

MAKING HISTORICAL SENSE OF THE LAW: IVAN RAND AT THE SUPREME COURT OF CANADA, 1943-1959

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A brilliant legal mind: that is the unanimous judgment in print about Ivan Cleveland Rand. This should make all judges and lawyers eager to emulate him and all legal historians skeptical. What could Rand possibly have written, said and done that so impressed contemporaries and more recent commentators? Both histories of *The Supreme Court of Canada*, by Professors Snell and Vaughan¹ and by Ian Bushnell,² wax ecstatic about him; at the same time, both books also put down most of the other appointees because their jurisprudential talents rarely rose above the ordinary.

Rand remains above this. And if there is something for judges, lawyers and the rest of us to emulate, then we need to ask what that something still is. More of his judgments remain alive and quoted today than those of all of his thirty-four predecessors at the Court combined. This includes those of his friend and admirer, Chief Justice Lyman Poore Duff, whose record-setting thirty-eight years at the Court now leaves no dust for modern judges to disturb, despite the late David Ricardo Williams's superb, lively biography of him.³

My method in this article is to look for that something to emulate in Rand within his practice as lawyer and judge. He had, I have found, a mind and method that naturally impelled him to make historical sense of the law. There was a discomfort with

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¹ James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: A History of the Institution* (Toronto: University of Toronto Press, 1985).

² Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992).

³ David R. Williams, *Duff: A Life in the Law* (Vancouver : University of British Columbia Press, in association with The Osgoode Society, 1984).

'presentism' in his judgments, a refusal to impose the present-day, often ephemeral, values and priorities around him on past actions and actors. Especially in his off-the-bench scholarly writings, Rand illustrated all of the best instincts of the best legal historians. He went straight to the original source, its words and intentions, showing the utmost respect for reconstructing any statute or judgment, or the facts in any case before him, in their own realities and circumstances. He put the primary text under his microscope and located that evidentiary text in its historical context. And he was never afraid to draw conclusions based on universal, legally transcendent principles. The lawyer in Rand clearly believed in a justice that must exist beyond the law. The legal historian in him provided the intellectual stimulus for identifying and implementing that just result. My title, making historical sense of the law, therefore locates Rand's methodology as well as my reading of him.

This is not to claim that Rand substituted legal history for the conventional appellate court approaches to statutory interpretation, legal reasoning and supplementary authorities. He neither evaded the legal issue, by getting himself lost in the narrative inside the case, as could Lord Denning, nor indulged himself in the law's origins for its own sake, as did Sir Edward Coke. His Supreme Court of Canada judgments consistently, but never slavishly, followed the pattern found in most appellate law judgments: with the issue clearly defined, he looked first to the statutes for jurisdiction and application, then to lines of authority in case law on point for reasoning, and finally to other relevant social facts, arguments and authorities for context. One example can suffice. In the 1949 constitutional reference, *Re: Validity of the Dairy Industry Act (1927)*,⁴ better known as the "Margarine Case," Rand's separate reasons presented a careful order: he read the Act in the context of the *Customs Duties Act* of 1886, to find the original import ban on margarine, alongside subsequent *Butter Acts* since 1903, and then examined four appellate judgments on federal-provincial distribution of powers. In so doing, Rand also defined for posterity, meaning for us, the nature of the federal government's criminal law powers *vis-à-vis* the provinces. Along the way he could not resist, however, adding citations to Adam Smith's *Wealth of Nations*⁵ on free trade and similarly to the *Act of Union* (1840)⁶ on taxation used for trade regulation.

These last two historical notes exemplify how comfortable Rand was in effortlessly reminding readers that every legal issue had its own history and, more importantly, that this was both relevant and necessarily instructive to the case under consideration. His use of legal history was always purposive to the point at issue in the case. He seemed to relish real property issues for this reason. Land, and all

⁴ *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)*, [1949] S.C.R. 1.

⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: Oxford University Press, 1904), Vol. II, chapters 2 and 3 (originally published in 1776).

⁶ *Act of Union*, 1840, 3 & 4 Vict., c. 35 (U.K.).

rights associated with it, formed the *raison d'être* for the English common law. In a series of judgments written between 1944 and 1959, Rand reconstructed historical events, citing the archival documents, which focused on the disputed transactions. In *Coulombe v. Société coopérative agricole de Montmorency* (1950),⁷ the issue was to define an obligation to repair a 250 year old dam on the Laval River. Was it a personal obligation for the current owner or a real servitude to the land? Rand narrated the story of the property's various owners over the two and a half centuries, finding for rights and duties attached to the land. A year later, in *Alberta v. Huggard* (1951),⁸ he had a field day, literally, with the history of prairie land grants, as rooted in medieval, non-feudal, socage tenure, and the Hudson's Bay Company charter of 1670, all of which he related forward to whether or not surface rights to oil and gas came with grants in fee simple. In numerous other land cases he revealed his mastery over nineteenth century case law, quoting extensive passages and analysing texts from English, Irish and Canadian sources. His reconstruction of Victorian case law, dealing with whether or not the owner of the equity of redemption in mortgaged lands could lawfully redeem after foreclosure and sale by the sheriff, remains the only textbook we have on the topic: *Pew v. Zink* (1954).⁹ In the end, Rand borrowed the rule from Irish land law experience.

There are strong hints here that we are not dealing with any run-of-the-mill appellate judge. In these matters, the bottom line for a legal historian must come from the question: *how* does that judge judge?

There are a multitude of criteria, and most judges mix and match according to their desired result. In the Supreme Court of the United States, Justice Antonin Scalia has focused on original meaning as a judge's strait-jacket. Similarly, some have found comfort in literalism, narrowing the law to strict construction of its wording in order to exclude anything not explicitly declared. Lord Mansfield often sought a moral imperative within the formal law to explain why certain acts were lawful or unlawful; and such morality jurisprudence continued with John Stuart Mill¹⁰ and, more recently, Patrick, Lord Devlin.¹¹ The legal positivism of H. L. A. Hart argued against judges imposing what they thought the law ought to be, urging them to apply the law as they found it.¹² That sort of legal formalism has been countered, of course, by natural law proponents, with their findings of a legal authority above positive laws, in sources

⁷ *Coulombe v. Société Coopérative Agricole de Montmorency*, [1950] S.C.R. 313.

⁸ *Alberta (A.-G.) v. Huggard Assets Ltd.*, [1951] S.C.R. 427.

⁹ *Pew v. Zink*, [1953] 1 S.C.R. 285.

¹⁰ John Stuart Mill, *Utilitarianism and On Liberty: including Mill's Essay on Bentham, and selections from the writings of Jeremy Bentham and John Austin*, 2nd ed. by Mary Warnock, (Oxford: Blackwell, 2003).

¹¹ P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

¹² H. L. A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963); also Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593.

often supernatural or located in eighteenth century enlightenment notions of natural reason.

How, then, did Rand judge? His method offered a unique blend, which we may choose to emulate in its parts, in total or not at all. Rand's judgments revealed and combined four criteria: first was his *textualism*, second his *historicism*, third his *intellectualism*, and fourth, his *transcendentalism*. And linkage was the key: words mattered, history mattered, ideas mattered, and the universals in the sum total of these elements mattered. Rand's textualism showed an acute care for words, a healthy pause for etymology. In *General Motors v. Bellows* (1949),¹³ a trade-mark dispute, he went straight to the original Latin meaning of '*frigidarium*', as the cooling room adjacent to the hot Roman bath, and then tracked the same word and concept through English usage, proving that the marketing label was not an invention by General Motors, merely a modern application to their brand of refrigerator. Ten years later in a copyright infringement case, *Composers v. Siegel Distributing* (1959),¹⁴ Rand delved into the history of the juke-box as a public phonograph, essentially to prove again that function and meaning remained consistent over time. In *R. v. Francis* (1956),¹⁵ Rand took pains to define historically what "peace treaty" meant at the time of the *Treaty of Paris* (1783), and what its subsequent meaning implied, for purposes of identifying relationships between Aboriginal and settler peoples, as each then understood them. In *Lord Nelson Hotel v. City of Halifax* (1956),¹⁶ he dissected the meaning of a "lodging-house" and who is a "lodger," for tax purposes. Earlier, in *Western Minerals v. Gaumont* (1953),¹⁷ Rand explained why he could not expand the statutory words "mines and minerals" to include "gravel." He went to the *Railway Act*¹⁸ passed fifty years earlier, to find parliament using "gravel" in that text, as denoting a category within the genus for those materials that formed land itself, thus deeming gravel to be roughage and not mineral. Taking words seriously and writing plain language were hallmarks of the Rand method for judgment writing.

Letting past actors and actions speak in their own words and meanings only signified the deeper commitment that Rand had to any law's historic integrity. Rand instinctively sought to recover the wholeness of whatever particular law presently existed, by using separate sources for his legal reasoning. He went first to analyse the authorities cited, always in their full and original texts, leaving out none of the essential words.

¹³ *General Motors Corp. v. Bellows*, [1949] S.C.R. 678.

¹⁴ *Composers, Authors, Publishers Association Co. v. Siegel Distributing Co. Ltd.*, [1959] S.C.R. 489.

¹⁵ *R. v. Francis*, [1956] S.C.R. 618.

¹⁶ *Lord Nelson Hotel Co. Ltd. v. Halifax (City)*, [1956] S.C.R. 264.

¹⁷ *Western Minerals Ltd., et al. v. Gaumont*, [1953] 1 S.C.R. 345.

¹⁸ *Railway Act, 1903*, S.C. 1903, c. 58.

TEXTUALISM

Rand's *textualism* was not mechanical, not that of a literalist or formalist who treats text as timeless. He treated the cited statute and case law as the entry level for the point at issue, not as the end-all for argument and analysis. In the constitutional reference concerning deportation of Japanese persons (1946),¹⁹ Rand started with the *British North America Act, 1867*²⁰ then worked through the relevant portions of the *Naturalization Act*,²¹ the *War Measures Act*,²² even the *Colonial Laws Validity Act*.²³ He then made a daring analogy, certainly coming one year after the Japanese surrender and with Canadian memories still fresh from wartime atrocities. He speculated about any Canadian national of Japanese parents, born in Canada, whose political situation might be similar to a Canadian national of English origin who sympathised with Oswald Mosley's British Fascists, or of a French-Canadian who supported Vichy and Premier Petain, or someone of Irish origins who agreed with President de Valera's wartime neutrality. These analogies were logical, courageous and the direct product of what happened when the law found in the statutory texts was applied with an even hand.

HISTORICISM

What ensured this *textualism* from becoming mere literalism or formalism was the second element in Rand's juridical method, *historicism*. Looking to the words, always in the primary text, made sense to Rand only when read within the context of their own original times and places. He took pains to discern legal origins, intent and meaning. In *G. v. G.* (1943)²⁴ the issue was whether a recrimination of adultery was an absolute bar to a decree of divorce *a vinculo*, under the New Brunswick law of 1791; in other words, if both parties were adulterous, they must live out their lives together as punishment. Rand had barely arrived at the Court in time for this case, but the Rand method was ready for application. He looked to the English law of divorce at the time of settlement in New Brunswick, which took him into pre-Reformation ecclesiastical courts, canon law, papal decretals and the established Church of England. He urged that this was not a contest between concepts but simply a problem between two human beings, calling it a "set off," analogous to mutual breach of contract and a spiritual offence, as in equity, where neither party came into court with clean hands or bodies. He confronted the history of the reception of English ecclesiastical law into New

¹⁹ *Co-operative Committee on Japanese Canadians v. Canada (Attorney General) (sub nom. Reference re Orders in Council in Relation to Persons of the Japanese Race)*, [1946] S.C.R. 248.

²⁰ Now the *Constitution Act, 1867*.

²¹ *Naturalization Act*, R.S.C. 1927, c. 138.

²² *War Measures Act*, R.S.C. 1927, c. 206.

²³ *Colonial Laws Validity Act*, 1865, 28 & 29 Vict., c. 63 (U.K.).

²⁴ *G v. G.*, [1943] S.C.R. 527.

Brunswick in 1791 and then identified what was not received from England, *i.e.*, New Brunswickers rejected the doctrine of indissolubility of marriage and created a new general civil right to divorce *a vinculo*, to be administered in civil, not ecclesiastical, courts. He meticulously rehearsed the post-1791 case law, looking unsuccessfully for a rule governing mutual adultery. Rand's answer: "it was a *par delictum* ... which leaves the parties to find their common remedy in common humiliation and mutual forgiveness."²⁵ What a beautifully apt turn of phrase! Historical reality since 1791 called for a legal flexibility and judicial discretion that made pleas of recrimination irrelevant. Circumstances and attitudes of each case's time and place had to be respected. The *G. v. G.* judgment offered church history at its best, as an antidote for legal formalism: the law was not a set of formal rules to be applied on a one-size fits all basis, as in the penitential Roman Catholic tradition, because the source of authority was in the law's history, not in its theology.

In this case Rand's *historicism* required reconstruction of different objective past realities for the law of divorce: the continuing pre-Reformation Roman Catholic, the post-Reformation Church of England, and the New Brunswick civil regime. He combined *textualism* and *historicism* effortlessly in Roman Law sources by going back to the Law of the Twelve Tables (450 B.C.), Gaius's *Institutes* (165 A.D.), the Justinian and the Napoleonic Codes: *Rosconi v. Dubois* (1951),²⁶ *Dulac v. Nadeau* (1953),²⁷ and *Car and General Insurance v. Seymour* (1956).²⁸ In other cases, such as *R. v. Boucher* (1951)²⁹ and *MacKenzie v. Martin* (1954),³⁰ Rand's *historicism* served a mono-tracked analysis in which a consistent, centuries-old legal reality on a single issue could be reconstructed, with statutes and cases, the older the better, strung like beads on a necklace of legal authorities. In *Boucher* it was a history of seditious libel beginning in the seventeenth century that Rand turned into a history of the right to criticise publicly the government of the day. In *MacKenzie* the issue concerned police powers exercised for preventive purposes, something that "post 9/11" North America knows all too well. Rand's analysis began in the Anglo-Saxon tithing in the time of Edward the Confessor. Paragraphs later he got to the statute 34 Edward III, c. 1 (1360) and powers to put people under surety-of-the-peace bonds. Rand found consistent respect at common law for a balance between community order and personal liberty; but in *MacKenzie* he dissented vigorously when the majority allowed a blind man to stand convicted and thrown in gaol by a police magistrate for threatening to disturb the peace. Again, everything had to be reconstructed in its own time and place, according to the laws in operation in the litigants' then and there, not in the judge's present day here and now.

²⁵ *Ibid.*, at para. 15 quoting Sir William Scott (as he then was) in *Proctor v. Proctor* (1819), 2 Hagg. Cons. 292, at 298.

²⁶ *Rosconi v. Dubois*, [1951] S.C.R. 554.

²⁷ *Dulac v. Nadeau*, [1953] 1 S.C.R. 164.

²⁸ *Car and General Ins. Corp. Ltd. v. Seymour*, [1956] S.C.R. 322.

²⁹ *R. v. Boucher*, [1951] S.C.R. 265.

³⁰ *MacKenzie v. Martin*, [1954] S.C.R. 361.

INTELLECTUALISM

Rand's method moved beyond *textualism* and *historicism* to a third characteristic which many of these case examples have already illustrated: *intellectualism*. This operated at two levels. First was his respect for ideas in the law. This mattered most, buried in the textual wording and its history, waiting to be exhumed and given new life in the immediate case under discussion. But where the civil law judge began with the idea or principle, found usually in a code, Rand's common law training reversed the epistemology, to a search among statutes, cases and secondary authorities for the core idea or principle. His temperament was inductive much more often than deductive. This is not to say that Rand did not have his ideas or principles to bring to each case, pretending to some sort of *de novo* or *tabula rasa*, where an open mind might just be an empty one. (This was where the fourth element in Rand's judgment-writing method came in: *transcendentalism*.)

This third element, *intellectualism*, at its first level championed ideas in the law, making them of greater priority than procedural technicalities or politically preferred results, or the protection of lawful privileges. At its second level, Rand's intellectualism drew boldly, often enthusiastically, on the interpretive ideas of modern scholarship, both legal and historical, not to decorate but to inform and to validate his judgments. Of course there was a lot of Rand's selectivity going into all of this, as to which idea applied and which scholar's work deserved citation and quotation. But what else is new in life and in law? The only way to avoid selection is to do nothing, to make no decision, which is exactly what judges cannot do, albeit a few nearly inert examples were seen, even at the Supreme Court of Canada, before Rand's time.

As for ideas themselves, consider the *St. Ann's Island* (1950)³¹ case, where – with all due respect to Justice La Forest and Chief Justice Dickson in *Sparrow*,³² and Dickson in *Guerin*³³ – Rand articulated the idea of the federal fiduciary obligation to all Aboriginal peoples thirty years before them. He went straight to section 51 of the *Indian Act*: “The language of the statute embodies the accepted view that these aborigenes [*sic*] are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation.” Then in *R. v. Francis* (1956),³⁴ Rand began with that fiduciary idea, only to apply his *historicism* to say that, what had been appropriate treaty rights for Aboriginal peoples at the end of the eighteenth century were enforceable 162 years later, but only if incorporated into law by federal statute. These two judgments epitomised Rand's approach to law. In *St. Ann's Island* he sorted through the original texts and their wording: the Aboriginal band council resolution of 1880 of a renewable lease, the *Indian Act* of 1880 prescribing terms for such leases,

³¹ *St. Ann's Island Shooting and Fishing Club Ltd. v. Canada*, [1950] S.C.R. 211.

³² *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

³³ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

³⁴ *R. v. Francis*, [1956] S.C.R. 618.

its approval by the Governor General in a quoted Privy Council minute, and then four subsequent renewals. Six years later in *Francis*, Rand really got down to his style of juridical business. An Aboriginal claimant appealed from the Exchequer Court for the \$123.66 customs duty charged for an American washing machine, refrigerator and oil heater. Canada called it smuggling; the appellant claimed immunity under Article 3 of the 1794 *Jay Treaty* with the U. S. The case was made for Rand's method. He quoted primary text back to the *Treaty of Paris* (1783), then *Ghent* (1815), then examined Lower and Upper Canada statutes pre-1801. To buttress his readings, he relied on the leading diplomatic histories of his day, Samuel Bemis on *Jay's Treaty*³⁵ and McNair's *The Law of Treaties*.³⁶ For extras he cited and quoted English and American case law. And, all of this done in pursuit of two core ideas: the fiduciary obligation, as the defining element in the relationship between Canada's Aboriginal peoples and the Canadian government, and a requirement for legislative enactment of Aboriginal rights created by peace treaties.

In the Japanese deportation reference,³⁷ the Rand idea was simple: if the law ordered repatriation, then Japanese Canadians, born in Canada, could only be repatriated to their *patria*, meaning Canada, as a *reductio ad absurdum*. Similarly, the core idea of a racially restrictive covenant that did not concern land simply failed because of the property law rule against inalienability. In *Degelman v. Guaranty Trust* (1954),³⁸ Rand literally introduced the idea of unjust enrichment to Canada from the U. S. and thereby rejected the idea of part performance, based in English equity. In *Saumur v. City of Quebec* (1953),³⁹ Rand went out on the limb with a full, principled rejection of censorship in issues of freedom of expression. All of these powerful ideas, whether in public or private law, captured Rand's *intellectualism*, his way of reducing a case to its core idea.

As for his use of the interpretive ideas of secondary scholars, this pushed him to the border on questions of how much judicial notice was needed or how much was too much? In Canada, Rand stood alone for the 1940s and 50s and not without suspicion from fellow judges, or perhaps awe, whether at his audacity or his enormous reading appetite. Supplementing judgments with secondary authors, cited from publications outside parliamentary and other case law sources, *de novo* as it were, was shunned by many judges as extraneous distractions, mere decorations, irrelevant non-authorities, puffed up prima donna professors and, worst of all, parachuting into a case an absent witness who could not be cross-examined until after all arguments had ended. To Rand, who never held an academic appointment until after retirement

³⁵ S. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New York: MacMillan, 1923).

³⁶ A. D. McNair, *The Law of Treaties: British Practice and Opinions* (Oxford: Clarendon Press, 1938).

³⁷ *Supra* note 22.

³⁸ *Degelman v. Brunet Estate*, [1954] S.C.R. 725.

³⁹ *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299.

from the Court, this would all have been nonsense! He routinely cited Pothier,⁴⁰ more often than all of his Quebecois colleagues put together. F. W. Maitland, Leslie Stephen, William Holdsworth, A. V. Dicey, Adam Smith, William Blackstone, Francis Bacon, and of course the *Encyclopedia Britannica* and the *Oxford English Dictionary*: when he needed help with an idea, he had no hesitation in seeking it, outside the case and court. The one obvious gap in all of this was that he never once, to my reading, cited a Canadian legal scholar. His short answer is in his 1954 article entitled “Legal Education in Canada,”⁴¹ published five years before he retired from the Court to become the founding dean of law at the University of Western Ontario. He asked: “What great jurists has Canada produced? They can be counted on the fingers of one hand. What outstanding legal scholars? ... recognized by the world centers of jurisprudence or admitted to the columns of legal publications of world standing? Not many.”⁴²

TRANSCENDENTALISM

In that same diagnostic article, Rand defined what he called “the principal function” of a law school: “to bring the minds of students to a familiarity with the great *ideas* of law and to inculcate such a training in their use as will enable...” self-sufficiency.⁴³ *Ideas* led to *intellectualism* and finally to *transcendentalism*. “Law must be formulated in mind and it must be declared in action, and the word is its supreme instrument”.⁴⁴ From *textualism* to *transcendentalism*, law was entirely a product of mind and reason. What Rand admired most in Justice Louis Brandeis was the belief “... that society could be fashioned by the organized power of human reason”.⁴⁵

Transcendentalism finds the source for the law’s authority outside and above the law itself and is usually juxtaposed against legal positivism. Rand certainly saw all core ideas in the law as transcendent and, of course, reserved his right to select which ideas mattered most. In a 1954 international forum at Columbia University Law School he represented Canada and began his address: “Man’s right to knowledge and its use, which I take to be a self-evident postulate...”⁴⁶ That set the tone for most core ideas that he identified in judging cases. It could lead to lofty assertions, as in *Noble and*

⁴⁰ Robert Joseph Pothier (1699-1772), French legal scholar and jurist and author of numerous treatises on the Roman-based civil law including the influential and oft referenced *A Treatise on Obligations, Considered in a Moral and Legal View* (Newburn, N.C.: Martin, 1802).

⁴¹ I. C. Rand, “Legal Education in Canada” (1954) 32 *Canadian Bar Review* 387

⁴² *Ibid.*, at 410.

⁴³ *Ibid.*, at 405 [emphasis added].

⁴⁴ *Ibid.*, at 395.

⁴⁵ I. C. Rand, “Louis D. Brandeis” (1947) 25 *Can. Bar Rev.* 240, at 247.

⁴⁶ I. C. Rand, “Community Security vs. Man’s Right to Knowledge (Symposium)... Canada” (1954) 54 *Columbia Law Review* 667, at 787.

Wolf v. Alley,⁴⁷ and in his civil liberties judgments for which he is still celebrated, such as: *Saumur v. City of Quebec* (1953),⁴⁸ in which he wrote about ‘original freedoms’;⁴⁹ *Henry Birks v. Montreal* (1955)⁵⁰ on Sunday closing; his numerous judgments on citizenship and naturalisation, like *Winner v. SMT* (1951);⁵¹ *R. v. Storgoff* (1945)⁵² on *habeas corpus*; *Klein v. Bell* (1955),⁵³ on the privilege against self-incrimination; and *Beattie v. Kozak* (1958),⁵⁴ on arrest without warrants. In all of these Rand identified the core idea as a universal, as based on ancient principles of justice, as a principle extant outside the memory of modern man and as guiding stars in the firmament of free and democratic societies. Much of this lives on, as with the fiduciary base for federal-Aboriginal relations, and in Rand’s finding in *R. v. Snyder* (1954),⁵⁵ that an accused had a right to full disclosure of the Crown’s case in a criminal prosecution, forty years before the much heralded more recent case of *R. v. Stinchcombe*.⁵⁶

CONCLUSION

In Rand, we have met a sort of Kipling-esque character, with an “insatiable curiosity,” who found adventure, not in trips round the world but in trips round the mind, captured mainly in books, legal texts and the art of intellectual conversation. Can we ever know what makes each of us tick? His classical education, law apprenticeship in Moncton, *cum laude* graduation from Harvard Law School, national exposure in practice from Quebec to Medicine Hat, Alberta, his brief political career in Moncton and much longer corporate counsel career, his several royal commission chairs: maybe it was that Baptist railway mechanic father of his? The coherence of all that became Ivan Cleveland Rand cannot explain the Rand method for judgments at the Supreme Court of Canada that I have argued in this essay. It begs bigger contexts, putting the one person into institutional identities, something that I have not done for Rand but will try to do as I bring this article to an end.

There is one context in which to put his jurisprudential method that ultimately defined Rand’s life: the Supreme Court of Canada 1943-1959. He presented himself for swearing-in on 22 April 1943, to join eight senior colleagues sitting in the old workshop buildings, located since 1876 in that rock-solid gate-keeper’s cottage that guarded parliament’s looming tower and acreage above it. By 1936 the predecessor

⁴⁷ *Noble v. Alley*, [1951] S.C.R. 64.

⁴⁸ *Supra* note 39.

⁴⁹ *Ibid.*, at 329.

⁵⁰ *Henry Birks & Sons (Montreal) Ltd. v. Montreal (City)*, [1955] S.C.R. 799.

⁵¹ *Winner v. S.M.T. (Eastern Ltd.)*, [1951] S.C.R. 887.

⁵² *R. v. Storgoff*, [1945] S.C.R. 526.

⁵³ *Klein v. Bell*, [1955] S.C.R. 309.

⁵⁴ *Beattie v. Kozak*, [1958] S.C.R. 177.

⁵⁵ *R. v. Snyder*, [1954] S.C.R. 479.

⁵⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

to the Department of Health Canada had condemned it as an unsanitary, over-crowded firetrap. That servient symbolism has now been somewhat reversed, beginning with Ernest Cormier's purpose designed judicial building in 1939 and then the *Constitution Act, 1982* and the new *Canadian Charter of Rights and Freedoms*; but the Court is still a creature of Parliament, existing solely on its statutory authority and not entrenched constitutionally. In 1943 Rand could only walk past that newly completed building; the wartime government of MacKenzie King had given a higher priority to his tax collectors, who occupied it until 1946. The new puisne justice had arrived just as the tides of war had finally shifted to Canadian, and her allies, advantage. But wartime at home had created numerous issues about limits to the Rule of Law. In the distribution of federal-provincial economic powers, wartime gave to the central government what the law had refused during the pre-war 1930s depression, specifically the New Deal model for federal powers in the six 1936 references that the Judicial Committee of the Privy Council helped to deny.⁵⁷ There were hold-over issues here, on such matters as jurisdiction over American soldiers in Canada⁵⁸ and the deportation status of Japanese Canadians.⁵⁹ A militarised society always challenges civil liberties, and this would become one challenge to the Rule of Law that Rand took up with genuine commitment.

He had replaced another New Brunswicker, Oswald Smith Crocket, who – unlike Rand – had had nineteen years trial experience at the Supreme Court of New Brunswick. Rand's intensity for the Rule of Law contrasted with Crocket's disinterest, something that even Prime Minister R. B. Bennett acknowledged when reluctantly appointing Crocket to the Court in 1931. Crocket subsequently dipped his jurisprudential pen into the Court inkwell as little as possible and took only one controversial stand during his eleven years. In 1939 he dissented from Chief Justice Duff's majority, by rejecting attempts to terminate Canadian appeals to the Judicial Committee of the Privy Council,⁶⁰ something Rand welcomed as another post-war issue. Duff's opinion of Crocket could not have been lower and of Rand higher. He had wanted Rand's appointment in 1931 and then harassed Crocket for eleven years. Crocket has suffered a reputation as the great concurreur, making most of his career by signing off on his colleague's writings. When he once announced to Duff that he would concur with him, the Chief Justice glared that that could force him to reverse his decision. On another occasion Crocket "once rushed out of Duff's chambers screaming "Who the hell does he think I am - a student?"". ⁶¹ Allow me to suggest that

⁵⁷ *Reference re The Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and The Limitation of Hours of Work Act*, [1937] 1 D.L.R. 673 (P.C.); *Reference re The Employment and Social Insurance Act, 1935*, [1937] 1 D.L.R. 684 (P.C.); *Reference re Natural Products Marketing Act, 1934 (Canada)*, [1937] 1 D.L.R. 691 (P.C.). These Privy Council decisions curtailed federal powers; the other three upheld federal powers.

⁵⁸ *Reference re: Exemption of United States Forces from Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483.

⁵⁹ *Supra* note 22.

⁶⁰ *Reference Re: Supreme Court Act Amendment Act (Canada)*, [1940] S.C.R. 49.

⁶¹ Williams, *supra* note 3, at 165.

Justice Crocket still deserves his day in the court of legal history and that someone should test the primary evidence to see how accurate is this conventionally negative view, beginning with his previous careers and trial judgments. Rand surely would not have tolerated building his own reputation at the expense of anyone, much less his New Brunswick predecessor at the Court.

When Chief Justice Duff finally welcomed Rand in 1943, he received an effusive thank you note in which Rand referred to him as his “great teacher,” called himself “the humble disciple” and then told Duff that “my highest aspiration has been to sit on a court presided over by you,” which he did for only eight months, until Duff had to retire.⁶² Rand’s words were like a violin sonata to the vain old man’s ears and the mutual admiration continued to his death.

In the post-war, post-Duff era the Court became *de facto* and *de jure* supreme, stepping out from the shadows of Downing Street and the Judicial Committee of the Privy Council. A new era was beginning and Rand was at its centre. Newfoundland entered confederation. The first Canadian born Governor General arrived. And the Court was in its new building, separate from Parliament Hill. Rand wrote his clear, compelling prose based on prodigiously thorough research, without any formal experience as a university teacher or trial judge until retirement from Ottawa. More to the point, the Court had no law clerks. Rand did all that reading, research, reflection, and no doubt revision entirely on his own.

He did not deliberately construct any paradigm for judgment-writing, but he naturally created his own method, by combining *textualism*, *historicism*, *intellectualism*, and *transcendentalism*. These guided his ways of thinking about law and the human conflicts it was meant to resolve peacefully. But these four elements were only means to an end; and his ends, his sense of purpose for law, remained greater than the sum of the piecemeal results of each case that he helped to decide. On one occasion he wrote explicitly about “a judicial method,” regarding his Harvard mentor, Justice Louis Brandeis.⁶³ Rand approved of the “social engineering” mission for law that Brandeis espoused, and of his commitment to civil liberties, constitutionalism and equality. Brandeis and Duff also shared, in Rand’s estimation, an anti-materialism that was needed to save North American culture from losing its soul. The end or purpose of law, in Rand’s view, was therefore as complicated as his four part method was clear. Whether or not one agrees that Rand possessed “a brilliant legal mind,” and whether or not one wishes to emulate any part of it, his impact on Canadian jurisprudence continues to be profound and permanent. In no small part, that is because Ivan Rand knew that the first responsibility of any judge is in making historical sense of the law.

⁶² Duff C.J. officially retired from the Supreme Court of Canada on January 7th, 1944, after having received two extensions from the government of Mackenzie King which allowed him to remain a member of the court past the mandatory retirement age.

⁶³ *Supra* note 48, at 243.