THE PRACTICE DIVISION OF THE SUPERIOR COURT

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What is the Practice Division of the Superior Court at Montreal and how does it function? Except during the months of July and August when a different judge presides every week, the rest of the year the change is made every two weeks. This division of the Superior Court hears Motions, Petitions and other similar applications.

When no appeal is (or can be) taken from an interlocutory judgment the dissatisfied party sometimes files an exception to the judgment, so that the opposite party cannot say that the judgment in question has been acquiesced in. The exception also acts as a reminder to the trial judge that he is being asked to revise the interlocutory judgment. This practice was disapproved of in *Laterreur* vs. *Canadian National Railway Company*,[1] where it was held as follows:

> "Le Code de procédure civile ne contient aucune disposition autorisant un plaideur à produire proprio motu une déclaration écrite à l'encontre d'un jugement non définitif. Pareil document sera rejeté sur motion à cet effet."

Wednesdays and Thursdays are called "Enquête days" in the Practice Division, in view of the fact that proceedings, which necessitate the examination of witnesses, are heard on these two days only. On Enquête days an additional judge presides in another room to help dispose of Enquête matters.

Lawyers are required to wear gowns, under Rule 12 of the Superior Court Rules of Practice for the District of Montreal. It reads as follows:

> "A toute séance de la Cour, y compris la Cour de Pratique, les avocats et les officiers de la Cour devront porter le costume lorsque des témoins sont susceptibles de comparaitre.
>
> At all sessions of the Court, including the Practice Division, when witnesses are to be interrogated, every advocate and Court official must wear a black coat, white shirt, collar and bands and the appropriate gown."

This rule, therefore, does not apply to an advocate presenting a proceeding on an Enquête day which does not require any proof to be made, for such proceedings, if they are not contested, can be submitted to the Court on any day. If, however, the opposite party objects to the granting of the proceeding, it is then postponed to a non-Enquête day, unless it is an urgent matter.

All Motions, Petitions, etc., which have been previously served, have to be filed at the office of the Prothonotary at least a day before the proceeding in question is made presentable before the Practice Division. This enables the Clerk of the Court to include, on the daily typewritten roll (a copy of which is put before the judge) the proceedings fixed for hearing for that day. Such proceedings if they are handed to the Clerk on the morning of their pre-

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[1](1938) 42 P.R. 316.

sentation, are continued sine die, and a notice has to be served on the opposite party, giving a new date of presentation.

In the Practice Court there is a deputy prothonotary who has special powers in Montreal and Quebec under art. 70a C.P. For example, he can grant, in his own name, motions asking for special modes of service of writs; he can give the plaintiff permission to return a writ within three days of the day that it should have been returned, etc.

At 10:30 A.M., when the judge arrives on the bench, inscriptions for judgment (by default to appear or to plead) which have been made presentable before the Court, are first called. The judge who presides over the Court when the inscription is presented, is the judge who ultimately signs the judgment. The evidence must be given immediately after the inscription Ex Parte is presented and not on another day, if the attorney for the defendant appears on the presentation of the Inscription, for he is entitled to cross-examine the plaintiff's wituesses.

The Practice Division looks after all inscriptions for judgment, if they are presented to the Court, although the Prothonotary may also have jurisdiction in the matter (seeing that the Court has jurisdiction in all matters). If proof is necessary, before judgment can be rendered, such as actions for rent, revendications, damages, the Clerk or the Practice Division marks down the name of the Judge (who is sitting that day in the Practice Division) on the back of the inscription and the following words, "Referred for proof to the office of the Prothonotary — judgment to be verified", which means that the action will be maintained if the proof will support the allegations in the declaration. This practice is criticized by Hervé Roch in his Actes et Registres de l'Etat Civil et Rectification, at p. 162, where he says as follows:

> "Dans certains districts judiciaires, la requête en rectification est accordée par le tribunal ou le juge a vérifier. Et la vérification de la preuve est faite par le protonotaire ou ses députés-protonotaires autorisés à ces fins. A notre sens, cette pratique est irrégulière, elle constitue un illogisme légal. Que la preuve ne justifie pas la demande en rectification, la requête est rejetée. On aura donc sur la même requête rendu deux jugements, l'un accordant la requête, l'autre la refusant; c'est-à-dire qu'on se serait dédit du premier jugement, qu'on désavouerait son propre jugement. Nous sommes plutôt d'avis, et c'est ce que la loi semble exiger, que le tribunal ou le juge entende la preuve, ou que la requête soit référée au greffe pour la preuve, que le tribunal ou le juge pourra ensuite apprécier pour rendre jugement."

In cases where there is an appearance but no plea, the inscription ex parte, as it is commonly called, is similarly marked, with the additional words "defendant and attorneys called make default", if no one answers on behalf of the defendant. If the inscription is in an action which does not necessitate any proof, as in a claim based on a bill of exchange where interrogatories have not been answered or have been answered in the affirmative, the Clerk marks the words "judgement to be verified". This means that the judgment will only be prepared by the Judgment Department, if it finds that the amount claimed is justified by the documents produced, that the action is not

prescribed, that it was served on the defendant, and/or that the failure to answer the interrogatories warrants a judgment for the plaintiff.

If the attorney for the defendant appears when an inscription ex parte is called out in open Court and asks for permission to plead, he must present a motion to that effect, under art. 205 C.P., unless the attorney for the plaintiff consents to the Inscription being struck and to accept a plea, although it is late. Article 205 C.P. has been applied to mean that the plea should accompany the motion. See *Tobin* vs. *Clement*,[2] where it was held as follows:

> "La partie en défaut de répondre à une pièce de plaidoirie ne peut se faire relever de son défaut sans produire la pièce avec motion."

This decision, however, is rarely followed in Montreal, where the Defendant is generally given a short delay to file his plea, if he gives in his motion a good excuse for not having done it within the legal delays. He is then ordered to pay the costs incurred by the plaintiff, as a result of his default to file his plea on time, which means that the defendant has to pay the fee on the motion made by him, the stamps put on the certificate of default and on the inscription, and the difference in the fee between items 20 and 21 of the Superior Court tariff.

The defendant may, on the presentation of the Inscription ex parte, ask for the dismissal of plaintiff's action or attack part of the conclusions, without producing a plea, by arguing in law only. Where a defendant admits liability in an action claiming damages, but disputes the amount claimed, it is preferable not to file a plea (so as not to increase the costs) but to cross examine the plaintiff's witnesses so as to reduce the amount of the eventual condemnation. The court will, of course, not grant the damages asked for if they have not been proven, even in cases where the defendant does not appear.

After the inscriptions, the Clerk reads all the motions and petitions that are on the typewritten roll. Proceedings which generally are not contested, such as motions for examinations of a plaintiff before plea, motions for substitution of attorney, and any other matter where the Court is informed by an attorney representing either party to a proceeding that there is no objection to it being granted, are so granted immediately, unless the judge is of the opinion that the proceeding in question is not well-founded in law. Proceedings that are contested, or if no one is present at the first calling of the roll, are then suspended, to be called again. After the typewritten roll is called, the proceedings that have not been previously filed but presented in open Court, for the first time, are then called. When the roll is read a second time, the proceedings which have been suspended are now heard in their term, if both parties are present, or if the party present insists upon proceeding in the absence of the adverse party.

Judgment is either given on the Bench or the matter is taken under advisement, the decision to be given later, after the judge has had an opportunity to study the points argued before him and look into the authorities, if any

[2][1936] P.R. 310.

were cited to him. When these authorities are numerous, it is advisable to prepare a list, with a copy for the adverse party.

If a proceeding which has been served has not been filed nor presented, the attorney who has come to Court with his copy, may obtain an entry of default (congé défaut), with costs aginst the party that failed to present the said proceeding.

Judgments are drawn up by former members of the Bar who form part of the judgment department. They are deputy prothonotaries. They also draw up judgments in actions based on bills of exchange, goods sold and delivered, work done, professional services rendered, etc., as authorized by art. 532 c.p. These officials sign themselves the judgments that are within their jurisdiction.

It is to be noted that many inscriptions by default to plead or to appear are presented to the Practice Division, although they could very well be submitted to the prothonotary, thus obviating the necessity of filing the inscriptions a day before the presentation date, in ex parte matters. This method also eliminates many of the delays in having a judgment signed by the judge who presides over the Practice Division, for the latter has to check the complete record submitted to him, before signing the judgment, besides studying all the cases that have been argued before him, and which he has taken under advisement.

The Practice Division of the Magistrate's Court of Montreal has not enough work to occupy one judge for a whole morning. There the judge, who presides over the Practice Division, hears contested cases in lessor-lessee matters as soon as he is finished with Practice matters. A different judge presides over this division of the Magistrate's Court every week. At 10:00 A.M. when the judge opens the Court, the Clerk calls all motions for rule nisi and the rules nisi themselves, followed by Inscriptions ex parte, Inscriptions by default to appear, and Motions. No typewritten roll is kept. The judges do not refer any cases for proof before the Clerk, but they hear the evidence in open Court. The plaintiff, or someone else who knows the facts, is examined by his attorney. The judge then gives judgment on the bench for the amount proved, if the action is otherwise well founded, or he takes the matter under advisement.

Inscriptions for judgment on promissory notes, goods sold and delivered, etc., in default cases should be presented before the Clerk of the Court, who has jurisdiction in these matters under arts. 532 and 1126 c.p., and not before the Practice Division.

CASE AND COMMENT

DUPLESSIS v. RONCARELLI

ADMINISTRATIVE LAW — PERSONAL LIABILITY OF PUBLIC OFFICERS — CIVIL LAW — 1053 *C.C.* — DUTIES OF APPEAL COURT RE. DECISIONS OF TRIAL JUDGE ON QUESTIONS OF FACT

The much-publicized case of *Duplessis* v. *Roncarelli*[1] has brought into focus interesting questions of legal principle, both in the sphere of Administrative law and in that of the Civil law. This case illustrates the intermingling of administrative and civil law elements. In Quebec, as in the rest of Canada, administrative and constitutional law are of Common Law origin, as modified by the relevant Canadian and Quebec statutes. Hence, the question of whether there is liability of public officers for their acts is determined upon principles of common law. However, once such liability is established in administrative law, we must turn to the criteria of delictual liability in the Civil Code to determine if in the case in point, the acts of the party constituted a delict or a quasi-delict.

The facts of this case are very involved and the writer will outline only those that are essential to the course of argument selected for this Comment.

The plaintiff-respondent was an adherent of the religious group known as the Witnesses of Jehovah, though he occupied no office in the organization. During 1945 and 1946, this group intensified the dissemination of its beliefs by house to house canvassing and the distribution of pamphlets in the streets, particularly in the city of Montreal. The substance of some of these pamphlets was offensive to the majority of the population of this Province, and in fact the defendant-appellant, at the time the cause of this action arose, had reasonable cause to believe one of these to be seditious.[2] Several of the Witnesses were brought before the Recorder's Court in Montreal for infractions of city by-laws concerning the distribution of written matter in the streets. The plaintiff, during 1945 and up to November 1946, had provided bail bonds in approximately four hundred of such arrests. However, he had ceased to do so

[1]The judgment of Mr. Justice Mackinnon in the Superior Court is reported at [1952] 1 D.L.R. 680. See the comment on this judgment by Professor E. C. S. Wade in (1951) 29 Canadian Bar Review, page 665. This judgment was overruled by the Court of Queen's Bench, Appeal Side. Bissonette, Pratte, Casey and Martineau JJ. formed the majority, Mr. Justice Rinfret dissenting. The latter judgment is reported at [1956] Q.B. 447. This decision is under appeal to the Supreme Court of Canada. The judgement of the Supreme Court will be suceptible of appeal to the Privy Council.

[2]In *Boucher* v. *R*, [1949] K.B. 238. the Court of Appeal of Quebec held that one of these pamphlets, entitled *Quebec's Burning Hate*, was seditious. This decision was later overruled by the Supreme Court by a five to four majority. See [1951] S.C.R. 265.

prior to the appearance of the pamphlet entitled *Quebec's Burning Hate*[3] in November of 1946. After the publication of the latter pamphlet, the action of the public authorities to curb the activities of the Witnesses was intensified.

In the months of November and December of 1946, plaintiff was the owner and operator of a restaurant and cafe in Montreal, and was the holder of a liquor permit which had been granted to him by the Quebec Liquor Commission on May 1, 1946, for the sale of alcoholic beverages in his restaurant-cafe. This restaurant had been operated by the plaintiff's family for thirty-five years, and had had a liquor permit, renewed from year to year, since its inception. Plaintiff and his restaurant had unblemished reputations and the restaurant had always been conducted according to law. The provisions of the *Alcoholic Liquor Act*[4] had been scrupulously observed and there was no evidence that plaintiff had allowed his restaurant to be used for meetings of the Witnesses. Nor had it ever been employed as a distribution centre for the literature of the Witnesses of Jehovah. Neither was there any evidence that plaintiff directly participated in this distribution, nor did he have any connection with the writing or editing of these pamphlets.

On December 4th, 1946, plaintiff's liquor licence was cancelled without notice by an order of the Manager of the Quebec Liquor Commission, in virtue of section 35 of the *Alcoholic Liquor Act*.[5] The defendant admitted that the liquor permit was cancelled before the expiration of its term as a measure of repression against the Witnesses. This fact becomes evident from a statement made by defendant to the press shortly after the cancellation.[6] Following these events and the subsequent notoriety, the plaintiff lost most of his clientele and was forced to close his establishment in the spring of 1947, with great financial losses resulting.

The plaintiff sought the authorization of the Chief Justice of the Appeal Court to sue Mr. Archambault, the Manager of the Quebec Liquor Commission.[7] Plaintiff's petition was rejected.[8] The plaintiff then sought the

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[3]See footnote no. 2.

[4]R.S.Q. 1941, c. 255.

[5]Section 35.

"1. Whatever be the date of issue of any permit granted by the Commission such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following. The Commission may cancel any permit at its discretion."

[6]"Roncarelli est indigne de bénéficier d'un privilège accordé par la Province qu'il contribue à vilipender et à calomnier de la façon la plus misérable. C'est moi-même, à titre de procureur général et de responsable de l'ordre dans cette Province, qui ai donné l'ordre à la Commission des liqueurs d'annuler son permis."

[7]Such consent is required by the terms of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, section 12:

"No one appointed under this Act as Manager of the Quebec Liquor Commission may be sued for acts done or omitted to be done by him in the exercise of the duties vested in him under this Act, except by the Government of this Province, or with the

consent of the Attorney-General to sue the Commission.[7] This too was denied.

The plaintiff then took action in the Superior Court against the defendant in his personal capacity, claiming $118,741 as damages for the cancellation of his liquor permit. The plaintiff contended that defendant had ordered Mr. Archambault to cancel the permit. As such, in acting arbitrarily and outside the scope of his authority, the defendant had incurred personal liability for his acts. Furthermore, defendant had defamed plaintiff in public statements to the press to the effect that plaintiff was a leader and organizer of a seditious and criminal group.

The defendant pleaded that:

1. Plaintiff's permit was cancelled by the Quebec Liquor Commission, and in so doing, the Commission was exercising a discretionary power formally conferred on it by section 35 of the *Alcoholic Liquor Act*.[9]
2. Defendant cannot be held liable for any part he may have played in the cancellation of plaintiff's licence as whatever he did was done in the exercise of his duties as Prime Minister and Attorney-General. *The Courts cannot question the act of a Minister of the Crown acting in a matter concerning the executive power and in the public interest.*[10]
3. Furthermore, defendant did not order the Manager to cancel the permit. The defendant merely approved a decision already taken by Mr. Archambault.

Mr. Justice Mackinnon decided in favor of plaintiff and awarded damages in the amount of $8.123.53. The Appeal Court quashed this judgment, Rinfret J. dissenting, the majority being formed by Bissonette, Pratte, Casey and Martineau JJ.

Responsibility of Public Officers

It is noteworthy that not one Judge accorded any weight to the defendant's argument that as head of the executive power and a Minister of the Crown, he cannot be held accountable to the Courts for his acts. Each one of the learned Judges affirmed that the law governing this point is the Common Law. Mr. Justice Mackinnon in the Superior Court[11] cited Dicey:

> "Every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[12]

Mr. Justice Pratte, even though he ruled in favor of the defendant in the

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authorization of the Chief Justice of the Province or, if he be prevented from granting such authorization, by the senior Judge of the Court of Appeal.

The Commission itself may be sued only with the consent of the Attorney-General."

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

[9]See footnote no. 5.

[10]Italics are the author's.

[11][1952] 1 D.L.R. 680, at page 696.

[12]Dicey, *Law of the Constitution*, 1939, Ch. IV, pages 193-4.

Appeal Court, also recognized the English origin of this branch of our law, and quoted with approval the statement by Mr. Justice Kellock:[13]

> "It is a fundamental principle of our public law that if an official wrongs a private person, he is accountable to the ordinary Courts and it is no defence that he acted in good faith . . . The highest Minister of the Crown and the humblest official are equally answerable for the legality of their acts to the ordinary tribunals."

The writer does not consider it necessary to review the dicta of each Judge on this point. Suffice it so say that all the Judges agreed that even Cabinet Ministers and Attorneys-General are liable to answer before the Courts for their acts.

Now the problem arises: by what acts does a public officer render himself liable to punishment or damages? It is obvious that if a public official is authorized by a specific text of law to do a certain act, and in so doing damage is caused to some person, the official will not be liable if he acted in good faith and according to the rules of natural justice. However, every act of a public officer must find its source in some positive provision of law. Mr. Justice Rinfret cited[14] Halsbury on this point:[15]

> "The private citizen can act as he wishes, provided he does not transgress the substantive law, or infringe the legal rights of others. The public officer, however, may do nothing but what he is authorized to do by some rule of common law or statute."

Beullac wrote in this connection:[16]

> "Toutes les fonctions publiques doivent trouver leur source dans un texte de loi."

It thus becomes relevant to determine whether defendant acted within his authority, as prescribed by statute, in taking part in the administration of the Quebec Liquor Commission. Does any statute entitle the defendant, whether as Prime Minister or as Attorney-General, to play any part in the administration of the Commission? It is respectfully submitted that, based on the following review of the relevant statutes, a negative reply is in order.

AUTHORITY OF THE PRIME MINISTER AND OF THE ATTORNEY-GENERAL

1. In the *Alcoholic Liquor Act*,[17] the Manager of the Commission is vested with the control of all the activities of the Quebec Liquor Commission,[18] namely:

> "To grant, refuse or cancel permits for the sale of alcoholic liquor . . . to inform the Attorney-General of the infractions of this Act of which it has knowledge."[19]

In virtue of section 148 of the same Act,

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[13]*Chaput* v. *Romain et al*, [1955] S.C.R. 834, at page 854.

[14][1956] Q.B. 447, at page 516.

[15]Halsbury, *Laws of England*, 1932, Vol. 6, No. 435, page 389.

[16]Beullac, *La Responsabilité Civile*, page 514.

[17]R.S.Q. 1941, c. 255.

[18]See section 5 of the Act.

> "The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager."

[19]Section 9 of the *Alcoholic Liquor Act*.

"The Attorney-General shall be charged with:
1. Assuring the observance of this Act and of the *Alcoholic Liquor Possession and Transportation Act*, and the investigating, preventing and suppressing of the infringements of such Acts, in every way authorized hereby;
2. Conducting the suits or prosecutions for infringements of this Act or of the said *Alcoholic Liquor Possession and Transportation Act.*"

In 1937, an Act entitled, *An Act to Guarantee the Independence of the Quebec Liquor Commission*[20] was passed by the Legislature. The provisions of this Act are now found in section 5 of the *Alcoholic Liquor Act.*

It is the opinion of the writer that the structure of the Acts cited above restrict the activity of the Attorney-General in relation to the Commission to the policing function,[21] while confining the administration of the Act entirely in the hands of the Manager. Surely the very title of the 1937 Act indicates the intention of the Legislature to remove the Commission from the departmental structure of the public Administration of this Province and from the influence of the Cabinet.

2. The *Executive Power Act*[22] recognizes the office of the Prime Minister, "... who shall *ex officio* be president of the Council ..." and "... a minister charged with the administration of justice, called the Attorney-General."[23] Nothing here would seem to indicate a text of law authorizing the defendant to assume any part in the administration of the Quebec Liquor Commission.

3. The *Attorney-General's Department Act*[24] outlines the duties of the Attorney-General. The only text in this Act which might suggest some relationship to the Quebec Liquor Commission is section 5, subsection 2:

"He advises the heads of the several *departments*[25] of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof."

Is the Quebec Liquor Commission a *department* of the Government of this Province? The *Public Department Act*[26] lists the fifteen Departments constituting the Government of this Province, and the Liquor Commission is not mentioned as one of them.

Thus, the learned Judges found that the defendant could rest upon no text of law authorizing him to take part in the administration of the Commission. Mr. Justice Mackinnon stated:[27]

"Nowhere can it be found any authority granted the Prime Minister or the Attorney-General to interfere in the administration of the *Alcoholic Liquor Act* or to order the cancellation of a licence."

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[20]1937, I George VI, c. 22.

[21]Note that by section 32 of *An Act Respecting the Provincial Police and the Liquor Police*, R.S.Q. 1941, c. 47.

"The direction and control of the Liquor Police shall be under the Authority of the Attorney-General."

[22]R.S.Q. 1941, c. 7.

[23]*Ibid*, section 5.

[24]R.S.Q. 1941, c. 46.

[25]Italics are the author's.

[26]R.S.Q. 1941, c. 43.

[27][1952] I D.L.R. 680, at page 699.

It would thus seem that there is no text of law authorizing the defendant to act in any way in the administration of the Quebec Liquor Commission.

The campaign of the Witnesses of Jehovah no doubt caused, at the time, serious disturbances in the Province. It is certain that the battle against them undertaken by the Prime Minister met with the approval of the vast majority of the Quebec population. By reason of certain decisions of the Supreme Court of Canada, we now know that the writings of the Witnesses are not seditious.[28] However, in view of the differences of judicial opinion throughout the Boucher Case, surely the defendant had reasonable cause to believe the pamphlet *Quebec's Burning Hate* to be seditious, and no doubt acted in good faith in his attempt to suppress it. It was his duty to oppose it by all legal means within his power as Attorney-General. Thus acting, within his functions and in good faith, he would incurr no personal responsibility. However, acting as he did outside his authority, if what he did amounted to a delict or quasi-delict within the meaning of article 1053 C.C.,[29] then he would be personally liable for the damage which his act caused.

Legal Significance of the Act of the Manager of the Quebec Liquor Commission

It must be noted at this point that the question of whether or not Mr. Archambault acted rightly and within his powers in cancelling the permit need not enter this case. If it is proved that defendant actually ordered the revocation and as such was at fault, it matters not if the Manager had just cause to cancel the permit. This is a recognized principle of civil law. Mazeaud remarked on this subject:[30]

> "Quand la faute du défendeur a provoqué le fait du tiers d'où est résulté le dommage, cette faute est la cause véritable du préjudice."

He adds at page 531:

> "Si le fait du tiers n'est pas fautif, on sait que ce fait n'a certainement aucune incidence sur la responsabilité du défendeur."

Savatier, in his *Traité de la Responsabilité Civile,* comments on this topic:[31]

> "Si, dans la trame de la causalité, on ne découvre qu'une faute, l'auteur en supporte tout le préjudice."

Further on this point, see the case of *Leroux* v. *City of Lachine.*[32] It was here held (headnote):

> "Where, at the request of a City Council, the Collector of Provincial Revenue cancels the permit issued by the Provincial authority to hold and operate a dance hall, an action in damages against the city should be maintained if it appears that the City Council was wholly unjustified in adopting such a condemnatory resolution

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[28]See footnote no. 2.

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

[30]H. & L. Mazeaud, *Traité de la Responsabilité Civile,* 4th ed., Vol. 2, page 526, para. 1629.

[31]Savatier, *Traité de la Responsabilité Civile,* Vol. 2, page 22.

[32][1942] S.C. 352.

without verifying the facts and without opportunity to the plaintiff to defend himself against the charges made."

Here, Mr. Justice McDougall awarded damages against the city without even discussing the discretion or the fault of the Collector of Revenue, the latter being the one who actually cancelled the permit.

Questions of Fact

To return to our analysis regarding the defendant, it now remains to determine *if the defendant actually did* take part in the administration of the Quebec Liquor Commission. Did he order the Manager to cancel the liquor permit, and if he did, was such order the *causa causans*, the *determining factor* causing Mr. Archambault to effect the cancellation? It might be well to note here some of the events leading up to the cancellation and the testimony relating thereto.

At about the time of the appearance of the pamphlet *Quebec's Burning Hate,* the chief Crown prosecutor at Montreal, Mr. Oscar Gagnon, notified Mr. Archambault that a holder of a liquor permit was a member of the Witnesses of Jehovah and had been providing bail in numerous cases involving the Witnesses. The manager of the Commission, presumably with the idea of cancelling this permit, telephoned the defendant to inform him of the matter. Mr. Archambault's testimony on this point ran as follows:[33]

"Certainement, ce jour là, j'avais appelé le premier ministre en l'occurence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de *mon intention d'annuler le privilège,*[34] et le premier ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait de la même personne, qu'il pouvait y avoir plusieurs Roncarelli."

Mr. Archambault then had an agent investigate and when this agent ascertained that the person who was providing the bail bonds and the holder of a liquor permit were one and the same, namely the plaintiff, the Manager again telephoned the defendant and notified him of these results. Whereupon the defendant said to him:[35]

"Vous avez raison, ôtez le permis, ôtez le privilège."

The Manager's interpretation of defendant's statement at that time was:[36]

" . . . et là, le premier ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder."

The defendant stated in his testimony:[37]

" . . . j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement."

Yet, at another point in his testimony, defendant stated:[38]

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[33][1956] Q.B. 447, at page 483.

[34]Italics are the author's.

[35]Excerpt from the testimony of the defendant, cited in [1952] 1 D.L.R. 680, at page 692.

[36]Excerpt from the testimony of Mr. Archambault, cited in [1956] Q.B. 447, at page 483.

[37]Excerpt from the testimony of the defendant, cited in [1956] Q.B. 447, at page 501.

[38][1956] Q.B. 447, at page 464.

"Non, je n'ai pas donné un ordre à M. Archambault . . . C'est à la suggestion du juge Archambault, après qu'il eût porté à ma connaissance des faits que j'ignorais, que la décision a été prise."

However, a few days after the cancellation of the licence, defendant made the following statement to the newspapers:

"C'est moi-même, à titre de procureur général et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des liqueurs d'annuler son permis."

Finding on the above evidence, there was a divergence of opinion among the Honourable Judges on these questions of fact. In the Superior Court, Mr. Justice Mackinnon found that:[39]

"In the light of the foregoing, the Court can reach no other conclusion than that defendant gave an order to Mr. Archambault to cancel the plaintiff's licence and it was his order that was the determining factor."

On the other hand, Mr. Justice Bissonette found that:[40]

"Il est prouvé, en fait, que le gérant de la Commission avait pris sa décision d'annuler le permis avant de demander conseil au défendeur."

Mr. Justice Pratte found that:[41]

"Il paraît donc certain qu'Archambault n'a pas révoqué le permis pour se conformer à l'ordre du défendeur, mais parce qu'il avait lui-même jugé à propos de le faire."

Mr. Justice Casey added:[42]

"The burden was on plaintiff to establish the relationship of cause and effect and, like my colleagues Mr. Justice Pratte and Mr. Justice Bissonette, I do not think that he made this proof."

Mr. Justice Martineau ruled that:[43]

"Je ne crois pas que le défendeur ait fait plus que d'approuver la décision déjà prise par M. Archambault."

On the other hand, Mr. Justice Rinfret, in dissenting, held that:[44]

"Il faut donc, avec le premier juge, conclure que la décision du premier ministre a été le *determining factor* et qu'elle doit être tenue pour être la décision définitive du procureur général. L'on en a vu, en effet, que tant le premier ministre que le gérant considéraient la Commission des liqueurs comme faisant partie du département du procureur général."

To recapitulate at this point, we see that there was general agreement among the learned Judges that the defendant did not have the authority by statute to take part in the administration of the Quebec Liquor Commission. Whether he in fact did so act is a matter of divided opinion. Mr. Justice Mackinnon found that defendant did order the cancellation and that such order was the determining cause of the cancellation, rendering the defendant liable for the ensuing damages. Mr. Justice Rinfret, dissenting in the Court of Queen's Bench, agreed with Mr. Justice Mackinnon's finding of fact and expressed the opinion that the defendant and Mr. Archambault acted under the mistaken impression that defendant, as Attorney-General, had authority over the Commission, and that the Manager treated defendant as his hierarchical

[39] [1952] 1 D.L.R. 680, at page 692.

[40] [1956] Q.B. 447, at pages 450 to 459.

[41] [1956] Q.B. 447, at page 466.

[42] [1956] Q.B. 447, at page 468.

[43] [1956] Q.B. 447, at pages 494-495.

[44] [1956] Q.B. 447, at page 503.

superior. On the other hand, the four remaining Judges in Appeal found that defendant did not order the cancellation of the permit.

DUTIES OF THE QUEBEC APPEAL COURT

Thus, the reversal by the Court of Appeal resolves itself into one on a question of fact. Let us examine what are the duties and mode of procedure of the Appeal Court when confronted with a decision by a trial Judge on a question of fact. Rivard, in his *Manuel de la Cour d'Appel,* wrote:[45]

> "Elle, (the Quebec Court of Appeal) observe en principe et dans ses lignes générales, la règle suivante, posée en Cour Suprême:"
> "A Court of Appeal should not reverse the findings upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanor of the witnesses, unless the evidence be of such a character as to convey to the minds of the Judges sitting in appellate tribunal the irresistable conviction that the findings are erroneous."[46]

Mr. Justice McDougall, speaking of the conclusion reached by the trial Judge in the Superior Court, recognized that Judges in Appeal are so bound.[47] This rule regarding the conduct of Appeal Tribunals with reference to the finding of the trial Judge on a question of fact can be summarized as follows: Ordinarily, an Appeal Court will not set aside the finding on fact of a trial Judge merely because the Judges of Appeal would have arrived at a different conclusion ; the finding must be clearly unsupported by the evidence. An Appeal Court should bear in mind that it has not heard or seen the witnesses while the trial Judge has.[48]

The surprising result when we apply this rule to the case under consideration is that even though four learned Judges in the majority in the Court of Queen's Bench overruled the trial Judge on a question of fact, not one of them acknowledged this rule. However, in dissenting, Mr. Justice Rinfret did so when he stated:[49]

> "En regard de cette preuve, je ne puis pas conclure que le juge de première instance a commis une erreur manifeste en tenant . . . "

In so finding, the learned Judge felt constrained to agree with Mr. Justice Mackinnon on his finding that the order was in fact given by defendant and that such order was the determining cause of the cancellation of the liquor licence.

However, we must keep in mind the fact that there is a converse rule to the one discussed above. It is clear that there are cases when the Appeal Court not only has the right but the duty to overrule the trial Judge on a question of fact.

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[45]Rivard, *Manuel de la Cour d'Appel,* at page 45.

[46]Mr. Justice Gwynne in *Ryan* v. *Ryan,* (1882) 5 S.C.R. 387, at page 406.

[47]*Leclerc* v. *Robitaille,* [1952] R.L. 257, at page 295.

[48]For further support of this proposition see: *Ruthman* v. *La Cité de Québec.* (1913) 22 K.B. 147; *De Felice* v. *O'Brien,* (1918) 27 K.B. 192, and (1918) 59 S.C.R. 684; *Powell* v. *Streathen,* [1935] A.C. 243; *McMillan* v. *Murray,* [1935] S.C.R. 572; *Montreal Transportation Co.* v. *The King,* [1926] 2 D.L.R. 862; *Labadie* v. *McMillan,* [1926] 3 D.L.R. 655; and *Johnston* v. *O'Neill,* [1911] A.C. 552.

[49][1956] Q.B. 447, at page 502.

"Tout en tenant compte des avantages que le juge de la Cour Supérieure a sur eux (the Judges in Appeal), *ils sont tenus d'infirmer son jugement*[50] s'ils sont convaincus qu'il s'est trompé."[51]

Therefore, if the majority of the Court of Appeal felt that the conclusions which Mr. Justice Mackinnon reached were clearly wrong and unsupported by the evidence, *they were bound to overrule.* However, it is submitted, with all due respect, that the learned Judges of the majority in the Appeal Court should have at least explicitly recognized the principle of the maintenance of findings of fact in the trial Court, and proceeded to demonstrate how the trial Judge was clearly wrong and unsupported by the evidence.

Appeal to the Supreme Court of Canada

The present case now goes before the Supreme Court of Canada to be decided — it is submitted — entirely on questions of fact. There can be no doubt that the Prime Minister and the Attorney-General is nowhere authorized to play any part in the administration of the Quebec Liquor Commission. Thus, the Supreme Court will have to decide: did defendant give an order to the Manager of the Commission and if he so did, was that order the *causa causans,* the *determining cause* of the cancellation of the plaintiff's permit?

What is the rule in the Supreme Court regarding the treatment to be accorded to the findings of fact in the Courts below?

"The Supreme Court of Canada will not disturb concurrent findings of fact in the Courts below unless exceptional circumstances are shown."[52]

It must be noted that the above is the rule to be followed when the findings of fact in the Courts below are *concurrent.* Such is not the situation in the present instance. Thus, the learned Judges of the Supreme Court will re-open the questions of fact *de novo.* What their decision on these facts will be is a matter of conjecture at this point. While the trial Judge, who saw and heard the witnesses first hand, and one Judge of the Court of Queen's Bench found that defendant did give an order, it must be kept in mind that four learned Judges in Appeal were of the firm conviction that he did not.

In conclusion, it is this writer's opinion that no matter how the Supreme Court finds on the facts of this case, it will not disturb the holding of the lower Courts on the principle of law regarding the liability of public officers. The salient and precedent-making characteristic of *Roncarelli* v. *Duplessis* will be the confirmation and reiteration of the principle of law that the Courts maintain the authority to review and pass upon the legality of the acts of public officers, even if they be the highest Ministers of the Crown. In this era of vastly expanding functions of Government and the increasing contacts of the private citizen with government officials, it is in this power of the

[50]Italics are the author's.

[51]Rivard, *op. cit.,* page 47. See *Les Commissaires du Hâvre de Montréal* v. *The Montreal Grain Elevating Co.,* (1908) 17 K.B. 385.

[52]*Premier Gold Mining Co.* v. *Coastwise S.S. & Barge Company,* [1926] 1 D.L.R. 1009.

"Ordinary Courts" that the citizen must find his protection. The Judges are the guardians of the liberties of the citizen.

> "The public official must act according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. *The Court is always entitled to examine the facts.*[53]"[54]

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[53]Italics are the author's.

[54]Lord Halsbury in *Sharp* v. *Wakefield,* [1891] A.C. 173, at page 179.