

JUSTICE RAND'S BIOGRAPHY: REFLECTIONS AND RECOLLECTIONS

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Some twenty years ago, I learned that William Kaplan was embarking on the task of writing a biography of Mr. Justice Rand,¹ one of the most accomplished judges ever to sit on the Supreme Court of Canada, and certainly far and away the strongest in his time. I was delighted to hear this, for at one stage I had come to know Justice Rand fairly well and I shall accordingly begin this review by briefly describing the context in which I got to know him.

I first met Justice Rand in 1959 when I was a professor at the U. N. B. Law School. It was a propitious time for the Faculty. We had just moved from Saint John, where the school had been since its inception in the nineteenth century, into Somerville House in Fredericton: Lord Beaverbrook's former home in New Brunswick, which he had donated to the University following its decision to move the school. At the same time two additional professors were named, and the Faculty was looking forward to transforming itself from just another trade school into a modern university law faculty, or as "Caesar" Wright was wont to put it, "an honest to God law school".

In addition, to ensure a nucleus of first-rate students, Lord Beaverbrook had persuaded Lady Dunn to create a number of prestigious law scholarships; and to that end, a selection committee was established consisting of a number of outstanding New Brunswickers, a step no doubt taken to fully impress her ladyship with the importance attached to her gift by the university. Rand, who after his retirement from the Court in 1959 had become the founding Dean of Law at the University of Western Ontario, generously agreed to chair the Committee. I was its Secretary, and it was in that context that I came to know him.

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¹ William Kaplan, *Canadian Maverick, The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2009).

Needless to say, we made sure that our distinguished chairperson was not left to his own devices during his visits whenever he was not visiting friends, notably Horace Pettigrove. Since he preferred legs over mechanical locomotion whenever practicable, I would often walk back to his hotel with him, and in the evening my wife and I and the Dean, Bill Ryan, would take him out to dinner or at our home. He enjoyed conversation through which I learned of his deep devotion to the province – where he planned to return – as well as his quirks; he would wax eloquent about the quality of the apples at the market in London, Ontario, and he could not understand “why anybody would put poison – meaning alcohol – into their bodies”. More importantly, I learned of his passion for his work, both on the Court and in the course of performing the fascinating assignments to which he was constantly being summoned. Throughout his period on the Court and afterwards, Rand was regularly involved in a wide array of important issues throughout the country; indeed in the case of the Palestine dispute, at the international level. He enjoyed talking about these activities and, of course, I enjoyed listening. I predictably was very impressed with the man; less predictably, Bill Ryan told me that Rand had formed a very good opinion of me.

The last time I spoke to Rand was in Ottawa where, in 1968, we met by chance in the lobby of the Chateau Laurier Hotel. He was at the time engaged in an investigation into labour relations in Newfoundland; and I was there on one of the many consulting jobs for the government that regularly came my way at the time. He was in good form and we sat down together for a chat on a bench rounding a column in the lobby. He was enthusiastic about his new venture. At some point – I shall never forget it – with his fist to his chin in a manner reminiscent of Rodin’s “The Thinker”, he remarked with satisfaction: “New ideas!”. A few months later, in January 1969, he died suddenly at the age of 84.

While, as will be seen, I am not persuaded by one of his judgment calls about Rand’s personal side, Kaplan has produced an excellent account of Rand’s career, which is at once scholarly and readable. Each aspect of Rand’s career is clearly brought home to the reader.

The task could not have been easy. As the author relates, Rand’s career took many turns. He was born in 1884, some fifteen years after the building of the intercolonial railway had transformed Moncton from a small village into a bustling railway town. The son of a railway mechanic, he himself worked as a messenger and clerk for the railway until he had enough money to attend what is now Mount Allison University in 1905. On the advice of a lawyer friend he at first studied engineering but later transferred to arts. He was an excellent student and, after a brief period in a law office, decided to attend Harvard Law School, where he was indoctrinated in its famous casebook approach to law.

While at Harvard he met his future wife, another New Brunswicker. They soon married and then, responding to the call of the West, the couple departed for Regina. Finding opportunities there wanting, they soon moved on to Medicine Hat, which had become quite prosperous owing to the discovery of natural gas in the area. He practised law there for a few years but the boom was coming to an end and there were family problems back home that needed attention, so the two returned to Moncton in late 1919. There too the couple arrived at the end of a buoyant economic cycle; but Rand had already arranged to enter a partnership with another lawyer and it gradually prospered.

Rand soon became involved in politics, an activity which culminated in his winning a seat in the provincial legislature in a by-election in 1925. The major issue at the time was the provision of electric power in the province, one that ironically resurfaced, though in a different form, at about the time this biography was published.

Rand did well in politics. Following his election he was appointed Attorney General and, in that post, introduced several worthwhile reforms to the law. There is a strong possibility that he might have become provincial Premier had he not accepted the offer to become regional counsel for the Canadian National Railway, where he remained for close to two decades, and at which time he developed an understanding of labour relations that would be invaluable in performing several important assignments that later came his way.

Up to this point, as Kaplan notes, Rand's career, though successful, would not have warranted a biography. All this, of course, changed with his appointment to the Supreme Court of Canada in 1943.

The mere recitation of the foregoing facts does not tell us much about the impact these activities may have had on Rand or on those affected by them. Despite the fact that Mr. Kaplan did not have access to any personal papers, he has been able to give the reader a real feel for these activities and their impacts, by providing a wealth of knowledge about the large and particular backgrounds of each phase of Rand's life, along with many astute observations about them. For example, he gives a good description of the Harvard method of teaching law when Rand was there, as well as the general views of its leading Faculty members. In other situations, he carefully describes the broad and specific social and economic backgrounds against which Rand's activities took place. Thus, Kaplan gives careful attention not only to Rand's judgments but also to the background of the important cases he was called upon to resolve when he was on the Supreme Court of Canada. As well, the author provides the reader with all that is needed to understand the many important issues Rand was called upon by governments to resolve: labour relations, the Cape Breton coal industry, the building of the trans-Canada oil pipeline (which formed the background of the

Landreville Inquiry), as well as the Palestine issue. It is this approach that gives the book its value.

The author rightly gives pride of place to Rand's outstanding work in the development of principles for protection of the individual against the state, notably, in the context of the deportation of Japanese Canadians² and the treatment of the Jehovah's Witnesses by the Duplessis government in Quebec.³ These cases alone would suffice to warrant Rand's standing as one of Canada's greatest judges.

The author does not, however, neglect Rand's private law cases, which provide excellent examples of how judges can adapt the common law to changing circumstances, an approach that had long been absent in the reasons of previous Canadian judges. These cases were particularly helpful to me during my early period as a law teacher when most courses I was giving were in the private law sphere. I was then involved in the not easy task of trying to break through the predominantly black letter law approach to which I had been exposed as a student and found Rand's judgments to be welcome examples of how, from reading the American legal realists, I thought law should be approached. I remember a conversation with Rand in which I discussed the difficulties I was facing and his reply simply was that it would come to me. The approach certainly has been increasingly adopted in our courts and particularly in the Supreme Court of Canada. It is one that is needed in a world in which so many transactions are dictated by conditions set by large commercial corporate entities. Not surprisingly Rand's judgments in this area, like those in the public law sphere, are sometimes cited to this day.

It is clear, however, that it was Rand's public law cases that particularly fascinated Kaplan, whom he considered his hero when he was in law school. Ironically, the author finds that his hero may have had feet of clay, for he suggests that these great civil libertarian judgments may have been motivated to a degree by Rand's alleged dislike of Catholics and French Canadians. He supports this view in a number of ways. The Jehovah's Witnesses cases, of course, came from Quebec. To this Kaplan adds Rand's treatment of Justice Landreville (a Franco-Ontarian) whom he recommended be removed as a judge, and he adds a few family incidents: one in which it appears he told his son to stay away from Acadian children in Dieppe, and another where he was furious when his sister decided to marry an Acadian and the two never spoke to each other for years. Kaplan also mentions a caustic remark supporting this view by a professor when Rand was Dean at Western.

² *Cooperative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 88; *sub nom Reference as to the Validity of Orders in Council in relation to Persons of the Japanese Race*, [1946] S.C.R. 248.

³ *Boucher v. The King*, [1951] S.C.R. 265 and *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

I take a different view. I think the author got it right when he attributed Rand's approach in these cases to his transformative period at Harvard, where he became imbued in values inherent in the provisions of the American Constitution for the protection of civil rights. Given the facts in the Jehovah's Witnesses litigation, he could be excused for disliking those who developed the oppressive measures there involved. It should also be observed that his civil libertarian approach was also evident in the case involving the deportation of Japanese Canadians,⁴ which could hardly be attributed to French Canadians. So far as the Landreville Commission is concerned, I agree that Rand was unnecessarily harsh, but there were any number of conflicting personality traits in the two men, apart from Landreville's being a Franco-Ontarian, that would have led Rand to dislike that flamboyant man, as is recounted and reflected in the name of the chapter "Canadian Gothic Meets the Mango King". Of the family incidents, such issues generally have a hundred overtones and a thousand nuances which make them unique. As judges tend to say, I would want to hear the other side. This is even more so of the remark of a dejected faculty member about his dean.

As well, the family incidents have to be judged in terms of the times. The fact is that, for a considerable period, the two linguistic groups in New Brunswick's Acadian region largely lived in separate villages and, given their different histories, would have different views of the world. This was particularly so as it related to the smaller sectarian groups such as those into which Rand was born. But the two groups could not live in complete isolation, particularly as the economy developed when both friendships and petty dislikes developed across what was both a linguistic and religious line. There was thus some tension between the French and the English in the Moncton area but, as Romeo LeBlanc underscored in the course of his first speech as Governor-General, when a farmer's barn burned down, the French and English joined together in building a new one.⁵

This was the climate in which Rand was born, and it is against that background that family issues should be understood. This did not prevent Rand from developing friendships with people who shared his interests in the French speaking community, as is evident from reading this biography. At all events, Rand was a man with an impressive sense of duty, and I cannot believe his personal views would have intruded in exercising his duties as a judge. Like the farmers in Romeo LeBlanc's comment, I think he would have been there for those who suffered abuse of their rights as citizens, whatever their racial, ethnic or linguistic group, or that of their oppressors, might be.

⁴ *Supra* note 2.

⁵ Rt. Hon. Romeo LeBlanc, "All of us can share the same future", *The Globe and Mail* (9 February 1995) A23: "In our *separate* villages we lived our *separate* lives in our *separate* worlds. Except when fire destroyed a barn. Then families with names like Cormier and Taylor worked shoulder to shoulder putting up a new one. When one family fell on hard times, another family was there to help."

What is certain is that the man the author paints is not the one I perceived in the five or six years I had occasion to work with him during his annual visits to Fredericton. Like the other English speaking members on the Sir James Dunn Law Scholarships Committee, Rand was fully conscious of the difficulty sometimes faced by the French speaking students who appeared before them and took pains to take this into account in deliberating upon an applicant's qualities. My experience is consistent with the position taken by the Acadian local historian, J. E. Belliveau, who, as the author notes, wrote a glowing obituary in *The Globe and Mail* shortly after Rand's death.⁶ He made clear that he did not agree with the assessment that Rand was in any way anti-French. Belliveau's father had given up his seat so Rand could run in the provincial legislature and it was the support of the Acadian community that allowed him to win.

The author is on firmer ground in his less than favourable assessment of Rand's work after his mandatory retirement from the Court, when he remained still very much in demand. He became the founding Dean of the University of Western Ontario Law School. He retained his intellectual acuity, knew what was required of a modern school which he described with eloquence, and he was popular with the students. However, from what the author tells us, not surprisingly at 75, he no longer had the flexibility required to develop the skills to take the steps required or the ability to enlist the aid of the talented young professors around him.

Rand also continued to be called upon to act as Chair of Royal Commissions, one regarding Justice Landreville, and two others relating to labour relations, one in Ontario, the other in Newfoundland. The first, the author notes, was not conducted in accordance with the standards one would expect; the second Kaplan describes as disastrous; the third, of course, was never completed. In a real sense, as the author observes, this was as much the fault of those who assigned these as it was Rand's. The latter was in his 80's, an advanced age to undertake the energy consuming task of chairing a royal commission, particularly when he had been devastated by the death of his wife not that long before. For Rand, with his highly developed sense of duty and the lure of new ideas, it was very difficult to refuse.

The fact remains that Rand's record of service to Canada, both as a judge and in the performance of other duties for governments, is ample evidence of his stature as a great Canadian. The author has done an excellent job of portraying him warts and all. His book ranks high among the many biographies of judges I have had the pleasure to read.

⁶ J. E. Belliveau, "The gentle and generous side of Ivan C. Rand", *The Globe and Mail* (6 January 1969) 7.