

JUSTICE IVAN RAND AND THE ROLE OF A JUDGE IN THE NATION'S HIGHEST COURT

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INTRODUCTION

What is the proper role for the judiciary in the governance of a country? This must be the most fundamental question when the work of judges is examined. It is a constitutional question. Naturally, the judicial role or, more specifically, the method of judicial decision-making, critically affects how lawyers function before the courts, *i.e.*, what should be the content of the legal argument? What facts are needed? At an even more basic level, it affects the education that lawyers should experience.

The present focus of attention is Ivan Cleveland Rand, a justice of the Supreme Court of Canada from 1943 until 1959 and widely reputed to be one of the greatest judges on that Court. His reputation is generally based on his method of decision-making, a method said to have been missing in the work of other judges of his time.

The Rand legal method, based on his view of the judicial function, placed him in illustrious company. His work exemplified the traditional common law approach as seen in the works of classic writers and judges such as Sir Edward Coke, Sir Matthew Hale, Sir William Blackstone, and Lord Mansfield. And he was in company with modern jurists whose names command respect, Oliver Wendell Holmes, Jr., and Benjamin Cardozo, as well as a law professor of Rand at Harvard, Roscoe Pound. In his judicial decisions, addresses and other writings, he kept no secrets about his approach and his view of the judicial role. He paraded both for all to see and he actively advocated them

There is, however, a problem the existence of which creates somewhat of a mystery. The common law method existed for centuries, indeed since time immemorial

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as the theory went; but in the nineteenth century it came under attack and was largely superseded as the appropriate legal method by the end of that century. In Canada, to a far greater degree than in the United States or even England, the approach of Coke, Hale, Blackstone, and Mansfield became illegitimate half a century before Ivan Rand's appointment to the bench.

Without a significant academic tradition, the Canadian legal profession of the late nineteenth century did not sustain a knowledge of the past. In England, with its strong practice tradition, the common law method survived in the technical lore of the legal profession; in the United States, jurists such as Holmes, Cardozo, and Pound gave the common law method a constant presence at the highest level of the legal system, just when the legal profession generally abandoned it. So, while the traditional common law method hardly survived in Canada, Ivan Cleveland Rand, a Harvard educated lawyer, eagerly read Blackstone.¹

The methodology that gained acceptance within the legal profession in the second half of the nineteenth century, and which laid claim to being "legal reasoning" to the exclusion of any other approach, is generally known today as "formalism".

CONSTITUTIONAL CHANGE

In 1990, Justice Beverley McLachlin (as she then was) clearly signalled a shift in direction when, for the Court, she called for judges (and lawyers) to adopt "a more flexible approach" and for decisions to be "rooted in the principle and policy underlying the... rule."² In 1995, Justice Peter Cory, for the Court, declared that the judiciary had the jurisdiction to modify or extend the common law in order to comply with prevailing social conditions and values.³ Three years later, speaking for a sizeable majority of the Court, he decried the taking of a "formalistic or legalistic approach" rather than a "case-by-case consideration" in decision-making in the legal system.⁴ These pronouncements inaugurated a new period in which Canada's highest court repudiated the model of decision-making known as "formalism" and returned the role of the judge to that which existed at common law.

¹ E. M. Pollock, "Ivan Rand: The Talent is the Call" (1980) 17 *University of Western Ontario Law Review* 115, at 121, 134. It was said that Rand read and re-read and memorized "a goodly portion" of Sir William Blackstone, *Commentaries on the Laws of England* (1795), 12th ed. in 4 volumes.

² *Khan v. The Queen*, [1990] 2 S.C.R. 531.

³ *Manning and Church of Scientology of Toronto v. Hill*, [1995] 2 S.C.R. 1130.

⁴ *Hodgson v. The Queen*, [1998] 2 S.C.R. 449. Chief Justice Lamer, along with Justices Gonthier, McLachlin, Iacobucci, Major and Binnie concurred.

Under formalism, legal expertise consisted in technical knowledge of rules. It was the age of the lawyer as a ‘rule mechanic’ and any deviation from that model was rejected as unprofessional. Any other approach to decision-making was “political” in nature and not suitable for the legal system. Under the formal model, the appropriate credentials for a judge required a technical knowledge of legal rules and impartiality in their application to a dispute, with impartiality understood as the judge not having a personal bias, either for or against any of the parties involved in the dispute, and a lack of any interest in the outcome of the particular matter being adjudicated.

The change, constitutional in nature, that emanated from the Court continues to be met today with resistance within the profession because of the hold that formalism acquired on the mind-set of Canadian lawyers. The formal model had acquired status as a fundamental belief about law and how to think like a lawyer. It had been unchallenged by critical academic analysis of any significance in Canada. The phrase “principled approach” was used to distinguish this changed model of judicial decision-making from formalism though, beginning in the 1970s, the term “contextualism” also gained a certain currency to identify the “new” method. But, was it a new method? The Canadian legal profession had experienced the “principled approach” before, in the work of Ivan Rand!

WHAT WAS LEGAL FORMALISM?

As a model of judicial decision-making, formalism developed in the nineteenth century, to resolve disputes within the legal system by application of fixed principles or rules to facts. The principles and rules were identifiable as “fixed” because they were found in sources deemed authoritative (the standard query with respect to the source of a rule or principle is: “is it an authority?”) and the prime source of such “fixed” principles was a previous decision by a judge; that is, a precedent. The authority of the earlier case, “fixed” by the doctrine of *stare decisis*, bound judges by principles or rules of law articulated in past decisions, with the result that changes could only be undertaken by the legislature, *i.e.*, political process and not by the judiciary. This doctrine was not adopted to achieve predictability and fairness of treatment for litigants but as a principle of constitutional law reflecting the prevailing view that judges did not have a creative role regarding the law; creativity was the job for politicians. *Stare decisis* developed in the middle of the nineteenth century and was declared to be settled by the end of that century.

Formalism required a lawyer to distill a “*ratio decidendi*” from the reasons for decision of a judge in a case. The *ratio* has been understood over the years to mean a number of things, but its essence was the construction of a rule from a case and the case becoming the authority for that rule. With time, more and more such rules were created and they governed the technocratic practice of law, along with the rules created by legislation.

The finding of “an authority” gave the appearance that a judge simply “found” the law and did not “make it”. If the law as “found” needed reform in order to respond to new social conditions, a formalist declared such a change to be the responsibility of the political system through legislative amendment. A judgment written by a formalist displayed a search for the right form of words to express a principle or rule and not a discussion of the problem as it existed in society and a proposed solution to fulfill social needs. Once the rule was found, it then led to a result good or bad for society and just or unjust for a particular litigant. A formalist judge had no other choice to make.

Formalists found support for their approach in what is known as the declaratory theory of law, reflected in the eighteenth century work of William Blackstone. He presented law as a complete body of rules existing from time immemorial and unchangeable, except to the limited extent that legislatures could change the rules by enacting statutes.⁵ Later in this essay, I will examine whether lawyers who promoted formalism and the consequent creation of a technocracy were disingenuous and deliberately distorted Blackstone’s method, or whether they actually misunderstood the theory. Whatever the reality, the literal use of this theory permitted formalism to project the claim of value neutral decision-making.⁶ Judges found existing principles or rules in the *ratio decidendi* of previous cases and had no choice but to follow these rules or principles. Policy considerations (social values) were not to enter the picture. The development of the formalist model, armed with the declaratory theory, proceeded into the twentieth century.

A crucial aspect of formalism is that the fixed principles are general propositions and are not fact specific. To engage the general rules, only certain facts (viewed as socially crucial) are significant. With certain values accepted as indisputable, deviations are not identified as social behaviour worthy of recognition by the law.⁷ Judges are not to undertake a detailed examination of the particular facts of a case but merely to identify certain key facts to produce a quick and certain result as governed by the controlling principles.

Formalism thus provides judges with the appearance of objectivity; the legal process is seen as separate from the political process in which policy is discussed and a socially acceptable solution reached. The knowledge possessed by a lawyer or a judge within the legal system is characterised as “technical knowledge” because rules of law are viewed in the same way that one sees the rules of a technical trade. The growth of formalism as a model had a certain attraction for lawyers because one could

⁵ Blackstone, *supra* note 1, at 70.

⁶ J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1961) at 6-7.

⁷ Absolutism in social values was accepted in the nineteenth century. This can be seen in the classic work of J. S. Mill, *On Liberty* (New York : Norton, 1975) written in 1859, in which he criticised social values being taken for granted and called for conformity in behaviour.

speak of a “legal” point of view as opposed to a moral or political point of view; there was also “legal” reasoning, and a “legal” question. The formal model offered the legal profession a distinct identity; and the requirement of “legal” knowledge of a technical nature gave lawyers an expertise that was exclusive; it acted as a barrier to those who lacked the technical training necessary to discuss the law and decision-making of lawyers and judges. Such an approach naturally meant that technical training, as opposed to scholarly study, was all that one needed. As a result, on the job training in a law office was the educational norm in Canada until the middle of the twentieth century. The existence of statute law (as opposed to judge-made common law) grew, in part, as a result of the growing acceptance of the doctrine of *stare decisis*. Statutes eliminated the need for judges to search for the appropriate rule. It was presented in the relevant statute. In order to maintain the appearance of objectivity and impartiality, formalism required that judges be concerned only with the “plain meaning” of a statute. The words were so controlling that judges could announce that they were not responsible for the social consequences of their decisions – they merely applied the law; that is, the words. The “plain meaning” approach, better described as the literal approach, denied that a judge should “interpret” language (that is, give meaning to words); rather, the language offered its literal meaning.

As with other aspects of formalism, the so-called “plain meaning rule” (“literal rule”) became an imperative legal doctrine during the nineteenth century.⁸ The formal model projected the idea that there was a single correct answer to a legal problem because there was a “correct” meaning for the words of a rule. With the literal approach, the judiciary should not be concerned with the policy behind a rule; the word “policy” became unmentionable. Law was formal and abstract, with a life of its own. Law became separated from the notion of justice. If the law did not produce a just decision, then politicians would have to adjust the situation.

In 1885, the confidence of the legal profession, convinced of a distinct body of legal knowledge and a distinct legal methodology, was aided immeasurably by the English jurist A. V. Dicey, who articulated the fundamental constitutional principle known as the Rule of Law.⁹ Law was supreme, and members of the legal profession were its guardians. In essence, as one scholar put it, Dicey’s Rule of Law declared that there be a government of laws and not of persons; those with political power render obedience to a law that is other than their own will, or whim; and thus, in a government of laws, law is superior to the will or whim of those with political power.¹⁰ The first government of English laws came with the *Bill of Rights* in 1689 but Dicey added something that proved irresistible for the legal profession. Of the several meanings for the Rule of Law promoted by Dicey, the most significant was: “no man is punishable

⁸ *Sussex Peerage Case* (1844) 11 Cl. & Fin. 85, 8 E.R. 1034; *Abley v. Dale* (1851) 11 C.B. 391, 138 E.R. 519; *Grey v. Pearson* (1857) 6 H.L.C. 61, 10 E.R. 1216.

⁹ A. V. Dicey, *Law of the Constitution*, 10th ed. (London: Macmillan & Co. Ltd., 1964).

¹⁰ C. Van Doren, *A History of Knowledge* (New York: Ballantine Books, 1992) at 300.

or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”¹¹ The word “ordinary” is crucial – the “ordinary legal manner” and “ordinary courts” signify those operating under the formal model. Significantly, administrative decision-makers who did not follow the formal model, but attempted to reach a result through the process of reasoning and analysis of adjudicative and social facts were said to be exercising a discretion (that is, exercising judgment and making choices) and not applying law (that is, the literal meaning of words). Consequently, control by the judiciary employing formalism became required and administrative law was born.

By the end of the nineteenth century, formalism as the defining methodology had taken hold of the legal profession in Canada. It was “legal” and any other approach was not. There could not be competition; one model was correct and any other had to be wrong.¹²

Behind formalism is an overwhelming concern with certainty. If judges make it appear that they are simply applying a rule to facts, then an image of certainty is projected and, supposedly, public confidence increased in the administration of justice, with confusion and litigation reduced. This attitude was nowhere better enunciated than by Viscount Birkenhead in the House of Lords in 1922:

[I]t is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule.¹³

THE COMMON LAW

In *The History of the Common Law of England*, published in the eighteenth century,¹⁴ Sir Matthew Hale offered the most succinct description of the role of judges in the years before the adoption of formalism. In the language of Hale, law was recognised from the earliest times as being of two kinds, the “written law” and the “unwritten

¹¹ *Supra* note 9, at 188.

¹² Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press for The Osgoode Society, 1997) at 9-17.

¹³ *Rutherford v. Richardson*, [1923] A.C. 1 at 5; and Ian Bushnell *The Captive Court, A Study of the Supreme Court of Canada* (Montreal: McGill-Queen’s University Press, 1992) at 56.

¹⁴ Matthew Hale, *The History of the Common Law of England* (Chicago: The University of Chicago Press, 1971), printed three times: 1713, 1716, and 1739. The University of Chicago Press reprinted the third edition in 1971, edited by Charles M. Gray. Hale lived from 1609 until 1676. He became a judge in 1653 and served as Chief Baron of the Exchequer (1660-1671) and Lord Chief Justice of England (1671-1676).

law”. “Written” referred to legislation, the law having been first reduced to writing before enactment.¹⁵

Written law or “legislation” was found in laws enacted by political actors within a political process. However, because the records of early or ancient statutes were inadequate, legislation enacted prior to 1189 was considered to be part of the unwritten law.¹⁶ The related concept of “time within memory” was established as the beginning of the reign of King Richard I in 1189.¹⁷

The term “unwritten” derived from the origin of the law, namely that which developed from immemorial usage or custom, the source of which lay outside any formal written document. Unwritten law, or the “common law”, was found in books of reports of judicial decisions, said to have “grown into use, and have acquired their binding power and force of laws by a long and immemorial usage.”¹⁸ They were said to be of “a vast extent, and indeed include in their generality all those several laws which are allowed, as the rule and direction of justice and judicial proceedings, and which are applicable to all those various subjects, about which justice is conversant.”¹⁹ This unwritten or common law became the identifying characteristic of the law of England and of legal systems based on that law.²⁰

Two propositions are of crucial importance in relation to the common law as judge-made law. One, that judges “may expound and evidence [the law], and be of great use to illustrate and explain it; yet it cannot be authoritatively altered or changed but by the Act of Parliament”;²¹ and two, law by its nature must be “accommodated to the conditions, exigencies and conveniences of the people, for or by whom they are appointed, as those exigencies and conveniences do insensibly grow upon the

¹⁵ *Ibid.*, at 3.

¹⁶ *Ibid.*, at 4: Statutes enacted between 1189 and the last year of King Edward II, 1326, were termed “Old Statutes”, since there was little evidence of these laws in authentic sources, and statutes created and begun with the reign of Edward III, 1326, were called “New” statutes.

¹⁷ *Ibid.*, at 3 - 4: The date 1189 had been selected as marking the point at which one could speak of something as being from immemorial because by legislation this was the date selected as the time of limitation in a writ of right, that is, a writ which lay for one who had the right of property against another who had the right of possession and actual occupation.

¹⁸ *Ibid.*, at 17.

¹⁹ *Ibid.*

²⁰ Because the common law (unwritten law) is so dominant a characteristic, it has resulted in the term “common law” being used to refer to our legal system, such as saying we follow the common law system or are part of the common law world. A distinction is generally being made with the civil law system, based on Roman law and using a code of law. In this context the term “common law” is being used as a synonym for “law of England”.

²¹ *Supra* note 14, at 18.

people, so many times there grows insensibly a variation of laws.”²² How can these two propositions exist together?

An explanation of the apparent conflict lies in an understanding of a metaphor used by Sir Matthew Hale. Accepting that the common law (unwritten law) changes over time, it might not be possible to say definitively when the change began, but

...[the changes] being only partial and successive, we may with just reason say, they are the same English laws now, that they were 600 years since in the general. As the Argonauts ship was the same when it returned home, as it was when it went out, tho’ in that long voyage it had successive amendments, and scarce came back with any of its former materials.²³

Thus one can say, “[the] body and gross of the law might continue the same, and so continue the ancient denomination that it first had”²⁴ even though changes have occurred. This metaphor of the ship of the Argonauts (the *Argo*) was crucial to an understanding of the apparent contradiction between the two central propositions. It will be discussed later, but first it is necessary to understand the nature of judicial decisions.

According to Hale, judicial decisions certainly affect the parties in the particular case being adjudicated, but

...they do not make a law properly so called (for that only the King and Parliament can do); yet they have great weight and authority in expounding, declaring, and publishing what the law of this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times; and tho’ such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.²⁵

Judicial decisions were classified as being of three kinds:

1. Cases in which the reasons of the judge were based on the laws and customs of the Kingdom, *e.g.*, heirs, passing a freehold, estates in property, and dower, in which the law is well established and “the judge seems only the instrument to pronounce it.”²⁶

²² *Ibid.*, at 39.

²³ *Ibid.*, at 40.

²⁴ *Ibid.*, at 42.

²⁵ *Ibid.*, at 45.

²⁶ *Ibid.*, at 46.

2. Cases in which the judge decides “as by way of deduction . . . upon those laws are framed or deduced...; [The] rule of decision is, first the common law and custom of the realm which is the great *substratum* that is to be maintain’d; and then authorities or decisions of former times in the same or the like cases, and then the reason of the thing itself.”²⁷

3. Cases “as seem to have no other guide but the common reason of the thing,”²⁸ unless the same point has been formally decided, as with the meaning of clauses in documents (deeds, wills) and where the ordinary meaning of the words is clear and the judge “does much better herein, than what a bare grave grammarian or logician, or other prudent men could do.”²⁹

In respect of many cases, there are previous resolutions, either on point or by analogy with the case in question. If the law is well established and understood, the role of the judge is to simply “pronounce it” and its application is straight forward and non-controversial. In the second and third situations, the judge must reason out a solution. In the second, the judge finds guidance in precedents (“the same or like cases”), other laws (common law), social facts (custom) and by regard to what is fit and proper in the circumstances. The judge is to reason out a solution using the guides provided. With the third kind, the judge is required to come to a reasonable answer and, while there may be precedents dealing with the same point, reason basically governs. Even though the ordinary meaning of words may be clear, the judge does more than serve as “a bare grave grammarian” and must provide meaning that is socially appropriate.

Reasoning involves making choices and judgments. Sir Edward Coke, called the greatest lawyer in English history,³⁰ wrote “Reason is the life of the law, nay the common law itself is nothing but reason.”³¹ However, the reason is not natural reason but reason governed by law, “the golden mete-wand and measure to try the causes of the subjects.”³² On this point Coke and Hale, and also Sir William Blackstone, agreed. Blackstone was prepared to accept that a previous judicial decision could be rejected if it were seen as unreasonable, or unjust.³³ For Blackstone, previous decisions of judges were evidence of the common law but were not to be taken as law themselves.³⁴

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, at xii, by C. M. Gray, “Introduction”.

³¹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton* (first published 1628) (New York: Gryphon Editions, facsimile of 1823 edition) at section 97b.

³² *Case of the Prohibitions* (1607), 12 Co. Rep. 63, at 64-65.

³³ *Supra* note 1, at 69-70.

³⁴ *Ibid.*, at 58 and 71.

A judge could have made a mistake. An unreasonable law was one which was not socially acceptable.

THE DECLARATORY THEORY

Sir Matthew Hale accepted the theory that the common law developed from immemorial custom or usage and could not be changed by judges. Sir Edward Coke also asserted that judges did not make law and, in keeping with this theory, Blackstone presented law as a complete body of rules existing from time immemorial and unchangeable, except by the legislature. Judges found the law and declared its existence. This “declaratory theory”, when formalists adopted it, needed to drop the proposition, which even Blackstone accepted, that the legal system had inherent power to change the law. As Hale put it, law by its nature must be “accommodated to the conditions, exigencies and conveniences of the people.”³⁵

Formalists applied the declaratory theory literally so that the judicial function became constitutionally defined by the maxim *jus dicere et non jus dare* – expound the law and do not make it.³⁶

John Austin (1790-1859), holder of the first Chair of Jurisprudence at University College London, dismissed the declaratory theory as a “childish fiction employed by our judges, that [the] common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges.”³⁷ The theory continued such that in 1968, less than a decade after Ivan Rand retired (1959), the Hon. Wilbur R. Jackett, then President of the Exchequer Court of Canada, proclaimed the declaratory theory of law as the theory of our legal system. In a lecture entitled “Foundations of Canadian Law in History and Theory”, President Jackett distinguished between theory and practice and acknowledged that, as “a practical fact”, the declaratory theory was not true. What is crucial for lawyers, he told the students, is that solutions to legal problems be found in the language of statutes and cases.³⁸ The word “reasoning” is absent. Words and literalism rule.

³⁵ *Supra* note 14, at 39.

³⁶ The maxim is variously worded but always with the same meaning.

³⁷ John Austin, *The Province of Jurisprudence Determined*, 2nd ed. (London: J. Murray, 1861-63) vol. 2, at 102.

³⁸ Published in Otto E. Lang, (ed.), *Contemporary Problems of Public Law in Canada: Essays in Honour of Dean F. C. Cronkite* (Toronto: University of Toronto Press, 1968) 3, at 27-29 (a lecture delivered to law students at Queen’s University in Kingston).

As one scholar has pointed out, treating legal matters as if the declaratory theory is true created an unhistorical mind-set in which the legal mind accepted that the present state of the law is what it has always been. This formalist attitude inhibited law reform by judges (other than the heavy handed tactic of ignoring precedents)³⁹ and governed the way in which it was considered appropriate for lawyers to think. As confirmed by President Jaccett, it was the governing theory during the years Ivan Rand served as a justice of the Supreme Court of Canada.

THE SHIP OF THE ARGONAUTS

Prior to formalism, how did common law lawyers maintain the declaratory theory and yet recognise the judicial power to change the law when deciding cases? As mentioned earlier, an understanding of the *Argo* metaphor used by Sir Matthew Hale provides an explanation. The law that theoretically existed from time immemorial consisted of general and basic principles which were simply declared to exist by judges. The judiciary could undertake “only partial and successive” change which occurred in the application of general principles to the circumstances of specific cases. The law (general and basic principles) remained the same until amended by the legislature but the cases, as evidence of the general principles, did not in themselves constitute law.⁴⁰

The idea that law retains an identity in spite of change has bedevilled some scholars.⁴¹ The law as general principles must be distinguished from the application of those principles in particular cases. Cases in which a principle is applied remain mere applications which may or may not themselves be followed. It depends on the reasoning and a determination of the appropriateness of a previous application. As Hale observed, if precedents are solid and the same point arises, a judge would have no reason to differ and would decide accordingly. And by extension, all judges would reach the same decision. In this scenario, it is relatively harmless to treat previous applications of a principle as “the law” as long as it is understood that, when changing social values demand new applications, the judge should identify the law as being the principle and clean it of inappropriate applications. It is traditional to speak of this as “development of the law.”⁴²

Hale’s metaphor was nicely illustrated by an example appropriately drawn from the work of Ivan Rand. The change of the law which occurred in *Boucher* (1950) was squarely within the bounds of the role of a common law judge. Justice Rand did not change the basic general principle (the “*Argo*”), he changed its application (its materials).

³⁹ Gough, *supra* note 6.

⁴⁰ *Supra* note 14, at 40.

⁴¹ *Ibid.*, at xxii.

⁴² Bushnell, *Captive Court*, *supra* note 13, at 55-63, 66-67.

BOUCHER V. THE KING (1951)

The famous case of *Boucher v. The King*⁴³ concerned the crime of sedition. Found in the part of the *Criminal Code* entitled “Offences Against Public Order”,⁴⁴ sedition essentially consists of generating feelings of hatred, ridicule or contempt against the government or arousing such feelings in persons of different classes against each other that the ability of government to govern may be impaired and social instability and disorder thereby created. The notion of “government” in this context is understood in a wide sense: the Sovereign, the government (cabinet), Houses of Parliament, the legislatures, the administration of justice, and the constitution itself. To be convicted, an accused must be shown to have had a seditious intention. The *Criminal Code* did not define seditious intention so its meaning had to be interpreted by the judiciary on a case-by-case basis.

The lingering influence of the common law method can be seen in Canada’s first *Criminal Code* (1892), based on Sir James Fitzjames Stephen’s draft British code of 1880. Stephen had hoped to make the law certain and to reduce or eliminate the “quasi-legislative authority” of judges⁴⁵ and a code was thought to eliminate the common law method and to promote formalism. Stephen’s draft code had grown out of his *Digest of the Criminal Law* published shortly before.⁴⁶ The creation of digests articulating rules of law resulted from the growth of formalism and may explain why formalists referred fondly to Blackstone’s *Commentaries*, which itself resembled a digest. Though an attachment to the common law tradition was evident in the Canadian *Criminal Code* of 1892,⁴⁷ the strength of that tradition certainly contributed to the fact that Britain has never enacted its own code.

The Royal Commission established in Britain in 1880 to consider codification of the criminal law defined seditious intention as:

⁴³ [1950] 1 D.L.R. 657 (hearing) and [1951] S.C.R. 265 (rehearing). The reasons for decision in the first hearing are not separately reported in the S.C.R. series but are incorporated into the report of the rehearing. The reasons for decision of Rand J. are the same in both the hearing and rehearing of the appeal.

⁴⁴ R.S.C. 1985, c. C-46, ss. 59-61. *Boucher* considered the offence of sedition as found in the *Criminal Code*, R.S.C. 1927, c. 36, s. 133 (as amended).

⁴⁵ D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989) at 24-37.

⁴⁶ James F. Stephen, *Digest of the Criminal Law* (London: Macmillan, 1877).

⁴⁷ S.C. 1892, c. 29. In addition to maintaining the common law approach with regard to components of a crime, Parliament deliberately retained the very existence of common law offences. Thus, the criminal law was to be found in its Code and in the common law.

an intention . . .

(1) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or the government and constitution . . . or any part of it as by law established, or either House of Parliament, or the administration of Justice; or

(2) to excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in church or state by law established; or

(3) to raise discontent or disaffection amongst Her Majesty's subjects; or

(4) to promote feelings of ill-will and hostility between different classes of such subjects.⁴⁸

In 1919, a special committee of the Canadian House of Commons, established to examine the law of sedition following the Winnipeg General Strike, accepted this 1880 definition of the British Royal Commission without hesitation. There was thus a solid and reasonably authoritative basis for that definition as law and one might have expected it to have been followed unquestionably until changed by Parliament. A desire for certainty had been satisfied. Yet, Justice Rand and a majority of the Supreme Court of Canada changed that law in *Boucher*.

The alleged seditious publication in *Boucher* was a pamphlet published by the Watch Tower Bible & Tract Society and distributed by the Jehovah's Witnesses. Fighting against what the Witnesses saw as persecution, the pamphlet, entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada", aimed at the Roman Catholic Church in Quebec and the courts alleged to be under the control of the Church.⁴⁹ Aimé Boucher distributed copies of this pamphlet in 1946 and was charged with publishing seditious material. Convicted by a jury, he was sentenced to one month imprisonment. The Quebec court of appeal affirmed the conviction by a 3-2 vote, with the dissent based on a perceived faulty charge to the jury by the trial judge. A five justice bench of the Supreme Court of Canada heard a further appeal in 1949. This hearing resulted in another 3-2 decision in which the majority found the charge to the jury defective and ordered a new trial. However, Justices Ivan Rand and James Estey, in dissent, would have acquitted the accused because the crime of sedition had not, in their opinions, been committed. They were prepared to change the law.

⁴⁸ Quoted by Rand J. in *Boucher*, *supra* note 43, at 287-88.

⁴⁹ Bushnell, *Captive Court*, *supra* note 13, at 296-301.

The Court granted the motion for a rehearing on the basis that a clear definition of seditious intention had not been established and the law, therefore, remained confused. This second hearing, before the full bench of nine justices, resulted in an acquittal in 1950 by a 5-4 vote, with Justice Rand now in the majority.

In reasons for decision, which were also those he delivered in the first hearing, Justice Rand declared:

The basic nature of the Common Law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the seventeenth century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions.⁵⁰

In this excerpt, Justice Rand asserted the traditional common law role of the judiciary as understood by Coke, Hale, and Blackstone. Gone was the idea that law is unchangeable except by the legislature. It would not be until 1995 that a similar sentiment would be expressed in the Supreme Court of Canada, and then by a majority of the Court.

For Justice Rand, the popular view of government in 1950 had changed as a social fact from that of the nineteenth and early twentieth centuries. Criticism of government had become a way of life and government was seen as accountable to the people. Prohibiting publications which could create contempt of political authority was no longer reasonable, according to Justice Rand, because freedom of expression as a social value had come to assume greater importance than in previous centuries. Justice Rand did not question the existence of the crime known as sedition or seditious libel, based as it was on the policy of promoting order and maintaining the stability of society. The law of sedition and the policy behind it still existed and the *Criminal Code* entrenched that principle of the criminal law. As the “ship of the Argonauts”, this principle could not be changed but the “materials” that formed the ship could be changed to allow it to sail in the conditions demanded by the middle of the twentieth century, as identified by Ivan Rand. In his opinion, the state of society in 1950 demanded that the only intention that would justify a conviction for seditious libel was that of inflaming the minds of people into hatred, ill-will, discontent, or disaffection, with the aim of disordering community life, directly or indirectly, in relation to government in the broadest sense. This view maintained the policy behind the law of sedition but recognised that simply criticising government and holding it up to hatred, ridicule or contempt could not be criminal unless what was said was such as to inflame the populace actually to create disorder. To simply create disrespect for

⁵⁰ *Supra* note 43, at 286.

government could not be criminal behaviour in 1950. In other words, to say that the government is corrupt is one thing; to say that the people should march and physically attack the corrupt government is another.

It is not surprising that members of the Court differed in their opinions. Of the four meanings for seditious intention that had been thought to exist (from the British draft code), only one remained: “an intention . . . to excite Her Majesty’s subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in church or state by law established.” With the exception of the meaning “an intention... to bring into hatred or contempt or to excite disaffection against... the administration of Justice,” which the Court rejected by a narrow 5-4 vote, the other parts of the once established meaning were soundly rejected by an 8-1 vote.

An examination of the various reasons for decision in *Boucher*, eight in all, shows that Justice Rand’s are different. Almost all of the other justices who made up the majority were concerned with the idea of “authorities” rather than with reasoning. The idea of authorities resulted in the stating of conclusions. For Justice Rand, what was needed was “the flexible process of... reasoning upon significant social and political matter.”⁵¹

What is surprising is that there was no comment, let alone debate, about Justice Rand’s abandonment of formalism and his express adoption of the pre-formalistic common law method. What he did struck at the very definition of a lawyer and a judge as understood under formalism. Justice Rand’s conclusions and his reasoning essentially forced the Court to declare a new definition of seditious intention. His words and their spirit caught the attention of the press which heaped praise upon him. Although other members of the Court also mentioned changing social facts (not in those words), “authority reasons” were still there. That may be the negative comment – no other judge concurred with Justice Rand’s reasons for decision and he stood alone. Nevertheless, a majority of the Court changed the law.

IVAN RAND AND THE COMMON LAW METHOD

In 1959, the year that Justice Rand retired from the Court, Horace Read, Dean of Law at Dalhousie University, published the first scholarly analysis of the judicial function in Canadian jurisprudence.⁵² Dean Read had studied under Dean Roscoe Pound at Harvard and had taught for sixteen years at the University of Minnesota’s law school. His assessment was not encouraging. He noted an almost complete dependence on

⁵¹ *Ibid.*

⁵² H. E. Read, “The Judicial Process in Common Law Canada” (1959) 37 *Canadian Bar Review* 265-293; and Bushnell, *Captive Court*, *supra* note 13, at 324.

English judges for development of the law and an uncritical and overly mechanical application of English decisions. Canadian judges maintained a non-creative role, notwithstanding that abolition of appeals to the Privy Council in 1949 had placed full responsibility on Canadian judges to develop the law. Dean Read pointedly stated that, with the exception of Ivan Rand, the justices of the Supreme Court of Canada had shown no evidence that they regarded the law as a living thing to be applied and shaped to meet the needs of an evolving society. Dean Read described Justice Rand as a “striking contrast” to the other judges and a “creative lawmaker”. But, curiously, his discussion of Justice Rand focused on a rather innocuous divorce decision in 1943,⁵³ *Boucher* was not mentioned at all.

The absence of any overt reaction against the Rand legal method by other judges or by commentators contrasted sharply with past reactions by judges against colleagues who favoured a non-formalistic method. Is it possible that the pronounced negative reactions of the late nineteenth century happened because formalism was still developing and technocratic judges were defensive? By 1950, formalism was securely entrenched within Canadian legal thought and perhaps the reasoning of Justice Rand was considered idiosyncratic. The great majority of the legal profession would not have identified it for what it was and consequently would not have seen it as a threat to the established legal method.

Of the six justices initially appointed to the Supreme Court of Canada in 1875,⁵⁴ Chief Justice Sir William Buell Richards and Justices Télesphore Fournier and William Henry displayed traditional common law tendencies, while Justices Samuel Henry Strong, William Johnstone Ritchie, and Jean-Thomas Taschereau were definitely formalists.

When the Court considered *The Queen v. McLeod*⁵⁵ in 1883, it still included justices educated in the pre-formalism period (pre-1850s), though formalism was competing for control of the legal mind. Appearance of the common law approach in the work of Justices William Henry and Télesphore Fournier caused a considerable reaction. William Ritchie, the second Chief Justice, viewed their attempt to change the application of the law with disdain and charged them with acting unconstitutionally; that is, beyond their proper role as judges. Chief Justice Ritchie stated: “This constitutional principle this court cannot ignore; it must not attempt to make laws.”⁵⁶ He had made his view clear when, as Chief Justice of New Brunswick, he responded to John A. Macdonald’s invitation to comment on the 1869 Bill to create the Supreme

⁵³ *G. v. G.*, [1943] S.C.R. 527.

⁵⁴ Bushnell, *Captive Court*, *supra* note 13, at 40-44.

⁵⁵ (1883) 8 S.C.R. 1; also Bushnell, *Captive Court*, *supra* note 13, at 123-127.

⁵⁶ *Ibid.*, at 27.

Court of Canada. He asserted that the judge's role was to determine and declare the law of the land but with no power to change that law.⁵⁷

In a professional journal of the time, a writer identified Henry Strong as a person of great talent and learning, a "scientific" lawyer, and as a man having no equal in intellectual capacity, a brilliant man.⁵⁸ The same journal described Chief Justice Richards as a man of powerful intellect and as a judge who took a wide grasp of a subject and discussed it not only with reference to the abstract law involved but also with reference to its relation to the wants and habits of a new country.⁵⁹ He was said to possess a brilliant common sense. These were two very different judges when it came to method. The profession at the time apparently saw both methods as legitimate.

After just over three years service, Chief Justice Richards left the Court because of ill health. Justice Fournier, who displayed restrained non-formalistic tendencies, remained on the Court for almost twenty years, resigning in 1895. He did not appear to challenge the formalists. Justice Henry was another matter. Like Chief Justice Richards, he displayed pronounced common law tendencies. He stayed on the bench for twelve and a half years, until his death in 1888. His presence proved unbearable to Justice Strong, the "scientific" lawyer. Wanting Justice Henry off the Court, Justice Strong wrote to Prime Minister Macdonald in 1880, attacking his ability as a judge and suggesting that Justice Henry be made the sole Exchequer Court judge (at that time, justices of the Supreme Court of Canada also served as judges of the Exchequer Court). So great was Justice Strong's intolerance of a non-formal approach that his letter warned that Justice Henry's impeachment was the only alternative to his suggestion. Justice Henry had to be removed to save the Court, Justice Strong maintained. Yet, it was not Justice Henry but Justice Strong, by then Chief Justice, who was effectively removed in 1902, to save the Court because of his aggressive attitude toward individuals and his reactions to things with which he did not agree. Contemporary professional journals branded the Court a discredit to the country and directed blame at Chief Justice Strong.⁶⁰ There is no question that Strong, the "scientific" lawyer, displayed characteristics of a technocratic nature.⁶¹

⁵⁷ Bushnell, *Captive Court*, *supra* note 13, at 9; and Gordon Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: The Supreme Court of Canada Historical Society and Carleton University Press, 1991) at 339-71, reproducing Chief Justice Ritchie's "Observations" as presented to parliament.

⁵⁸ *Ibid.*, at 41 referring to "Constitution of our Appellate Courts" (1875) 11 *Canada Law Journal* (n.s.) 188, at 190.

⁵⁹ *Ibid.*, at 42-43 referring to "Judicial Appointments to the Supreme Court" (1875) 11 *Can. L. J.* (n.s.) 265, at 265-66.

⁶⁰ Bushnell, *Federal Court*, *supra* note 12, at 43-44.

⁶¹ P. Pitcher, *Artists, Craftsmen and Technocrats* (Toronto: Stoddart, 1996). Pitcher identified lawyers in general as technocrats and accepted that that character was necessary for their role in the business world (at 154-155).

With Justice Henry's death in 1888, the common law method effectively disappeared and the Court lapsed into a state of intellectual sterility. A spark briefly appeared in 1902-03. In the estimation of the profession, the Court had reached its lowest point by 1902 when Chief Justice Henry Strong resigned. In what seems to have been an attempt to save the Court, the Minister of Justice himself was appointed. At the time seventy-two years of age, David Mills died suddenly a year and eight months later. He had an American university legal education, having obtained his law degree from the University of Michigan in 1855. Known for his political activities rather than for the practice of law, Mills was a Senator when made Minister of Justice. A review of his judgments in his short time on the Court reveals a definitely non-formalistic approach. One example spoke volumes. With respect to statutory interpretation (in this case, the Constitution), he said

Were it necessary to do so, it would be our duty to make the words of the statute yield to its reason and expressed intention.... The courts of England have, on more than one occasion preferred to follow the reason rather than the exact letter of the law.⁶²

Justice Mills continued by affirming that he was merely adhering to the letter and spirit of the statute.⁶³ He wrote for a majority of the Court in the case!⁶⁴ And, as with Justice Rand in *Boucher*, the other justices did not make overt criticisms at the time.

The Bar did not welcome Justice Mill's appointment because of his lack of significant time as a practising lawyer. At the time, it was common at luncheon talks and after dinner speeches to add a touch of levity by telling tales about inept judges, with the butt of such "jokes" inevitably being either William Henry or David Mills. In

⁶² *In re Representation in the House of Commons* (1903) 33 S.C.R. 475, at 592.

⁶³ *Ibid.*, at 592-3.

⁶⁴ In 1902 John Armour, Chief Justice of Ontario, was appointed when over 72 years of age. Within eight months he would be dead. He was described as having had a robust common sense, defined as possessing insight into human nature and an appreciation of the fitness of things, with a clear conception of the conditions of life in Canada, as well as a capacity to grasp the true inwardness of a legal proposition. He was also said to have been one of the best judges on questions of fact. This was not language describing a "scientific" judge. He served the shortest period on the Court of any judge, and his main task was as a Canadian commissioner on the Alaska Boundary Commission of 1903, for which he received six months leave from his judicial duties. He became a member of the Bar in 1853. In 1905 James Maclellan from Ontario was appointed at the age of 72 and a half years. He served three years and four months. Like Armour he became a member of the Bar in the 1850s and had not been touched by formalism until late in his career. Although Armour and Maclellan did not display the pronounced characteristics of formalism, the most definite display of non-formalism was by David Mills.

her study of different character types, Patricia Pitcher concluded that the technocratic mentality ultimately drives out everything else.⁶⁵

Coke and the late generation Elizabethan lawyers were said to have been conscious of history and used it to transform the law from a craft to a liberal art, with law a focus for social thought including historical thought.⁶⁶ Formalism transformed lawyers into technocrats and law into a technical trade. The evidence is overwhelming that the justices of the Supreme Court of Canada, as well as the mainstream of the legal profession, were solidly committed to the technical nature of their work and the role of judges as non-creative. Just over a decade before Justice Rand's appointment to the Court, there appeared the most vivid example of the hold that formalism had acquired.

In 1929, the Judicial Committee of the Privy Council (then the final court of appeal for Canada) directed the Court to abandon the formal model (at least in constitutional law cases) and to give the words of the constitution a "large and liberal interpretation" (that is, not simply a literal meaning).⁶⁷ In 1930, the Court responded by expressly, and very publicly, rejecting the direction as non-legal in nature.⁶⁸ The Privy Council, declared the Court, had not acted judicially when it made the suggestion but had acted politically and, whatever it might do, the Supreme Court of Canada, as a court of law, could not act other than in the mould of formalism. In 1932, Prime Minister R. B. Bennett considered Ivan Rand for appointment to the Court.⁶⁹ Had he made the appointment then, it would certainly have created an interesting situation.

Within two months of his 1943 appointment to the Court, Justice Rand made clear his opinion of the judicial role. In *Reference re: Exemption of United States Forces from Proceedings in Canadian Criminal Courts*,⁷⁰ he described the judicial function with emphasis on reasoning and the need to draw upon all sources. Quoting from an opinion of the Judicial Committee, he declared that reasoning and good sense should prevail and warned that insistence upon "precise precedent" would create judicial sterility.⁷¹ Justice Rand demonstrated an affinity for the best of the American

⁶⁵ *Supra* note 61, at 5.

⁶⁶ *Supra* note 14, at xii.

⁶⁷ *Edwards v. Attorney General for Canada*, [1930] A.C. 124; known in the Supreme Court of Canada as *In the Matter of a reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276.

⁶⁸ *Town of Montreal West v. Hough*, [1931] S.C.R. 113; also George F. Henderson, "Eligibility of Women for the Senate" (1929) 7 *Canadian Bar Review* 617-628; and Bushnell, *Captive Court*, *supra* note 13, chapter 17, at 218-229.

⁶⁹ E. M. Pollock, "Mr. Justice Rand: A Triumph of Principle" (1975) 53 *Can. Bar Rev.* 519, at 521.

⁷⁰ [1943] S.C.R. 483. Rand was appointed in April and this reference was heard on 14-18 June 1943.

⁷¹ *Ibid.*, at 524.

legal system when he praised a decision of John Marshall, Chief Justice of the Supreme Court of the United States (1801-1835 and widely reputed by U. S. scholars to be the greatest of the judges of that Court) as having “characteristic power”. This early decision indicated that Justice Rand came to the Court with determined ideas about important aspects of a judge’s role: dominance of reasoning, not merely finding “authorities”, a need to examine all sources of information, a willingness to learn from the best of American decision-making, as well as indicating a rapport with the work of the Judicial Committee of the Privy Council.⁷² Justice Rand did not make any secret of his opinion about the proper role of a judge.

When in 1949 the House of Commons considered the final touches to the Bill to end appeals to the Judicial Committee of the Privy Council, concern was expressed in debate that the Supreme Court of Canada might begin to resemble the Supreme Court of the United States. The incident regarding the Court’s refusal to obey the Privy Council direction, to take a large and liberal approach, apparently had been forgotten. In reply, Prime Minister Louis St. Laurent (formerly a leading member of the legal profession and Attorney General of Canada) assured everyone that the Supreme Court of Canada would not create new law; it would apply the law as it existed.⁷³ This debate occurred on 23 September 1949 when the Court was considering the *Boucher* case. On 5 December 1949, the Court released its reasons for decision in that case.⁷⁴ The reasons of Justice Rand asserted that “the basic nature of the Common Law lies in its flexible process of traditional reasoning upon significant social and political matter”.⁷⁵ He then announced that the judiciary must change the law in response to new social values.

One might have expected some debate within the legal profession and that a collision of ideas was inevitable, but it did not happen. The academic component of the profession in that era was in a rudimentary state; and critical exploration of law and of the legal system was not a normal aspect of the legal profession.⁷⁶

⁷² Duff C. J. C. and Taschereau J. displayed a need to find authoritative sources in their judgments; Kerwin J. asserted that an exemption from the jurisdiction of Canadian courts was to be “grounded on reason”. A contemporary case comment stated that the concern was the circumstances in which an exemption would not be recognized and referred to the judgment of Rand J.: H. J. Wilson (1943) 21 *Can. Bar Rev.* 593, at 594 and 596.

⁷³ Bushnell, *Captive Court*, *supra* note 13, at 274.

⁷⁴ *Supra* note 43.

⁷⁵ *Ibid.*, at D.L.R. 680 and at S.C.R. 286.

⁷⁶ I am not including the Faculty of Law at the University of Toronto as part of the profession. In Ontario, the profession’s educational facility, Osgoode Hall Law School, was in turmoil at this time regarding the issue of whether it should emulate a university or a trade school: C. I. Kyer and J. E. Bickenbach, *The Fiercest Debate* (Toronto: The Osgoode Society, 1987).

Of course, repudiation of a judicial power to change the law (a prime feature of the common law method) is central to formalism. The image of a non-creative and non-political judiciary is thought to be essential for public acceptance. The staying power of this approach is evident in a paper entitled “Judicial Independence”, delivered in 1996 by the Hon. Allan McEachern, then Chief Justice of British Columbia.⁷⁷ In his opinion, if judges were to have the power to change the law and to render decisions on a case-by-case basis, it would be a threat to “traditional legal values”. “Traditional” for Chief Justice McEachern meant the values from the era of formalism, a period of seventy-plus years. For Ivan Rand, traditional legal values were found in the centuries of the common law method.

IVAN RAND AND *STARE DECISIS*

Inevitably, Justice Rand had something to say about the decision, taken in the name of formalism, to abandon the power to change the law, a power which he saw as inherent in the common law.

Adoption of the doctrine of *stare decisis* in the latter part of the nineteenth century was crucial to establishing the formal model of judicial decision-making. The doctrine denied to the judiciary the power to change law, whether in relation to common law decisions or to the meaning given legislative language. All judicial decisions became fixed. As one scholar commented, regarding the House of Lords:

The accepted motto of the law lords became ‘never knowingly creative’. The common law was regarded as past the age of child-bearing. For the judges the issues of law; for the politicians the issues of policy. For Parliament the making of law; for the judiciary its application.⁷⁸

It has been said that *stare decisis* in the House of Lords, which until relatively recently served as the controlling judicial authority in Canada,⁷⁹ rested “chiefly on the repeated assertions of one judge, Lord Campbell.”⁸⁰

Whether the House of Lords was bound by its previous decisions is a question which arose in the early part of the nineteenth century. Until 1852, it had been answered in the negative. In that year, Lord Campbell entered the scene and said

⁷⁷ Hon. A. McEachern, “Judicial Independence” delivered at the 11th Commonwealth Law Conference, Vancouver, August 1996.

⁷⁸ R. B. Stevens, “The Role of a Final Appeal Court in a Democracy: The House of Lords Today” (1965) 28 *Modern Law Review* 509 at 518.

⁷⁹ Bushnell, *Captive Court*, *supra* note 13, at 293.

⁸⁰ Sir Frederick Pollock, *A First Book of Jurisprudence* (London: MacMillan, 1904) at 325.

“yes” in *Bright v. Hutton*.⁸¹ According to Lord Campbell, the change provided the needed certainty in the law and reflected “the constitutional mode in which the law is declared.”⁸² However, the Lord Chancellor at the time, Lord St. Leonards, held a different opinion. He saw the judiciary as retaining the common law power to depart from a previous decision in order to correct an error.⁸³ In 1854, Lord St. Leonards re-asserted his view that the House of Lords would not be bound to adhere to an erroneous principle adopted in a previous case.⁸⁴ But, in 1860, in *Attorney-General v. Dean and Canons of Windsor*,⁸⁵ Lord Campbell, now Lord Chancellor, reaffirmed his opinion:

By the constitution of this United Kingdom, the House of Lords is the court of appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals.⁸⁶

In 1861, when Lord Campbell again asserted in *Beamish v. Beamish*⁸⁷ that a decision of the House of Lords, as the supreme court of appeal, “must be taken for law till altered by an Act of Parliament”,⁸⁸ none of the other judges voiced opposition. This was the “really decisive point at which the opportunity for reconsideration was lost”.⁸⁹ Though Lord Campbell died within months of the decision in *Beamish*, his opinion obviously fell on receptive ears, an example of the power of an idea whose time had come.⁹⁰

In *Beamish*, Lord Campbell also set in motion another idea. If the law established by a decision of the House of Lords bound all inferior tribunals and every subject of the Queen, then the “House would be arrogating to itself the right of altering the law, and legislating by its own separate authority”,⁹¹ if it were not equally binding upon the judges of the House of Lords. Implicit in this statement was the idea that the judiciary should avoid all appearance of exercising political power: law and politics

⁸¹ (1852) 3 H.L.C. 341, 10 E.R. 133.

⁸² *Ibid.*, at 10 E.R. 153.

⁸³ *Ibid.*, at 152.

⁸⁴ *Wilson v. Wilson* (1854) 5 H.L.C. 40 at 63, 10 E.R. 811, at 821.

⁸⁵ (1860) 8 H.L.C. 369, 11 E.R. 472.

⁸⁶ *Ibid.*, at H.L.C. 392, E.R. 481.

⁸⁷ (1861) 9 H.L.C. 274, 11 E.R. 735. Lord Campbell was so committed to the doctrine of *stare decisis* that he applied it to a decision of the House of Lords in which the Lords had been equally divided.

⁸⁸ *Ibid.*, at H.L.C. 339, E.R. 761.

⁸⁹ Pollock, *supra* note 80, at 330.

⁹⁰ “Nothing is more powerful than an idea whose time has come” is attributed to Victor Hugo, in Paul Johnson, *The Birth of the Modern: World Society 1815-1830* (New York: Harper-Collins, 1991) at 148.

⁹¹ *Supra* note 87, at H.L.C. 339, E.R. 761.

were to be separated. This idea was a strong element within formalism. If doubt remained as to acceptance of the doctrine of *stare decisis*, the famous case of *London Street Tramways Co. v. London County Council* (1898)⁹² removed it. Lord Halsbury firmly committed the Lords to the doctrine that they were irreversibly bound by their own prior decisions.

The debate among the law lords would naturally have been intently monitored in Canada. The conflicting opinions of Lord St. Leonards and Lord Campbell in the middle of the nineteenth century meant that the question was then unsettled. In the Supreme Court of Canada, Justice John Gwynne asserted in 1881 the view that a previous decision of the Court need not be followed if it were judged to be “erroneous”.⁹³ Appointed in 1879 at almost sixty-five years of age, he had been educated in the pre-formalism years of the 1840s. In 1891, Justice Christopher Patterson considered that the doctrine of *stare decisis* only applied to decisions of a court of last resort, such as the House of Lords, which meant that the Supreme Court of Canada had the power to correct error. He recognised that the point had not been completely settled and he chose the opinion of Lord St. Leonards over that of Lord Campbell.⁹⁴ Justice Patterson was then almost seventy years of age and, like Justice Gwynne, a legal product of the 1840s.

By 1901, judges of the Supreme Court of Canada had adopted the imperative rule and accepted that they were bound by a previous decision of their own, whether erroneous or not.⁹⁵ Only Justice Gwynne voiced a contrary thought and expressed his unease in very brief concurring reasons for decision. He repeated the institutional point made earlier by Justice Patterson that the Supreme Court of Canada differed from the House of Lords. From the Court’s creation in 1875-76 until 1901, statements affirming *stare decisis* emanated from Justice Strong, the “scientific” lawyer, and it was he who still led the Court as Chief Justice in 1901.

The Supreme Court had an additional shield in making the legal process appear non-creative and non-political. Decisions of the House of Lords were binding in Canada and for a time even the decisions of the English Court of Appeal were considered to be so. English cases were authoritative so the Canadian judges could maintain that they did not make the law. To the extent that any creative element was present in the legal system, it resided in England.⁹⁶ Certainty and stability in the law were paramount values.

⁹² [1898] A.C. 375.

⁹³ *Levi v. Reed* (1881) 6 S.C.R. 482, at 500 - 01.

⁹⁴ *Stephens v. McArthur* (1891) 19 S.C.R. 446, at 460.

⁹⁵ *Duval v. Maxwell (Burrard Election case)* (1901) 31 S.C.R. 459. The case that has become the classic citation for the adoption of *stare decisis* by the Supreme Court of Canada is *Stuart v. Bank of Montreal* (1909) 41 S.C.R. 516.

⁹⁶ Bushnell, *Captive Court*, *supra* note 13, at 291-295.

Until the 1960s, discussions concerning the doctrine of *stare decisis* in Canada combined two matters – application of the doctrine to the Court and the binding nature of English decisions, in particular those of the House of Lords. With formalism firmly entrenched in the Canadian legal profession, with its overwhelming demand for certainty in law, the use of English authorities as controlling, and the rejection of the law-making power inherent in the common law of old remained essentially unchallenged.

Abolition of appeals to the Judicial Committee of the Privy Council in 1949, and recognition of the Supreme Court of Canada as the highest court in the Canadian hierarchy of courts, had no apparent impact on the operation of the doctrine of *stare decisis* (in both its aspects) until challenged by Ivan Rand in 1957. This occurred in a constitutional case involving the federal trade and commerce power, *Reference re The Farm Products Marketing Act*.⁹⁷ He declared that, with the end of appeals to the Judicial Committee of the Privy Council, the Court had acquired the same powers as had been possessed by the Judicial Committee as the final appellate court for Canada. This meant that, unlike the House of Lords, the doctrine of *stare decisis* did not apply.⁹⁸ Justice Rand wrote:

From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92 [of the Canadian constitution], and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us.⁹⁹

This statement revealed Justice Rand's attachment to the traditional common law approach. Judges were not to create fundamental changes in the law, but could modify it; later in the same reasons, he wrote that judges were able to refine interpretation.¹⁰⁰

In *Farm Products Marketing*, Justice Rand acknowledged that the “definitive statement”¹⁰¹ on the interpretation of the trade and commerce power in the constitution assigned the regulation of particular trades confined to the Province to provincial legislative jurisdiction and assigned both inter-provincial and international trade to federal legislative jurisdiction. In effect, there were two “matters” for constitutional purposes: “local trade” which came within provincial jurisdiction and “external trade” within federal jurisdiction. He then observed: “But neither the original statement nor

⁹⁷ [1957] S.C.R. 198, at 212-3.

⁹⁸ *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.).

⁹⁹ [1957] S.C.R. 198, at 212

¹⁰⁰ *Ibid.*, at 213.

¹⁰¹ *Supra* note 97, at 209.

its approval furnishes a clear guide to the demarcation of the two classes.”¹⁰² Thus, the basic principle of law was clear and could not be changed (“the Argo”); however, the words “external” and “local” (the “parts of the Argo”) could be interpreted in light of the challenges of the time. For Justice Rand, Canada presented a single market (“one economic unit”¹⁰³) in the context of a constitution the spirit of which placed economic matters within the federal sphere of control and cultural matters within the provincial. Adjudication of a trade and commerce dispute required, not the application of a general rule dealing with something called “particular trades” within a province, but an analysis of the facts and an examination of a flow of trade to determine federal (external) and provincial (local) aspects. Commercial transactions completed within a province might still factually be extra-provincial in their implications and thus fall within federal competence. Justice Rand concluded:

...if in a trade activity including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond provincial power.¹⁰⁴

An emphasis on “particular trades” had dominated cases in the past and, if blindly followed, provincial authority would continue to dominate economic matters. For example, when Canada desired to control the grain trade nationally, federal counsel argued that the export of grain was a source of national wealth. The Court concluded that, to control the grain trade, Ottawa had to regulate grain elevators and they were beyond federal control as “individual forms of trade and commerce confined to the province”.¹⁰⁵ Justice Rand viewed such cases as mere examples; in this instance, an example whose time had passed. As Alexander Smith noted in a treatise on the trade and commerce power,¹⁰⁶ the decision in *Farm Products Marketing* demanded a chapter entitled “A Break with the Past”. There had indeed been a change. Although the federal trade and commerce power still existed, and the policy or purpose still aided federal control over the economic life of the country, the meaning of the language (external versus local) had been adapted to the times.

Justice Rand’s reasons for decision evidenced a change of a more fundamental nature; namely, the rejection of formalism. In his treatise, Alexander Smith commented that a majority of the Court in *Farm Products Marketing* had abandoned the mechanical rigidity of trying to apply rules of former days and had embarked on a new line of departure which viewed events in a wider context.¹⁰⁷ Rather than consider an abstract

¹⁰² *Ibid.*

¹⁰³ *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, at 638.

¹⁰⁴ *Supra* note 97, at 209.

¹⁰⁵ *The King v. Eastern Terminal Elevator Company*, [1925] S.C.R. 434.

¹⁰⁶ Alexander W. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 157.

¹⁰⁷ *Ibid.*, at 159-160.

event in an attempt to apply a rule as if it were a formula, the majority undertook a factual analysis which applied the idea of a flow or stream of commerce.

The eight justices who participated in *Farm Products Marketing* rendered six sets of reasons for decision. This diversity evidenced both the judicial style of the time for references as well as the existence of differences of opinion. The three justices from Quebec (Justices Taschereau, Abbott and Fauteux) proceeded along orthodox lines with respect to previous tendencies in the law to support provincial power over commercial matters. They did not acknowledge the new approach of their four colleagues (Chief Justice Kerwin and Justices Rand, Locke, and Nolan).¹⁰⁸ Both Kerwin and Locke (Justice Nolan concurred with Justice Locke) wrote reasons for decision which supported the new pro-federal idea of a flow of trade and restricted provincial authority to purely local trade. They wrote statements of conclusions as if they represented the spirit of the law. They did not acknowledge undertaking a change in the law. Justice Rand alone acknowledged and justified the evident law reform. He did so in the language of the classic common law judge:

It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.¹⁰⁹

That Justice Rand's three judicial colleagues supported his notion of a flow of trade spoke well for the persuasiveness of his position about the "life of the country", although his colleague's commitment to the formal model apparently did not allow them to acknowledge that their conclusions represented significant changes in the law. The formal model appeared to be still operating: the justices were not making choices but merely declaring conclusions already in existence.

Two years after this decision and after sixteen years on the Court, Justice Rand reached the mandatory retirement age of seventy-five years. It was soon clear that his declaration of the end of *stare decisis* and his language signalling the end of formalism had not been embraced by his colleagues. Apparently, formalism was too ingrained in the profession. However, as noted, Justice Rand's conclusions were usually accepted by a majority of colleagues in the various cases in which he participated.

Seven years after Justice Rand's retirement, the Lord Chancellor of England, Lord Gardiner, announced on 26 July 1966 that the House of Lords would thereafter

¹⁰⁸ Justice Cartwright rendered a separate judgment in which he did not address the issues of the scope of the trade and commerce power or the doctrine of *stare decisis*.

¹⁰⁹ *Supra* note 97, at 213.

be free to depart from a previous decision of its own.¹¹⁰ It might have been expected that the end of formalism would follow as a matter of course in Canada; but the legal method was so strongly entrenched that the Court abandoned even the practice of slavishly following events in England and did not copy the decision to abandon *stare decisis* taken in England. Similar to its reaction to the Judicial Committee's direction in the 1929 *Persons* case to abandon literalism, the Court maintained the doctrine of *stare decisis*.

In 1967, a Court majority (three of five) expressly commented on the Court's authority to depart from previous decisions and effectively reaffirmed continuance of the doctrine of *stare decisis*.¹¹¹ Justice Cartwright began with the statement: "I do not doubt the power of this Court to depart from a previous judgment of its own",¹¹² but he virtually restricted the power to depart to decisions made *per incuriam*, meaning cases in which the judges had through inadvertence applied the incorrect law (such as a section of a statute that had been repealed or amended). As blatant mistakes, it had never been doubted that such cases held no precedential value. Somewhat obtusely, Justice Cartwright added:

...especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.¹¹³

What could he have meant by "compelling"? Any doubt was removed when Justice Cartwright reaffirmed "the ancient warning" *ubi jus est aut incertum, ibi maxima servitus prevalebit* (where the law is either vague or uncertain, there the greatest slavery will prevail) as one that should not be forgotten.¹¹⁴ The passionate demand for certainty in the law and the continuance of the technical approach still dominated the Court under his leadership.

Justice Rand's overt use of the common law method made him unique. That he was not challenged was surprising, unless formalism as a model could not expose itself by criticising the non-formalistic approach and thereby acknowledge its existence. Justice Rand's method might have been regarded simply as his personal style.¹¹⁵

¹¹⁰ [1966] 3 All E.R. 77.

¹¹¹ *Binus v. The Queen*, [1967] S.C.R. 594, at 601.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ A biographer simply termed it "the Rand style": E. M. Pollock, "Mr. Justice Rand: A Triumph of Principle" (1975) 53 *Can. Bar Rev.* 519 at 526. At the time of Rand's death, Chief Justice Cartwright, a pronounced formalist, viewed his approach as personal to him and not as characteristic of a non-formalist model, such as the common law method: (1969) 47 *Can.*

Justice Rand died on 2 January 1969. Just over a year later, the challenge to formalism was renewed when, on 23 March 1970, Bora Laskin was appointed to the Court. Justice Laskin's writings as a Professor of Law clearly labelled him as non-formalistic in approach.¹¹⁶ The Trudeau government wanted a change in the role of the judiciary. Pierre E. Trudeau, himself a former Professor of Law, had chosen Laskin to lead the way in the highest court. On introduction of a bill in the House of Commons in 1971 concerning federally appointed judges, the government seized the opportunity to announce its policy. In introductory remarks, the Parliamentary Secretary for the Minister of Justice said:

The new *Federal Court Act*, just recently proclaimed, is an example of the evolution of an older institution, a necessary evolution to keep our judicial system in step with the changes in our society and the changing role of law in that society.¹¹⁷

He went on to say that the judiciary had to accept a role in changing the law and recognize a duty and a responsibility to interpret law in accordance with contemporary thought. The judges, it was said, were expected to link the jurisprudence of the past with the cultural norms and social contexts of the present and future.

Justice Laskin's appointment to the Court occurred on the very day that Chief Justice John Cartwright retired. The search for a replacement had been carefully carried out. Cartwright's formalism contrasted starkly with Laskin's non-formalistic approach.¹¹⁸ But life for Laskin was not going to be easy. In a 1972 case, the effect of a decision rendered in 1965 had to be considered. Significantly, four justices (of a full bench of nine) still took a position in support of *stare decisis* and considered the previous decision to be conclusive.¹¹⁹ But the days of the formal model in the Supreme Court of Canada were limited. In a 1971 speech, Justice Emmett Hall said that it was then not open to question that the Supreme Court of Canada might depart from previous decisions.¹²⁰ Though one can speculate about controversy within the Court at this time, regarding the proper role of the judiciary, it would take another twenty years

Bar Rev. 155.

¹¹⁶ Bushnell, *Captive Court*, *supra* note 13, at 344-346; and Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: The University of Toronto Press for The Osgoode Society for Canadian Legal History, 2005).

¹¹⁷ Albert Bechard (Parliamentary Secretary to the Minister of Justice) *House of Commons Debates*, Third Session: Twenty-Eighth Parliament, vol. VII, 1971, at 6665.

¹¹⁸ Rand's place on the Court was taken by Roland Ritchie, one of the most determined formalists to sit on the Court. His approach provoked the then Professor Bora Laskin to abandon caution and severely attack him in a case comment for reasons which stated nothing but conclusions: "Case Comment: *Robertson and Rosetanni v. The Queen*" (1964) 42 *Can. Bar Rev.* 147.

¹¹⁹ *Brant Dairy Co. Ltd. v. Milk Commission of Ontario*, [1973] S.C.R. 198.

¹²⁰ Hon. Emmett Hall, "Law Reform and the Judiciary's Role" (1972) 10 *Osgoode Hall Law Journal* 399.

for the Court openly to adopt the common law method with its announcement of the “principled approach”.

THE WRITTEN LAW: READING LEGISLATION

While formalism demanded that the “literal” rule govern the reading of legislation, the common law principle laid down by Sir Edward Coke in *Heydon’s Case* in 1584,¹²¹ required that one consider the problem which necessitated enactment of the legislation; and, once the “true reason of the remedy” was determined, give the words the meaning that will “suppress the mischief, and advance the remedy”; that is, “to add force and life to the cure and remedy, according to the true intent of the makers of the Act.”¹²² The policy behind the legislation guided interpretation of the words. Under the common law, the spirit of a law governed, not its letter. In an early treatise concerned with legislation, *Dwarris on Statutes* (1830),¹²³ the author made the point that the real intention (when collected with certainty) would always prevail over the literal sense of the terms. Every statute ought to be expounded, not according to the letter, but according to the meaning of the words.

Although formalism continued to invoke the word “interpretation” when considering statutes, the literal rule meant that true interpretation had been abandoned. Literalism was not “interpretation” because interpretation gives meaning to words. While this extreme version of formalism existed in Canada, a modified version also existed within the common law world which allowed a creative role for the judiciary. The then Master of the Rolls, Sir Wilfrid Greene, clearly articulated this version in a 1938 address in England:

When a judge ‘interprets’ a precedent he discovers and enunciates the true meaning of a principle in its relation to the particular set of facts before him. Similarly, when he interprets a statute he discovers and enunciates the true meaning of the statute in its relation to the particular facts before him. But I do not so much like this way of putting it, since it obscures the essential and all-important act of interpretation. It is this judicial interpretation of precedents which gives that flexibility and power of adaption which is characteristic of our written law. When the judge says that the principle of a decided case covers a new set of facts he is throwing a new light on the meaning of the principle and giving it a new operation. To that extent he is ‘making’ law, but he makes it not by some legislative act but by the use of his power of interpretation.¹²⁴

¹²¹ (1584) 3 Co. Rep. 7a, 76 E.R. 637 (Ex. Ch.).

¹²² *Ibid.*, at 7b.

¹²³ Sir F. Dwarris, *A General Treatise on Statutes* (London : Saunders and Benning, 1830-1831) at 690, citing *Magdalen College Case* (1616) 11 Co. Rep. 73 at 73b, 77 E.R. 1235, at 1245.

¹²⁴ “The Judicial Office”, Presidential Address at the University of Birmingham (Birmingham:

There is no indication that in the heigh-day of formalism in Canada, the word “interpretation” carried the meaning articulated by Sir Wilfrid Greene.

The emphasis on social policy in *Heydon's Case* meant it could not survive the advance of formalism. But, as judges could not change the law in any way, *Heydon's Case* could not be expressly rejected, and it remained nominally part of the law. As might be expected, the possibility existed that it might be reaffirmed and this occurred in *Hawkins v. Gathercole* in 1855.¹²⁵ In restating *Heydon's Case*, Lord Justice Turner chose the spirit of the law over its letter and thereby assured himself a place in future discussions of the matter, because judges lacked authority to repudiate his decision expressly. Other than that, it had no effect. The reasonableness of the principle in *Heydon's Case* commended its appearance in Sir P. B. Maxwell's treatise, *The Interpretation of Statutes*, published initially in 1875, though the governing principle to statutory interpretation was identified as Coke's approach.¹²⁶ In Maxwell's third edition, published in 1896, the editor added a section entitled “Fallacy of Literal Construction”.¹²⁷

With the dawn of the twentieth century, elimination of the common law approach in favour of formalism became a settled matter. In Craies, *A Treatise on Statute Law* (1911),¹²⁸ the rule in *Heydon's Case* was relegated to problems with “obscure” enactments. So, in the early years of the twentieth century, a Supreme Court of Canada justice could categorically assert: “With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used.”¹²⁹ In a highly informative article published in 1937, “The Literal Canon and the Golden Rule”, E. Russell Hopkins of the University of Saskatchewan relegated the rule in *Heydon's Case* to a footnote, with the comment that its impact at the time “is a matter of some perplexity”.¹³⁰ Under the influence of formalism, all the old principles from the period of the common law method remained formally intact (at least in footnotes), though the judges had no power to make or unmake any law in any way.

In his wonderfully refreshing and insightful 1938 article “Statute Interpretation in a Nutshell”,¹³¹ John Willis outlined three approaches: the “literal” or

Holdsworth Club, 1938) at 11-12.

¹²⁵ (1855) 24 L. J. Ch. 332.

¹²⁶ In the Supreme Court of Canada, Justice Henry (in dissent) had maintained *Heydon's Case* as the proper approach: *Chesley v. Murdoch* (1877) 2 S.C.R. 48.

¹²⁷ A. B. Kempe, *Maxwell On The Interpretation of Statutes* (London: Sweet & Maxwell, 1969) at 26-30.

¹²⁸ W. F. Craies, *A Treatise on Statute Law Founded on and being the Fourth Edition of Hardcastle on Statutory Law* (London: Stevens & Haynes, 1907) at 95-96.

¹²⁹ *Chamberlin v. The King* (1909) 42 S.C.R. 350, at 353-4 (Sir Louis Henry Davies).

¹³⁰ (1937) 5 *Can. Bar Rev.* 689, at 689, n. 4.

¹³¹ (1938) 16 *Can. Bar Rev.* 1.

“plain meaning” rule; the “golden” rule; and the “mischief” rule. Willis identified the mischief rule, namely that propounded in *Heydon’s Case*, as the one most frequently used although never formally mentioned. While Willis viewed it as eminently sensible and in accord with the idea of supremacy of Parliament, he concluded that:

...in the present state of the law the [mischief] rule is without doubt unworkable. You cannot interpret an Act in the light of its policy without knowing what that policy is: that you cannot discover without referring to all the events which led up to the legislation: but a well-settled rule of law forbids reference to any matters extrinsic to the written words of the Act as printed.¹³²

Willis was referring to “the extrinsic evidence rule” created under formalism which, as he said, made the common law approach unworkable. The extrinsic evidence rule forbade the use of facts other than the words themselves to provide the meaning of a law.

Facts which shed light on the policy behind a law are known as “social facts”, while “adjudicative facts” relate specifically to parties to the dispute and the dispute itself: who did what? to whom? when? where? how? and why? In litigation involving the constitutional validity of a law, adjudicative facts are the provisions of the challenged law. The extrinsic evidence rule provides powerful support for the literal meaning approach, although exceptions popping up over the years as common sense peck away at the formal model. As an effective shield to maintain the literal approach, the extrinsic evidence rule naturally has a significant staying power. It only began to be seriously questioned in Canada in the early 1980s, led by Brian Dickson, soon-to-be Chief Justice at the dawn of the *Charter* era.¹³³

With abandonment of formalism, the current position is that a justice may look at anything that sheds light on the purpose of legislation (*i.e.*, the policy behind the law) and is then charged with giving meaning to the words which best fulfill that policy, within the limits of the actual language used.¹³⁴ When Ivan Rand served on the Court, such an idea would have been considered unthinkable, notwithstanding that it dominated his work.

The hold of formalism on the vast majority of the Canadian legal profession is evidenced by the very late acknowledgment of the role of social facts in judicial decision-making. In 1994, a three judge panel of the Ontario Divisional Court asserted that they were dealing with “an area where Canadian legal principle is in a very early

¹³² *Ibid.*, at 14-15.

¹³³ *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714.

¹³⁴ Ruth Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1997), chapter 13.

state” and subject to “some uncertainty”,¹³⁵ even though the classic medium of proof for such facts, the American “Brandeis brief” (particularly in constitutional litigation), dated from 1908; and a significant scholarly discussion entitled “Judicial Notice” by Kenneth Culp Davis had appeared in the *Columbia Law Review* in 1955.¹³⁶

The most pronounced characteristic of the Rand jurisprudence was the presence of reasoning as opposed to conclusions based on authoritative rules. For Justice Rand, Rule of Law meant “the rule of the objective standard of reason as contrasted with the subjective standard of the individual; it is the rule of principle against expediency.”¹³⁷ With this emphasis on reasoning, he logically needed to consider the policy behind a law, its purpose or object. Justice Rand demonstrated this approach in *Reference re Validity of Section 5(a) of the Dairy Industry Act*.¹³⁸ Interpreting the federal criminal law power in the Constitution, he examined the purpose or policy behind the decision to confer that legislative jurisdiction on Parliament rather than upon provincial legislatures. Not surprising, years later, when the Court felt obliged to present a precedent in support of the proposition that the purpose of a law must be examined, reference would be made to Justice Rand’s decision rendered some fifty years before.¹³⁹

Whether applying a principle of the common law or a principle expressed in legislation, the common law method is the same. Justice Rand wrote that the common law

...has an organic influence within it which, being based upon the actual condition of the society to which it applies, necessarily possesses the capacity to change as that society changes....¹⁴⁰

He could have been referring to the interpretation of legislation. Just as a judge lacks authority to change the basic principles of the common law, a judge similarly lacks authority to disregard the words of legislation. But, while the words remain the same, their meaning can change. Interpretation in accordance with the “actual condition of the society” creates a need for social facts. In formalism, only the words of the legislation apply, which is also the approach when applying judge made rules under the doctrine of *stare decisis*.

¹³⁵ *Re Canada Post Corp. and Smith* (1994) 20 O.R. (3d) 173.

¹³⁶ K. C. Davis, “Judicial Notice” (1955) 55 *Columbia Law Review* 945.

¹³⁷ Hon. I. C. Rand, “The Role of an Independent Judiciary in Preserving Freedom” (1951) 9 *University of Toronto Law Journal* 1, at 8.

¹³⁸ [1949] S.C.R. 1.

¹³⁹ *Attorney General of Canada v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

¹⁴⁰ Hon. I. C. Rand, “The Role of the Supreme Court in Society”, an address given in the early 1960s and published in (1991) 40 *University of New Brunswick Law Journal* 173, at 179, edited with introduction by William Kaplan.

Justice Rand insisted that lawyers and judges had “a general political literacy” because law was part of governmental regulation of conduct and action in society.¹⁴¹ As part of government, judges must be aware of the society in which they live and make socially relevant decisions. The social knowledge that judges must possess was found within the area of law known as judicial notice: knowledge that the court and judge could be presumed to possess.¹⁴² As American legal scholar James Bradley Thayer stated, judicial notice belonged to the same topic as legal or judicial reasoning, concerned with the nature and limitations of the judicial function.¹⁴³ Before formalism, judges went beyond the record for their social facts;¹⁴⁴ under formalism, judges could only give a literal meaning to the words of the law.

In 1959, delivering an address a few months before the end of his judicial career, Ivan Rand made his views crystal clear.¹⁴⁵ The desirable qualities in a lawyer entailed an intellectual cultivation of broad dimensions, an intense interest in and a lively curiosity about politics, literature, science, the arts and fields of knowledge generally. The mind of a lawyer should orient itself to any set of assumptions and work its way to their social consequences. In Justice Rand’s view, more scholarship was needed with a more realistic understanding of social facts in widening perspectives and broadening backgrounds, with deeper appreciation of new attitudes, assumptions, needs and demands of human beings.

Integral to legal reasoning, and to the capacity of the common law and the interpretation of legislation to change, was the use of social facts. The articulation of social facts was something for which Justice Rand has been recognised over the years. His reasons for decision in *Reference re Section 92(4) of the Vehicles Act, 1957 (Sask.)* (1958)¹⁴⁶ became a classic because the social values were so clearly expressed. The question before the Court concerned the admissibility, in a criminal prosecution for the offences of driving while intoxicated or while impaired by alcohol, of the results of a breath test compelled by provincial legislation. Favouring admissibility of the breath test evidence, Justice Rand wrote:

The answer...must take into account a consideration of the impact on a constantly intensifying traffic of persons and vehicles on the highways, of

¹⁴¹ “Address of Mr. Justice Ivan Rand of Supreme Court of Canada to Law Students of University of New Brunswick” (1950) 3 *U.N.B. L.J.* (Part 2) 7, at 8.

¹⁴² The word “notice” was at one time often used interchangeably with the word “knowledge”.

¹⁴³ J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, & Co., 1898), at 279.

¹⁴⁴ *Supra* note 136, at 959, citing Lord Mansfield in *Lewis v. Rucker* (1761) 2 Burr. 1167 at 1172, 97 E.R. 769, at 772.

¹⁴⁵ “An Address by the Honourable Mr. Justice I. C. Rand to the Alberta Section of the Canadian Bar Association” (1955-61) 1 *Alberta Law Review* 459 (delivered on 28 January 1959).

¹⁴⁶ [1958] S.C.R. 608.

their use by automobiles, and its ghastly results from mere carelessness in operation alone. When to the lethal dangers inherent and multiplying under the best of ordinary circumstances we add the most potent and destructive factor, the intoxicated driver, a stage has been reached where the public interest rises to paramount importance.¹⁴⁷

Social facts dominated Justice Rand's famous decisions concerning the implied bill of rights and were notable in the cases involving citizenship rights. In *Roncarelli v. Duplessis*,¹⁴⁸ possibly his best known decision, his extensive reference to social facts compelled Justice Robert Taschereau, an avowed formalist, to abandon his model and introduce social facts himself. Justices Rand and Taschereau ended up on opposite sides, with the latter in dissent; but no doubt was left that the final decision depended on a weighing of the social priorities involved.

That Justice Rand provided reasons for his decisions, and not simply the citation of authorities with conclusions attached, has meant that today, with abandonment of formalism, his method has assumed a pronounced importance, while decisions based only on authority have in essence withered away. The intellectual barrenness of formalistic decisions renders them of no help in the new era. The decisions of Ivan Rand were different. This phenomenon was evident in a 1982 decision of Justice Gérard La Forest, then a member of the New Brunswick Court of Appeal, concerning a constitutional case dealing with the confused area of concurrency and paramountcy. His judgment was indicative of today's judicial decision-making approach. In a thorough and masterful manner, Justice La Forest focused on the reasoning in previous cases rather than the results.¹⁴⁹ At one point he noted: "But nowhere did the Courts set forth any underlying reasons for [the] approach [adopted] except perhaps in the judgment of Rand J. in the *Johnson* case."¹⁵⁰ On further appeal,¹⁵¹ the Supreme Court of Canada adopted these reasons for decision and, within a year, Justice La Forest was appointed to the Court. He added his voice to the move away from formalism and a return to the common law method.

IVAN RAND AND THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

In 1930, the Supreme Court of Canada had expressly declared the Judicial Committee of the Privy Council not a court of law.¹⁵² Indeed, it was not a court in the formalist

¹⁴⁷ *Ibid.*, at 619.

¹⁴⁸ [1959] S.C.R. 121.

¹⁴⁹ *R. v. Chiasson* (1982) 135 D.L.R. (3d) 499, 39 N.B.R. (2d) 630.

¹⁵⁰ *Ibid.*, at D.L.R. 507.

¹⁵¹ *Chiasson v. The Queen*, [1984] 1 S.C.R. 266.

¹⁵² *Supra* note 68.

mode¹⁵³ and, because of Justice Rand's commitment to the common law method, he saw its work in a positive way.

The existence of appeals to the Privy Council had been an issue since the statutory creation of the Supreme Court of Canada in 1875. Originally thought to have been generally abolished, this proved true only for appeals as of right; and the practice developed of Canadians seeking leave to appeal to the Privy Council based on the prerogative power of the sovereign. As long as Canadians kept asking to appeal across the ocean, the appeal was maintained. The Privy Council itself suggested that leave should be sought only for cases of "public importance or of a very substantial character"; but Canadian litigants demonstrated that such appeals were considered a normal part of the legal system, at least for those with the money to use it.

Following an agreement between the governments of Ontario, Quebec, and Ottawa in 1881,¹⁵⁴ the practice was adopted of taking constitutional cases to England regardless of the decision of the Supreme Court of Canada. Such cases inevitably raised issues of public importance and, given that a Canadian government brought the application for leave, it should not have been unexpected that the Privy Council would generally grant leave as a matter of course. Canadians thus made the Judicial Committee of the Privy Council an indispensable part of governance for their country.

There were those in Canada who opposed continuation of the appeal and saw it as a blot on the self-governing status of the country. They were not numerous. Until after the Great War, the unity of the Empire served as a powerful value in Canada, with the Privy Council considered the "legal heart and head of the British Empire", a link that bound the Empire together.¹⁵⁵ Significantly, the legal profession provided the most enthusiastic supporters. In the 1930s, in the aftermath of the Great War and in the midst of the Great Depression, opposition gathered steam. The movement to end the appeal focused not on self-government but on the quality of the Privy Council's work, a common criticism being that it had not followed the intention of the fathers of confederation and had improperly altered the constitution. Privy Council bashing became the thing to do. Bora Laskin, then an academic lawyer, noted in 1946 that writers on the Canadian constitution engaged in a "'year around' open season on the Privy Council (an activity now enjoying almost the status of a national pastime)."¹⁵⁶

¹⁵³ There may have been individual judges who sat on the Board and who had technocratic tendencies but, as an institution, it displayed non-formalistic characteristics.

¹⁵⁴ *Mercer v. Attorney General for Ontario* (1881) 5 S.C.R. 538.

¹⁵⁵ Anon., "The Judicial Committee of the Privy Council" (1894) 30 *Canada Law Journal* 294, at 298; Wallace Nesbitt, "The Judicial Committee of the Privy Council" (1909) 29 *Canadian Law Times* 241, at 251.

¹⁵⁶ B. Laskin, "Book Review" (1946) 24 *Can. Bar Rev.* 249, at 250.

In the end, the federal government presented a Bill to abolish the appeal in 1947 and it received the Royal Assent on 10 December 1949. Thereby, the Supreme Court of Canada became the ultimate court of appeal for Canada.

By the 1950s, with the growth of university law faculties, waves of criticisms erupted against the work of the Supreme Court of Canada. The common excuse for its lack of quality was that the Court had been hindered over the years by not having the status of the highest court. In Laskin's opinion, the Court demonstrated a lack of legal doctrine and an absence of an independent judicial tradition. He used the phrase "captive court". The Privy Council became the scapegoat for the ills of the Court and of the Canadian legal system; and criticisms of the Court continued into the 1960s and beyond. The questions naturally arose whether something else had been operating to create and maintain the "captivity" and whether the Privy Council was inappropriately blamed. However, the scapegoat idea enjoyed simplicity and provided such a degree of comfort for Canadian lawyers that it attained mythic proportions.

In the book titled *The Captive Court*,¹⁵⁷ I embarked on a comprehensive history of the Court to 1989, with a particular emphasis on the appeal to the Privy Council and naturally the notion of captivity. I had not thought of the project as an iconoclastic work; however, a critical examination of a myth can be perceived as such. The conclusion reached was that the least likely cause of the captivity was the appeal to the Privy Council. But myths die hard.¹⁵⁸

Following the end of appeals to the Judicial Committee, Justice Rand addressed law students on the topic of Canadians succeeding to the role occupied by the Privy Council. There was a need, he said, to assess its work which, as a British court

¹⁵⁷ *Supra* note 13.

¹⁵⁸ One reviewer did not consider the facts and arguments presented in the book (nor even mention them); instead, without presenting his own analysis, the reviewer simply stated: "The identity of the captor is not in doubt: for the first seventy-odd years of the court's existence, it was the Judicial Committee of the Privy Council.... Certainly this theme will come as no surprise to most readers. It had achieved canonical status when I attended law school in the 1970s": P. Girard, "Beyond Captivity: A Review of Ian Bushnell's *The Captive Court*" (1993) 13 *Windsor Yearbook of Access to Justice* 308, at 309. That some law schools in the 1970s, over twenty years after the heigh-day of Privy Council bashing, taught uncritically that the Privy Council intellectually inhibited the mental processes of Supreme Court of Canada justices, as asserted by Bora Laskin, seemed to be itself evidence of mental captivity. To have that view carry over into an academic environment in the 1990s meant that Ivan Rand, who was on the Supreme Court of Canada at the time of the bashing and who highly praised the Privy Council for the quality of its work, was certainly adventurous in challenging such strong and allegedly binding conventional views. Now see Philip Girard, *supra* note 116.

...in the conception of the judicial function, in the independence and objectivity of judges, in the technique of legal reasoning, and in the processes of judgment, . . . [had] reached full maturity.¹⁵⁹

The Privy Council, he said, had demonstrated great legal ability in interpreting the Canadian constitution and gave favourable mention to Lord Herschell, Lord Watson, Lord Macnaghten and Viscount Haldane. Crucial was identification of its non-formalistic approach:

The reasoning is seen to proceed not only from broad and intimate familiarity with precedent and principle but also with that sense, in their many aspects, of surrounding matters, the habits of men and the rhythms of their lives, which communicates strength and realism to judgment.¹⁶⁰

This was the standard that Justice Rand wanted Canadian lawyers to emulate. But, he added a somewhat discouraging note. He said that attaining the necessary professional standard could be achieved, “*if we appreciate fully the character of what they have bequeathed us*” [emphasis added].¹⁶¹ It would be then that Canadian lawyers could shoulder the responsibility of judicial autonomy.

In an address a decade later, Justice Rand emphasised that “statesmanship is involved” when a judge interprets the constitution. He referred to an article, written by Viscount Haldane on the occasion of Lord Watson’s death, in which Haldane praised Watson for being a statesman as well as a jurist. Commenting that Haldane had very properly written of the statesmanship of Watson, Justice Rand stated: “It is a statesmanship act that is performed when you say, ‘This legislation is constitutional or unconstitutional’.”¹⁶² Speaking at the Harvard Law School in 1960, Justice Rand warned that a “preoccupation with the language of the statute” and “confining interpretation in substance to the unaided text” created “a somewhat arid and unrealistic conceptualism” when interpreting a constitution.¹⁶³ For Ivan Rand, the concern was not that the Privy Council had done these things but the danger that Canadian judges might continue to do so.

In the notorious *Persons* case of 1929,¹⁶⁴ the Privy Council noted in the language of Viscount Sankey that the *Constitution Act, 1867* “planted in Canada a

¹⁵⁹ *Supra* note 141, at 7.

¹⁶⁰ *Ibid.*, at 8.

¹⁶¹ *Ibid.*

¹⁶² *Supra* note 101, at 189.

¹⁶³ Ivan C. Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 *Can. Bar Rev.* 135, at 152.

¹⁶⁴ *Supra* note 67.

living tree capable of growth and expansion within its natural limits.”¹⁶⁵ The object of the Act was to grant a Constitution to Canada, and Sankey directed the justices of the Supreme Court of Canada not to “cut down the provisions of the Act by a narrow and technical construction, but rather give it a large and liberal interpretation.”¹⁶⁶ The Court flatly rejected this direction. In 1930, Chief Justice Anglin denied any creative element in judicial decision-making and stated that it was the exclusive province of the legislature to determine what the law should be

...whatever may occur elsewhere . . . it would seem to be the plan of this ‘Court of Law and equity’ to give effect to the intention of the legislature as expressed, not to make law as they think it should be.¹⁶⁷

Such a public and clear rejection of the Privy Council’s directive demonstrated strong feelings. It also provided a glaring illustration that the justices of the Court did not believe they were held “captive” by the Privy Council. Such a reaction, which included a repudiation of the Privy Council as a “Court of Law and equity”, and the characterisation of it as a political body, suggested that the legal profession, the staunchest supporter of the appeal in the 1920s, felt threatened by it. In a 1932 constitutional case, Viscount Sankey admonished that “it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed”,¹⁶⁸ thereby making clear that the Privy Council maintained its position that constitutional interpretation should be based on the policy behind the provisions rather than on literal interpretation of the words in which they are expressed. Again in 1935, now Lord Chancellor, Viscount Sankey reasserted views expressed in the *Persons* case that a large and liberal interpretation should be adopted.¹⁶⁹ While these words might have been music to the ears of someone like Ivan Rand, who advocated such views throughout his judicial career, the justices of the Court and the mainstream of the Canadian legal profession at the time must have found it highly disconcerting. If Ivan Rand had been appointed to the Court in 1932, he would have provided the fertile soil in which Viscount Sankey’s interpretive direction would have blossomed. But, Rand and the common law approach had to wait for over another decade.

The Judicial Committee made no secret of its non-formalistic tendencies. *Brophy v. Attorney-General of Manitoba* (1895) was a leading example. Lord Chancellor Herschell stated

...the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words

¹⁶⁵ *Ibid.*, at 136.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Supra* note 68, at 128.

¹⁶⁸ *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, at 70.

¹⁶⁹ *British Coal Corporation v. The King*, [1935] A.C. 500.

employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is *to interpret*, not to enact.... [However] it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.¹⁷⁰

The phrase “surrounding circumstances” was crucial. A judge was directed to go beyond the mere words and consider whatever available information revealed the “intention” or policy behind the legislation. However, under the formidable influence of formalism, the Canadian legal profession used Lord Herschell’s statement as authority for its literal approach. The preferred phrases were “the true construction of the language used” and “the function of a tribunal is limited to construing the words employed” and the remainder of the quote was simply ignored. Viscount Sankey’s language, nevertheless, was clear and persistent. He should not have been misrepresented or misunderstood.

Earlier, I stated that Justice Rand identified Lord Herschell, Lord Watson, Lord Macnaghten and Viscount Haldane as having great legal abilities. Herschell, as Lord Chancellor, had rendered the decision in *Brophy*, while Watson and Macnaghten sat on that appeal.

With the end of appeals to the Privy Council, Justice Rand had declared in *Farm Products Marketing Act*, discussed earlier, that the Supreme Court of Canada could take its place and exercise its powers. The powers he meant were those that came with a non-formalistic approach; and he pointed out that the Board had modified its language, used in interpreting provisions in the Constitution. In keeping with the common law method, there would be no departure from the basic principles of jurisdictional distribution but he recognised the power to undertake

...a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.¹⁷¹

At the beginning of his judicial career, Justice Rand articulated his opinion that the judicial function entailed reasoning drawing upon all sources and, quoting the Judicial Committee, he declared that reasoning and good sense should prevail, warning that insistence upon “precise precedent” would create judicial sterility.¹⁷² Justice Rand’s praise for the Judicial Committee, and his urging that it be emulated by

¹⁷⁰ [1895] A.C. 202, at 215-6 [emphasis added].

¹⁷¹ [1957] S.C.R. 198, at 212-3.

¹⁷² *Supra* note 70.

the Canadian legal profession, was not apparently heard in the chorus of criticism that created the myth that the woes associated with the Court were the fault of the Judicial Committee.

In 1964, near the end of his tenure as founding Dean at the Faculty of Law, University of Western Ontario, Rand wrote the foreword to the “Supreme Court Review” published by the *Osgoode Hall Law Journal*.¹⁷³ This was the first annual review of the work of the Court undertaken in Canada and an issue dedicated to Dean Rand on the occasion of his retirement from Western. He wrote an upbeat foreword, in essence a pep talk, in which he welcomed periodic critical review of the work of the Court as a stirring of legal scholarship. For him, the “Supreme Court Review” was a start. Nevertheless, he felt the need to refer once again to his concern. He praised Lord Watson and Viscount Haldane as possessing “powerful and comprehensive minds” and criticised Canadian judges as undertaking “a submissive observance of the exact letter and phrase in their pronouncements.”¹⁷⁴ The problem, he observed, could be attributed to the “comparative absence of broad scholarly concern for legal research” in Canada. This was the captivity. A technocratic enterprise did not need or desire scholarly study.

Earlier, at the end of his judicial career in 1959, Justice Rand had addressed the Alberta Branch of the Canadian Bar Association¹⁷⁵ and remarked that, as makers of our own destiny in the field of law, the legal profession lagged in scholarship in comparison with that in England or the United States, and was not equal to their dimensions in imaginative and original thinking. We must try to emulate them, he said. The needed scholarship involved more realistic understanding of social facts in widening perspectives and broadening backgrounds, with deeper appreciation of new attitudes, assumptions, needs and demands that would emerge from these tremendous changes. We must do our own thinking-out of new problems, he said, and express it in our own idiom; the time of relying on the thinking of others must end.

He pushed the envelope, not only to end the age of the technocrat as lawyer but to engage the lawyer in scholarship as artist.

AFTER RAND

*In the Last Resort*¹⁷⁶ was Professor Paul Weiler’s study of the Supreme Court of Canada. In that work, he noted that the 1960s Court regressed to a heavily legalistic

¹⁷³ (1964) 3 *Osgoode Hall Law Journal* 168.

¹⁷⁴ *Ibid.*, at 168.

¹⁷⁵ *Supra* note 145.

¹⁷⁶ (Toronto: Carswell/Methuen, 1974) at 227.

formal style that rendered mechanical opinions and that this occurred when many of the Court's members had served in the 1950s. Of course, an absent member of the 1960s Court was Ivan Rand. The appointment of Ronald Martland in 1958 and of Roland Ritchie in 1959, coupled with the presence of John Cartwright, assured a critical core of influential justices who by their personality, if not their reasoning, would lead the Court. They were unquestionably technocrats and devotees of the formalist model.

But its end was in sight. What Weiler described could have been the phenomenon that frequently surrounds the death of an idea or practice, namely, as is believed for a candle, the flame burns brightest as it dies out. While formalism dominated the work of Justices Cartwright, Martland and Ritchie, the same Conservative government that appointed the latter two justices also appointed Emmett Hall in 1962, a judge in the mould of Ivan Rand. Justice Hall was one of the first judges, after Rand, to recognise publicly the law-making role of the judge.¹⁷⁷ In 1963, the first Court appointee of the new Liberal government was Wishart Spence. With his Harvard LL.M., Justice Spence would join Bora Laskin and Brian Dickson in a trio committed to non-formalist decision-making, dubbed by the press as "the L.S.D. connection" because they stood out from the other members of the Court.

Pierre Elliott Trudeau undertook the main challenge to formalism on the Court. The Trudeau Liberal government's first appointee was Bora Laskin in 1970. Justice Laskin was unquestionably a non-formalist in the image of Ivan Rand, although more of an activist. Trudeau era appointees to the Court were expected to accept a role in law reform, to recognise a duty and a responsibility to interpret law in accordance with contemporary thought, and to link the jurisprudence of the past with cultural norms and social contexts.¹⁷⁸

The Court re-established the common law method and in 1990 announced its "principled approach" by which the Court abandoned the "captivity" inherent in formalism and in the technocratic approach to law. How judges would respond to their new role would become the issue. Justice Rand himself had displayed judicial restraint in the exercise of inherent judicial power, an essential element of the common law method.¹⁷⁹

¹⁷⁷ Bushnell, *Captive Court*, *supra* note 13, at 342; and now, Frederick Vaughan, *Aggressive in Pursuit: the Life of Justice Emmett Hall* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2004).

¹⁷⁸ *Supra* note 167; and Bushnell, *Federal Court*, *supra* note 12, at 167.

¹⁷⁹ It should be remembered that under the common law judges possess the power of judicial review. When it should be used is another matter.

Sir Lyman Poore Duff has been recognised by some as one of Canada's greatest jurists. His biographer, David Ricardo Williams, called Chief Justice Duff a judicial technocrat. Ivan Cleveland Rand, Williams said, brought soul to the Court.¹⁸⁰

¹⁸⁰ D. R. Williams, *Duff: A Life in the Law* (Vancouver: U. B. C. Press, 1984), at 277.