

## INTRODUCTION

Born in Moncton, New Brunswick on 27 April 1884, Ivan Cleveland Rand died in London, Ontario on 2 January 1969. His life spanned both Great Wars of the twentieth century as well as the Korean and Viet Nam wars. His father, Nelson Rand, a labour activist, worked as a mechanic with the Intercolonial Railway in Moncton. Rand worked there as an audit clerk for five years before attending Mount Allison University, from which he graduated in 1909 at the age of twenty-five. Then it was on to Harvard Law School and graduation with a LL.B. in 1912. Though called to the Bar of New Brunswick, it was to western Canada – Medicine Hat, Alberta – that he was drawn to commence his legal practice. It was also the place of his first marital home with his bride, Iredell (Baxter) and where they started their family. Seven years later, they returned to Moncton and he established his legal practice with Clifford Robinson, who had served as Premier of the province for not quite one year in 1907-08. Rand had his own political experience in 1924-1925 when he held brief tenure as an elected member of the provincial Legislative Assembly and as Attorney General in the government of the first Acadian premier, Peter J. Veniot. In 1926, he became corporate counsel to Canadian National Railways, building a solid reputation in the law which led eventually to appointment to the Supreme Court of Canada on 22 April 1943. Upon mandatory retirement in 1959, Ivan Rand became the founding dean at the Faculty of Law, University of Western Ontario, in London, Ontario.

A law student at age 25; a practising lawyer at 28; his country at war at 30, when he was too old for military service; Attorney General at 40; corporate counsel at 42; Supreme Court of Canada justice at 58; law dean at 75. His was a public life for a private man who, at times, appeared austere. The essays in this volume reflect on his method and legacy as a judge. For more about Ivan Rand the man and his career, see William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2009).

This collection of articles begins with personal reflections by Ivan Rand's New Brunswick successor as a justice of the Supreme Court of Canada, Gérard V. La Forest. He recounts the man he knew and comments on William Kaplan's biography of Justice Rand.

The second contribution is by Ivan Rand himself. In 1965, he delivered a series of lectures at the Faculty of Law, University of New Brunswick. In one, he addressed the development and role of the Supreme Court of Canada. What is presented is an edited transcription of his lecture as delivered on that day. Though similar, it is not the version published as "The Role of the Supreme Court in Society" (1991), 40 *University of New Brunswick Law Journal* 173. Then a former dean, Ivan Rand reviewed development of courts and the meaning of justice from Saxon and Norman times to the Supreme Court of Canada. He explained meanings of the

expression “common law’ and the customs which informed that legal system. Rand detailed the initial debates and concerns about the legislation establishing the Supreme Court of Canada, which Parliament enacted in 1875, and his concern that the Judicial Committee of the Privy Council had interpreted the *Constitution Act, 1867*, not as jurists but as ‘imperial judges’ concerned with ‘creation of an empire’.

Ian Holloway, dean at the Faculty of Law, University of Western Ontario, focuses on Ivan Rand’s contribution to legal education, both as judge and as founding dean of that Faculty. Dean Holloway recounts Rand’s early life and his time at Harvard Law School, documented in part, by access to Rand’s Harvard notebooks. From Rand’s 1909 Valedictory Address at Mount Allison University, Holloway finds “duty’ to be the “watchword” in his legal career, a value he regarded in others and instilled in law students at U.W.O. On the role of university-based legal education, Holloway considers the Rand approach to be “utilitarian”, that “university law schools should exist to train better lawyers”. This led Rand to question the value of moot courts and mock trials in legal education but, as dean, he expressed great pleasure and pride in the accomplishments of U.W.O. law students in such endeavours. For Rand, legal training was not directed at the business of legal practice, a black-letter law approach, but at the education of the whole person who would play a crucial role in the maintenance of constitutional democracy and respect for the rule of law.

Four contributors then consider broader themes in the Rand jurisprudence and method. These include his approach to constitutionalism and statutory interpretation, his decided inclination to the common law method over legal formalism, and his principled approach to issues of civil liberties and the dialectics driving the law’s evolution.

Jonathan Penney, Senior Research Fellow and Lecturer, Victoria University in New Zealand, writes of Justice Rand invoking ancient constitutionalism, as exemplified particularly in the famous Jehovah Witnesses cases of the 1950s. To Penney, Justice Rand was not a proponent of natural law; rather, he grounded himself historically in the rights of “Englishmen”. Discussing the implied Bill of Rights cases, he relies in part on a letter written by then Dean Rand in 1962: that, indeed, Parliament and provincial legislatures were constrained by an implied Bill of Rights which he linked to the ancient constitutionalism associated with parliamentary democracy. Penney draws a clear distinction between Rand’s conception of these ancient rights and the civil rights created by positive law; the former were beyond legislative repeal.

David Mullan, professor emeritus at Queen’s University, Faculty of Law, considers the distinction between unwritten and underlying constitutional principles in Justice Rand’s support for the implied Bill of Rights theory and subsequent application of such principles in the more recent *Provincial Court Judges Reference* (1997) and in the *Quebec Secession Reference* (1998). In particular, Mullan focuses attention on

the extent to which Justice Rand would consider implicit constitutional principles to constrain the exercise of legislative jurisdiction by Parliament and the provincial legislatures. He reviews the highs and lows in the acceptance of the implied Bill of Rights approach and notes that it was never accepted by a majority of the Supreme Court of Canada during Rand's tenure on the Court. It was directed at the principle of parliamentary democracy, rather than as a protection of individual rights and freedoms in general. When, in the 1980s and 1990s, the Court expressed support for this approach it did so after adoption of the *Canadian Charter of Rights and Freedoms* (1982). In the course of his essay, Mullan considers what is meant by the "constitution of Canada".

Ian Bushnell, retired professor at the Faculty of Law, University of Windsor, credits Justice Rand with a return to the traditional common law method of judging, away from the letter of the law applied in a strict or literal sense, to consideration of its underlying contextual purpose. The second half of the nineteenth century favoured formalism, which extolled the virtues of technical knowledge of rules or maxims of interpretation, urging that judges do not make the law. Formalists invoked William Blackstone's declaratory theory of law to support their cause. Bushnell reviews the twists and turns in the struggles between common law method and formalism in the early days of the Supreme Court of Canada and in its relationship with the Judicial Committee of the Privy Council. In Canada prior to 1950, formalism enjoyed the ascendancy. When, in the 1990s, the Supreme Court of Canada repudiated formalism in favour of a "contextual" approach to interpretation it effectively meant a return to the jurisprudence of Justice Rand.

Randal N. M. Graham, of the Faculty of Law, University of Western Ontario, extends analysis of Justice Rand's approach to statutory interpretation and to the impact of interpretive theory on his jurisprudence. Graham identifies the Rand approach as reflecting a personal strand of originalist construction, which he labels "historical evolution" involving two distinct steps: consideration of the socio-legal climate at the time of enactment, and analysis of the "textual history" of the statutory language. Graham illustrates the Rand approach in specific Supreme Court of Canada decisions and concludes that the major portion of the Rand interpretive jurisprudence produced progressive results. He finds that "Rand consistently interpreted legislation in a way that minimized state powers and expanded civil liberty", though all the while grounding himself in legislative intention. Graham exemplifies the essential differences between originalist and progressive interpretations by presenting gun-control and gun-enthusiast versions of the right to bear arms in United States constitutional law. He concludes with a discussion of the significance of differing interpretive theories as applied to the Rand jurisprudence.

The next six papers assess Justice Rand's contribution to specific areas of law: conflicts, family, labour, commercial, insurance and torts.

John P. McEvoy, of the Faculty of Law, University of New Brunswick, discloses that Ivan Rand could not help but be exposed to Conflict of Laws (Private International Law) while studying at Harvard, even though he did not take the third year Conflicts course offered by Joseph H. Beale. McEvoy presents the Rand Conflicts jurisprudence in relation to several topics: jurisdiction to adjudicate, characterization, public policy, choice of law, and recognition and enforcement of foreign judgments. In these areas, Justice Rand generally wrote separate reasons for decision which, at times, did not attract the concurrence of another member of the Court. While the majority tended simply to follow English precedents, Justice Rand used the technical language of Conflict of Laws more than they did. He also focused on the underlying reasoning for an applicable principle. Though not an overly significant contribution to the development of a Canadian approach to Conflict of Laws, the Rand jurisprudence reflected his independent voice.

Lorna Turnbull, of the Faculty of Law, University of Manitoba, reviews the Rand family law jurisprudence. She concludes that the conservative approach found in these cases is in sharp contrast to his creative approach in constitutional law. She criticises the Rand jurisprudence as deferential to precedent and the male-centred assumptions that then informed family law. An area of progressive thinking is identified in matters of custody, where Justice Rand applied a more modern approach by favouring an award of custody to an unwed birth mother over a married couple, at a time when family stability and conformity were differently defined.

Debra Parkes, of the Faculty of Law, University of Manitoba, revisits the “Rand formula” in light of *Charter* jurisprudence on freedom of association in the labour union context. The Rand formula addressed the “free-loader” problem, by requiring those who benefit from union negotiated terms and conditions of work to support the union by paying union dues, regardless of membership status in the union. Parkes finds that the separation of union dues and union membership has proved an important contribution to the jurisprudence on the positive freedom of association and the negative freedom not to associate, though much judicial analysis has been directed at unions as mini-democracies. Looking to the future, Parkes sees the Rand formula being challenged by the contemporary trend to a more conservative and individualistic conception of labour relations.

Thomas Telfer, of the Faculty of Law, University of Western Ontario, directs attention to Justice Rand’s jurisprudential contribution to commercial law. Recognising that the development of personal property security legislation has relegated such concepts as conditional sales and chattel mortgages to historical curiosities, Telfer narrows the scope of commercial law to the law of contracts and of bankruptcy. Telfer draws attention to Justice Rand’s enduring contribution to contract law in the principle that favours a bilateral agreement over an offer of a unilateral contract. In relation to bankruptcy, Telfer examines Justice Rand’s positive contribution to the issue of priorities in the context of unpaid employees and to the very purpose of bankruptcy

legislation in terms of the discharge of a bankrupt. Telfer finds these contributions to be significant.

Richard W. Bird, retired professor at the Faculty of Law, University of New Brunswick, asks whether Justice Rand's significant contribution to civil rights is mirrored in his insurance jurisprudence. His answer is 'no'. Rand's insurance jurisprudence is conservative in approach, with little evidence of the judicial activism so revered in relation to civil rights. Bird concludes that Justice Rand generally kept to the express words of an insurance policy and respected the autonomy of the parties in relation to freedom of contract. Bird quotes from a lecture given by Justice Rand in the 1960s in which he extolled as one virtue of the common law that "it places upon the individual the duty of protecting his own rights."

Edward Veitch, retired professor at the Faculty of Law, University of New Brunswick, directs attention to a single but famous case, *Cook v. Lewis* (1951). Justice Rand held that the onus of proof shifted to the defendants to exculpate themselves when an injured plaintiff proves liability in one or both of them when engaged in a common endeavour, in this case, hunting. Veitch reviews the judicial and academic reactions to the decision in the broader common law world. He considers that *Cook v. Lewis* reflected a more mature Supreme Court of Canada, free to develop the common law without the controlling influence of the Judicial Committee of the Privy Council from far-away London. Rand's decision foresaw liability attaching to other inherently dangerous activities, the development of liability due to destruction of the plaintiff's proof, and, for some, a duty to warn.

DeLloyd J. Guth, of the Faculty of Law, University of Manitoba, contributes the final article in this collection. He examines a series of Rand's judgments to show consistent citation to historical authorities, both legal and literary. His method was rooted in textualism, historicism, intellectualism and transcendentalism. This required respective rejection of legal formalism, presentism, pragmatism and positivism. Rand's commitment to civil liberties, constitutionalism and equality came from his "historical sense of the law", as each article in this volume clearly exemplifies.

During the lengthy development of this collection we have had admirable cooperation and patience from our contributors and have extended the same to those who originally agreed but eventually found themselves unable to do so. We owe a debt of gratitude to respective staff in each law faculty who gave of their skills in this *hommage* to a great jurist: Sue Law at Winnipeg greatly assisted DeLloyd Guth with his efforts. We express appreciation to the editors and staffs of the two law journals for accommodating this co-publication and giving their support. The deans of our respective law faculties, as well as Ian Holloway (Western Ontario), helped to make this a tripartite project.

We decided to pioneer this “book” as special issues of our respective law school journals in order to enhance quality-control, hard-copy and electronic distribution at minimal costs, a collegial cooperation between our two faculties, and the mutual intellectual interests of our students in Winnipeg and Fredericton. Financial support for this project has been generously provided by the New Brunswick Law Foundation, the Supreme Court of Canada Historical Series, and our two law faculties. Over time, a number of student researchers have been employed for footnote checking, proof-reading and assisting authors in the preparation of each article. They remain anonymous here, to avoid errors of omission but are known gratefully to each author.

We dedicate this collection to the legal legacy of Ivan Cleveland Rand and we offer it to the Supreme Court of Canada as a proud part of its collegial memory.

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