal Gazette* (5 September 2009) A1.

<sup>97</sup> By evening, the party had gravitated to Scott’s home. “All of friends were there to rejoice,” Thérèse Casgrain remembered, “including Roncarelli” (Djwa, *Politics of the*

gal education ever since. To borrow the elegant phrasing of Karl Llewellyn, *Roncarelli* has become one of those classic law school cases bearing “the rich deep polish of a thousand class room[]” discussions.<sup>98</sup> Of course, the meanings attached to great cases like *Roncarelli* are seldom, if ever, static. If, in the 1960s, *Roncarelli* appeared to be a case about human rights and about a particular time and place in Quebec history, it has come, in recent years, to be seen more simply as the classic Canadian exposition of executive constraint under the rule of law. Despite those shifting textures, a constant has been Justice Rand’s judgment standing at the decision’s gravitational centre.

The implied bill of rights cases earned Justice Rand an unparalleled admiration among an influential cadre of Canadian constitutional law scholars. Bora Laskin, then in the process of eclipsing Scott as the leading figure of his generation of legal scholars, described Justice Rand as “the greatest expositor of a democratic public law which Canada has known.”<sup>99</sup> Naturally, Scott admired Justice Rand, too, and impressed upon his law students that he was “Canada’s greatest jurist”.<sup>100</sup> McWhinney went a step further, calling Justice Rand the preeminent “philosopher of Canadian constitutional law,”<sup>101</sup> and anointing him “the most outstanding public law judge now sitting in the Commonwealth.” Jean Beetz, by contrast, sounded notes of caution about the implications of Justice Rand’s jurisprudence on notions of parliamentary sovereignty and federalism, but even he too admitted that the implied bill of rights cases had a certain creative force behind them.<sup>102</sup> When the lectures in constitutional classrooms turned to the implied bill of rights, invariably it was the decisions of Justice Rand that became the focus of attention.

This is not to say that Justice Rand’s influence was uniform across the country and curriculum. Attending law school in Vancouver in the mid-1950s, Thomas Berger recalls that he learned next to nothing about the

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*Imagination*, *supra* note 20 at 314). Pierre Trudeau was there too. See also Thérèse Casgrain, “The Achievements of F.R. Scott” in Sandra Djwa & R. St. J. Macdonald, eds., *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics* (Montreal & Kingston: McGill-Queen’s University Press, 1983) 3 at 4.

<sup>98</sup> K.N. Llewellyn, “On Our Case-Law of Contract: Offer and Acceptance, I.” (1938) 48 Yale L.J. 1 at 32.

<sup>99</sup> Bora Laskin, “An Inquiry into the Diefenbaker Bill of Rights” (1959) 37 Can. Bar Rev. 77 at 124.

<sup>100</sup> See Letter from Douglas Pascal to Ivan C. Rand (4 May 1966) in Ivan Cleveland Rand fonds, Ottawa, Library and Archives Canada (MG30-E77, R2355).

<sup>101</sup> Edward McWhinney, “The Supreme Court and the Bill of Rights—The Lessons of Comparative Jurisprudence” (1959) 37 Can. Bar Rev. 16 at 36.

<sup>102</sup> Jean Beetz, “Le contrôle juridictionnel du pouvoir législative et les droits de l’homme dans la constitution du Canada” (1958) 18 R. du B. 361.

implied bill of rights cases.<sup>103</sup> Indeed, an examination of the course outlines of constitutional law classes from the period reveals a preponderance of attention spent on matters of history, sovereignty, prerogative and executive powers, and, most of all, federalism and the division of powers.<sup>104</sup> Still, it is surely not a coincidence that the University of British Columbia began offering a seminar in “Civil Liberties” in the 1959–1960 academic year.<sup>105</sup> And, the students of Dean Rand’s constitutional law classes at the University of Western Ontario in the early 1960s would have had particular incentive to pay attention to Justice Rand’s decisions. More significantly, the most widely used textbook in Canada—Laskin’s *Canadian Constitutional Law: Cases and Text on Distribution of Legislative Power*—greatly expanded its coverage of the implied bill of rights cases in the “Civil Liberties” section of its second edition, which appeared in 1960.<sup>106</sup> The text’s reference to *Roncarelli* is slight, but telling. In his commentary, Laskin describes *Roncarelli* as a case about private law enforcement of “civil liberties in Canada”.<sup>107</sup> *Roncarelli*, like the other implied bill of rights cases, had begun to transform the canon of Canadian constitutional law.

And there is evidence that law students, or at least some of them, did take notice of the implied bill of rights. Again, it can be no coincidence that a number of student-written articles on Justice Rand and the implied bill of rights appeared in the late 1950s. Articles by law students R.R. Price, J.T. Eyton, and Gary Murray Keyes (as well as Sheppard who had just graduated), suggest that Justice Rand and the idea of Canadian constitutional rights had captured the imagination and attention of a number of Canadian law students.<sup>108</sup> In the years that followed, the implied bill of rights cases increasingly became integrated into the canon of Canadian constitutional law teaching. It was reading Justice Rand’s judgments in the implied bill of rights cases as a law student in the early 1980s, William Kaplan admits, that inspired his decision years later to pen Justice

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<sup>103</sup> Thomas R. Berger, “One Man’s Justice: My Life in the Courts”, *McGill Law Journal Annual Lecture Series*, (2005) 50 McGill L.J. 987 at 990.

<sup>104</sup> D.C. McDonald, “A Survey of the Actual Content of the Curricula of the Canadian Common Law School” (1 June 1959) in Ivan Cleveland Rand fonds, Ottawa, Library and Archives Canada (MG30-E77, R2355).

<sup>105</sup> *Ibid.*

<sup>106</sup> See Bora Laskin, *Canadian Constitutional Law: Cases and Text on Distribution of Legislative Power* (Toronto: Carswell, 1951). Compare Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 2d ed. (Toronto: Carswell, 1960).

<sup>107</sup> *Ibid.* at 940.

<sup>108</sup> See R.R. Price, “Mr. Justice Rand and the Privileges and Immunities of Canadian Citizens” (1958) 16 U.T. Fac. L. Rev. 16; J.T. Eyton, “The Jehovah’s Witnesses and the Law in Canada” (1959) 17 U.T. Fac. L. Rev. 96; Gary Murray Keyes, “Civil Liberties and the Canadian Constitution” (1959) 1:2 Osgoode Hall L.J. 20.

Rand's biography.<sup>109</sup> Generations of law students have now puzzled over and wrestled with Justice Rand's constitutional law judgments. Perhaps not quite Canada's answer to Oliver Wendell Holmes Jr., Justice Rand and his judgments will undoubtedly remain alive in the casebooks of Canadian constitutional law.

Outside of the law school curriculum, however, *Roncarelli's* star has dimmed more dramatically. It is unfortunate that Canada's twentieth-century history is being taught without mention of *Roncarelli*, or, indeed, without any attention to Canadian courts and their pre-Charter jurisprudence. *Roncarelli* often serves as a minor detail in historical accounts of Duplessis's life,<sup>110</sup> but, along with the other implied bill of rights cases, is almost entirely absent from the recent "historiography" of rights,<sup>111</sup> generalist histories of Canada,<sup>112</sup> and the standard undergraduate Canadian history texts.<sup>113</sup> *Roncarelli* does warrant mention in the most recent editions of *A Short History of Quebec*, but the authors confuse *Roncarelli* with *Switzman*, and mistakenly credit the former with striking down the *Padlock Act*.<sup>114</sup> Interestingly, to the extent that *Roncarelli* remains a remembered case of historical significance at all, it is as a "landmark vic-

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<sup>109</sup> William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2009) at xi.

<sup>110</sup> See Conrad Black, *Duplessis* (Toronto: McClelland & Stewart, 1977) at 387. See also Alain-G. Gagnon & Michel Sarra-Bournet, eds., *Duplessis : entre la grande noirceur et la société libérale* (Montreal: Québec Amérique, 1997).

<sup>111</sup> See Lambertson, *supra* note 14 at 3; Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937–82* (Vancouver: UBC Press, 2008); Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (Montreal: McGill-Queen's University Press, 2003); George Egerton, "Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945–1950" (2004) 85 Can. Hist. Rev. 451; Carmela Patrias & Ruth A. Frager, "This Is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns" (2001) 82 Can. Hist. Rev. 1. Kaplan's work on the Jehovah's Witnesses is the notable exception (Kaplan, *State and Salvation*, *supra* note 53).

<sup>112</sup> See generally Robert Bothwell, *The Penguin History of Canada* (Toronto: Penguin Canada, 2006).

<sup>113</sup> See e.g. Robert Bothwell, Ian Drummond & John English, *Canada since 1945: Power, Politics, and Provincialism*, rev. ed. (Toronto: University of Toronto Press, 1989); R. Douglas Francis, Richard Jones & Donald B. Smith, *Destinies: Canadian History since Confederation*, 6th ed. (Toronto: Nelson Education, 2008); Margaret Conrad & Alvin Finkel, *History of the Canadian Peoples: 1867 to the Present*, vol. 2, 5th ed. (Toronto: Pearson Longman, 2009); J.M. Bumsted, *The Peoples of Canada, A Post-Confederation History*, 2d ed. (Oxford: Oxford University Press, 2004).

<sup>114</sup> John Dickinson & Brian Young, *A Short History of Quebec*, 4th ed. (Montreal: McGill-Queen's University Press, 2008) at 294. I thank Derek McKee for the reference and for his valiant, but unsuccessful, efforts to have the publisher correct the error.

tor[y] ... for freedom of religion.”<sup>115</sup> Nevertheless, historical scholars tend to regard Canadian jurisprudence—*Roncarelli* included—as possessing little of interest beyond their doctrinal value. Perhaps it is the law’s inclination to narrow historicism that partially explains why *Roncarelli* and the other implied bill of rights cases seem to matter so little outside the world of law. As Canadian constitutional scholars have increasingly eschewed historical approaches to the discipline, historians more broadly may be simply mirroring back less interest in the law. Whatever the explanation, it remains the case that in the classrooms teaching Canadian history, *Roncarelli*, like virtually all of the Supreme Court of Canada’s pre-Charter jurisprudence, can scarcely be found.

All of this suggests that *Roncarelli*’s presence in the classroom depends, like so many things, on time and place. In the law schools of the 1960s it would have been treated as a still-unfolding moment of rights jurisprudence. After the adoption of the *Canadian Charter*, the implied bill of rights cases continued to draw attention, but as antecedents of limited constitutionalism in the name of individual rights, and more generally as explorations of the role of unwritten norms in constitutional adjudication.<sup>116</sup> *Roncarelli*, for its part, increasingly stripped of its historical context, became a case standing for one proposition above all others: the limited authority of the executive branch under the rule of law.

## Conclusion

*Roncarelli* had been argued, but not yet handed down, when Frank Scott spoke at a Convocation of Dalhousie Law School in the autumn of 1958. In keeping with the occasion, his address brimmed with promise. And, though he did not mention the case by name, *Roncarelli* was clearly on his mind. This, Scott proclaimed, was an exceptional moment in Canadian constitutional history defined by “our awakening interest in the subject of human rights and fundamental freedoms,” and a pronounced shift in emphasis to “the individual freedoms, such as freedom of religion, of speech and of the press.”<sup>117</sup> Alongside these traditional civil liberties, he added the rights he had argued for in *Roncarelli*: “[t]he right to a fair hearing before an administrative decision is taken affecting one’s liberty

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<sup>115</sup> Michael D. Behiels, “Pierre Elliott Trudeau’s Legacy: The Canadian Charter of Rights and Freedoms” (2003) 19 S.C.L.R. (2d) 139 at 145.

<sup>116</sup> See Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389; Mark D. Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91; Dale Gibson, “Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution” (1999) 11 N.J.C.L. 49.

<sup>117</sup> F.R. Scott, Convocation Address, Dalhousie Law School (1 November 1958) in Francis Reginald fonds, Ottawa, Library and Archives Canada (MG30-D211, R5822, vol. 19, Reel H-1278).



or property, the right to an unbiased exercise of discretionary powers, the right not to be judged by someone who is acting in his own cause,”<sup>118</sup> which is the right of every individual, in other words, to Justice Rand’s rule of law. “[F]or the first time in our history,” Scott enthused to the room of Dalhousie graduates, the Supreme Court of Canada had been asked to “build a Canadian law of human rights.”<sup>119</sup>

In focusing on the Supreme Court of Canada, Scott elided the broader array of voices (his included) in this important moment of constitutional construction. We would do well in reflecting on *Roncarelli*’s legacy to recognize what Scott himself sometimes overlooked—that cases draw meaning from the context from which they emerge and into which they fall. Today, legal professionals tend to treat as a given *Roncarelli*’s iconic status as “one of the classic judgments in Canadian public law.”<sup>120</sup> The dangers in greatness, however, lie in the dulling of its historicity—a loss of the sense of the constitutional context from which *Roncarelli* came. In its own time and place, *Roncarelli* found fame as a case about Frank Roncarelli’s constitutional rights—his right to give bail, his religious freedoms, and his right to possess a liquor licence administered according to the rule of law, that is, without recourse to malice, caprice, whim, or bias. Viewing *Roncarelli* as yet a further building block in Justice Rand’s jurisprudence of citizenship rights allowed its audiences to condense its meaning and to privilege the opinion of a judge of unequalled stature. In the battle for greater constitutional protection for individual rights, lawyers, scholars, and media commentators took every opportunity to think, talk, read, and write human rights and fundamental freedoms into Canadian constitutional culture. Understanding *Roncarelli* from the perspective of constitutional culture sheds light on a significant moment of transition in Canadian constitutional history, but it also reveals the dynamic ways in which time and place shape the meaning of cases otherwise written in stone.

We would do better to integrate law—including its great cases—into our historical understanding of twentieth-century Canada. Just as historians need to take account of law’s powerful role in fashioning Canadian constitutional culture, legal scholars should be more alive to the historicity of legal judgments. Otherwise, legal scholars run the risk of commemorating a historic case like *Roncarelli* in conversations heard only among ourselves.

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<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> David Dyzenhaus, “The Deep Structure of *Roncarelli v. Duplessis*” (2004) 53 U.N.B.L.J. 111 at 112.