CHAPTER 31


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Introduction

In 1966, at the Victoria University of Wellington, I had the privilege of taking the course in Constitutional and Administrative Law taught by three of New Zealand’s most distinguished public lawyers: Colin Aikman, then Dean of the Law Faculty, Ken Keith, until 2015 a judge a judge of the International Court of Justice, and Roger Clark. In many ways, it was the most significant event in my legal education as evidenced by my subsequent career as both an academic and practising public lawyer. I remain forever grateful to those giants in the field.

Roger Clark taught the component of the course devoted to civil liberties. I still recollect vividly the enthusiasm that he brought to our classroom discussion of the famous 1882 case of Beatty v. Gillbanks,1 a case that pitted the marching members of the Weston-super-Mare ‘soldiers’ of the Salvation Army against both the antagonistic and challenging members of the Skeleton Army and ultimately the constabulary of that Somerset town. In this volume of essays celebrating Roger Clark’s outstanding achievements, I use this case as a launching point for consideration of recent Canadian case law and controversy concerning the outward or public manifestations of religious beliefs and practice.

Of course, it goes without saying that the intersection of religious practice with the public domain and the exercise by others of their beliefs and freedoms is a much travelled road, and it is not my intention to engage in an elaboration of the various twists and turns that that very long road has taken

1 (1882) 9 QBD 308. I was interested to read in his obituary in The Telegraph, 30 September 2009, that Beatty v. Gillbanks also remained the favourite case of another distinguished public lawyer, Professor Sir David Williams: <http://www.telegraph.co.uk/news/obituaries/law-obituaries/6248213/Professor-Sir-David-Williams.html> accessed 18 September 2014. Indeed, Sir David, in what must have been one of his last publications, wrote the entry on the case in Peter Cane & Joanne Conaghan (eds), The New Oxford Companion to Law (OUP 2008) 70.
since 1882. Rather, my objective is to describe briefly and analyse how the competing tensions have fared in the context of Canadian judicial review of administrative action which has placed restrictions on or responded to public manifestations of religious life and practices.

2  An Apparently Honourable History

The 1959 decision of the Supreme Court of Canada in *Roncarelli v. Duplessis* (and particularly the judgment of Rand J.)\(^2\) remains one of the most celebrated Canadian public law decisions. It is one of a number of judicial responses to the Quebec government's sustained attempts to suppress Jehovah's Witnesses in the full and public practise of their faith.\(^3\) The particular manifestation was a 1946 liquor police raid on a Montreal restaurant owned by Frank Roncarelli, a raid which led to the cancellation of Roncarelli's liquor licence. That cancellation ultimately ruined his business. It transpired that the impugned actions, while carried out under the formal direction of the General Manager of the Quebec Liquor Commission, were in reality dictated by the Premier of Quebec, Maurice Duplessis. The precipitating cause was that Roncarelli, a Jehovah's Witness had been standing bail for fellow Witnesses charged with various offences under both the *Criminal Code* and Quebec law restricting the activities of the Witnesses.

In terms of conventional judicial review law, the case epitomizes the application of several important common law principles: that administrative power should not be used at the dictation of someone on whom the relevant statutory regime has not bestowed any relevant authority; that administrative power should not be used for purposes alien to or not contemplated by the relevant statutory regimes; and, most importantly, at least for current purposes, that implicit in the grant of even broad or open-ended statutory discretion is the limitation that power should not be exercised in a way that supresses or is aimed at the exercise of common law rights and freedoms, and, in this instance, freedom of religion and expression and also the freedom to stand bail for someone charged with an offence.

As in *Beatty v. Gillbanks*, the majority of the Supreme Court was not convinced by arguments to the effect that there were public or societal order

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\(^2\) [1959] SCR 121.