Reconciling the Public with the Private: Judging Judges

by William Kaplan

If the Supreme Court of Canada has had a heroic age, it was the 1940s and 1950s and Ivan Rand was the hero who defined it. Canada's top court was finally supreme and not just in name. It was now regularly called upon to consider and decide questions of great public importance. This is where Rand made his impact. It started first with the Japanese Deportation Case. In a nutshell, fueled by racism, Japanese Canadians had been brutalized and robbed of their property during the second world war, and after it was over there was a move to banish them to Japan, an unknown country to many of these born and bred British subjects. When the case came to the SCC, Rand, in dissent, in one of his first cases as a Supreme Court judge, said no.

Although nothing in his background presaged this contribution, over the next decade Rand established his reputation as Canada's greatest civil libertarian judge. This accomplishment cannot be overstated because, when certain key cases came before him, the civil liberties he proclaimed were invented out of whole cloth. Most of the cases involved a dispute over the division of powers. Who was entitled to legislate: the federal Parliament or the provincial legislatures? By and large, judicial assignment of legislative jurisdiction was a routine task. Even cases that cried out for judicial intervention, such as the Persons case or the Japanese Deportation case, were approached by most Supreme Court judges in exactly the same way as a minor commercial dispute – by applying precedent and determining whether it was Parliament or a province, or sometimes both, that had been assigned legislative authority. Because there was no Bill of Rights, as in the United States, or anything like the *Charter of Rights and Freedoms*, which was more than a generation away, there were no judicial tools at hand. Rand was left with little choice but to imply a Bill of Rights. The opportunity was provided by the premier of Quebec and his 'War without Mercy' against the Witnesses of Jehovah – the religious group that figures front and centre in most of the important civil liberties cases in the 1950s.

In *Boucher*, the sedition case, Rand famously held: “Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are 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.” In *Saumur*, free speech was given another boost. In *Roncarelli,* Duplessis was held accountable for his gross abuse of legal power. In *Switzman* and *Smith and Rhuland*, Rand stood up for the free speech rights of communists and fellow travelers. There was *Aristocratic Restaurants* where Rand upheld peaceful picketing in a labour dispute.

But there is one case that stands out in this pantheon of great civil liberties decisions: the restricted covenant case of *Noble et al v. Alley.* Ontario courts had already ruled on the issue and on broad public policy grounds struck down restrictive covenants. Rand, in his remarks from the bench demonstrated that he fully understood what was at stake but in his reasons for decision, uncharacteristically, adopted the Supreme Court’s well worn technical approach to deciding a case brought before it. Why might that be? What other factors might have influenced this great civil libertarian judge? What happens when the public confronts the private? And how do we judge a judge? In his or her day, or our own?