
BOOK REVIEW: Canadian Maverick: The Life of Ivan C. Rand

By Gerald P. Sadvari, *McCarthy Tétrault LLP*

William Kaplan, *Canadian Maverick: The Life of Ivan C. Rand*
Toronto: University of Toronto Press, 2009

If you mention Justice Ivan Rand's name to lawyers today, the labour lawyers will likely recall the Rand Formula. Those of a political bent or interested in administrative law may find the name Leo Landreville coming to mind. But for most of us, if we remember anything about this great Canadian judge, it will be his decisions in the Quebec Jehovah's Witnesses trilogy of cases culminating in *Roncarelli v. Duplessis*. Justice Rand has been credited by many, including William Kaplan, with inventing the concept of an implied bill of rights, the forerunner of the present *Canadian Charter of Rights and Freedoms*. A provincial attorney general, judge, royal commissioner, member of a special commission of the United Nations and founding law dean, not to mention successful private practitioner and in-house counsel, Justice Rand performed virtually every role a modern lawyer can imagine. But his success in virtually every one of these roles was not universally admired and not without controversy. He was, as Mr. Kaplan illustrates time and again, "a complex, confounding and often contradictory man" (page 424). The emphasis is quite properly upon the first and last of these three, his complex character leading to contradictions between his personal life and public persona.



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Justice Rand shared many of the common prejudices of his age and community. He was basically anti anyone who was not like himself. This large group included French Canadians, Catholics, Jews and anyone whose name ended in a vowel. And yet he was a great and active supporter of the state of Israel, which celebrated his contribution to the establishment of that country. He was the first great civil libertarian judge in Canadian history, not only willing but able to rationally and forcefully set limits on the power of the state to interfere with basic individual rights and liberties.

Ivan Rand was born in Moncton, New Brunswick, on April 27, 1884. At the age of 15 he graduated from high school and, like his father, worked on the railroad. At 21 he went to Mount Allison University, studying engineering and switching to arts after two years. He was a star debater, and after graduating with high honours, he was accepted at Harvard Law School, one of three Canadians accepted at the time. It is Harvard that Mr. Kaplan credits for Justice Rand's liberal views of citizens' rights and state power limitations. The *American Bill of Rights* and other well-established protections against state power, totally foreign to Canada at the time, obviously impressed him as the most rational way to regulate the interaction between the citizens of a democratic state and the state itself.

Rand returned to New Brunswick after graduating and was called to the bar in November 1912, at the age of 28. He then soon proceeded to Medicine Hat, Alberta, an apparent boomtown, and started practising law, appearing in his first case before the Supreme Court of Canada a mere four years later. He was a true barrister, in court almost daily and engaged in a wide variety of cases, from criminal and family to corporate law matters, contracts and torts. When Medicine Hat's economy collapsed in 1920, Rand returned to Moncton, which unfortunately was not doing much better. He continued to impress his community and was so active in the provincial Liberal Party that in 1924 he was named attorney general of New Brunswick, even before he had ever run in, let alone won, an election. He eventually ran and lost, but was then given a safe seat in a subsequent by-election. As attorney general he was extremely active and relatively progressive (page 52), instigating such innovations as a *Reciprocal Enforcement of Judgments Act*, reforming the *Bastardy Act* to extend protections under the law to "bastards" (as they were then known), imposing speed limits for the first time on some highways, and so on.

As with the Liberal Party's loss of power, Rand lost his seat in the 1926 election. He began working his way up the ranks of counsel within Canadian National Railways ("CNR"), ultimately becoming commission counsel. It was here that he became familiar with labour law and labour relations, as the CNR had many unions with which it (and he) had to deal.

Kaplan describes the provincial Rand as "often sullen, remote, uncommunicative, detached, almost totally focused on his work" (page 183). He was a liberal in general and a bigot in particular. He refused to meet his sister's French Canadian husband until, 30 years after their marriage, he did so at her funeral. During his early life he did little entertaining at home and was already beginning to show the traits of the self-absorption that subsequently dominated his personality. Although he later accused Leo Landreville of snobbery (entirely without foundation, except in his own mind), it was Rand himself who exhibited this trait in many ways. For instance, as the first head of the Moncton Barristers Society, he helped instigate the change in appellation of justices from "Your Honour" to "My Lord," an entirely gratuitous and unhelpful change, but no doubt one he relished as he was already

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anticipating becoming a judge (albeit upon a bench that already possessed that honorific).

As a good and ambitious Liberal, Rand flattered Prime Minister Mackenzie King whenever the opportunity presented itself, although Rand's appointment to the Supreme Court of Canada in April 1943 was entirely merited by his legal accomplishments.

At that time the Supreme Court of Canada building had been condemned as a fire trap, and a replacement had not yet been completed. None of the judges (seven in number until 1949, when two were added to deal with the expansion of their appellate authority) had clerks. It was a very conservative and traditional court, mainly occupying itself with applying precedents from England's Judicial Committee of the Privy Council ("JCPC"). Kaplan describes most of Rand's colleagues, at least those on the court when he was appointed, as legal nonentities who did not bother to consult each other and as a consequence wrote numerous turgid and repetitive sets of reasons that did not enlighten the bar or the public in the least. On this court, Rand shone as a beacon of rationality and inventiveness, although he pales in comparison with those who came later, as his analyses and prose were uneven and sometimes obscure.

In January 1946, the court heard its first case in its new home. It was the Japanese deportation case, which followed their internment and the confiscation of their homes. It was a fire sale of their property. The government wanted the power to deport not only naturalized Japanese Canadians but also those who were born here. To defuse this controversial issue, the government referred the legislation to the Supreme Court of Canada with respect to constitutionality. Of the seven judges, only Rand addressed the basis of such a law, calling it what it was: racism, simple but far from pure. Nevertheless the law was upheld by the court as a whole and further upheld on appeal to the JCPC, but by then the government had wisely changed its mind and dropped the proposed Act.

The trilogy of "Jehovah's Witnesses versus Quebec" followed over the next decade: *Boucher*, *Saumur* and, of course, *Roncarelli*. Rand had by far the clearest grasp of the essential issues and values at stake: tolerance for the opinions of others, the right to freedom of expression and religion, and the line delineating the terminus of state power to interfere with these.

"Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are the essence of our life" (page 126): Rand was the first to talk about the unchallengeable rights of Canadians. In contrast, Chief Justice Thibaudeau Rinfret

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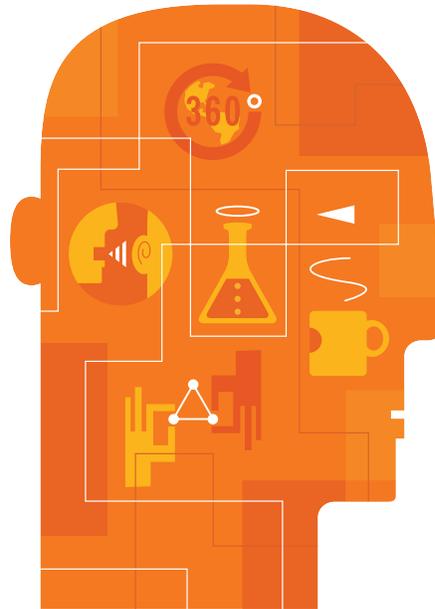
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actually cut off Rand several times when he was leading counsel down this path with keen questioning, thus diverting Rand's train of thought to his own angry and irrelevant tangent. This was typical and no doubt frustrating for Rand, whose brilliance would shine for generations of law students but could not enlighten his fellow Lords. In *Saumur*, the court actually issued seven different sets of reasons. This was the Supreme Court of Canada at its nadir, a totally botched jumble of incoherent analysis.

It must be said that even in *Roncarelli*, Rand's reasons--all too typically, for him--mixed sheer poetic expression and inspired conceptualization with convoluted and opaque reasoning. To refresh the memory of those of us decades from law school, Mr. Roncarelli was a Jehovah's Witness who posted bail for 400 jailed fellow witnesses and as a result had his liquor licence revoked "pour toujours." In Rand's opinion, Premier Maurice Duplessis had gone too far. If he got away with this, he could use (or more properly put, abuse) his political power to close down any business he wanted, and for any reason. So could any other similarly placed politician. Rand viewed this as a clear abuse of power and admonished government officials that they must exercise their administrative authority impartially and in good faith. We are fortunate that the *British North America Act* created the divisions it did between federal and provincial power, because this is the analysis upon which many of these decisions dealing with fundamental rights and freedoms had to be originally founded. It was relatively easy to find an action beyond the power of a province on the basis of a constitutional analysis, without getting into overarching fundamental rights or even public policy. When the Supreme Court found Duplessis had exceeded his power, it was provincial power that was limited as a result. Under our system the federal government could logically do what the province could not, so the decision did not and could not reach that far. Although it took many years and much fumbling with an ineffective bill of rights, ultimately Rand's analyses and beliefs led to our *Charter of Rights and Freedoms*. Rand was able, in the abstract judicial world, to struggle with and overcome his many prejudices.

Rand heard over 600 cases in his judicial career and wrote 400 sets of reasons, although astonishingly he was the author for the majority of the court only 23 times. Some of his other important decisions involved striking down restrictive covenants of land (albeit on the narrowest of bases rather than as against public policy), creating the remedy of unjust enrichment (*Deglman*), attempting to clarify the law of causation in tort cases with two possible tortfeasors (*Cook v. Lewis*) and raising to a position of paramountcy the welfare of a minor child (*Hepton v. Maat*).

Bora Laskin called Rand "the greatest expositor of a democratic public law which Canada has ever known" (page 161). Unfortunately, at least in Rand's view, retirement came all too swiftly, given his age at the time of his appointment: "I was just getting a grasp of the law when they made me retire" (page 163). However, it was probably just as well that he left the bench when he did, as his performance in his next position demonstrated. Rand was appointed the founding dean of the University of Western Ontario Law School. While much anticipation followed his appointment, due to his lengthy and revolutionary article of 1954 on legal education, he was, regretfully, unable to live up to those expectations. He was a hidebound conservative dean who felt that fighting for his faculty's rights, particularly for funding, was beneath him (even though his salary was three times that of the highest-paid faculty member, and he had two pensions in addition). When given the opportunity to apply his own ideas five years after his article, he could not. He had a very narrow view of a law professor's role: to teach the students the rules. Although he wrote about the importance of legal imagination--that a lawyer must strive to improve society and to achieve justice and greatness for his (not her) country--in his daily duties he simply could not live up to his own admonitions.

By the time Rand presided over the judicial inquiry into the conduct of Justice Leo Landreville, his prejudices were open and uncontrollable. Landreville had already been through a preliminary hearing over accusations of corruption and conspiracy, and the presiding magistrate found there was no case to go to trial. But the Law Society of Upper Canada conducted one of its rare (and, it is hoped, unique) kangaroo court inquiries into his alleged behaviour. Conducted in camera with no notice to the accused, let alone the provision of an opportunity to defend himself, the Law Society "convicted" Landreville of being unfit to be a judge and then proceeded to gratuitously send the report to the federal justice minister. The hearing and the finding were clearly beyond the authority of the Law Society, with the hearing conducted contrary to all the rules of natural justice. When invited to explain and defend itself at the Rand inquiry, the Law Society understandably declined; there were no possible justifications. Nevertheless, this report started the chain of events that led to the judicial inquiry. The minister of justice (the first person to notify Landreville that he had been "convicted" by the Law Society) asked Landreville if he wanted an inquiry, and Landreville, astoundingly, replied that he did. At that time, there was no formal judicial disciplinary procedure (the Canadian Judicial Council was not created until 1971, no doubt partly as a result of this fiasco).

Rand's dislike of Landreville was evident from the beginning. He insisted upon obtaining a copy of the Law Society report and then lunched with the treasurer, John Arnup, to discuss it further. Kaplan put it neatly: "Rand did not understand the difference between an inquiry and an inquisition" (page 355). It is true that, like Martha Stewart's error, Landreville's offence was not the money that he made or how he made it, but lying to investigators about it. This was enough to condemn him, in Rand's view, of far more heinous offences, of which there was little or no evidence. Rand, for instance, constantly and sarcastically interrupted Landreville's lawyer, the pre-eminent former treasurer of the Law Society (and president of The Advocates' Society), John J. Robinette, during his closing argument. He went so far as to ask Mr. Robinette about the Law Society report, which in the end

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had not even been put in evidence (although it was clearly important, in Rand's mind). After adjourning the hearing *sine die*, Rand shockingly issued a report that went well beyond the scope of his inquiry. He concluded that Landreville lacked all credibility and morality. Rand relied upon hearsay, amateur psychological analysis and rambling thought in a report that was at times nearly incoherent. It took Gordon Henderson ten years to set aside these findings in the Federal Court based upon the unfairness of Rand's procedures, among other criticisms. In the end, the government of Canada paid Mr. Landreville \$250,000 in recompense.

Rand died in January 1969 while in the midst of preliminary inquiries undertaken on behalf of Newfoundland and Labrador relating to the province's labour relations. He left behind a mixed legacy, as a result of what Kaplan aptly describes as his first-rate intellect and third-rate temperament. His achievements in the area of civil liberties shone as a beacon of hope for many years. It is now clearer than ever that he took the first giant step towards our present recognition and acknowledgment of the individual's rights and freedoms. The Rand formula in labour relations long stood the test of time. The University of Western Ontario survived his deanship and went on to join the ranks of the best law schools in Canada.

Rand was a product of his time, but as a result of his firm belief in the world of ideas and rationality, and inspired by his sojourn at Harvard, he was able to overcome his many biases in his written analyses and helped light the way for enlightened Canadians to follow. ■

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