

The Effect of Alcohol on the Canadian Constitution ... Seriously

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Article abstract

Alcohol has exerted a staggering influence on the Canadian constitution. It was a prominent feature of daily life in the young Dominion, much to both the delight and chagrin of many. The temperance movement exerted its own influence on both the federal and provincial legislatures. Without “alcohol” as a head of power, the legislatures claimed control over this seeming, social evil sometimes under “Peace, Order and Good Government”, “criminal law”, or “Trade and Commerce”; at other times under “Property and Civil Rights”, “Local Matters”, and so forth. Court challenges abounded; the result was, in part, the judiciary’s failure to walk a straight line toward a clear division of powers between the federal and provincial governments. But the result was also many of the doctrines of division of powers that still form part of Canadian constitutional law. Beyond its impact on the division of powers, alcohol was also at the root of Canada’s most important decision on the rule of law: *Roncarelli*—a decision argued and won by the late F. R. Scott.

THE EFFECT OF ALCOHOL ON THE CANADIAN CONSTITUTION ... SERIOUSLY

—F. R. SCOTT LECTURE—

*The Honourable Morris J. Fish**

Alcohol has exerted a staggering influence on the Canadian constitution. It was a prominent feature of daily life in the young Dominion, much to both the delight and chagrin of many. The temperance movement exerted its own influence on both the federal and provincial legislatures. Without “alcohol” as a head of power, the legislatures claimed control over this seeming, social evil sometimes under “Peace, Order and Good Government”, “criminal law”, or “Trade and Commerce”; at other times under “Property and Civil Rights”, “Local Matters”, and so forth. Court challenges abounded; the result was, in part, the judiciary’s failure to walk a straight line toward a clear division of powers between the federal and provincial governments. But the result was also many of the doctrines of division of powers that still form part of Canadian constitutional law. Beyond its impact on the division of powers, alcohol was also at the root of Canada’s most important decision on the rule of law: *Roncarelli*—a decision argued and won by the late F. R. Scott.

L’alcool a exercé une grande influence sur la constitution canadienne. Ce fut un élément marquant de la vie quotidienne au sein du jeune Dominion, étant source de plaisir ou de dépit pour plusieurs. Le mouvement pour la tempérance influença les autorités législatives fédérales et provinciales. Sans l’« alcool » comme chef de compétence distinct, les pouvoirs législatifs ont voulu exercer leur autorité sur ce fléau social, le qualifiant soit sous le chef de compétence « paix, ordre et bon gouvernement », « droit criminel », ou « échanges et commerce » ; soit sous « propriété et droits civils », « matières de nature locale », et ainsi de suite. Les recours en justice furent nombreux ; le résultat fut, en partie, l’échec des tribunaux à tracer une ligne séparant clairement les pouvoirs des gouvernements fédéraux et provinciaux. Le résultat fut également le développement de plusieurs doctrines sur la séparation des pouvoirs, qui font toujours partie du droit constitutionnel canadien. Au-delà de son impact sur la séparation des pouvoirs, l’alcool fut au cœur de la décision la plus importante sur la primauté du droit au Canada : *Roncarelli*—une décision plaidée et gagnée par feu F. R. Scott.

* Justice of the Supreme Court of Canada. The author acknowledges with appreciation the assistance of his law clerk, Rory Gillis.

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Introduction

It is a pleasure to return to McGill. And it is an honour to give the F. R. Scott Lecture. It is an honour for many reasons, personal and professional. To have had F. R. Scott as a professor is to be blessed with the lifetime gift only a great academic can bestow. To have known the poet and to have read his poetry is to have savoured “the expression of a man who is living intensely and sensitively on all levels, spiritual, intellectual, political and sensual.”¹ To have enjoyed the friendship of Frank and Marian Scott, as my wife Judy and I did for 25 years, is itself a cause of celebration. I am so honoured to have been invited today to honour Frank Scott’s memory in this way, and to recall Marian as well, with affection and admiration.

I remember vividly my first lecture in Professor Scott’s constitutional law class. Professor Scott, a tall and charismatic man, entered the classroom with his notes in one hand and the class list in the other. In those days, class attendance was both mandatory and recorded. Scott called out the names on his list: “Angus?”; “present”. “Brown?”; “present”. “Cohen?”; no answer. “Cohen?”; again no answer. Scott looked up, a puzzled expression on his face. “Has this man no friends?”, he asked.

I remember as well a phone call I received at my law office from Professor Scott in 1967. He sounded distraught. Could I please come up to see him as soon as possible? I rushed to the Law Faculty. No sooner had I entered his office than he removed a summons from his top drawer and placed it in my hand. I immediately understood the ominous legal and political consequences that had brought me to Frank Scott’s office. This Canadian legal legend of the political left stood charged with having turned right... on a red light! I could see the headlines: « F. R. Scott, homme célèbre de gauche, effectue un virage à droite ! » I had no choice but to save the man, perhaps an entire political movement. And even without the benefit of the *Charter*, I managed to do just that.

Scott insisted on an account. I sent him one. It read essentially as follows: “For professional services, including research, preparation, meetings, attendances at court, and disbursements: In all, one poem.” Instead, I received the following note: “Dear Morris, How can one repay the gift of freedom? Eternal gratitude is the least one can offer. As for a poem, it comes when it comes. *Veremos*, as the Spaniards say. Love, joy, peace. Frank Scott.”

¹ EK Brown, *Responses and Evaluations: Essays on Canada*, David Staines, ed (Toronto: McClelland and Stewart, 1977) at 239.

Over the years, Frank Scott sent me copies of his essays, books, poetry, and anthologies. He inscribed one of them as follows: “To Morris Fish: One man’s meat is another man’s Poisson!”

In that light, I turn now from the Poisson to the meat of my lecture. I begin with a word about its venerable origins. My third-year essay at the law faculty, written for Professor Scott a half-century ago, was on a matter of pressing legal, sociological, and political importance: “The effect of alcohol on the Canadian Constitution.” Professor Scott liked the paper and graded it accordingly. But no one has to my knowledge read it since. When I was invited to give this lecture, I thought this would be a particularly appropriate opportunity to read my paper to you, all 120 pages of it ... including the footnotes. Alas, I was unable to locate it. I did, however, find an editorial page article that I wrote for *The Montreal Star* several years later. It was derived from my third-year essay and began as follows:

Liquor has exerted a staggering influence on Canada’s constitution. More staggering, in fact, than the influence it exerted on the constitution of Canada’s first prime minister.

Yet, while many historians ... have commented on the drinking habits of [Sir John A MacDonal], few seem to have noticed that alcohol has played so important a role in our national legal development.²

In honour of my old professor and friend, F. R. Scott, I’d like to return to this understudied topic of interest to us both: The effect of intoxicating beverages on our national constitution. I could hardly have chosen a more auspicious occasion or a more appropriate audience. Your attendance here in such large numbers testifies to your own fascination with the subject.

Historian Will Ferguson has written, in reference to Confederation and to the drinking habits of our first prime minister, that “Canada, like many a child, was conceived under the influence of alcohol.”³ Ferguson could equally have been writing about the development of the Canadian constitution. A surprising number of our foundational constitutional judgments began as disputes over the sale, licensing, and prohibition of alcohol. A survey by Professor R. C. B. Risk found that 30 of the first 125 cases addressing the division of powers between the federal and provincial governments involved liquor disputes.⁴

² Morris Fish, *The Montreal Star* (14 May 1968), 8.

³ Will Ferguson, *Bastards and Boneheads: Canada’s Glorious Leaders Past and Present* (Vancouver: Douglas and McIntyre, 1999) at 82.

⁴ RCB Risk, “Canadian Courts Under the Influence” (1990) 40 UTLJ 687 at 689.

A quick list of key constitutional cases from the late 19th and early 20th century reads like a liquor board document: *Local Prohibition*;⁵ *Manitoba License Holders*;⁶ *Canada Temperance Federation*;⁷ *Nat Bell Liquors*;⁸ *Consolidated Distilleries*;⁹ *Canadian Pacific Wine*;¹⁰ *Brewers and Maltsters*.¹¹ I could go on.

It is in these early liquor cases that we see the first discussions of the double aspect doctrine; paramountcy; peace, order and good government; and the legal significance, if any, of the original understandings of the *British North America Act*.¹²

Comment expliquer l'abondance de causes ayant trait à l'alcool? La réglementation de l'alcool a constitué l'une des grandes questions juridiques, politiques et morales de la fin du 19^e siècle et du début du 20^e—précisément au moment où les tribunaux étaient saisis pour la première fois d'importantes questions constitutionnelles. Il s'agissait d'une question *juridique* épineuse, en raison de l'incertitude entourant la compétence en matière d'alcool. Les pouvoirs d'interdiction ou de réglementation de la vente d'alcool semblaient se situer à l'intersection de plusieurs dispositions de *L'acte d'Amérique du Nord britannique*. Il s'agissait d'un problème *moral* épineux, parce que le pays était divisé entre des ouvriers dont la vie sociale était axée sur l'alcool, et des avocats de la tempérance qui voyaient dans l'alcool un des maux de la vie moderne. Et il s'agissait d'un problème *politique* épineux, parce que les hommes politiques des trois paliers de gouvernement—fédéral, provincial et municipal—souhaitaient avoir compétence en matière de réglementation de l'alcool afin de pouvoir tirer parti des occasions de favoritisme et des revenus associés aux permis d'alcool.

Today, I shall first share with you the story of how alcohol has nurtured our constitutional development from its earliest days. And, later,

⁵ *Ontario (AG) v Canada (AG)*, [1896] AC 348, 11 CRAC 222 [*Local Prohibition* cited to AC].

⁶ *Manitoba (AG) v Manitoba License Holders' Association* (1901), [1902] AC 73, 12 CRAC 333 [*Manitoba License Holders* cited to AC].

⁷ *Ontario (AG) v Canada Temperance Federation*, [1946] AC 193, 2 DLR 1 [*Canada Temperance Federation* cited to AC].

⁸ *R v Nat Bell Liquors Ltd*, [1922] 2 AC 128, 65 DLR 1 [*Nat Bell* cited to AC].

⁹ *Consolidated Distilleries Ltd v The King*, [1933] AC 508, 3 DLR 1.

¹⁰ *Canadian Pacific Wine Co v Tuley*, [1921] 60 DLR 315, 36 CCC 104.

¹¹ *Brewers and Maltsters Association of Ontario v Ontario (AG)*, [1897] AC 233, 11 CRAC 330.

¹² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

how liquor licensing enabled Frank Scott to make a pivotal and lasting contribution to the rule of law in Canada.

I. Liquor: A Constitutional Succour?

A. *The People*

It is useful to begin with a discussion of two realities of 19th century Canadian life: the centrality of drinking to daily routines, and the social and political backlash that widespread drunkenness caused.

The most obvious reason why so many constitutional cases involved alcohol is that there was a lot drinking going on in 19th century Canada—and not much else. In her history of the prohibition movement in Canada, Jan Noel describes alcohol as the caffeine of daily life.¹³ Many families, children included, would begin the day with a stiff shot of whiskey. As one chronicler reported: “Whiskey was served to each member of the household in the morning. It was considered to be a precaution against colds and to enable one to do hardy work.”¹⁴ Even nursing mothers would regularly drink for fortitude. In Montreal, residents would add brandy to their water to make sure it was safe to drink.¹⁵ Some, it seems, still consider this a sensible precaution.

Following breakfast, men would drink throughout the day—even, and especially, while at work. As Noel recounts, labourers would pass buckets of whiskey in the fields and factories, and carters and cabmen expected a drink as a tip for their services.¹⁶ The professional classes were no different than their labouring counterparts. Lawyers and judges would imbibe, on the job, to “keep up their eloquence”.¹⁷ My own eloquence, such as it is, just comes naturally.

Following a day at work, men would head to the taverns to drink and socialize. Taverns were known as “public houses” because they were the centres of social life. The number of taverns per-capita, by today’s standards, is astounding. In the 1830s, Saint John, New Brunswick had one

¹³ Jan Noel, *Canada Dry: Temperance Crusades Before Confederation* (Toronto: University of Toronto Press, 1995) at 13-14.

¹⁴ *The Napanee Beaver* quoted in Graeme Decarie “Something Old, Something New ... : Aspects of Prohibitionism in Ontario in the 1890s” in Donald Swainson, ed, *Oliver Mowat’s Ontario* (Toronto: Macmillan, 1972) at 156-157.

¹⁵ Noel, *supra* note 13 at 156.

¹⁶ *Ibid* at 13-14.

¹⁷ *Ibid* at 14.

tavern for every 50 people. Toronto, one for every 119. I am sad to say that Montreal lagged far behind at only one for every 258.¹⁸

Neither Quebec City nor Toronto had anything to be ashamed of, however. When English philanthropist Sir James Silk Buckingham toured North America in the 1830s he reported that in one hour's carriage ride in Quebec City, he saw "more ... taverns and spirit shops with drunken inmates than we had witnessed in all our three years journey through the United States."¹⁹ Of Toronto, Buckingham said: "Absolute drunkenness ... abounds to a greater extent in Toronto than in any town of the same size in America."²⁰

Though public drunkenness was common in the first half of the 19th century, drunks were rarely thrown in jail. When they were, they encountered a pleasant and unexpected surprise. Many jailors were licensed to sell alcohol.²¹ A drunken prisoner need not even have left his cell to keep his buzz going.

The importance of alcohol to daily life reached the highest levels of Canadian society. An 1838 committee report in the Nova Scotia Legislature found that the judiciary included a number of "ruddy complexioned gentlemen", a polite euphemism for alcoholics.²²

Politicians were no different. When the Parliament of Upper Canada sat for the first time in 1792, it held its proceedings in a tavern at Niagara-on-the-Lake.²³ Not the only time, perhaps, that parliamentary debates resembled an evening at the pub.

Our first prime minister, Sir John A. MacDonald, was prone to trumpet his own drinking. He once famously stated during an election campaign: "I know enough of the feeling of this meeting to know that you would rather have John A. MacDonald drunk than George Brown sober."²⁴ MacDonald was elected, so it seems the public agreed.

Regulation of the consumption of alcohol has a long history in Canada, beginning as early as 1648, but until the mid-19th century substantial restrictions were reserved for our First Nations.

¹⁸ Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) at 27.

¹⁹ Noel, *supra* note 13 at 15.

²⁰ *Ibid* at 125.

²¹ Heron, *supra* note 18 at 48.

²² Noel, *supra* note 13 at 41-42.

²³ Heron, *supra* note 18 at 28.

²⁴ *Ibid* at 77.

For the white population, regulations prior to the mid-19th century were common, but relatively insignificant. Licensing began in Quebec in 1648 and eventually spread to the other colonies.²⁵ From the sources I have examined, it seems, however, that police officers and magistrates devoted little time to enforcement—and still less to abstinence.

Other early laws targeted, somewhat comically, particular drinking behaviours. One decree banned drunken driving—of horse drawn carriages. Another decree in 1791 prohibited the sale of liquor to canoe-men shooting the rapids of the Ottawa River.²⁶ Yes, that great Canadian pastime—drunk canoeing—was almost drowned in its infancy!

Social attitudes toward alcohol began to change in the 1820s when temperance societies were founded across the country to promote sobriety. The backlash against alcohol was motivated by a number of factors, including the opposition of religious groups and women's organizations. Another factor was the widespread belief that alcoholism was undermining productivity. The consumption of alcohol had increased greatly during the late 18th century.

The temperance movement initially targeted these social ills in small steps. An early Montreal temperance society required its members to limit themselves to “*six* small glasses of liquor a day.”²⁷ Nevertheless, pamphlets, poems, and songs were distributed throughout the country to discourage drinking. An 1866 song was typical of the movement:

We were so happy till Father drank rum
Then all our sorrow and trouble begun
Mother grew paler, and wept ev'ry day
Baby and I were too hungry to play
Slowly they faded, and one summer's night,
Found their dear faces all silent and white.²⁸

These social pressures had some effect. By the 1850s, approximately 500,000 people had promised to abstain from alcohol.²⁹ In Quebec, there

²⁵ *Ibid* at 26.

²⁶ Alcohol Policy Network, “Milestones in Alcohol Policy”, online: Alcohol Policy Network <<http://www.apolnet.ca>>.

²⁷ Noel, *supra* note 13 at 156 [emphasis added].

²⁸ Stella (of Washington), “Father's a Drunkard and Mother is Dead” (1866) (music by EA Parkhurst), online: Public Domain Music <<http://www.pdmusic.org>>.

²⁹ Heron, *supra* note 18 at 54.

was a dramatic, albeit temporary, drop in liquor production. Between 1847 and 1850, production fell from 645,000 to 80,000 gallons.³⁰

B. The Legislation

Temperance advocates, however, quickly began to focus on legislative efforts to curtail drinking. A flurry of legislative activity followed. British Columbia passed the *Habitual Drunkards Act*,³¹ which permitted the wives of drunkards to obtain legal title to their husbands' property.³² Many provinces created interdiction lists, which criminalized the sale of alcohol to known drunkards.³³

Other restrictions were of a more amusing nature. Many provinces barred gambling, the playing of games, and most forms of entertainment from taverns.³⁴ The intent was not to ban drunken billiards—as dangerous as that pastime may be—but to make men less likely to visit the tavern. The effect of the law, however, defied its purpose: Once patrons arrived at the tavern, there was, henceforth, nothing to do but drink.

Many municipalities also passed laws barring liquor licence holders, though not drunkards, from running for public office.³⁵

Over time, the objective of the temperance movement changed from a reduction in drinking to the outright prohibition of alcohol. In response, New Brunswick enacted outright prohibition in 1855. There were far too many violators to prosecute, however, and riots ensued.

Other governments trod more carefully following New Brunswick's experience. In 1864, the Province of Canada passed the *Dunkin Act*.³⁶ The *Dunkin Act* permitted municipalities to prohibit alcohol within town limits if a majority of local voters supported the measure in a plebiscite. The Act had the political attraction of passing the buck. The Province of Canada could remain neutral on the controversial question of prohibition, while empowering voters to decide whether their town should go dry.

After Confederation, the province of Ontario implemented the *Crooks Act* in 1876, which revived the *Dunkin Act* model. Quick on its heels, the

³⁰ Noel, *supra* note 13 at 173.

³¹ *Habitual Drunkards Act*, SBC 1887, c 11.

³² See Heron, *supra* note 18 at 138.

³³ *Ibid* at 138.

³⁴ *Ibid* at 158.

³⁵ *Ibid*.

³⁶ For a discussion, see *ibid* at 159.

federal government followed with the *Canada Temperance Act*.³⁷ The *Canada Temperance Act* extended the so-called “local option” to towns across the country. If one quarter of a town’s residents signed a petition requesting prohibition, the Governor in Council would order the town to hold a binding plebiscite.

In addition, in 1883, the federal government continued its foray into the regulation of alcohol with the *McCarthy Act*. The *McCarthy Act* established federal licensing requirements for many sellers of liquor, such as saloons, ships, and wholesalers.³⁸ Licensing had traditionally been a provincial responsibility.

C. *The Courts*

It was this flurry of legislative measures to regulate, reduce and prohibit drinking that triggered many of the foundational federalism cases of the late 19th and early 20th centuries. Two important constitutional questions needed to be answered. First, which level of government—the federal or the provincial—had jurisdiction to regulate the sale, consumption, and production of alcohol? Second, should any distinction be drawn between the power to regulate alcohol and the power to prohibit it entirely? These questions would need to be answered despite an almost complete lack of precedent to guide the courts.

And the questions were challenging—both politically and legally—for several reasons.

First, as we have seen, the role of alcohol in daily life was a contentious social issue. Temperance advocates relentlessly lobbied governments to enact prohibition. On the other hand, opponents of prohibition were passionate and often violent. Author Craig Heron recounts that, in one plebiscite in Toronto in 1877, hundreds of working men surrounded the voting stations to intimidate supporters of prohibition. When the results revealed that prohibition had been rejected, 10,000 people joined in a celebratory torch-light parade.³⁹

A more comical example comes from Guelph. When residents voted down prohibition, drinkers led a parade down the streets with a float featuring Gambrinus, the Greek god of beer.⁴⁰

³⁷ RSC 1927, c 196. For a discussion, see Heron, *supra* note 18 at 160.

³⁸ *Liquor License Act*, SC 1883, c 30, s 7.

³⁹ Heron, *supra* note 18 at 160.

⁴⁰ *Ibid* at 160-61.

A second complicating factor was that there were pronounced regional differences in attitudes toward alcohol. In 1898, the Laurier government held a national plebiscite on the question of prohibition.⁴¹ This was the first nationwide plebiscite in Canadian history. A slim majority of Canadians, 51.2%, voted for prohibition. In the Maritimes, 82% of voters were in favour. In Quebec, however, 80% were opposed. Some on both sides remain proud of that result to this day.

Third, the power to regulate alcohol brought several important political advantages. Liquor fees and import duties were a significant source of revenue. Craig Heron estimates that in the 1830s, import duties on alcohol provided between one quarter and one half of the Nova Scotia government's annual revenue.⁴²

Liquor licensing also enabled a rudimentary form of social welfare.⁴³ A poor widow falls on hard times? Give her a liquor licence, for free, so she can earn a living selling alcohol.

Fourth, liquor licences were an important tool of patronage. The competing federal and provincial bills were attempts to wrest control of the liquor industry. For example, Oliver Mowat, the premier of Ontario, had included provisions in the 1876 *Crooks Act* to transfer control of liquor licensing from municipalities to the provincial government, so that he could control who received licences.⁴⁴

The final, and most significant, complication facing the courts was that the *British North America Act* was unclear on which level of government had jurisdiction over alcohol. Many provisions in sections 91 and 92 could plausibly serve as the basis for jurisdiction. The federal government could point to its "Peace, Order and Good Government" power, its s. 91(2) power over "the Regulation of Trade and Commerce" and its s. 91(27) power over the criminal law.

The provincial government could point to its 92(8) power over "Municipal Institutions", which perhaps authorized local prohibition. Section 92(9) gave the provinces jurisdiction over "Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes." Section 92(13), as we all know, gave the provinces jurisdiction over "Property and Civil Rights". And sec-

⁴¹ See "Canada: Prohibition Referendum 1898", online: Electoral Geography 2.0 <<http://www.electoralgeography.com>>.

⁴² Heron, *supra* note 18 at 24.

⁴³ Noel, *supra* note 13 at 41.

⁴⁴ *Fermented or Spirituous Liquors Act*, SO 1876, c 26, s 1.

tion 92(16) placed within provincial power “Generally all Matters of a merely local or private Nature in the Province”.

It was into this tempest of social, political, and legal cross-currents that courts waded in the 1870s. The two critical questions they faced, it will be recalled, were: Which level of government had the jurisdiction to regulate alcohol; and which level of government had the jurisdiction to prohibit alcohol in its entirety. The courts’ answers to the questions shaped the Canadian Constitution in its infancy and later traced the turns that constitutional interpretation sometimes appears to take.

The first question to reach the newly formed Supreme Court of Canada was whether the provinces could implement licensing schemes to regulate wholesalers and manufacturers of alcohol. The case was *Severn v. The Queen*.⁴⁵ Ontario had passed a statute requiring wholesalers and manufacturers to obtain licences from the province—of course, the licences came with a hefty fee. The Ontario statute was one skirmish in the long-running battle between Oliver Mowat and Sir John A. MacDonald. In a 4-2 decision, the Supreme Court struck down the Ontario statute. The majority found that manufacturers and wholesalers were involved in national trade. National trade, as opposed to the merely local activity of operating a tavern, fell within the federal government’s trade and commerce power. It is in *Severn* that we begin to see how the federal Trade and Commerce power will be distinguished from the provincial powers.

The Court rejected Ontario’s argument that its licensing scheme fell under the province’s section 92(9) power over licensing of saloons and taverns. The Court relied heavily on pre-Confederation practice. Prior to Confederation, provincial licensing regimes had been limited to retail sales, such as at taverns. There was no indication that the drafters of the *BNA Act* intended to increase provincial jurisdiction. The Court held that any ambiguity in the meaning of sections 91 and 92 should be interpreted in accordance with pre-Confederation practice.

Severn marked an initial victory for the federal government. The Supreme Court *and* the Privy Council (or “the Board”), however, would return to the issue of regulation on many occasions. The Privy Council first turned its attention to a question that had plagued the provincial high courts: which level of government had jurisdiction to enact prohibition?

Courts in three provinces had divided on the question. Courts in Ontario and Nova Scotia held that the provinces had jurisdiction to prohibit the sale of alcohol. The Nova Scotia Supreme Court found that prohibition

⁴⁵ [1878] 2 SCR 70, 1 Cart 414.

fell within 92(13)—the provincial power over property and civil rights.⁴⁶ It explained that “not only does drunkenness destroy the health and reputation, waste the property and ruin the happiness and comfort of those addicted to it, but it is the cause of most of the crimes committed in the land.”⁴⁷ The Upper Canada Court of Queen’s Bench based its conclusion on the provincial power over municipal institutions.⁴⁸

The New Brunswick Supreme Court reached the opposite conclusion. It held that the federal government had exclusive jurisdiction to enact prohibition under its trade and commerce power.⁴⁹

Five years later, in 1880, the Supreme Court of Canada agreed. In *The Queen v. Fredericton*⁵⁰ the Court held that the *Canada Temperance Act* fell squarely within the federal government’s trade and commerce power, and added two important findings unnecessary to this result.

First, the Court held that provincial governments could not prohibit the sale of alcohol because provincial prohibition would interfere with the federal government’s ability to collect import duties on alcohol, if it so chose. Second, the Court gave birth, in these terms, to the enduring doctrine of paramountcy: “[T]he right to regulate trade and commerce”, said the Court, “is not to be overridden by any local legislation in reference to any subject over which power is given to the Local Legislature.”⁵¹

The Supreme Court’s decision in *Fredericton* was not appealed to the Privy Council. Only two years later, however, the Privy Council addressed the *vires* of the *Canada Temperance Act* in *Russell v. The Queen*.⁵² The Board’s approach differed markedly from modern practice. Rather than determining whether prohibition fell under an enumerated power in *either* section 91 or 92, the Board only considered whether the power fell under section 92. If it did not, the Board reasoned that the power necessarily fell under the federal government’s peace, order, and good government power (POGG). We see here an expansive interpretation of the residual nature of the POGG clause: it covers all powers not held by the provinces.

Perhaps unsurprisingly, the Board found that the power to prohibit was not contained in section 92. It rejected the provinces’ argument that

⁴⁶ *Keefe v MacLennan* (1875), [1876] 11 NSR 5 [*Keefe*].

⁴⁷ *Ibid* at 11.

⁴⁸ *Re Slavin and Orillia*, [1875] 36 UCQB 159.

⁴⁹ *R v Justices of the Peace of the County of Kings*, [1875] 15 NBR 535.

⁵⁰ *The Queen v Fredericton (Mayor)*, [1880] 3 SCR 505, 2 Cart 27 [cited to SCR].

⁵¹ *Ibid* at 540-41.

⁵² [1882] 7 App Cas 829, 8 CRAC 502 [cited to App Cas].

the provincial power to raise revenue through retail licensing extended to prohibition. Prohibition could not fall under the power to raise revenue because prohibition, by definition, foreclosed the possibility of licences. The Privy Council also rejected the argument that prohibition fell under the provincial power to regulate property and civil rights. Prohibition is not “a matter in relation to property and its rights, but one relating to public order and safety.”⁵³ Notice that the Nova Scotia Supreme Court had also characterized prohibition as matter of order and safety, but had used that very characterization to find provincial jurisdiction—the opposite conclusion.⁵⁴

The Board also rejected the argument that the *Canada Temperance Act* fell within the provincial power over matters of a local nature. Although the *Act* empowered local prohibition, the *Act* applied to communities across the country. Prohibition was also a national evil. The Privy Council’s interpretation radically narrowed the provinces’ power over local matters: Any federal statutes with national reach would be shielded from the provinces’ power under section 92(16) of the *BNA Act* to legislate in relation to “Matters of a purely local or private Nature in the Province”.

Les décisions de la Cour suprême dans *Severn et Fredericton*, et celle du Conseil privé dans *Russell*, ont constitué des victoires décisives pour le gouvernement fédéral, qui jouissait désormais d’une compétence exclusive pour réglementer la fabrication et la vente en gros de l’alcool, et aussi pour instituer la prohibition. En outre, le pouvoir du gouvernement fédéral en matière de « paix, ordre et bon gouvernement » avait été interprété de manière large, tandis que celui des provinces à l’égard des « matières d’une nature locale » avait été grandement restreint.

To widespread surprise, however, the law took a u-turn, and the Privy Council issued a series of decisions scaling back federal power. The first was *Hodge v. The Queen*.⁵⁵ In *Hodge*, a tavern owner had been convicted of operating a billiards table in his tavern. The law in question was one of many intended to make taverns less attractive places for socializing. The owner challenged his conviction on the ground that the regulation fell outside provincial jurisdiction.

The Privy Council rejected his claim by introducing the double aspect doctrine. “[S]ubjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect.

⁵³ *Ibid* at 838-39.

⁵⁴ See *Keefe*, *supra* 46 at 10-12.

⁵⁵ (1883), [1883-1884] 9 App Cas 117, 9 CRAC 13 [cited to App Cas].

91.”⁵⁶ The Board found that although the billiards prohibition was related to trade and commerce, its primary purpose was maintaining local order. The regulation thus fell within provincial jurisdiction.

Hodge also addressed a second issue. The Board laid to rest concerns that the provincial legislatures were not fully sovereign within their legislative spheres. The provinces, said the Board, had “authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.”⁵⁷

Hodge thus expanded the scope of provincial jurisdiction *and* defined the nature of that jurisdiction.

The federal government was dealt another defeat in the *McCarthy Act Reference*.⁵⁸ The *McCarthy Act*, as I mentioned earlier, was Sir John A. MacDonald’s attempt to wrest control of liquor licensing from the provincial governments—in particular, Oliver Mowat’s government in Ontario. Both the Supreme Court and Privy Council struck down the *Act*, without deigning to give reasons. Together, *Hodge* and the *McCarthy Act Reference* made clear that that the provinces had exclusive jurisdiction to regulate the local sale of alcohol.

The provincial governments soon completed a trifecta of victories. In the *Local Prohibition Reference*,⁵⁹ the Privy Council had to decide whether provincial governments had jurisdiction to enact prohibition. In dispute were the many provincial statutes that empowered towns to prohibit the sale of alcohol. This issue, of course, was nearly identical to the issue in *Russell*. There, the Privy Council considered whether the federal government had jurisdiction to enact prohibition—and found that it did. Moreover, the Board had grounded federal jurisdiction on its finding that section 92 did not grant the provinces the jurisdiction to prohibit the sale of alcohol. Surely, the Board could not now find that the provincial governments had jurisdiction?

Well, the Privy Council in fact did exactly that. The Board held that both the provincial and federal governments had concurrent jurisdiction to enact prohibition schemes. The *Local Prohibition Reference* is one of the earliest judicial decisions granting both the federal and provincial governments power to legislate in relation to the same matters.

⁵⁶ *Ibid* at 130.

⁵⁷ *Ibid* at 132.

⁵⁸ Unreported. For a discussion, see Risk, *supra* note 4 at 715-21.

⁵⁹ *Supra* note 5.

There are several important points raised in the Reference, although the reasoning at times prompts some head scratching. First, the Privy Council found that the provinces could prohibit the sale of alcohol within their borders under *either* their property and civil rights power or their power over matters of a local nature. Oddly, however, the Board held that it could not fall under both—and refused to say which of the two powers applied!

Second, the Board limited the trade and commerce power. The trade and commerce power granted the federal government the power to regulate, but not the power to prohibit. Thus, the federal government would have to ground its jurisdiction to prohibit in the peace, order and good government clause.

Third, the Privy Council defined the peace, order and good government power. This power granted the federal government jurisdiction over matters of “national concern”. A matter was of national concern if it was “unquestionably of Canadian interest and importance” and did not “trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.”⁶⁰

This “national concern” test would seem to suggest that the peace, order and good government power could not form the basis of federal jurisdiction, since the Board had already found that section 92 granted the provinces the power to prohibit. Nevertheless, the Board found, *again without explanation*, that the federal government did have the power to enact prohibition laws under the peace, order and good government clause!

Fourth and finally, the Board embraced the principle of paramountcy. Any provincial prohibition statute that came into conflict with the federal prohibition statute would be rendered inoperative. Of course, that led to the following question: Were the federal and provincial statutes necessarily in conflict? The Board found that they were not. Each prohibition regime was triggered in a town only by a majority plebiscite vote. Until a majority vote, neither statute was in conflict with the other. Once a town triggered the federal regime, however, the principle of paramountcy rendered the provincial scheme inoperative in that town.

The *Local Prohibition Reference* was followed by a series of liquor cases that affirmed provincial rights. In *Manitoba License Holders*⁶¹ and *Nat Bell Liquors*⁶² the Board upheld provincial prohibitions on the sale of al-

⁶⁰ *Ibid* at 360.

⁶¹ *Supra* note 6.

⁶² *Supra* note 8.

cohol in Manitoba and Alberta, even though the laws reduced the national demand for imported liquor—and thus decreased the import duties the federal government collected. The key to the constitutionality of both statutes was that they only applied to intra-provincial sales of alcohol. They expressly did not prohibit interprovincial or international transactions in alcohol.

Thus the Board attributed jurisdiction over *intra*-provincial sales to the provinces, and jurisdiction over *inter*-provincial sales to Parliament. Despite its unrestricted wording, the federal trade and commerce power had been limited to a power over only interprovincial trade and commerce. Ironically, during this period in the United States, the narrower federal power over “interstate commerce” had effectively expanded into a power over *all* trade and commerce.

All of these cases set the stage for the great legal denouement of the period: the 1946 case, *Canada Temperance Federation*.⁶³ For the third time, the Judicial Committee of the Privy Council considered which level of government had jurisdiction to prohibit alcohol. In *Russell*, it had held that the federal government had exclusive jurisdiction to prohibit. In the *Local Prohibition Reference*, it had held that both the federal and provincial had concurrent jurisdiction. Now, the Board considered whether to scale back federal jurisdiction even further. At issue, once again, was the *Canada Temperance Act*. The Canada Temperance Federation challenged the *Act* on the grounds that there was no enumerated power that supported federal jurisdiction. It expressly asked the Board to overturn *Russell* and the *Local Prohibition Reference* by declaring that only the provinces had the jurisdiction to prohibit alcohol.

The Board disagreed and reaffirmed that both the federal and provincial governments had concurrent jurisdiction. Two elements of the Board’s reasoning are of prime importance. First, it developed the modern formulation of the “national concern” branch of the peace, order and good government power. “The true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole”⁶⁴ then it will fall within the peace, order and good government power.

The second issue was whether this national concern branch justified federal jurisdiction over alcohol. This was an important but by no means an easy question. Yet surprisingly, the Board held that it need not answer

⁶³ *Supra* note 7.

⁶⁴ *Ibid* at 205.

it. *Russell* had already decided 60 years earlier that prohibition was a matter of national concern. For the Board, the decision was “firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it”.⁶⁵ Thus, the great question of prohibition essentially ended in a tie: concurrent jurisdiction.

After *Canada Temperance Federation*, liquor cases continued reaching the courts for several decades. For example: the 1980 case, *Labatt Brewing Co. v. Canada*,⁶⁶ where the Supreme Court held that the federal government did not have jurisdiction to prescribe standards for “light” beers. To discuss all of these cases today would be an imposition on your constitution and mine. I should note, however, that I am open to returning regularly to McGill to discuss the effect of other intoxicating substances on the constitution. Marijuana perhaps? LSD? There is a lot of material to work with.

II. One of F. R. Scott’s Legacies: *Roncarelli*

Any history of the liquor cases, however, would be incomplete without a brief discussion of the most famous liquor case of all—and the role that F. R. Scott played in it.

En 1947, le premier ministre du Québec Maurice Duplessis a ordonné à la Commission des liqueurs provinciale de retirer au restaurateur Frank Roncarelli son permis de vente de spiritueux, apparemment pour le punir de son appui aux Témoins de Jéhovah. Le gouvernement Duplessis avait lancé une campagne d’envergure provinciale contre les Témoins, à qui il reprochait de remettre en question les enseignements traditionnels du christianisme. Des milliers de personnes avaient été arrêtées pour le simple fait d’avoir distribué des brochures sans permis. Roncarelli, lui-même un Témoin de Jéhovah, s’était porté caution pour plus de 390 coreligionnaires qui avaient été arrêtés. Le premier ministre Duplessis a ordonné l’annulation du permis de vente de spiritueux de Roncarelli dans le but de punir ce dernier et de provoquer la ruine de son restaurant, afin qu’il n’ait plus les moyens de se porter caution.

Roncarelli sued Duplessis, and the case reached the Supreme Court.⁶⁷ A recent issue of the *McGill Law Journal* has a wonderful collection of essays on the legacy of the Court’s decision in that case.⁶⁸ In a characteristic act of courage, F. R. Scott represented Roncarelli, assisted by A. L. Stein,

⁶⁵ *Ibid* at 206.

⁶⁶ *Labatt Brewing Co v Canada (AG)* (1979), [1980] 1 SCR 914, 110 DLR (3d) 594.

⁶⁷ See *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2nd) 689 [*Roncarelli* cited to SCR].

⁶⁸ (2009) 55:3 McGill LJ.

an experienced trial lawyer and tenacious cross-examiner. I say courage for three reasons. First, representing Roncarelli required standing up to the most powerful premier in Quebec history. Second, it also meant publicly defending a Jehovah's Witness at a time when the religion was reviled in Quebec. Neither professional peril nor personal sacrifice could deter Frank Scott from his own personal engagement in a just cause. Third, Duplessis's decision to revoke Roncarelli's licence was par for the course in Canadian politics. Since their inception, liquor licences had been used as patronage tools to reward supporters and punish opponents. As we have seen, it was precisely for this reason that the jurisdictional debates over liquor regulation were so important. In representing Roncarelli, Frank Scott disregarded decades of practice and convention.

Frank Scott's brilliant advocacy won a historic judgment that few others could have achieved. The Supreme Court agreed with Roncarelli and issued a seminal endorsement of the rule of law: "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion.'"⁶⁹ The Court continued: "what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*?"⁷⁰ It may be that no lawyer other than F. R. Scott could have obtained such a historic judgment.

Roncarelli v. Duplessis signals the progression in the liquor cases, from matters dealing with jurisdiction to matters dealing with human rights. In recent decades, we have seen dozens of key criminal cases involving liquor. The intoxication defence; searches and breathalysers; the question of consent. Even the right to counsel owes its—dare I say—constitutional maturity to alcohol. In *R. v. Therens*,⁷¹ the Supreme Court held that a defendant is entitled to be informed of his right to counsel under section 10(b) of the *Charter* when instructed to accompany an officer to a police station for a breathalyser test. *Therens* stands as a foundational case on the definition of detention and the scope of the rights of the accused.

Conclusion

That concludes our brief tour of alcohol and its impact on the Canadian constitution. What can we take away from the liquor cases we have discussed today? In my view, at least three things.

⁶⁹ *Roncarelli*, *supra* note 67 at 140, Rand J.

⁷⁰ *Ibid* at 141.

⁷¹ *R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655.

First, we see the constitutional legacy that the liquor cases have left. It is in these cases that we are introduced to paramountcy, double aspect doctrine, concurrent jurisdiction, and the reach of “Peace, Order, and Good Government”, “local matters”, “trade and commerce” and “property and civil rights”. And of course, the limits on governmental discretion.

Second, from these cases we see the u-turns, pauses, and dead ends that inevitably arise during the interpretation of constitutional questions of first impression. The courts are perhaps not the first to have had difficulty walking in a straight line after encountering alcohol. While much of the reasoning in these cases has been abandoned, by the time we reach the *Local Prohibition Reference*, the final results bear resemblance to modern law.

Third, we see courts responding to, and grappling with, the social and political pressures of the time. The liquor cases frequently turn on the courts’ characterization of alcohol as a national evil, a local evil, a matter of order and safety, or merely a good to be traded in commerce. Resolving that question inevitably drew the courts into the passionate social debates of the late 19th century. Similarly, we see the courts responding to the intense jurisdictional fight between the federal and provincial governments. It is perhaps not surprising that the Privy Council come down right in the middle in the *Local Prohibition Reference*—concurrent jurisdiction for all.

The challenge, of course, was that courts needed to grapple with these social and political pressures *while* simultaneously addressing foundational issues of constitutional law, such as paramountcy and double aspects. Would our constitutional law have developed differently if it had been some other, less socially divisive, issue that had prompted early interpretation of our constitution?

I am uncertain of the answer, but I can say with confidence that alcohol has had a marked and lingering effect on Canada’s constitutional development.

And I can say with confidence as well that my account to Frank Scott for “one poem” was sent to the wrong address. I should have sent it to the poem, not the poet, as Frank himself explained:

“POEM TALKING TO POET”

*“Write me a poem,” you said.
So I sat by the window, minding my business.*

*After a little you asked,
“Will it be modern and free?”*

*“I cannot tell you before hand,” I answered.
“I am not master here.”*

I watched the trees carve nightmares in the night,

Heard dusty winds borrow the sound of tears.

*[Then it came, and so it was,
And Lo! There it was!]*

*"Here is your poem," I said.
"I do not think it will live long."*

*You sighed, then trembled on my fingertips,
Being yourself the writing on the page.*
