

MR. JUSTICE RAND A TRIUMPH OF PRINCIPLE

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Introduction

Ivan Cleveland Rand¹ was appointed to the Supreme Court of Canada on April 22nd, 1943 in his fifty-ninth year. It would be more accurate to say that he was drafted into the court. His reputation as a man of principle, an independent thinker, and an outstanding lawyer, had preceded him to Ottawa. Rand's appointment to the court, like the universal respect which he enjoyed, had commanded itself.

The purpose of this article, written as the Supreme Court of Canada celebrates its centenary, is to attempt an assessment of Rand's contribution to that institution and the effect of that contribution on the court and on Canadian jurisprudence. In Rand, we are fortunate to have a subject who has written and lectured extensively, thereby leaving a record which supplements his judicial pronouncements and which lends valuable insight into his thought processes. To paraphrase the time-worn admonition to counsel, he told us what he was going to do, he did it, and he told us what he did, even in the doing.

The son of a railway mechanic, Rand spent five years in the audit office of the Intercolonial Railway before pursuing his university studies at Mount Allison University. In Rand's valedictory address of 1909 we find not only a message to his fellow graduates but the earliest articulation of the credo by which he lived, was judged and—what became very significant in his later years—by which he judged others. It was for Ivan Rand the universal filter through which his whole life passed:

The honesty, the courtesy, the dignity, the flush of modesty, the purity of thought, these are characteristics which are not the exclusive property of the possessor. To the extent that we recognize them in others and make them our own, we become possessors of each other. To these and such as these, let us pay homage; they are the best things in the world; they point out the drift and tendency of things;

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¹ Born in Moncton, New Brunswick on April 27th, 1884; died at London, Ontario, January 2nd, 1969.

and we should seize them. It is only on the basis of a common attitude towards them that we can meet in friendship. To this common attitude, independence is essential; without it we are chasing shadows, and it is the recognition of these truths and loyalty to them; it is such a triumph of principle that brings satisfaction; nothing else can. As we go out let us take as a working principle, do the duty that lies nearest you — and let it be done honestly and thoroughly. If we do this, perhaps our living here will not be altogether in vain.²

Deciding upon a legal career, he briefly read law in the offices of a prominent Moncton barrister before proceeding to the Harvard Law School from which he graduated with distinction in 1912. In 1913, after a brief period of practice in Moncton, he moved to western Canada and opened a law office in Medicine Hat, where he practiced his profession until 1920 when his wife's health forced him to return to Moncton.

The next six years of private practice, were punctuated by a brief but distinguished interlude as the Attorney General of New Brunswick in 1924-1925. In 1926 he was appointed regional counsel of the Canadian National Railways with headquarters in Moncton and became commission counsel of the Railway in 1933. During that period of time Rand had occasion to appear before the Judicial Committee of the Privy Council with whose informal inquiry procedures he became so enamoured that, in later years, he adapted them to his own use in the Supreme Court.

While with the Railway, Rand's sense of fairness and obligation to the public interest sometimes appeared to interfere with what more narrow-minded advocates considered to be his client's interest and his advocate's role. He confessed that on occasion, in the course of an application to the Railway Transport Board for leave to discontinue some local rail facility which had, insofar as the Railway was concerned, become redundant, it appeared to him that the local interest was not being adequately represented. In those circumstances, Rand felt obligated to say what could be said on the other side of the issue and, it is reported, he sometimes presented that case so vigorously that the ultimate decision of the Board went against the Railway.

Throughout his thirty years of practice he held that the most important tools of the advocate's trade were an active imagination and a flexible mind. Without them neither could he accurately identify his client's cause nor successfully articulate it. To the greatest extent possible the lawyer should mentally reconstruct the realities of his client's situation so as to be able, from that

² From the valedictory address delivered by Ivan C. Rand in 1909 upon his graduation from Mount Allison University, Sackville, New Brunswick.

vantage point, and with a professional judgment, to explore all of the probable details and separate the relevant from the irrelevant facts. To omit this procedure and rely entirely on the often warped perceptions of the client was to put at risk the client's best interest. Only after engaging in this "reconnaissance into the actualities" could the advocate, with any safety, detach himself to objectively develop and execute the most appropriate strategy for his client's cause. To proceed otherwise, in his view, was tantamount to releasing the bowstring before aiming the shaft and promised an equivalence of success.

The reconstruction of these details and their imaginative elaboration were just as important to the adjudicative process itself and Rand, in later years, resisted many attempts to arbitrarily constrain the advocate's role. As he observed in *Ross v. Lamport*:³

... a law-suit is not a tea party, and except where there has been a clear and objectionable excess, we should hesitate to put shackles on the traditional scope allowed counsel in his plea to the tribunal of his clients' countrymen. The attempt to divest a trial of any feeling would not only be futile but might defeat its object which is to ascertain the reality of past events.

However, he did recognize an upper limit on the exploitation of these courtroom tensions particularly in relation to the prosecution:

It cannot be over emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.⁴

That sense of dignity and fair play together with the desire to explore every issue in its totality were characteristic of the man and followed him through his entire life.

Indeed it was these very qualities that established his reputation both in western and eastern Canada and prompted Prime Minister R. B. Bennett, in 1932, to direct that an Order-in-Council appointing Rand to the Supreme Court be drawn up. The Conservative Prime Minister who was familiar with Rand's prominence in the west, regarded him as the most able lawyer in the maritime

³ *Ross v. Lamport*, [1956] S.C.R. 366, at pp. 375-376.

⁴ *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24.

provinces and the logical choice for appointment from that region notwithstanding his party affiliation. Although this laudable intent was not fulfilled, Rand was never far, it appears, from the public mind. The *Ottawa Journal* published an editorial in 1939⁵ calling upon the government of the day to "recruit or conscript his services" as Chairman of the Tariff Board. The call to Ottawa did not come, however, until four years later and then to serve in an institution which would make demands on the full range of Rand's talents.

The Honourable J. R. Cartwright, eloquently summarized Rand's judicial career in observing that "his record offered a fair promise which, in the sixteen years that he occupied the Bench, was gloriously fulfilled".⁶ Rand established himself securely in the minds of many as the greatest judge who ever graced that bench, although others would concede that position to the former Chief Justice, Sir Lyman Duff.⁷ Without doubt, they are the two most eminent judges Canada has yet produced.

Although Mr. Justice Rand was never called upon to serve as Chief Justice,⁸ and although the age of retirement rule removed him from the bench at the height of his judicial career,⁹ there is no doubt that he never harboured any resentment as a result. He had long hence¹⁰ adopted as a working principle: "Do the duty that lies nearest you—and let it be done honestly and thoroughly."

It is the thesis of this article that Rand's achievement is as much a product of what the man was as it is of what he said and how he said it. Rand lived according to the categorical imperative which appears to have constituted the principal component of his judicial as well as of his personal philosophy. In what may have been his earliest public utterance¹¹ he declared the primacy of the human intellect and the importance of liberty for the individual; the only principles worth adopting are "working principles" which "contribute to better social conditions"; it is not

⁵ Wednesday, April 5th, 1939.

⁶ Tribute to Dean I. C. Rand by the Honourable Mr. Justice J. R. Cartwright, London, Ontario, March 26th, 1964.

⁷ See, for example, the comments of G. Le Dain in (1974), 12 Osgoode Hall L. J. 261, at pp. 262-263.

⁸ Had Bennett succeeded in appointing Rand to the court in 1932, the seniority rule would have placed Rand in line to succeed Rinfret as Chief Justice upon Rinfret's retirement in 1954.

⁹ Professor E. McWhinney writing in (1959), 37 Can. Bar Rev. 16, at p. 37 was moved to observe that "one can only regret the perverse rule . . . that compels a great liberal judge like Mr. Justice Rand, at the height of his intellectual powers, to retire this year . . .".

¹⁰ *Supra*, footnote 2.

¹¹ *Ibid.*

sufficient to know them merely, "we must be them". The obverse of his concern for the liberty and independence of the individual was the necessity that the virtues of "honesty", "courtesy", "modesty", and "purity of thought", in a word restraint, be observed in social relations.

The unifying theme in Rand's judicial pronouncements and, indeed, in his life's work, is this: we are privileged to be a society of free persons the hallmark of which is the use of reason in the ordering of its affairs, the continued existence of which depends upon a high degree of individual responsibility. This was his message, first, last and always; it is the continuous thread visible throughout his judicial and extra-judicial writings, extending from 1909 to 1969.

The Court During the Rand Years: 1943-1959

Rand's career on the Supreme Court of Canada began just as the long and distinguished career of Chief Justice Duff was drawing to a close.¹² Originally a six-judge tribunal, the court was expanded to seven in 1927¹³ during Duff's tenure and, finally, to nine in 1949.¹⁴ The increase in membership coincided with the abolition of appeals to the Privy Council in civil matters achieved in 1949, which made the Supreme Court of Canada the court of final resort for all matters. Prior to the abolition of the appeal as of right in civil matters in January of 1975, this change had had the most significant impact on the court's operations and outlook, and had occasioned Rand's now-famous dictum:

The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. 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, 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. This is a function inseparable from constitutional decision. 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.¹⁵

¹² Duff served on the court from September 27th, 1906 until January 7th, 1944. He was appointed Chief Justice on March 17th, 1933.

¹³ S.C., 1927, c. 38, s. 1.

¹⁴ S.C., 1949 (2nd sess.), c. 37, s. 3.

¹⁵ *Reference re Farm Products Marketing Act of Ontario*, [1957] S.C.R. 198, at pp. 212-213.

But the Supreme Court Act had always embodied the principle of the *de plano* appeal or the appeal as of right. In 1956 the amount or value of the matter in controversy in the appeal entitling the litigant to an appeal as of right in the Supreme Court was increased, so that it was required to exceed ten thousand dollars, rather than two thousand. Notwithstanding this increase, the court's case load grew steadily over the years. In the ten years between 1950 and 1960, for example, the number of cases disposed of by the court each year increased from sixty-two to 119.¹⁶ Because of the unrestricted right of appeal the court found itself devoting a disproportionate amount of its time and effort to disposing of issues which raised no new or important questions for the country. As early as 1947 it had been argued that "it is the issues arising, not the amount of money or form of procedure, that renders a case of sufficient moment to be determined by the highest tribunal".¹⁷

Rand participated in about 640 cases¹⁸ during his sixteen years on the bench, which is an average of forty cases per year. He delivered written reasons in over four hundred. He was on the minority or dissenting side in only seventy-nine cases, which represents about twelve per cent of the total and hardly marks him as a "great dissenter". Significantly, he was the lone dissenter in only twenty-eight cases. However, Rand was not afraid to disagree and to intellectualize that disagreement in a vigorous opinion—even with respect to subject matters with which he had little previous contact. A case in point was *Spun Rock Wools Limited v. Fiberglas Canada Limited*¹⁹ which, in 1943, was only his fourth reported decision.

In that case, Fiberglas Canada Limited brought an action for infringement of patent against Spun Rock Wools Limited respecting a process for the manufacture of glass wool insulation or "mineral" wool. It had succeeded in the Exchequer Court but in the Supreme Court of Canada on appeal, the original decision was reversed, Rand J. dissenting. The majority in the Supreme Court dismissed the plaintiff's claim on the ground that there was no invention in the claim sued upon and that the patented process was a well-known process prior to the granting of the patent rights. It appears that when Rand received a copy of the draft opinion representing the majority view he sensed that

¹⁶ See P. Weiler, *In the Last Resort* (1974), p. 8 *et seq.*

¹⁷ G. How, *The Too Limited Jurisdiction of The Supreme Court of Canada* (1947), 25 Can. Bar Rev. 573, at p. 575.

¹⁸ Roughly catalogued they represent 304 public law cases and 328 private law cases.

¹⁹ [1943] S.C.R. 547.

something was wrong even though he had had no prior experience with patent law. At his beloved retreat in Shediac he reviewed the history of the development of the processes for manufacturing glass or mineral wool and discovered that the process in question did indeed represent a substantial breakthrough in understanding and applying known principles:

It is, therefore, a significant commentary on the quality of ingenuity behind the patent of the respondents that, through that period of intense groping for a new method, no mind associated the well-known disc with the purpose before it. There is, too, a striking illustration of the fact that simple solutions are sometimes most invisible...²⁰

On further appeal to the Privy Council²¹ the trial decision in favour of the appellant was restored, with the Board adopting the reasoning of Rand, J. and quoting extensively from his dissenting opinion:

It appears to their Lordships to be impossible to deny to the inventors of this process a measure of inventive skill which amply supports the patent. They would once again adopt the language of Rand J. as expressing clearly the view which they take: "But even if it were assumed that there is sufficient in the case to justify the conclusion that the method of disc disintegration was one that had seen actual use, it cannot, in my opinion, be said that the adaptation of such a machine to produce glass wool through a combined action of disintegration and propulsion is analogous to disintegration alone for entirely different purposes. It is a new use with a new product not cognate in any sense of patent law with the previous operation or its product."

While interesting in itself, the quantitative analysis is revealing, if at all, of the nature of the institution and not of that of the judges. The Supreme Court of Canada is notorious for the multiplicity of opinions delivered in individual cases.²² Even the eloquence of Rand was not sufficient to disabuse the court of this long-standing practice. While a review of the record

²⁰ *Ibid.*, at p. 565.

²¹ [1947] A.C. 313, at p. 318.

²² A classic example is *Saumur v. The City of Quebec and The Attorney General of Quebec*, [1953] 2 S.C.R. 299, where seven separate opinions were delivered on behalf of the nine man court. See Laskin, *Our Civil Liberties*, [1955] *Queen's Quarterly* 455, at p. 468 wherein the author commented upon the "extraordinary division of opinion" in the case: "A majority of the Court holds that the provinces have some legislative competence in the matter of freedom of religious expression. Two-thirds of the Court hold that the provinces do not, at least in some circumstances, have such legislative competence. Only one-third of the Court denies federal legislative competence on religious freedom. Yet less than a majority affirms federal legislative competence on the matter. The layman may be pardoned if the situation passes his comprehension."

does show that Rand delivered the opinion of the court on twenty-three occasions, in strictly quantitative terms his presence on the court appears to have had little effect.

The built-in or institutional inertia reflected in the tradition of independent opinion writing and the volume of insignificant *de plano* appeals were great obstacles which even Rand and the great prestige which he carried could not overcome. Nevertheless and, perhaps paradoxically, Rand did make a tremendous impression on the public consciousness. It was the sum of the man's qualities reflected in his work which for lack of a better term can be summed up as "the Rand style", which has left an indelible impression on Canadian jurisprudence, the Canadian public and, ultimately, on the Supreme Court of Canada.

The Rand Style

Rand, as we have already noted, lent primacy to the human intellect which he considered to be the characteristic which set man apart as unique in creation. He also espoused the view that the full flowering of man's intellectual capacity could be best achieved in a society founded upon the recognition of this characteristic and its requirements. "Every man" observed Rand, "must live as if he had a monitor looking constantly over his shoulder".²³ Rand's beliefs determined his conduct absolutely. As a result, his judicial pronouncements reflect more reliance upon original and imaginative thought and resort to first principles than they do upon precedent.²⁴ Rand evidences in his analysis of the underlying factors a penetrating awareness that law was the measure of human conduct and not a rigid set of immutable principles. "Logic" he said, "must yield to common sense as well as to justice".²⁵

In tracing the development of divorce jurisdiction through the ecclesiastical laws and the early English statutes in *Gracie v. Gracie*,²⁶ Rand observed that the procedure there in question:

...took on a mechanical characteristic. It tended to disregard the actual elements of conduct involved and to make use of categories of behaviour as if the controversy were a contest between concepts rather than a problem between human beings.

²³ As told to J. E. Belliveau and published in *The Toronto Star*, February 18th, 1950.

²⁴ By a rough tally kept during a review of Rand's opinions it appears that he cited no case law in 145 opinions, one case only in 69 opinions, two cases in 49 opinions and more than 2 cases in 152 opinions.

²⁵ *C.P.R. v. Winnipeg*, [1952] 1 S.C.R. 424, at p. 444.

²⁶ [1943] S.C.R. 527.

The quality of the word which gives expression to thought was equally important to him. He had a superb command of the English language and he demonstrated, in addition, a respectable grasp of French.²⁷ He had a unique ability to marshal words into powerful combinations, made possible in part by refining concepts through an economical use of words, a technique he sometimes developed to a fault, and in part by a natural ability which permitted him to write quickly and with relative ease. "When we come to the expression of thought we become students of language—we become scholars, or we should become scholars—of language."²⁸

Rand, of course espoused the liberal democratic tradition. His outlook and his fundamental intellectual and working premises placed him in harmonious relationship with those strains in Canadian society and its law which advanced this tradition, and sensitized him to threats to that tradition. A series of cases which came before the Supreme Court during the 1950's led to what has been termed "the distinctive contribution to Canadian constitutional law of Mr. Justice Ivan C. Rand"²⁹—his elaboration of the notion of Canadian citizenship status.

He carried this philosophy to other fields and in the course of his resolution of the bitter Ford Motor Company dispute in 1945, now more famous for the articulation there of the "Rand Formula", he underscored the need for a rational approach to the resolution of labour-management conflicts:

That we must have some sort of law or convention regarding these [labour—employer] relations is inescapable: Whenever human beings are drawn together socially or economically, a rule of that nature by whatever name we call it becomes imperative, and the stronger the conflict of interest the more insistent the demand for settled understandings. But we preserve the conquests of these understandings as we do of human rights generally, and they are taken on by new groups as of course.... The question is whether the remaining controversies are to be settled in the mode of war or reason. Considering the immense stage in which those relations now appear, it would be a sad commentary on what we call Christian civilization if every foot of

²⁷ See for example, *Dulac v. Nadeau*, [1953] 1 S.C.R. 164, at pp. 182-186, the opinion of Rand J. in which he resorts to a variety of treatises and materials on the civil law and incorporates references switching with apparent ease from English to French and back again. See also *Modern Motor Sales Ltd. v. Masoud et al.*, [1953] 1 S.C.R. 149, Rand J., dissenting, at pp. 157-163.

²⁸ Ivan C. Rand, *Is a Free Press Compatible with The Concept of a Fair Trial? A Constitutional View*. A paper delivered at the Osgoode Hall Law School, April 15th, 1966.

²⁹ See R. R. Price, *Mr. Justice Rand and The Privileges and Immunities of Canadian Citizens* (1958), 16 U. of T. Fac. L. Rev. 16.

that field would have to show the waste of conquest by economic struggle. There is still and may always be a residue of this area which it will be beyond the powers of man to conquer by force of his intellectual or spiritual faculties and a similar residue may remain in economic relations. But the measure of our civilization will be the degree to which that residue is diminished in scope.³⁰

Although widely regarded as a "liberal" or "activist" judge he exhibited a very pronounced "conservative" tendency. This is most evident in a number of private law cases and in much of his extra-judicial writing. He never lost sight of the fact that real life is a give and take proposition, and that the desideratum of liberty for the individual carried with it the concomitant or balancing requirement of restraint or responsibility without which liberty for the individual would be unattainable. But it was not sufficient to simply say that all men must recognize their responsibilities no matter how unjust their condition:

Responsibilities are the correlatives of rights and where the latter are unreasonably denied it is somewhat of mockery to be told that you must discipline yourself to injustice in order to demonstrate your title to justice.³¹

"The essence of democracy" he said, "is self restraint".³² This notion encompassed individuals, groups and even governments. He saw government intervention as necessary only to the extent that individual self-restraint or responsibility did not create a climate in which freedom of the individual could flourish. This explains, in part, his deep concern for the independence of the judiciary and the quality of those who people it. In a public speech in 1951 he characterized the judicial function and its role in our society in terms which only the most reckless would undertake to paraphrase:³³

The role of the judiciary in preserving freedoms is not sufficiently ascertained by mere statement of jurisdiction: we must examine that role in action. They can be preserved only through a judicial administration which, by intelligence, courage, and unrelenting vigilance, maintains their standards inviolate. But as the first condition of such a functioning the judicial mind must itself be free.

...

The function bristles with difficulties and inadequacies but it is the best arbitral means yet vouchsafed to humanity. In these days when

³⁰ Arbitration award, January 29th, 1946, Ford Motor Company and United Automobile Workers.

³¹ *Ibid.*

³² The Globe and Mail, Saturday, March 28th, 1964.

³³ Ivan C. Rand, The Role of an Independent Judiciary in Preserving Freedom (1951), 9 U. of T.L.J. 1, at pp. 5, 6, and 14.

the underworld of hate threatens to engulf us in its madness and when humanity is balancing perilously on the edge of an abyss, it is time for all the massive forces of our society to shift their emphasis from rights to duties and responsibilities and to devise methods by which the process of law will play a greater part in that reconciliation.

....

In the independence of courts of justice resides the assurance to men of the enjoyment of the deepest demands of their nature. Justice is imperfect in action because that nature is imperfect. The matter of life has no sharp contours, the perimeters are shadowy and merge into transitions, and we must rest satisfied with approximations. In life's accounting much must be written off. We move in the masked environment of turbulent plunging passion and will as well as in that of the visible, and the question is before us whether or not we can govern ourselves rationally, whether that notion is not a delusion. In spite of the deficient mechanics of adjudication, of the fallibilities of judgment, and the enveloping unknown into which all advance must take us, the low incidence of friction and controversy in the infinitude of our social relations and transactions is some indication of the quality of judicial administration. It reflects also the general acceptability of laws and the high responsibility of the citizenry. And the general approbation of the magistrates to whom democracy has entrusted the dispensation of justice according to law certifies that so far they are fairly meeting the supreme test of civilization.

Insofar as the ultimate control of judicial conduct was concerned, Rand offered little hope for the often touted "Code of Judicial Ethics":

The objective should not be to devise a formula to tell judges what not to do but to appoint judges who do not need to be told. The ethical standards of a public official will be determined by his own instincts as to what is and what is not proper—and any man who must look up his code of ethics to find out how he should act, should not occupy a judicial office.

At the outset Rand's contribution was characterized under the rubric of the Rand style. A sketch, in broad outline, of the essential characteristics of that style was then developed. In what follows, I have attempted to supply some necessary detail, colour, emphasis, and hopefully, some perspective.

The Application of Principle

Mr. Justice Rand's reasoning in many of the issues raised before the court was compelling and the course which he chose to follow appeared consistently to be the correct one, for the simple reason that he always took the trouble to find out where we had been.

In *Reference re U.S. Forces*,³⁴ the court was asked whether members of the armed forces of the United States of America

³⁴ [1943] S.C.R. 483.

who were present in Canada at the invitation of the Canadian government in connection with the combined war effort, were exempt from criminal proceedings prosecuted in Canadian criminal courts. Rand proceeded forthwith to identify the principle at stake and, by the application of reason, to determine the relationship between the principle and our fundamental legal and constitutional system in order to find a workable rule.

There is no doubt that the constitutional principle in England has for several centuries maintained the supremacy of the civil law over the military arm. . . . Can that principle be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on our soil?

The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle by the Parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public.³⁵

He was equally conscious that all issues were not justiciable and that the law itself was not the universal solvent. He knew that courts could not perfect an imperfect world and that any attempt to do so would be to invade the province of the legislature. "Liability is necessary for the essential standards of social conduct", he observed, "but any enlargement of the field which in general rule our legal experience has mapped out, should come from the legislature and not the Courts".³⁶ This temptation to legislate was to be resisted no matter how emotionally compelling the cause. Such a case was *The King v. Eastcrest Oil Company*.³⁷

In this case a four year old child had fallen into and drowned in an abandoned oil well on the defendant's property. The well had been fenced off but the owner was convicted and appealed. In allowing the appeal Rand wrote:³⁸

The legislation is not specially intended for the protection of children, and we cannot allow sympathy to stretch its scope. The conditions in

³⁵ *Ibid.*, at pp. 524-525.

³⁶ *The King v. C.P.R.*, [1947] S.C.R. 185.

³⁷ [1945] S.C.R. 191; see also *Bedard v. Gauthier*, [1958] S.C.R. 92.

³⁸ *Ibid.*, at pp. 197-198.

which we live bristle with hazards for the young but, from the standpoint of safeguarding them, there is no more reason to treat the patent danger of such an opening as *malum prohibitum* than that of many other accessible structures or conditions equally dangerous. The balance between the responsibilities of owners of property and guardians of children is too close in accepted considerations of policy to justify our going beyond what the legislation has fairly indicated; and however poignant the death of a child in such circumstances may be, it is still one of the unhappy risks of living in this imperfect world, and not a happening to call for the infliction of punishment on others.

The technique of stripping away the non-essential, identifying the problem and characterizing it, and the discussion of its resolution in terms which relate principle to function, expressed in non-technical language, were the identifying traits of a Rand opinion. Perhaps better than any of his contemporaries he provided the legal community and the community at large with authoritative *explanations* of the law. A court of last resort and its members have the onerous double duty of not only settling the law but of rendering it comprehensible. In the *Spun Rock Wools* case discussed earlier, Rand's opinion offered a short course on the law of patents as well as on the technique for manufacturing fiberglass insulation. The constitutionality of Ontario's Mining Act was upheld in the *Dupont* case³⁹ in which his opinion provides not only a good discussion of legal principles but in part constitutes a handbook on the staking of mining claims. The history of land grants in the western provinces and the history of land dealings between the Dominion government and the western provinces is catalogued by Rand in *Western Minerals v. Gaumont* and *Prudential Trust v. The Registrar, Humboldt Land Registration District*.⁴⁰

Responsibility

Throughout his life, Rand was governed by principles of conduct which stressed public responsibility and the subordination of personal interest to the public weal. His writings and even his judgments are replete with examples. He regarded restraint and individual responsibility as a necessary ingredient in human affairs without which individual freedom could not flourish.

One of the earliest illustrations comes from *Jones v. Schafer*⁴¹ which was an action for damages arising out of a motor vehicle collision. A transport truck had broken down and had been

³⁹ *Dupont and MacLeod v. Inglis and Mann*, [1958] S.C.R. 535.

⁴⁰ *Western Minerals Ltd. v. Gaumont and A.G. of Alberta*, [1953] 1 S.C.R. 345 and *Prudential Trust Co. Ltd. v. The Registrar, Humboldt Land Registration District*, [1957] S.C.R. 658.

⁴¹ [1948] S.C.R. 166.

abandoned overnight by the driver on the travelled portion of the highway. The driver had set out flares and returned home for the night planning to come back in the morning to see to the repairs. Unfortunately, after he had left the scene, someone had removed the flares leaving the truck as a dangerous obstruction on the highway. By a majority, the Supreme Court of Canada reversed the decision of the Alberta courts which had awarded damages to the plaintiff who was injured in a collision with the vehicle. Rand dissented from this view and in remonstrating the truck driver who had abandoned his broken down transport for his own convenience, exhibits the very high standard which he requires of personal conduct:⁴²

The highway is primarily for the purpose of passing and re-passing; for automobiles it is neither a storage place nor a garage. The individual user is limited by what can be accorded all persons in similar circumstances and by the reconciliation of convenience in private and public interests. . . .

But reasonable people meet emergencies by resorting to just such practical and homemade means and where the public danger of these days from obstructions in highways is balanced against such relatively paltry inconvenience of the individual, I cannot doubt that the individual must give way. . . .

The truck, then, at the time of the accident constituted a nuisance dangerous to persons using the highway in the ordinary manner. It was the duty of the owner to have it removed, but, if instead of that, means were taken to guard against its danger, then those means must be maintained at all events, and it is no answer that a third person removed them; they must be kept as effective as the removal itself would be.

Similarly in *Beaudin v. Choquette*,⁴³ he was one of two dissenting judges who would have allowed the appeal of a cyclist who had been seriously injured in a collision with an overtaking automobile on a rural road. The evidence established that the cyclist had turned left across the path of the automobile without any signal, and that the driver of the automobile had sounded his horn prior to passing. Rand believed that the overtaking motorist had a higher responsibility than the rest of the court was prepared to concede and should have, in the circumstances, given greater warning:⁴⁴

⁴² *Ibid.*, at pp. 180-182.

⁴³ [1949] S.C.R. 348.

⁴⁴ *Ibid.*, at p. 362. See also *McLeod v. Roe*, [1947] S.C.R. 420, a case of injury to a roller skater (Supreme Court of Canada unanimously allowed the appeal of the rink owner); *Ware's Taxi Limited v. Gilliam et al.*, [1949] S.C.R. 637, injury to a child being transported to school unlocking rear door and falling out (Rand J. is one of two dissenting judges who would have exonerated the driver); *Cook v. Lewis*, [1951]

It may be that bicycles on a paved highway present risks that are an annoyance to people in a hurry in automobiles; but so long as they are not banned, the danger of serious injury to those using them must be recognized and the relatively trivial measures of warning and safety exacted.

This strict and almost puritanical approach to duty or responsibility is also reflected in his famous arbitration award resolving the Ford Motor Company dispute in 1946 and in his Royal Commission Inquiry into Labour Disputes⁴⁵ as well as in his report on the activities of Mr. Justice Landreville.⁴⁶

On Personal Liberty

Matters affecting the liberty of the individual or the abuse of power by persons in authority were of particular concern to Mr. Justice Rand. His dissenting opinion in 1954 in *MacKenzie v. Martin*⁴⁷ presaged his position five years later in *Roncarelli v. Duplessis*.⁴⁸ In the *MacKenzie* case, the respondent, a police magistrate and a justice of the peace, had convicted the appellant, a blind man, on the charge of unlawfully, repeatedly calling on the telephone his estranged wife at her boarding house and at her place of employment thereby causing annoyance and breach of the peace. The respondent had ordered the appellant to find two sureties to be answerable for his good behaviour for three years and, on default, had committed him to jail for six months. The appellant secured his discharge from custody by *habeas corpus* proceedings and sued the respondent in damages for false imprisonment.

Mr. Justice Rand, disagreeing with the four majority judges and with the Ontario Court of Appeal, took the position that the respondent had no authority in law to do what he had done and could not claim the protection of The Public Authorities Protection Act of Ontario. He reviewed the history of the law of preventive justice commencing with the early Saxon law and concluded that the conduct complained of in the case did not

S.C.R. 830 where Rand and the majority of the court refused to overturn the Court of Appeal ruling ordering a new trial; and *British Columbia Electric Railway Co. Ltd v. Farrer*, [1955] S.C.R. 757 where Rand J. and the majority held a pedestrian contributorily negligent when struck by a bus while crossing the street on a "walk" sign.

⁴⁵ Report of the Royal Commission Inquiry into Labour Disputes (1968).

⁴⁶ Report of the Royal Commission Inquiry re The Honourable L. A. Landreville (1966).

⁴⁷ [1954] S.C.R. 361.

⁴⁸ [1959] S.C.R. 121.

constitute the type for which a magistrate could lawfully make an order binding the appellant to keep the peace:⁴⁹

It is necessary to remind ourselves that personal liberty is one of the supreme principles of our law, and where one person is set up in authority over another, he must, in the actions he sets in motion that may shackle that liberty, be able to justify what he does in some power or authority given him by law, or he must answer for the consequences.

Two years later, a unanimous Supreme Court in 1956 allowed the appeal in *Parke v. The Queen*⁵⁰ which was a case involving proceedings to have an accused committed to detention as an habitual offender under the relevant provisions of the Criminal Code. Rand's concern was that "under such a determination a person can be detained in prison for the rest of his life with his liberty dependent on the favourable discretion of a minister of the Crown".⁵¹ The Crown's argument that the appeal should be dismissed because no miscarriage of justice had occurred, did not impress Mr. Justice Rand. "In such a case", he said "form is substance and if the loose practice followed in the present proceedings were tolerated, the clear intention of Parliament to surround this new and extreme power over the individual with specific safeguards would be nullified".⁵²

Rand felt strongly that the true protection against any arbitrary abuse of power was a flexible and enquiring court rather than a series of rules or shibboleths that must be complied with in a formalistic way:

...the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.⁵³

Finally, in what was almost his last judicial act, Mr. Justice Rand exemplified his view that "the open public court is the citadel of our legal system"⁵⁴ in delivering his opinion in *Ron-*

⁴⁹ *Supra*, footnote 47, at p. 372.

⁵⁰ [1956] S.C.R. 768.

⁵¹ *Ibid.*, at pp. 773-774.

⁵² *Ibid.*, at p. 774.

⁵³ *Boudreau v. The King*, [1949] S.C.R. 262, at p. 270.

⁵⁴ *Toronto Newspaper Guild v. Globe Printing*, [1953] 2 S.C.R. 18, at p. 29.

carelli v. Duplessis.⁵⁵ This case and particularly his opinion have become classics in Canadian law. Not only was the defendant a provincial premier, but both the trial court and the Supreme Court of Canada voted to award damages against him personally.

It will be recalled that Roncarelli, the proprietor of a restaurant in Montreal, was a member of the Witnesses of Jehovah. He had acted as bail-man for a large number of members of his sect charged with violation of municipal by-laws arising from their activities in distributing pamphlets and other literature. Roncarelli's liquor licence had been revoked by the Quebec Liquor Commission on the direct order of the Premier of the province. Roncarelli's restaurant business collapsed as a result. Mr. Justice Rand was not impressed with the argument that the relevant legislation gave an unfettered discretion to the public authorities to grant or revoke such licences:⁵⁶

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

Writing about his former mentor Louis D. Brandeis in 1947, Mr. Justice Rand might well have been describing himself:⁵⁷

The part he played was in the application of principle, but principle is neutral and respects no person and at times toward individuals he appeared harsh and almost ruthless.

The Grace and Power of Words

Because he believed that law is for something, that it is "part of Western man's dream of a life governed by reason",⁵⁸ Rand became a scholar of language. He carried on a life-long love affair with words and ideas. In expressing thought he was meticulous and precise in the use of words. His tightly packed narrative style was achieved through the economic use of words.

⁵⁵ *Supra*, footnote 48. Not the least interesting aspect of this case is the elapsed time between the cancellation of Roncarelli's liquor licence and his ultimate vindication in the Supreme Court of Canada — 12 years or, the period of time spanning the last three-quarters of Rand's term on the bench.

⁵⁶ *Ibid.*, at p. 142.

⁵⁷ Ivan C. Rand, Louis D. Brandeis (1947), 25 Can. Bar Rev. 240, at p. 249.

⁵⁸ J. Willis, Convocation Address, Osgoode Hall Law School (1973), 7 Law Soc. Gaz. 235, at p. 238.

In interpreting the language of the law he was seldom precluded from reaching the "just" result in a controversy by the barrier of the literal meaning of the language of the law.

Rand conveyed to Canadians through a series of remarkably graphic word pictures the real sense of our law and its relationship to our society. After he pointed out that "a religious incident reverberates from one end of this country to the other, and there is nothing to which the 'body politic of the Dominion' is more sensitive",⁵⁹ who could claim to no longer see that religious freedom might indeed be a matter which transcends purely provincial interest. His solicitude for freedom of speech has heightened public consciousness of its importance. He outlined the erosion of restraints on this freedom which has stopped "only at perimeters where the foundation of the freedom itself is threatened",⁶⁰ so that our "public law leaves the literary, discursive and polemic use of language, in the broadest sense, free".⁶¹

Each new case provided a vehicle for elaborating a different facet of our polity. "Highways are a condition of the existence of an organized state: without them its life could not be carried on."⁶² Thus, in the *Winner* case, he effectively disabused us of any notion that provincial ownership of highways and the lands upon which they are constructed might constitute a barrier to freedom of movement throughout Canada, a view which he confirmed in the *Murphy* case in 1958 by reminding us that "this country is one economic unit".⁶³

Two instances which fall clearly into the breakthrough category are Rand's articulation of the concept of "civil rights" in subsection 13 of section 92 of the British North America Act,⁶⁴ and his redefinition of seditious libel in the famous case of *Boucher v. The King*.⁶⁵ This was the first of several cases to reach the Supreme Court arising from the activities in Quebec of the Witnesses of Jehovah. It is interesting as a case because initially it was argued before a five judge court, and resulted in the ordering of a new trial. Mr. Justice Rand had voted, however, to allow the appeal and to enter a verdict of acquittal. An application was then made and granted for a rehearing before the full nine judge court. The Supreme Court by a vote of five to four allowed

⁵⁹ *Saumur v. The City of Quebec and The Attorney General for Quebec*, *supra*, footnote 22, at p. 329.

⁶⁰ *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 305.

⁶¹ *Ibid.*

⁶² *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at p. 920.

⁶³ *Murphy v. C.P.R.*, [1958] S.C.R. 626, at p. 638.

⁶⁴ (1867), 30 & 31 Vict., c. 3, as am. (U.K.).

⁶⁵ [1951] S.C.R. 265.

the appeal and entered a verdict of acquittal, as Rand had done on the first hearing.

The hurdle in the *Boucher* case was the crime of seditious libel and its scope as defined in long-standing judicial precedent. Mr. Justice Rand pointed out that our basic constitutional concepts had changed over the years so that we no longer "conceive of the governors of society as superior beings"⁶⁶ but rather as "servants, bound to carry out their duties accountably to the public".⁶⁷ He argued, in effect, that mere ill will or bad feeling as a result of the exercise of freedom of speech was not sufficient to render that vital activity illegal. The effect of this activity properly conceived in the circumstances of our society "is to eviscerate the older concept of its anachronistic elements".⁶⁸

On a very few occasions only did Rand's urge to pack the most meaning into the fewest words lead him into pronounced elliptical construction and create difficulty for the reader. A classic example of this rather muscular prose can be found in *Reference re Farm Products Marketing Act of Ontario*:⁶⁹

This is a function inescapable from constitutional decision. 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.

Another example is provided in the following passage from *Anthony v. The Queen*, a case in which an action had been brought in the Exchequer Court against the Crown for damages for loss by fire of a barn and its contents occasioned by an incendiary bullet fired by a soldier being transported by truck along a highway:⁷⁰

Failure in relation to a duty undertaken or assumed directly toward the injured person becomes affirmative action in the obverse of actual conduct modified by the failure, and the actual conduct may be

⁶⁶ *Ibid.*, at p. 285.

⁶⁷ *Ibid.*, at p. 286.

⁶⁸ *Ibid.*, at p. 290.

⁶⁹ *Supra*, footnote 15.

⁷⁰ *The King v. Anthony*, [1946] S.C.R. 569, at p. 573. See also the following passage from *The Royal Trust Co. et al. v. Crawford et al.*, [1955] S.C.R. 184, Rand J., at p. 189: "We have in this case the risks to that impartiality not only of the power to postpone conversion, which, identical with that to retain, is not here an independent means to benefit or prejudice a particular interest but an ancillary incident to conversion; but also the fact that the trustees, through control of the company, determine when and in what amounts dividends shall be declared."

mere persistence in inaction; but where the injured person is not the one with whom the undertaking is made, then it must appear at least that he is within the intended range of benefit. . . .

On another occasion, like the artist who strives too hard for perfect refinements, Rand's prose overstepped the threshold of comprehension to such an extent that it precipitated an enquiry from an editor of the *Law Reports* as to whether or not a page had been omitted from Mr. Justice Rand's reasons.

When Rand was informed of this enquiry, he was outraged at the impertinence of the man. He fumed into a colleague's Chambers and proceeded to berate the editor for his inherent lack of comprehension. More objectively, his colleague chided Rand by suggesting that he write back to the editor, deny the omission and refer him, as an authority, to the passage above quoted from *Anthony v. The Queen*. Seized with the humor of the situation Rand is reported to have laughed and conceded that perhaps absolute clarity had not, in fact, been achieved. It was this ability to laugh at himself which was a side of Rand that was missed by most of those who appeared before him in court and who were exposed only to his rather austere visage and his oftentimes ruthless search for the truth.

Two cases involving dealings between business corporations and municipalities reveal another facet of Mr. Justice Rand and his use of language. As the occasion required, he could chastise subtly or lay on the verbal lash with vigour. Thus, in the *City of Toronto v. Canada Permanent Mortgage Corporation* he reminded the business community that municipalities operate under restraints imposed by the legislature:⁷¹

That persons engaged in large scale investments could, to any extent, act upon such a loose and irregular mode of civic financing as that exhibited here is something over which the veil of charity had best be drawn.

The City of Winnipeg, in 1948, discovered that in attempting to apply the doctrine of *ultra vires* and rely upon its lack of contractual authority in the 1880's to avoid its obligations under an agreement which had been observed by both parties for the past sixty-five years, it fell under the full power of Rand's wrath:⁷²

...the city having absorbed irrevocably the substance of the benefit under the contract seizes upon this item . . . which even in actual breach would create little more than a ripple on the surface of its economy, to justify repudiation. . . .

⁷¹ [1954] S.C.R. 576, at pp. 582-583.

⁷² *C.P.R. v. Winnipeg*, *supra*, footnote 25, at pp. 443-445.

In this exceptional conjunction of circumstances, to carry a rule of *ultra vires* to an ultimate logic would, in the presence of the institution of equity, be its reduction to absurdity. At such a point, logic must yield to common sense as well as to justice. The city, by reason of these matters, has drawn upon itself an equity of obligation; it would be inequitable and unjust while it is enjoying to the full the actual benefits for which it bargained, to refuse to pay the price for them.

Finally, Mr. Justice Rand authored a remarkable series of speeches, articles, book reviews and lectures, unique in the history of the Canadian judiciary, containing some of the most elegant legal writing ever produced in Canada. One can do no more in an article of this length than to commend these works to the reader.

Fundamental Freedoms

Freedom and responsibility are the yin and yang of the Rand cosmology; it is impossible in his view to have one without the other:

Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.⁷³

In Rand's view, such freedom was the foundation on which our parliamentary institutions stood. It was the very fabric of our democratic society. As early as 1946, within the social and economic microcosm of the Ford dispute he articulated the thesis that industrial civilization is secured within a framework of labour-employer constitutional law based on a rational social doctrine, which, in turn, forms part of the general security of the nation:⁷⁴

Now that security is here, in a democratic order which I think is government through the form of predominant individual opinion, but which assumes the presence of diverse opinion that may at any time become predominant and which at all times respects minority interests. The preservation of the individual as a centre of thought and action and its reconciliation with the general security is the end of that government. But unguarded power cannot be trusted and the maintenance of social balance demands that the use or exercise of power be subject to controls. Politically this resides in alert public opinion and the secret ballot.

When the Alberta Legislature enacted in 1937 An Act to ensure the publication of Accurate News and Information,⁷⁵ the

⁷³ *Boucher v. The King*, *supra*, footnote 65, at p. 288.

⁷⁴ *Supra*, footnote 30.

⁷⁵ Bill No. 9.

Supreme Court of Canada declared it to be *ultra vires*. Cannon J. opined that "the province cannot interfere with his [inhabitant of Alberta] status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern".⁷⁶ This was the germ of a notion which Mr. Justice Rand grasped to assist in striking down or circumventing provincial statutes which sought to limit individual freedom. Rand believed firmly that "underlying all systems of social law are shadowy provisional postulates of a transcendental nature".⁷⁷ It would be consistent with this view if such underlying postulates could be adjusted from time to time by the national Parliament, but it would be inconsistent if limitations were imposed by the individual components of the federal nation. As early as the *Boucher* case⁷⁸ in 1951 respecting the Criminal Code charge of seditious libel, Rand referred to the proselytizing activities of the Witnesses of Jehovah as "this exercise of what has been taken for granted to be the unchallengeable rights of Canadians".⁷⁹

And finally, in what is probably the classic exposition of the essentiality of free speech and the communication of ideas to a free society, are his views expressed in *Switzman v. Elbling*:⁸⁰

Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence.

The *Winner*⁸¹ case in 1951 raised the question of the constitutionality of certain licensing legislation of the Province of

⁷⁶ [1938] S.C.R. 100, Cannon J., at p. 146.

⁷⁷ *Op. Cit.*, footnote 33, at p. 4.

⁷⁸ *Boucher v. The King*, *supra*, footnote 65.

⁷⁹ *Ibid.*, at p. 285.

⁸⁰ *Supra*, footnote 60, at pp. 306-307.

⁸¹ *Supra*, footnote 62.

New Brunswick which sought to restrict use of its roads by, in effect, favouring its own residents. Mr. Justice Rand used this opportunity to declare that "the privilege of using highways is likewise an essential attribute of Canadian citizenship status".⁸²

Later a by-law of the City of Quebec which required that the permission of the Chief of Police of the city be obtained before any pamphlets or booklets could be distributed on the streets was before the court in the *Saumur* case.⁸³ To the claim that the city, as proprietor of the streets, has authority to forbid or permit as it chooses, Mr. Justice Rand responded: "The public entitled to use them is that of the Dominion, whose citizens are not of this or that province but of Canada."⁸⁴

By precluding provincial action from restricting certain fundamental and essentially political rights, Rand intended to secure for them the universality of national entitlements. Nothing in his judicial writings suggest, as Abbott J. did in his opinion in the *Switzman* case, that the federal Parliament lacks the power to restrict these fundamental freedoms. On the contrary, he specifically rejected that notion:⁸⁵

...the common law acknowledges no limitation to legal sovereignty nor any outside juridical order which can impinge upon it. In a practical sense, it does not contemplate action by legislature which is nugatory by reason of its contradiction of the natural environment. But, however independent courts may be, they are bound by the declared law; and the accountability of the legislature is to the electorate.

In a subsequent speech delivered to an American audience in New York City in 1954 entitled "Man's Right to Knowledge and Its Free Use", Rand came very close to assigning a natural law basis to freedom of man in western society. He suggested, in effect, that the only reason for limiting that freedom would be to ensure its continued existence:⁸⁶

To relate that right to what we in the West call democratic government requires that, within the limits possible to any assumption, we make clear the primary assumption of democracy, which is that the individual must remain free and that government must ultimately conform to the preponderant judgment of free men. This must be taken to be an absolute in the sense that it is inseparable from our form of organization; changes must lie within that fundamental postulate; its surrender or destruction would be the end of such a government.

⁸² *Ibid.*, at p. 920.

⁸³ *Supra*, footnote 22.

⁸⁴ *Ibid.*, at p. 333.

⁸⁵ *Op. cit.*, footnote 33, at p. 5.

⁸⁶ (1954), 10 U. of T. L. J. 167.

Civil Rights

Provincial legislation limiting freedom of speech and of religion, in particular, has typically been sought to be justified as a valid exercise of the exclusive legislative power given to the provinces in subsection 13 of section 92 of the British North America Act. With one powerful statement in the *Saumur* case he drew the line irrevocably between "civil rights" and fundamental freedoms.⁸⁷

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.

Similarly in the *Switzman* case he rejected the argument that provincial legislation intended to shield the individual from exposure to dangerous ideas can be analogized to valid libel and slander legislation.⁸⁸

The same notion was adapted to the activity of trade in *Reference re Farm Products Marketing Act of Ontario*:⁸⁹

The production and exchange of goods as an economic activity does not take place by virtue of positive law or civil right; it is assumed as part of the residual free activity of men upon or around which law is imposed.

While the ultimate success of the adaptation of this imaginative notion to the activity of trade remains to be seen, its appeal and success in the realm of civil liberties or fundamental freedoms is assured. Rand's classic statement in the *Saumur* case established at once the primacy of the fundamental freedom of speech and outlined the scope of valid provincial legislation affecting that freedom. In a single leap the second great hurdle in the Canadian constitution had been overcome and a high level of protection had been effectively assured to some essential freedoms.

Conclusion

If the dimension of a man's greatness is measured by the depth and breadth of his individual achievements—Ivan Cleveland Rand was a great man. His brilliant judicial career, on which this

⁸⁷ *Supra*, footnote 59, at p. 329.

⁸⁸ *Supra*, footnote 60, at p. 305.

⁸⁹ *Supra*, footnote 15, at p. 211.

article has dwelt at length, finds jealous rivals in his other achievements which would do credit to several lifetimes.⁹⁰

Ironically, for the man who placed reason and rationality above all, it was the inexorable effluxion of time and the application of an arbitrary rule that removed him from the court. On April 27th, 1959 he reached his seventy-fifth year and was required to retire. Even in this, what was for him undoubtedly one of the saddest moments in his life, he did it with a characteristic verve.

It was said of him by his successor that like a railroader whose run had ended "he knew how to take his hand off the throttle". He offered his successor assistance and advice but spared him the hovering spectre of a sage and wise predecessor perched on his shoulder. With an "if I can be of assistance, you know where to reach me" he left for other tasks: the shaping of younger minds; the restructuring of a flagging industry; the examination of judicial and extra-judicial conduct; and the review of fundamental principles of labour relations.

On January 2nd, 1969, during the course of his study of labour relations in Newfoundland, he died at the age of eighty-four leaving behind a rich legacy of thought and deed. Of Ivan Rand it can be truly said:

He did his duty honestly and thoroughly. His living was not in vain.

⁹⁰ Trial Counsel 1913-1943; Attorney General of New Brunswick 1924-1925; Judge, Supreme Court of Canada 1943-1959; Arbitrator, Ford Motor Company (Rand Formula) 1946; Representative, United Nations Special Committee on Palestine 1947-1948; Royal Commission Inquiry on Coal 1959-1960; Dean, Faculty of Law, University of Western Ontario 1959-1964; Royal Commission Inquiry *re* The Honourable L. A. Landreville 1966; Royal Commission Inquiry into Labour Disputes 1966-1968; Inquiry into Labour Legislation in Newfoundland 1968.