

# RAND ON INSURANCE: STRICT READING AND THE INDIVIDUAL

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Ivan Cleveland Rand was once described as “one of the most outstanding legal minds ever to come out of the Maritimes”<sup>1</sup> and, so dominant was his presence at the Supreme Court of Canada, that the 1950s were described as “the Rand years.”<sup>2</sup> His opinions in cases concerning the detention of Japanese-Canadians during the Second World War and the discriminatory treatment of Jehovah’s Witnesses in Quebec made him a “champion of religious freedom and civil liberties.”<sup>3</sup> Having such a dominant and respected role in the field of civil liberties, the question naturally arises whether his contributions in other areas of the law were equally significant. In particular, having sat on twenty-two insurance appeals to the Supreme Court of Canada,<sup>4</sup> what did he contribute to the law of insurance? This article will answer that question.

## 1. THE 1940s

Rand’s first insurance appeal as a justice of the Supreme Court of Canada was *The Travelers Indemnity Company, et al. v. Powers*.<sup>5</sup> The respondent, Powers, was a passenger in an automobile owned by Hibbard Motors Sales Limited and driven by one of its employee’s, Dean, for personal pleasure. Unfortunately, Dean had an accident and Powers suffered injuries which resulted in a judgment against Dean. The insurer, Travelers Indemnity, had issued the motor vehicle liability policy to the owner, Hibbard. By agreement of the insured and insurer, the “omnibus” clause had been deleted from the policy. This clause would have extended coverage to other persons who drove the vehicle with the consent of the named insured. However, the policy

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<sup>1</sup> James Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 151.

<sup>2</sup> Ian Bushnell, *The Captive Court, A Study of the Supreme Court of Canada* (Montreal: McGill-Queen’s University Press, 1992) at 326.

<sup>3</sup> *Ibid.*, at 300.

<sup>4</sup> The cases are listed elsewhere in this volume.

<sup>5</sup> [1944] S.C.R. 77.

did contain a “Canadian garage endorsement” which insured Hibbard for liability caused by “the ownership, maintenance or use of any automobile for all purposes in connection with the above described operations, and also for pleasure use....” Counsel for Powers had argued successfully at trial and on appeal before the Quebec courts that Dean fell within the words “and also for pleasure use”. The Supreme Court of Canada allowed the appeal by Travelers Indemnity. In the judgment of Justice Taschereau, with Justice Rand concurring as a member of the unanimous panel, the Court agreed with the insurer that the policy covered only Hibbard: “The policy as amended does not say that all persons driving an automobile belonging to the insured for ‘pleasure use’ are protected by its terms.”<sup>6</sup> Though he did not write reasons for decision and merely concurred in the case, *The Travelers Indemnity Company, et al. v. Powers* set the tone for Justice Rand’s approach to insurance policies in subsequent appeals. As contracts, insurance policies were to be given a literal (if not a strict) interpretation consistent with respect for freedom of contract. From a public policy perspective, all legislatures in Canada eventually reversed *The Travelers Indemnity Company, et al. v. Powers* by legislatively extending an owner’s policy to cover all persons who drive a vehicle with the consent of the insured owner. Public policy was a role for the legislature, not the courts.

Justice Rand’s concurrence with Justice Taschereau was the first and last time that he ever did so. Likewise, Justice Taschereau thereafter concurred only once with Justice Rand. Twice they both managed to concur with a third judge. In all the other insurance appeals on which they both sat, they either delivered separate or dissenting opinions. One may suspect that the differences of opinion that they expressed in later years in the fields of religion and civil liberties carried over into the fields of private law, including insurance.

Rand more often found in favour of the insurer than the insured. As a justice of the Supreme Court of Canada, he heard nineteen appeals concerning the scope of insurance coverage and found no coverage in thirteen. The trend was set early in his judicial career. In *New York Life Insurance v. Schlitt*,<sup>7</sup> the deceased had purchased a double indemnity life insurance policy but, to collect the double indemnity, death had to occur “through external, violent and accidental cause.” The deceased died in a fire in his barn. Was this fire accidental or intentionally set by the deceased to effect his suicide? The evidence was sparse. The deceased’s wife had told him earlier that day of her intention to leave the marriage and the deceased had responded that, if that happened, he could not face it. A gasoline can was found in the barn after the blaze and the doors of the barn had been closed during the fire. In separate reasons for

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<sup>6</sup> *Ibid.*, at 81. This conclusion is consistent with the result in *Vandepitte v. Preferred Accident Insurance Co.*, [1933] A.C. 70, wherein the Judicial Committee of the Privy Council concluded that the third party beneficiary rule prevented a non-owner driver from benefitting from an automobile insurance policy even if it contained an “omnibus” clause.

<sup>7</sup> [1945] S.C.R. 289.

decision, Justices Kerwin (Rinfret, C.J. concurring), Taschereau, and James Estey each concluded that the evidence did not support a finding of suicide and decided in favour of the estate against the insurer. They applied the presumption against imputation of a crime, *i.e.*, suicide, and considered the evidence fell short of establishing that the deceased had committed suicide. Justice Rand alone dissented. He put the question as follows:

Does, then, the presumption against suicide as it arises in this case throw upon the appellant [insurer] the burden of establishing it by the preponderance of probability, or does the onus remain [on the insured] of establishing death by accident? I have no doubt it is the latter; and if, with the presumption and its underlying probative force properly applied, the proof in rebuttal brings the court to the point where on the whole case it must say that the probabilities are in equal balance, the respondent [insured] must fail.<sup>8</sup>

In his view, the estate had the legal burden to establish death by accidental means within the meaning of the insurance contract and this it had failed to do.

The legal burden on the insured often proved heavy when Ivan C. Rand sat. In *Boiler Inspection and Insurance Co. v. Abasand Oils Ltd.*,<sup>9</sup> “a gas explosion in the furnace ... damaged the boiler; as a direct result, a flame, forced out of a small aperture in the furnace, played upon a wooden support and set a fire which spread to the structure of the building and ultimately consumed it....”<sup>10</sup> The insurance policy covered loss of property from the explosion of gas within the furnace but not loss from fire and an endorsement provided business interruption insurance “caused solely by an accident,” but again excluding an accident caused by fire. Justice Rand (with Rinfret C.J. and Locke J. concurring) concluded that the policy “*makes it perfectly clear* that a fire caused by an explosion is to be deemed to be completely severed from the explosion....”<sup>11</sup> Not all members of the Court found the policy so clear. Justice Estey (Taschereau, J. concurring) in dissent, read the policy as covering the business when the explosion and the fire occurred concurrently. One year later, what had been perfectly clear to Justice Rand did not seem so clear to the majority of his colleagues. In *Sherwin-Williams Co. of Canada Ltd. v. Boiler Inspection and Insurance Co. of Canada*,<sup>12</sup> Justice Rand alone concluded that a fire was separate from the explosion which produced it, and therefore the resultant damage was not covered by the policy. Justice Taschereau (Rinfret, C.J. concurring) held “there was an unbroken sequence between the explosion in Tank No. 1, which is the casualty, and the ultimate loss.

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<sup>8</sup> *Ibid.*, at 308.

<sup>9</sup> [1948] S.C.R. 315.

<sup>10</sup> *Ibid.*, at 316.

<sup>11</sup> *Ibid.*, at 319 [emphasis added].

<sup>12</sup> [1950] S.C.R. 187.

There was not an intervening cause, in which was merged the original casualty.”<sup>13</sup> In separate reasons for decision, Justices Estey and Locke agreed.

Again, Justice Rand’s analysis and conclusion did not find favour with provincial policy makers. Legislatures across Canada intervened with statutory amendments requiring insurance policies to provide coverage “against fire, whether resulting from an explosion or otherwise...” and “against explosion...whether fire ensues therefrom or not.”<sup>14</sup>

Legal difficulties for an insured continued in *Marcoux v. Halifax Insurance Co.*<sup>15</sup> A truck overturned when the steering mechanism malfunctioned and the driver lost control. A pedestrian, who initially indicated that he had not been hurt, was later found to have suffered several broken ribs when struck by the truck. The insured did not forward notice of the accident to the insurer, though the policy required notice to be given promptly. When the injured pedestrian claimed damages, the insurer denied the insured’s claim for indemnification because of the failure to give prompt notice. Though the Supreme Court of Canada unanimously held that the insured’s claim must fail, Justice Rand did not join in the reasons of Justice Taschereau (Rinfret C. J., Kerwin, Locke, JJ. concurring) but expressed himself separately. He wrote:

On the facts, then, as they have been presented, I feel bound to conclude that there was sufficient to indicate to a reasonable and prudent person that bodily injury had most probably been suffered. The obligation to give notice therefore arose and in that situation it is scarcely disputable that it was not given promptly.<sup>16</sup>

Today, it is likely that the Court would at least consider granting relief from forfeiture available under provincial insurance legislation<sup>17</sup> or the *Judicature Act*.<sup>18</sup>

One decision of Justice Rand’s which stood apart from the others decided in the 1940s was *Springfield Fire and Marine Insurance Co. v. Maxim*.<sup>19</sup> In the original application for a fire insurance policy to cover risk to a flour mill, the respondent’s husband made a misrepresentation by stating that he had not suffered a previous fire. Under these circumstances, application of the statutory conditions would render

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<sup>13</sup> *Ibid.*, at 195.

<sup>14</sup> For example, *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 123(1).

<sup>15</sup> [1948] S.C. R. 278.

<sup>16</sup> *Ibid.*, at 286.

<sup>17</sup> For example, *Insurance Act*, *supra* note 14, s. 110; *E lance Steel Fabricating Co. v. Falk Brothers Industries Ltd.* [1989] 2 S.C.R. 778.

<sup>18</sup> For example, *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 26(3); *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.

<sup>19</sup> [1946] S.C.R. 604.

the policy void. Later, the insured husband conveyed ownership of the flour mill to the respondent, his wife, though he continued to operate it. When notified of the conveyance through its local agent, the insurer Springfield Fire and Marine issued an endorsement which read:

Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only. All other terms and conditions remaining unchanged.<sup>20</sup>

When a fire subsequently occurred, the insurer refused to pay on grounds that the husband's original misrepresentation had voided the policy and that the respondent, as an assignee, was in no better position than her husband. The insurer also argued that she had not given any consideration for the policy. Justice Hudson (Rinfret C.J. concurring) agreed with the insurer while Justice Kerwin (Estey J. concurring) disagreed. Justice Rand broke the tie in separate reasons holding for the insured, thus supporting Justices Kerwin and Estey. What was refreshing about his judgment in this case, and lacking in his other judgments on insurance appeals in the 1940s, was that his overview of the facts led to a conclusion with sound public policy. First, he did not mire in the language of the endorsement. He recognized that events leading to the endorsement could be described as an assignment, but quickly recognized a moral element to an insurance policy such that it was not assignable by an insured, at least not without consent of the insurer. The real question then was: what were the consequences of the insurer's consent to the transfer? Rand J. stated:

The request for approval of an assignment is in effect an application for a new contract of insurance. The company may require any information considered necessary or desirable before giving consent. It could insist upon an application *de novo*. But if does not see fit to do that, apart from the question of estoppel on the fact that, in reliance on the approval, the assignee ordinarily can be said to have abstained from taking out new insurance, the company must be deemed to have been content to deal with the assignee on the footing of his own representations alone.<sup>21</sup>

Earlier in his reasons he had characterized any other approach as meaning that "an innocent purchaser could continue the payment of insurance premiums for any number of years, and in the event of fire find himself at the mercy of a misrepresentation by his predecessor in title about which he knew nothing and which might be irrelevant to the actual risk of the new contract."<sup>22</sup> Rejecting the insurer's second argument, he

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<sup>20</sup> *Ibid.*, at 612

<sup>21</sup> *Ibid.*, at 621.

<sup>22</sup> *Ibid.*, at 620.

held that retention of the unexpired portion of the premiums constituted the necessary element of consideration.

The only other insurance case involving Justice Rand in the 1940s was *Adam v. Ouellette*,<sup>23</sup> in which the issue was whether the named beneficiary under a life insurance policy could be changed by a will. The policy named the father as beneficiary but, in his later will, the insured left “tous les biens, meubles, immeubles, argent, creances y compris mes assurances et tous autres biens, etc.” to his wife. Justice Taschereau (Rinfret, C.J., Kerwin, Estey JJ. concurring) held in favour of the wife. Rand J. dissented. Obviously he did not consider either the French language or the Quebec *Civil Code* as factors indicating that he should defer to his Quebec colleagues.

## 2. THE 1950s.

Of the fifteen insurance appeals involving Justice Rand in the 1950s, he wrote reasons for decision in ten. Only once did he deliver the majority judgment and only once did he dissent, by concurring with the reasons of another justice. On four occasions he merely expressed his concurrence but on nine occasions he delivered separate concurring reasons for decision. Based on his contribution to insurance appeals, the 1950s in the Supreme Court of Canada would never be described as “The Rand Years”. His decisions generally continued his conservative approach of the 1940s. In *World Marine & General Insurance Co. Ltd. v. Leger*<sup>24</sup> he concurred with Kerwin J. that a soliciting agent had no authority to bind an insurer. There was no evidence of judicial activism in this judgment and the case contrasted sharply with the Court’s 1973 decision in *Blanchette v. C. I. S. Limited*,<sup>25</sup> in which Justice Pigeon held a soliciting agent to be the agent of the insurer. Some provinces have since gone so far as to legislate the authority.<sup>26</sup>

Compared to their predecessors, appellate judges today are more apt to express simple concurrence rather than concurrence supported by extensive reasons for decision unless, though agreeing with the result, there is a significant difference of opinion as to the law. *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*<sup>27</sup> was such a case. Andrews & George, the insured, manufactured glue which it sold to a lumber company manufacturing plywood. Unfortunately, the glue was defective and the insured settled liability with the lumber company. The insured’s policy covered “liability imposed by law...for damage to...property of others caused by accident during

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<sup>23</sup> [1947] S.C.R. 283.

<sup>24</sup> [1952] S.C.R. 3.

<sup>25</sup> [1973] S.C.R. 833.

<sup>26</sup> For example, *The Insurance Adjusters, Agents and Brokers Act*, S.N. 1986, c. 36, s. 26.

<sup>27</sup> [1953] 1 S.C.R. 19.

the policy period and arising out of the...use of or the existence of any condition in merchandise products...sold...after the insured has relinquished possession...and away from premises owned by...the insured.”<sup>28</sup> There were two other relevant provisions. The first stated, “This policy applies only to accidents or occurrences which originate during the policy period”<sup>29</sup> and the second excluded coverage for “Damage to or destruction of property where the insured has assumed a liability therefor under the terms of any contract or agreement.”<sup>30</sup> All members of the Court were of the opinion that liability arose from a contract, so the exclusion applied and there was no coverage. Justice Kerwin (Estey J. concurring) was of the view that, but for the exclusion, the insurer would be liable and concluded that to come within the words “caused by accident” all that was necessary was for damage to have occurred off the premises. Justice Rand, in separate reasons, also concluded that, for there to be coverage, the accident had to occur off the premises of the insured but added the qualification that it be “something out of the ordinary or the likely, something fortuitous, unusual, and unexpected, not, in the ordinary course, guarded against.”<sup>31</sup> Justice Kellock agreed with Justice Rand but Justice Cartwright concluded that he did not have to decide the question. When the question of what constituted an accident returned to the Supreme Court of Canada some twenty-three years later, in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*,<sup>32</sup> Justice Pigeon stated: “What was said by Rand J. in [*Andrews & George*] as to the meaning of the word “accident” clearly does not form part of the *ratio decidendi*.”<sup>33</sup>

Beyond the meaning of “accident” in an insurance policy, *Andrews & George* was also significant for a progressive view expressed by Justice Rand regarding the relationship of contract and tort law:

Where a contract expressly or by implication of fact provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort.<sup>34</sup>

In 1986, the Supreme Court of Canada, in *Central Trust Co. v. Rafuse*,<sup>35</sup> finally settled this relationship consistent with the position which Justice Rand had expressed more than thirty years before.

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<sup>28</sup> *Ibid.*, at 21.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, at 24.

<sup>31</sup> *Ibid.*, at 27

<sup>32</sup> [1976] 1 S.C.R. 309.

<sup>33</sup> *Ibid.*, at 317.

<sup>34</sup> *Supra* note 28, at 26.

<sup>35</sup> [1986] 2 S.C.R. 147.

In contrast to *Andrews & George*, the rationale for the separate opinions of Justice Rand (Rinfret C.J. concurring) and Justice Taschereau (Estey and Locke JJ. concurring) in *Ellis v. London-Canada Insurance Co.*<sup>36</sup> is difficult to ascertain. The insurer had issued a motor vehicle liability policy to the insured, a man named Gillan. Upon further investigation, the company asked the soliciting agent to request return of the policy for cancellation. The insured returned the policy and on 20 September the soliciting agent refunded the premium paid by the insured. On 23 September, the insured had a motor vehicle accident in which his wife died. The plaintiff, the administrator of the wife's estate, claimed that the policy could only be cancelled on fifteen days notice, pursuant to provisions of the *Insurance Act*. Justices Rand and Taschereau both agreed that surrender of a policy differed from unilateral cancellation by an insurer and that the fifteen days notice provision applied only in the latter situation. The need for two sets of reasons for decision to make this same point seemed somewhat of a waste of judicial resources.

The Court divided on the interpretation of a Contractors Liability Policy in *Indemnity Insurance Company of North America v. Excel Cleaning Service.*<sup>37</sup> For once, Justice Rand sided with the insured. In the business of cleaning rugs, Excel dispatched an employee to the home of a customer where the employee damaged a rug which was tacked to the floor. The policy purported to cover "all sums which the insured shall become obligated to pay by reason of liability imposed upon the insured by law for damages because of injury to or destruction of property...arising out of the work of the insured...."<sup>38</sup> Under the heading "Exclusions", it stated: "This policy does not apply:... (g) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured."<sup>39</sup> The insurer argued that, while the rug was being cleaned, it was in "the care, custody or control of the insured" and therefore there was no coverage. If accepted, this reasoning would have meant that the policy was of little value to the insured. Surprisingly, two members of the Court accepted that argument, Chief Justice Kerwin and Justice Cartwright. They were of the view that, if the customer's wife had not been home at the time, there would have been no question that the rug was in the care and control of the Excel employee. The fact that she was home at the time made no difference. More pragmatically, Justice Rand reasoned:

Obviously while the respondents are in the process of cleaning any article, a *de facto* impact on the dominion over it is involved; but it is only in the nature of something imposed upon that dominion, not derogating from it; or, to put it in another form, the obligation to do work upon the property

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<sup>36</sup> [1954] S.C.R. 28.

<sup>37</sup> [1954] S.C.R. 169.

<sup>38</sup> *Ibid.*, at 171.

<sup>39</sup> *Ibid.*



is in contemplation of law to do it while the property remains within the exclusive care and control of the owner.<sup>40</sup>

Justices Estey and Locke agreed in separate reasons. Logically, this meant that a rug cleaned on the premises of the insured would not be covered under the policy; so what did the parties think the Contractors Liability Policy covered? *Excel Cleaning* should be compared with *Piggott Construction (1969) Ltd. v. Saskatchewan Government Insurance Office*,<sup>41</sup> where a builder's all-risk policy, issued for construction of a community swimming pool, excluded the "costs of excavation...foundation, piers or other supports...which are below the surface of the ground."<sup>42</sup> The only part of the pool to be constructed above ground was a manhole cover. As Justice Cameron, had observed for the Court of Appeal, "for all practical purposes, the insurer delivered a worthless policy."<sup>43</sup> In this situation, the Court referred back to the original oral contract when no mention had been made of the exclusion. The 1950s at the Supreme Court of Canada were not as innovative in fulfilling the needs of insureds.

Justice Rand delivered brief concurring reasons in *General Security Insurance Co. of Canada v. Howard Sand & Gravel Co. Ltd.*<sup>44</sup> The respondent, Howard Sand & Gravel, had a contract with one Patterson to haul cement. Although Patterson hauled solely for Howard Sand & Gravel, the parties considered their legal relationship to be that of an independent contractor. When a question later arose as to whether Patterson required a public commercial vehicle licence, not required for vehicles owned and used solely in the business of the owner, Howard Sand & Gravel bought Patterson's vehicle for \$1 and registered the vehicle in its name. It also agreed to sell the vehicle back to Patterson for \$1 at any time. Patterson informed his insurer of this change in ownership and they issued a policy naming Howard Sand & Gravel as the insured. Thereafter, the vehicle remained in the possession of Patterson. After this change in ownership and registration of the vehicle, two claims were made on the policy. The insurer paid the first claim and negotiated a settlement of the second for \$25,000. It then took the position that it was not liable under the policy because of the misrepresentation as to true ownership of the subject vehicle. To settle this \$25,000 liability, the insurer and Howard Sand & Gravel eventually agreed to pay \$15,000 and \$10,000, respectively, to the injured third party. Later, Howard Sand & Gravel learned that the insurer had known all the facts and claimed repayment of the \$10,000 it had paid out to the third party.

In the Supreme Court of Canada, all judges agreed that Patterson had remained owner of the vehicle, that the insurer knew the true facts and had misrepresented them

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<sup>40</sup> *Ibid.*, at 175.

<sup>41</sup> (1985), 16 C.C.L.I. 204 (Sask. C.A.).

<sup>42</sup> *Ibid.*, at 219.

<sup>43</sup> *Ibid.*, at 233.

<sup>44</sup> [1954] S.C.R. 785.

in negotiating the settlement with Howard Sand & Gravel. In the words of Justice Locke: “the appellant should be held to be estopped by its conduct from asserting that the right to indemnity had been lost by reason of the misrepresentations made in the application.”<sup>45</sup> He also concluded that a public carrier licence was, indeed, not needed in this situation. More significantly, and relying on *Moule v. Garrett*,<sup>46</sup> Justice Locke held that money paid under ‘mistake of fact’ could be recovered, even though the defendant had not received the money as long as it was paid to the use of the defendant. For his part, Justice Rand reserved the question of what constituted a common carrier but agreed that the insurance company’s misrepresentation entitled the insured to rescind the settlement agreement and to recover the moneys paid. His comments hardly justified a separate opinion.

One of the two insurance cases where the full Court was able to concur in one set of reasons was *Continental Casualty Co. v. Roberge*.<sup>47</sup> The insured had a throat infection and was unable to work. The question presented was whether the insured was entitled to \$100 per month under an accident and sickness policy. To be so entitled, the insured had to be “necessairement, strictement et continuellement retenu dans la maison.”<sup>48</sup> The evidence revealed that the insured made several trips to his doctor, the insurance company and his lawyer. He also took a short walk each day and went to a nearby store. Justice Abbott (Taschereau, Rand, Kellock, Fauteux JJ. concurring) held that he was not so confined within the meaning of the policy and denied coverage.

The only case where Justice Rand delivered the majority judgment in the 1950s was *Lumberman’s Mutual Casualty Co. v. Stone*.<sup>49</sup> In compliance with the statutory conditions, the insurer, by registered letter, notified the insured that it was cancelling an automobile insurance policy. Included with the notice was a cheque refunding the unearned portion of the premium. The statutory conditions required any notices to be sent by registered mail to the insured “at his last post office address, notified to the insurer.” The cancellation provision provided that the coverage would cease fifteen days “following the receipt of the registered letter at the post office to which it is addressed.” Twice the postal authorities tried to deliver the letter to the insured’s home address but, on both occasions, no one was home to accept delivery. The letter carrier testified that a card had been left notifying the insured that the letter was available for pick up at the post office. The insured testified that he never received the card. Eventually, the letter was returned to the insurer. Justice Cartwright, in dissent, held that the discrepancy between the insured’s address and the statutory conditions referenced to the insured’s post office’s address meant that the conditions

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<sup>45</sup> *Ibid.*, at 796.

<sup>46</sup> (1872), L.R. 7 Ex. 101.

<sup>47</sup> [1955] S.C.R. 676.

<sup>48</sup> *Ibid.*, at 677.

<sup>49</sup> [1955] S.C.R. 627.

had not been satisfied. Justice Rand, J. ((Taschereau, Fauteux JJ, concurring; Kellock, J. concurring in a separate judgment) sided with the insurer:

The company, as well as the insured, is seen, thus, to have a substantial interest in this provision. The latter could, by being absent from his place of abode, compel the maintenance of a risk which the insurer seeks to end; and it is to meet such a situation that the clause is provided.<sup>50</sup>

It might be overstating his view, but one gets the impression that Justice Rand thought that the insurer needed more protection from the insured than the other way round.

When not merely interpreting terms of a contract, the judgments of Justice Rand showed much more judicial creativity. For example, his holding in *Springfield Fire and Marine Insurance Co. v. Maxim*,<sup>51</sup> that an insurer's consent to an assignment of an insurance policy created a new contract, has stood the test of time. While not illustrating the creativity of Justice Rand alone, *Northern Assurance Co. Ltd. v. Brown*<sup>52</sup> certainly reflected a pragmatic approach to insurance law by its holding that the legislative policy of providing an accident victim with a right to proceed directly against the tortfeasor's insurer was not to be tied up in the law of contract. The case arose because legislatures across Canada had enacted amendments to insurance legislation to provide that:

Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled upon recovering a judgment...to have the insurance money...applied in or towards satisfaction of his judgment....<sup>53</sup>

The phrase “notwithstanding that such person is not a party to the contract” could be seen as implying that the statute merely modified the insurance contract to provide a right to the victim. Another possibility was to view the victim's right as purely statutory. In *Northern Assurance Co. Ltd. v. Brown* the insurer argued that indeed the victim's right was contractual. If accepted, this would have meant that all statutory conditions applied to every insurance policy as a matter of contract, including the one year limitation period on commencing an action against an insurer. Justice Cartwright again dissented and agreed with the insurer. Chief Justice Kerwin (Taschereau J. concurring) held, in a brief two paragraph judgment, that the victim's claim “is a substantive right given by statute and does not arise under the contract.”<sup>54</sup>

<sup>50</sup> *Ibid.*, at 630.

<sup>51</sup> *Supra* note 20.

<sup>52</sup> [1956] S.C.R. 658.

<sup>53</sup> For example, *Insurance Act*, *supra* note 14, s. 250.

<sup>54</sup> *Supra* note 52, at 660.

Justice Rand, in somewhat lengthier reasons, came to the same conclusion. It was Justice Locke who delivered the most thorough analysis of the history and context of the section in issue. He also characterized the right as statutory. Again, it is difficult to understand why the other judges wrote separate concurring judgments instead of just concurring with Justice Locke.

Today, it is easy to understand why the Supreme Court of Canada was hesitant to give leave to appeal to cases that merely involved interpretation of a term of a contract. From the Court's perspective, the parties could easily revise the terms for future contracts; or, if a statutory provision was in issue, the legislature could respond. Three cases of the Rand insurance jurisprudence fit within this category. In *Wawanesa Mutual Insurance Co. v. Bell*<sup>55</sup> an automobile insurance policy covered the named insured while driving his own automobile and "an automobile not owned by the insured nor by any person or persons of the household of which the insured is a member..." For three years the insured had been living with his brother, who was married and had a family. One day, the insured's car did not start so he borrowed his brother's car without permission and, unfortunately, had an accident. Justice Rand (Cartwright J. concurring) characterized the insured as "in" his brother's household but not "of" that household and, therefore, covered by the policy. Chief Justice Kerwin (Taschereau J. again concurring) delivered another brief separate judgment accepting the decision of the lower court in favour of the insurer. Justice Locke delivered the tie-breaking and more elaborate opinion, dismissing the appeal and holding in favour of the insured. The issue in the case was now moot. Today's standard motor vehicle liability policy excludes coverage while the insured is driving an automobile owned by any person "residing in the same dwelling premises." The case is one of the few where Justice Rand decided in favour of the insured when construing a term of an insurance contract.

The indemnity agreement in a standard automobile insurance policy now covers the insured for liability "arising from the ownership, use, or operation of the automobile." It is common for standard general public liability and homeowner's policies to exclude coverage for this liability. Two cases interpreting the meaning of the phrase came before the Supreme Court of Canada during Justice Rand's tenure on the Court and both are now also moot. *Stevenson v. Reliance Petroleum Limited*<sup>56</sup> and *Irving Oil Co. Ltd. v. Canadian General Insurance Co.*<sup>57</sup> both concerned an insured's truck delivering oil when the driver negligently allowed oil to escape while filling a customer's oil tank and a fire ensued. The question in issue was whether the filling of the customer's oil tank involved "the ownership, use, or operation of the automobile." In *Stevenson v. Reliance Petroleum Limited*, the Kerwin-Taschereau team (again Chief Justice Kerwin delivering the opinion and Justice Taschereau concurring)

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<sup>55</sup> [1957] S.C.R. 581.

<sup>56</sup> [1956] S.C.R. 936.

<sup>57</sup> [1958] S.C.R. 590.

held the automobile insurer liable. Justices Rand and Cartwright, *per* a developing tradition, delivered separate concurring opinions. Justice Locke dissented in part. Two years later in *Irving Oil Co. Ltd. v. Canadian General Insurance Co.* the justices substantially maintained their grounds. The Kerwin-Taschereau team continued as before, while Justices Locke and Rand (with Cartwright J. concurring except for one reservation) simply agreed that the appeal be dismissed. Today provincial insurance legislation specifically provides that a motor vehicle liability insurer may exclude coverage for liability arising “from the ownership, use or operation of any machinery or apparatus, including its equipment, mounted on or attached to the automobile while such automobile is at the site of the use or operation of that machinery or apparatus.”<sup>58</sup>

A second case in the Rand insurance jurisprudence subsequently rendered moot by legislative amendment was *Gray v. Kerlake*,<sup>59</sup> which involved an annuity contract. The contract originally provided for payment of the annuity to the annuitant’s surviving wife if he died before a specified date. After a marital breakdown, the annuitant changed the beneficiary to a friend. If the annuity contract could properly be characterized as a life insurance contract, the designation in favour of the friend was invalid. At that time, the holder of a life insurance contract made payable to a “preferred beneficiary” could only substitute another preferred beneficiary as the beneficiary under the policy. The friend was not a preferred beneficiary. The Court agreed unanimously that an annuity contract was not life insurance. The alignment of justices in the three separate opinions differed slightly from the usual. Chief Justice Kerwin concurred with Justice Cartwright, Justice Taschereau concurred with Justice Locke, and Justice Abbott concurred with Justice Rand, who wrote:

Life Insurance in its characteristic forms involves, as its essence, a risk in a specified payment of money absolute from the moment the contract takes affect. That constitutes the security sought by the insured, the premiums for which in turn furnish the consideration to the insurer. There is nothing of that in this case. The repayment when death is before the age of 60 years is simply the return of the premiums to that moment paid. The only risk assumed by the Association in relation to death lies in the preservation or investment of the premiums. But that is not a life insurance risk; there is in fact no risk in the true sense whatever and the Association will retain the benefit derived over the years from the use of the premiums received.<sup>60</sup>

In *Cases on the Canadian Law of Insurance*, Professors Baer and Rendall commented:

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<sup>58</sup> *Insurance Act*, *supra* note 14, s. 241.

<sup>59</sup> [1958] S.C.R. 3 [editors’ note: see John P. McEvoy’s article in this volume].

<sup>60</sup> *Ibid.*, at 12 .

Of course, the judges do not always detect risk shifting when it exists. It is clear that an annuity company undertakes a particular and identifiable risk any time it issues a life annuity in the classic sense, that it does so for a “premium,” and that “pooling” is the technique used to make the arrangement work. The Canadian case law appears to demonstrate a judicial innocence of understanding or a reluctance to apply the regulatory scheme which the industry and the Superintendents intended.<sup>61</sup>

As mentioned above, and as illustrated in the cases discussed, Justice Rand usually stuck to the express terms of the insurance contract when deciding a case. Therefore, *Firth v. Western Life Assurance Co.*<sup>62</sup> was a surprise. The premium on a life insurance policy was due on 13 April, Easter Sunday, a holiday, but the insured died on 14 May, without having paid the premium. That evening, the plaintiff put an envelope under the door of the insurer containing a certified cheque for the premium. The policy provided a thirty day grace period. Relying on the provisions of the *Lord's Day Act*, the plaintiff argued that the premium could not have been paid until 14 April so that the grace period expired on 14 May and not 13 May. Chief Justice Kerwin (Taschereau and Abbott JJ. concurring) dismissed the action, holding that the grace period had expired on 13 May. Justice Cartwright dissented and Justice Rand concurred with him. Both agreed with the plaintiff that the *Lord's Day Act* extended the contractual grace period and allowed for payment on 14 May.

One might suspect that Justice Rand had softened a little. However, in *Union Marine & General Insurance Co. v. Bodnorchuk et al.*<sup>63</sup> he was back on the side of the insurer. He and Justice Taschereau agreed with Justice Locke's determination that the insurance policy in question had been cancelled by mutual agreement. Justices Kerwin and Abbott dissented. The insured had purchased a fire insurance policy from another company to replace the policy now in dispute and had asked the agent to pick up the replaced policy for return to the insurer. Not wanting to lose his commission, the agent delayed doing so and the property was destroyed by fire six days later, before the policy had been picked up by the agent. The majority result was in keeping with the Court's decision in *Ellis v. London-Canada Insurance Co.*<sup>64</sup>

The final insurance appeal heard by Justice Rand was *La Corporation du Canto de Chatham v. The Liverpool & London & Globe Insurance Co. Limited.*<sup>65</sup> The insurer had issued an indemnity bond covering theft by an employee with any claim to be made within three months of discovery of the loss. The insured did not submit a

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<sup>61</sup> Marvin G. Baer and James A. Rendall, *Cases on the Canadian Law of Insurance* (6<sup>th</sup> ed.) (Scarborough: Carswell, 2000) at 50.

<sup>62</sup> [1957] S.C.R. 428.

<sup>63</sup> [1958] S.C.R. 399.

<sup>64</sup> *Supra* note 36.

<sup>65</sup> [1959] S.C.R. 47.

claim until four months after discovery of the loss and there was no evidence that the money was stolen by the employee. Justice Fauteux (Rand, Abbott, and Martland JJ. concurring) dismissed the action. Taschereau J. concurred in a separate judgment. The insurer had succeeded again.

### 3. CONCLUSIONS

Reflecting on Justice Rand's role in the twenty-two insurance appeals, what conclusions can be drawn? First, none stand out as presenting major public policy issues requiring innovative jurisprudence. Two cases may be considered to rise above the rest in securing justice: *Springfield Fire and Marine Insurance Co. v. Maxim* and *Northern Assurance Co. v. Brown*. Both required the Court to look behind the language of, in one case, an assignment, and in the other, the legislation, to find a public policy appropriate to the commercial world. This they did successfully. In dismissing these two appeals, it should be noted that both were from decisions of lower appellate courts that had already got it right. The role of Justice Rand in both was merely to deliver separate concurring reasons that basically adopted the positions of the lower appellate courts. If anything stands out in these twenty-two appeals, it is the number of separate concurring judgments delivered, eleven; that was, 50% of the total number of insurance appeals on which he sat. Only twice did he speak for the majority.

In a lecture given at the University of New Brunswick in the 1960s, Justice Rand said:

One of the outstanding characteristics of the common law is that it is individual to the extent that it places upon the individual the duty of protecting his own rights.<sup>66</sup>

That philosophy carried over to his interpretation of contracts. It was for insureds to look after their own interests in negotiating the terms. That the insured had little power to negotiate the terms was not a sufficient reason to come to their aid. As he said later in the lecture:

You have heard of 'yellow contracts' in the United States. These were contracts made by corporations of the magnitude of General Motors with an individual workman. The State of Illinois saw fit to say that in a contract of that sort certain provisions could not be made effective. It was not in violation of the constitutional provision to respect the validity of contract to say that these two were not in the same contracting position. One was an all-powerful aggregate of money power and the other was an individual

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<sup>66</sup> Ivan. C. Rand, "The Role of the Supreme Court in Society" (1991), 40 *University of New Brunswick Law Journal* 173, at 178.

who, if he didn't accept the conditions which were objectionable to him but which were required, would be left more or less on the street. He would be deprived, almost, of his economic life. The Supreme Court in early days did hold that these provisions were in violation of the Constitution.<sup>67</sup>

Justice Rand's social conscience did not surface in the law of insurance contracts as it did in causes involving civil liberty and religious freedom. He certainly cannot be described as being a friend of the insured. If anything, individualism led to a strict interpretation of contracts that made him a friend to the insurer. There are hints that suggest, however, that if he had continued longer on the Court, social conscience would have also emerged in insurance cases.

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<sup>67</sup> *Ibid.*, at 181.