

The Coxford Lecture

Judging The Judges: “May They Boldly Go Where Ivan Rand Went Before”

The Honourable Ian Binnie

It is a pleasure to be asked to deliver this year’s Coxford Lecture, an event that has established itself as one of the pre-eminent occasions for reflection on the rule of law. It is a particular pleasure to do so at the law school founded by Ivan Rand. Most judges have a shelf life of about 10 years after their departure from the Supreme Court of Canada but in the public law jurisprudence Justice Rand is still frequently cited today. He remains perhaps the most eloquent judicial exponent of the rule of law in our history.

Generally, the “rule of law” is contrasted with “the rule” of individuals. When elaborated by such learned jurists as the late Lord Thomas Bingham¹ the concept seems to presuppose some objective and fixed legal content that rises above the prejudices and follies of individual judges. Judges are seen as expounders of settled law and precedent not innovators.

Ivan Rand embodied a more creative vision of judging. He was a man with important ideas who liked to argue from first principles. He was gifted with a pithy turn of phrase. While not celebrated for a sense of humour, he would probably have agreed with Ralph Waldo Emerson that: “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”² As a Harvard graduate he had been exposed to the American Realist School of jurisprudence, an unapologetically judge-centered approach to law. Its principal proselytizer, Oliver Wendell Holmes, Jr., wrote that “[T]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”³

Critics will say that this expansive view of the role of judges contradicts the *grundnorm* of the rule of law. As they like to put it, judges should apply the law not make it.⁴ George Jonas, the resident philosopher at the *National Post*, complained

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1. See Thomas Bingham’s Sixth Sir David Williams Lecture, “The Rule of Law” (2007) 66 Cambridge LJ 67 (2006).
2. Ralph Waldo Emerson, “Self-Reliance” in *Essays: First Series* (1841, repr. 1847).
3. Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 Harv LR 457.
4. Professor Grant Huscroft, for example, writing in the Queensland Law Journal, argues that “[c]onstitutional romantics assume the worst of elected legislators and the best of judges, invariably downplaying the problems inherent in constitutional judicial review if not ignoring them altogether” (37) to which he adds: “Convinced of the importance of rights, constitutional romantics naturally assume that there must be judicial power to enforce them. After all, they insist, rights are designed as a check on majoritarian excess; we cannot acknowledge the importance of rights whilst leaving them at the whim of the legislature” (47). Grant Huscroft, “Romance, Realism, and the Legitimacy of Implied Rights” (2011) 30:1 U Queensland LJ 35. While the particular focus of Professor Huscroft’s criticism is the theory of implied rights, he

recently that “the law isn’t the law until a judge says it is”.⁵ However, the thesis of this lecture is precisely that the law *needs* creative judges like Ivan Rand provided it is understood that when “making” the law, to use the pejorative phrase, judges respond to fundamental considerations of order and fairness, not to personal whim.

Ivan Rand was a judicial activist of the first order long before the term became a fashionable form of denunciation. The word “activism” is usually used by critics to imply that a judge is pushing the envelope beyond the proper boundaries of the law, but properly understood the term may equally indicate a judicial tightening of the boundaries to deny the bench a power seemingly conferred by the Constitution or legislation. Restraint, as much as expansion, is governed by the judges’ recognition of the limits of their institutional competence and their appreciation of their role in the constitutional scheme.

I am going to talk about three important areas of the law to illustrate my “creativity” thesis. Firstly, I am going to look at instances where the Court has gone beyond settled precedent to fulfill its institutional mandate. Here, I will refer to the *Patriation Reference*⁶ of 1981 and the *Québec Secession Reference*⁷ of 1998 where, in my view, the Supreme Court rose to the occasion (although no less a critic than former Dean Harry Arthurs has dismissed the Court’s treatment of our constitutional history as “ahistorical”⁸). A more black letter approach would seriously have failed the country.

Secondly, in what I would describe as activism in the cause of institutional restraint, I will talk about the Supreme Court’s “reading down” of different provisions of the *Canadian Charter of Rights and Freedoms* in a way that limited the scope of the *Charter* language but gave effect to the Court’s realistic view of its own limitations.

Thirdly, freed from the constraints of the bench, I am going to move from the past to present controversies. I will invite you to consider the challenge posed to the courts by globalization, and the problem of enforcing human rights law across national boundaries. Here, the law has a lot of catch-up work to do. Specifically, I will flag the difficult question of the absence of effective remedies against multinational corporations accused of complicity in human rights abuses in the third world. Here again boldness is required. Too often, I think, we praise the giants of our past for their boldness and creativity, but are too timid to follow in their footsteps in confronting the challenges of today.

Ivan Rand’s Reliance on First Principles

The *Patriation Reference* of 1981 and the *Québec Secession Reference* of 1998 share a common jurisprudential basis with many of Justice Ivan Rand’s opinions

clearly prefers judicial deference and restraint to creativity and boldness. The latter virtues, it seems, are to be expected only of legislative bodies.

5. George Jonas, “Canada Is a Country We No Longer Recognize”, *National Post* (11 February 2012).
6. *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753.
7. *Reference re Secession of Québec*, [1998] 2 SCR 217.
8. Conversation with the author of uncertain date.

in the 1950s. In the *Québec Secession Reference* (1998) it will be recalled, the Supreme Court identified four (some say five) essential unwritten “principles of the Constitution”, namely federalism, democracy, constitutionalism and the rule of law, and respect for minorities (para. 32).

Each of these general principles had earlier been employed in a creative way by Justice Rand as the occasion required, and without embarrassment. He was not afraid of unwritten principles. He embraced them. He thrived on them.

Democracy, in his view, was inconceivable without freedom of thought and expression. At the height of the Cold War he persuaded the Supreme Court to stand up for the rights of the Communists⁹ despite their association in the public mind with violence and revolution. Communists were no more popular with the legal establishment in the 1950s than jihadists are today. Democracy, in Ivan Rand’s view, included the right to advance causes antithetical to its own existence.

Justice Rand’s insistence on the rule of law as a constitutional principle was most memorably expressed in *Roncarelli v. Duplessis*¹⁰ where he held the Premier of Québec liable to compensate an aggrieved restaurant owner whose liquor licence had been revoked because of his persistent support of Jehovah’s Witnesses. Damages were assessed against Premier Duplessis personally. Ivan Rand’s words are as apposite today as when written over half a century ago:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute (140).

* * *

... [if] 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, [it] would signalize the beginning of disintegration of *the rule of law as a fundamental postulate of our constitutional structure* (142) [emphasis added].

As to the “unwritten” principle of federalism, he was conscious of the need for checks on federal power to maintain a balance within the federation. In the *Margarine Reference*,¹¹ he beat back the federal criminal law power, which had previously been thought to be virtually unlimited. Largely ignoring precedent

9. For example, he held in *Smith & Rhuland Limited v The Queen, on the relation of Brice Andrews*, [1953] 2 SCR 95, that the Nova Scotia Labour Board was wrong to refuse to certify a trade union because of its domination by Communist leadership. Unlike the situation today, he had no constitutional text in which to anchor his opinion. In *Switzman v Elbing and AG of Québec*, [1957] SCR 285, he wrote to invalidate what was popularly known as the *Padlock Act*, [an Act to protect the Province Against Communistic Propaganda, 1 George VI, Ch. 11] a Québec statute which made illegal the promotion of Communism in the province and authorized the police to “padlock” any house where such propaganda was alleged to be found. See also *Saumur v City of Québec*, [1953] 2 SCR 299.

10. *Roncarelli v Duplessis*, [1959] SCR 121.

11. *Reference re Validity of Section 5 (a) of the Dairy Industry Act*, [1949] SCR 1.

from the Privy Council, Justice Rand held that Ottawa could not invade a clear field of provincial jurisdiction (regulation of dairy products) by criminalizing the manufacture and sale of margarine unless such an “invasion” could be justified on the grounds of “Public peace, order, security, health, [or] morality”. As usual, Justice Rand started with general and overarching principles and worked his way forward to the solution of the problem at hand, regardless of the hobgoblins of the Privy Council standing in his way.

And of course, he is remembered today for his dedication to the last of the great unwritten constitutional principles identified in the *Québec Secession Reference*, namely the protection of minorities. He denounced the treatment of Japanese Canadians by the federal government after World War Two¹² and the Government of Québec’s harassment of Communists and Jehovah’s Witnesses.¹³ He authored a series of judgments that are models of good sense and clarity, although going well beyond the legislative texts and court precedents then available for their support. He was a champion of reasonable accommodation.

A great judge is not necessarily a great scholar. During the many years that Ivan Rand worked as General Counsel for Canadian National Railways, I doubt if he read many books of jurisprudence. But he was familiar with the ways of the world. It was his unique blend of intellect, practicality and idealism, coupled with his boldness of spirit, that made him a great judge.

The Patriation Reference

I now “fast-forward” twenty-five years to Ivan Rand’s legacy as reflected in the *Patriation Reference* of 1981. The court was confronted with Prime Minister Trudeau’s threat to go unilaterally to Westminster to seek patriation of the Constitution and, by the way, to add a *Charter of Rights and Freedoms*. The effect of the *Charter* would be to limit significantly the power of the provinces as well as the federal Parliament. The provinces considered that it was all very well for the federal power to preach *self-restraint*, as had the Diefenbaker *Bill of Rights*, but to impose legislative limits on the other level of government was (as in the *Margarine Reference*) yet another example of federal overreaching.

Until 1982, of course, our Constitution was an ordinary statute of the British Parliament. Want of patriation did not result from want of effort. Agreement

12. See *Reference re Deportation of Japanese*, [1946] SCR 248, aff’d [1947] 1 DLR 577 (PC). The Supreme Court of Canada nevertheless upheld the validity of the order, Justice Rand dissenting.

13. In the 1950s, the Jehovah’s Witnesses were dealt with harshly by the Duplessis government, backed by the Roman Catholic Church. The subject matter of *Boucher v The King*, [1951] SCR 265, for example, was a highly provocative pamphlet distributed in Montreal and elsewhere by the Jehovah’s Witnesses entitled “Québec’s Burning Hate for God, Christ and Freedom is the Shame of All Canada”. After listing various grievances, the pamphlet concluded that, “the force behind Québec’s suicidal hate is priest domination”. This was too much for Duplessis. A number of Jehovah’s Witnesses were charged with sedition. Eventually, to its credit, the Supreme Court (at a rehearing) quashed the prosecution. Justice Rand declared the pamphlet should be seen as to be protected expression by a religious minority that had suffered unrelenting attacks by the provincial government. “That some of the expressions [in the brochure], divorced from their context, may be extravagant and may arouse resentment” should not distract attention from the underlying plea for reasonable accommodation, he wrote at page 291.

amongst the federal government and the various provinces on an acceptable amending formula proved elusive for decades. The politicians dithered. In the meantime, with the emergence of a powerful separatist movement in Québec, it looked as if the country might risk falling apart.

On May 20, 1980, a referendum was held in Québec on the issue of independence from the rest of Canada. The wording was murky but the intent of the Parti Québécois government was evident. Québec would go its own way. An important promise was made by Prime Minister Pierre Trudeau, that if Québec voted to stay in Canada the federal government would start a process of constitutional renewal. This, it was presumed, would lead to greater decentralization of power. Only forty percent voted to secede. However, when change came it did not offer more powers to Québec but limitations imposed by a *Canadian Charter of Rights and Freedoms* and the flat rejection of Québec's historic claim to a veto over all constitutional change.

The federal government took the position that it could go alone to the mother of all Parliaments at Westminster. Mr. Trudeau had no doubt that Ottawa spoke for Canada. He was opposed not only by Premier Lévesque but by a majority of provincial premiers. They took the position that the federal government could seek patriation only with their unanimous consent. They relied on the so-called "Pact of Confederation". Of course, with a separatist government in Québec, the provincial position, if accepted, would necessarily have resulted in continued paralysis. Constitutional reform was not in the interest of the Lévesque government.

Premier Lévesque was not alone. Premier Brian Peckford of Newfoundland, for example, said that the consent of his province might depend on a transfer of some or all federal jurisdiction over the fisheries. Trudeau remarked, no doubt with a shrug, that he wasn't prepared to bargain human rights against fish.

A number of First Nations took the view that their treaties had been made with the British monarch and they did not wish to be denied recourse to the British Parliament as the guarantors of Queen Victoria's personal undertakings. Entrenchment of existing aboriginal and treaty rights helped to calm those waters.

There was little enthusiasm on the Laskin Court for the sort of "originalism" implicit in much of the provincial pleadings of a "Pact of Confederation".¹⁴ Instead, in the *Patriation Reference* the Supreme Court, in a burst of creativity, turned originalism on its head. The majority found that in the 114 years *since* Confederation the federal government had invariably consulted the provinces on significant amendments *before* going to London. The majority judgment accepted the constitutional practice of federal and provincial governments *after* Confederation as evidence of what the Constitution required, provided that in acting as they did the politicians had felt obliged by the Constitution to act in that way. Constitutional practice, then, gave rise to a constitutional convention of consultation that contradicted the federal government's assertion that it was free to proceed to London unilaterally.

14. Even though the Supreme Court itself had dipped into originalism in the *Reference re Bill 30, An Act to amend the Education Act (Ont)*, [1987] 1 SCR 1148.

While the Supreme Court agreed with the federal government that the *law* of the Constitution did not prevent Mr. Trudeau from going on his own to London, a majority also agreed with the provinces that to do so would violate constitutional *convention*. Constitutional convention (or usage) required the support of a substantial number of provincial governments (the precise number to be left to the judgment of the politicians). In other words, unilateral action by the federal government would be legal but unconstitutional.

Chief Justice Laskin's dissent accused the majority of abandoning the well settled distinction between constitutional law and constitutional practice. Conventions, he pointed out, often contradicted the written text of the Constitution, and were not enforceable by the courts. This was correct, but judicial blessing of federalist unilateralism would have upset the equilibrium of the federation. Ivan Rand, I believe, would have voted with the majority to preserve that balance.

The decision sent the parties back to the negotiating table, which eventually produced "substantial consent" for a revised constitutional package (including the "notwithstanding clause" in section 33 of the *Charter*.)

The analysis in the majority judgment was not without its critics including most prominently, former Prime Minister Trudeau, who delivered a blistering criticism of its reasoning in a speech opening the new Bora Laskin Library at the University of Toronto Law School.¹⁵ There was some merit in Trudeau's criticism. There was limited historical justification—but much practical wisdom—in the Court's paradoxical verdict.

On the whole, there was broad public support for the outcome of the *Patriation Reference*. It provided a reasonable, yet bold and creative framework within which the politicians could make their political decisions about the future of the country. The controversy was resolved by the politicians, not by the courts.

What About Québec?

The Government of Québec continued to maintain that the entire constitutional exercise was illegitimate. Mr. Lévesque complained about the "Night of the Long Knives." In 1995 there was a further referendum in Québec calling for Québec unilaterally to quit Canada. The *indépendantiste* position was lost by about one percent, an absolutely razor-thin margin. The federal government was moved to ask, understandably, "if there *were* a successful referendum result authorizing the Government of Québec to secede from Canada, what would we do? What is the law?"

In the United States, when the issue of secession began to gather strength in the South and crystallized with the election of Abraham Lincoln, there was no question about asking the Supreme Court of the United States about its legality. The country went to war.

15. Pierre Elliott Trudeau, "Convocation Speech at the Opening of the Bora Laskin Law Library" (1991) 41:3 UTLJ 295.

But 1860 was different than 1998. Ottawa had no Army of the Potomac. If by a democratic vote equal to about twenty-three percent of Canada's population, Québec were to opt to secede there could be no recourse except to the rule of law.

The federal government contended that Canada was and is one and indivisible; but counsel for Québec (who was in fact an *amicus curiae* appointed by the court) argued that under international law, Québec was free to exercise a right to self-determination.¹⁶ If Québec determined democratically, on a clear question, that it wanted to leave Canada, then it has every legal right under the law of nations to do so, he said.

The international law argument did not pose much of a challenge. The right to self-determination has generally been limited to oppressed people. At the time of the *Secession Reference* the Prime Minister of Canada, the Chief Justice and the Governor General were all French speaking Canadians, the first two from Québec itself.

As to the constitutional argument, counsel for Québec argued that the principle of democracy trumps everything else in the Constitution. The vote took place only in Québec. The rest of Canada, in the view of the Québec government, had no say in the matter. Yet the Court had to recognize the reality that Québec's departure would leave a hole in our legal landscape that would, in all likelihood, destabilize the country. In these circumstances it would have been unimaginable for the rest of Canada to say to Québeckers, as Oliver Cromwell said to the Rump Parliament, "Depart, I say, and let us have done with you. In the name of God, go". In the hundred and thirty years since Confederation, vast interlocking relationships had grown up across the country and the sudden rupture of these relationships would have produced a legal vacuum with extremely serious economic and social consequences.

The Court's response was that democracy is only *one* of (at least) four "unwritten" constitutional principles. Democracy is fundamental to Canada, but so too is the rule of law. In a federal structure members have obligations to each other as well as rights. Unilateralism was not part of our constitutional tradition, as the Court had already declared in the *Patriation Reference* seventeen years earlier. It would be unacceptable for one of the members simply to walk out on the federation and say *sayonara*, leaving it to the rest of the country to pick up the pieces.

This time there was no "constitutional practice" for the court to look to. The relevant constitutional texts did not supply the answer. The amending formula

16. The right to self-determination had a lengthy gestation period in public international law. It was identified as a "principle" in Article 1, para 2, and Article 55 of the *United Nations Charter* as well as in other resolutions. However, it became an "obligation" on member states (in certain contexts) via the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted by the General Assembly in 1960 (Resol 1514 (XV)). "The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter, and is not a "recommendation", but is in the form of an authoritative interpretation of the Charter." (Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) 581.) The right to self-determination was identified as *jus cogens* by Judge Ammoun, Sep Op, *Barcelona Traction (Belgium v Spain)* (Second Phase), ICJ Reports (1970), p. 304 and is also considered today to be *erga omnes* (see *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, 102, para 29).

did not contemplate secession (to have done so would have been anathema to Mr. Trudeau). The court, in the tradition of Ivan Rand, turned to unwritten principles. It held that a democratic vote in Québec in favour of independence would trigger a legal obligation on both sides to negotiate the way forward. The Québec government could no more close its eyes to the dislocation posed by its secession to the rest of the country, than the rest of the country could ignore a clear democratic vote in Québec in favour of independence. The parties were constitutionally obliged to sit down and negotiate new terms of confederation or sort out the logistics of an orderly separation. The Court made it clear that its job was simply to settle the legal framework within which these negotiations would take place. As in the 1981 *Patriation Reference*, the court dealt only with the legal framework. Everything else was left up to the politicians.

I believe the 1981 *Patriation Reference* and the 1998 *Québec Secession Reference* stand as great judgments because they combine generous amounts of creativity tempered by practicality. These were the hallmarks of Justice Ivan Rand. At the same time, however, activism may also consist of *declining* a jurisdiction which the judges determine is beyond the institutional competence of the courts. It may be as “activist” to read *down* a constitutional or legislative provision as to read it *up*. Either way may be seen as cutting against the legislators’ intent.

The “Reading Down” of the *Charter*

This need for creative restraint where appropriate, is crucial to judging the judges. In this country there are law professors, some in this university, who think the judges have pushed the envelope too far in their interpretation of the *Charter*. They argue that certain of the rights and freedoms have been extended beyond anything intended by the politicians at the time the *Charter* was adopted. These *Charter* “originalists” complain for example, about the Supreme Court’s interpretation of section 7’s guarantee of “fundamental justice”. The critics say that section 7 has been turned by judicial amendment into a guarantee of “*substantive* justice”. Everybody who was anybody in Ottawa in 1981 was told section 15 was just a *procedural* provision.

I have a different view. I believe that the courts in their interpretation of the *Charter* have stopped well short of what the politicians intended, and they have done so by recognizing the virtues of restraint and practicality. Above all, the courts have demonstrated a self-awareness of the institutional limitations of the judicial process. Chief Justice Dickson put the point this way in the *Auditor General’s* case,¹⁷

17. *Canada (Auditor General) v Canada (Minister of energy, mines and resources)*, [1989] 2 SCR 49 at p. 91. In that case, it may be remembered, the Auditor General went to court to enforce what appeared to be his statutory right of access to government information relevant to his audit. He sought documents concerning the Petro-Canada takeover of Petrofina. Despite the statutory language, the Supreme Court ruled that the Auditor General’s remedy for non-disclosure would only lie with the House of Commons, not the Courts.

There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

Connoisseurs of *Charter* history will know that when section 15 was drafted by the Department of Justice and referred to the Joint Parliamentary Committee, it was purely and simply a provision prohibiting discrimination on enumerated grounds. It was the legislators—not the judges—who decided to add the introductory language giving “everyone” the right to equal benefit and protection of the law. Taken literally, this would mean that every classification made by legislation providing for different treatment of different individuals on any ground would be open to *Charter* challenge and require justification by the government under section 1 of the *Charter*. This was the view taken in many of the lower courts in early section 15 cases.

In *Streng v. Township of Winchester*,¹⁸ for example the plaintiff sued a municipality for injuries sustained in a motor vehicle accident. He said the Township had failed to keep the roadway in good repair, but he did not commence his action until after the expiry of the brief three-month limitation period. Plaintiffs whose injuries were caused by someone other than a municipality were generally governed by the usual six year limitation. Mr. Streng argued that the “special” limitation period for municipalities violated his equality rights. He succeeded in the Ontario High Court. Smith J, a much respected trial judge, ruled that the “special” defence conferred on municipalities infringed equal treatment:¹⁹

[M]ust there be “discrimination” based upon human attributes and characteristics before s. 15 is triggered? As already indicated, I think not... [it] seems to me that s. 15 should be so interpreted as to allow the courts to strike down all irrelevant or unreasonable classifications that result in certain individuals having the benefit of a law or the protection of a right....

In *Jones v. Ontario (Attorney General)*²⁰ a municipal employee running for election claimed he was denied the equal benefit of the law under a provision of the *Municipal Act* that required him to take a leave of absence without pay for the duration of the election. Non-municipal employees were not required by law to take a leave of absence without pay from their jobs. The law was declared to be in breach of s. 15(1) but upheld under s. 1 as a reasonable limit.

The gathering section 15 *tsunami* was not limited to municipalities. A woman whose husband had been killed in a job-related motor vehicle accident successfully argued that she had a right to go to court under the ordinary tort system to recover substantial damages rather than be stuck with the much lesser

18. *Streng et al v Township of Winchester* (1986), 56 OR (2d) 649, 31 DLR (4th) 734 (HC).

19. In holding that there was a *prima facie* breach of s 15(1), Smith J commented, at 741:

The class created here is that of persons suffering personal injuries as a result of the negligence of others. The class may be further narrowed by including only those suffering injuries in car accidents. All members of such a class are entitled to expect, in the normal course, to be treated alike.

20. *Jones v Ontario (Attorney General)* (1988), 65 OR (2d) 737 (H.C.).

compensation available under Workers' Compensation. Her claim was upheld by the courts in Newfoundland.²¹

In the United States equality rights are not limited to personal characteristics (although certain characteristics such as race are particularly "suspect.") The U.S. approach was described by Justice Robert Jackson of the United States Supreme Court in 1949:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some *reasonable differentiation* fairly related to the object of regulation.²²

On this view, the judge's role in assessing "reasonable differentiation" would go well beyond personal characteristics such as race and gender. It would include the entire legislative agenda.

Such an expansive doctrine of equality raises enormous questions of practicality and institutional competence. Potentially, the courts would command a voice in practically every legislative scheme. When it came time for the Supreme Court of Canada to speak in *Andrews v. The Law Society of British Columbia*,²³ all nine judges declined the broad power ostensibly spelled out in section 15. They decided that section 15 should go back to being a prohibition against discrimination. In the Court's view, differential treatment would only require section 1 justification if a legislative classification was based on characteristics personal to claimants or the class to which they belonged. This interpretation, I believe undershoots the plain meaning of the opening words of section 15(1), but the "reading down" is quite understandable given "the appreciation by the judiciary of its own position in the constitutional scheme."²⁴

The courts have acted with similar restraint on other key *Charter* issues. Section 52 of the *Charter* is quite clear that "any law" inconsistent with the Constitution is null and void to the extent of such inconsistency. The French text speaks more generally of "les dispositions incompatibles", an even broader expression. Why then cannot a citizen in a *private* dispute who feels aggrieved by something in the *common law* raise a claim or a *Charter* defence?²⁵ Justice Rand himself refused to enforce a discriminatory provision in the sale of private land between private parties, although he did so under cover of "uncertainty".²⁶ In *Dolphin Delivery*,²⁷ the Supreme Court insisted that the *Charter* is concerned only with the behaviour of the state, not disputes between citizens. Its function, as Justice Sopinka once memorably said, is to help "fight City Hall." Common law claims against a private entity, however discriminatory, have been put beyond the reach of the *Charter*.

The section 15 jurisprudence has another curious aspect. When a court issues

21. *Piercey Estate v General Bakeries Ltd* (1986), 31 DLR (4th) 373 (Nfld SC).

22. *Railway Express Agency Inc v New York*, 336 US 106, 112 (1949) [emphasis added].

23. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

24. *Auditor General's case*, *supra* note 17 at 91.

25. Instead of being directed to one of the human rights tribunals.

26. *Noble and Wolf v Alley*, [1951] SCR 64.

27. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

a judgment disposing of a claim between private citizens it seems obvious that such a judgment is an exercise of state power. However, the Supreme Court concluded that while in a political science sense it could be said that judges are part of government, the *Charter* should not be construed in that way.²⁸ Judges are umpires, not players.

It seems obvious that the Courts have “read down” the *Charter* in these instances. This was a very “activist” thing to do.

Are there instances, however, where the courts have pushed the *Charter* beyond its proper limit? The critics generally point to the Court’s treatment of section 7 and the judicial refusal to limit section 7 to procedural justice.²⁹ But this argument puts the critics in a bit of a conundrum. Their main complaint, speaking generally, is that judges have gone beyond the constitutional *text*. But section 7 speaks of “fundamental justice” and on a textual reading *fundamental* justice cannot be the same thing as *procedural* justice. This is not to say that procedure is unimportant. It is to say only that procedures do not exhaust the content of the much larger concept of fundamental justice.

In fact, the Court has been very sparing in its invocation of section 7 in respect of what might be considered “substantive” rights. As with the boogeyman of “unwritten constitutional principles”, critics often mistake the Court’s refusal to close the door on a doctrine that might on some occasion in the future be fruitful, for an intention on the part of the Court to go through the door and act irresponsibly.

There is a time for boldness and a time for restraint and judges should be judged in part on their ability to tell the difference. My point is that creativity and boldness do not always lead to an expansion of judicial authority. In the case of a number of provisions of the *Charter*, I believe that “judicial activism” has led to a reading down of key provisions, and understandably so.

28. At para 36 of *Dolphin Delivery*, the Court said:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the *Charter* applies.

29. This argument is based on the fact that some senior civil servants gave an opinion to the Joint Parliamentary Committee that fundamental justice was just another name for procedural justice, and that the only reason for not using the expression procedural justice was the fear of importing into Canada all of the United States “due process” jurisprudence. Chief Justice Lamer used to parody this argument by likening it to a situation where somebody comes up and hands you an apple and says “here my friend is a banana.” When you protest that it is not in fact a banana but an apple, the response is that for heaven’s sake, we must treat it as a banana because we have assured the politicians it *is* a banana.

Corporate Complicity in Human Rights Abuses

I come finally to the contemporary problem of alleged corporate complicity in human rights abuses in the Third World. Many of these cases are currently proceeding through the courts of Canada, the United States and the United Kingdom. How would Justice Rand have viewed the general reluctance of our domestic courts to give relief to these people?

Globalization has brought immense economic benefits to the Third World, but there are victims too. When it comes to developing laws and international conventions to facilitate international business, the international legal community has responded quickly and effectively. The World Trade Organization, for example, is a very busy and respected institution. UNCITRAL and other international organizations have produced a wide variety of legal conventions and instruments to facilitate dispute resolution within the business community.

The forgotten people in all this are some of the inhabitants of the Third World where this economic activity is taking place. Some claim to have suffered personal violence. Some claim environmental damage, or the taking of their lands without compensation. Lord Bingham, in the Sir David Williams Lecture previously mentioned, declared that as part of the rule of law

means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve. It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined.³⁰

While Lord Bingham did not address the issue of globalization in his lecture, an international or domestic global economy that took seriously the rule of law would provide *some* avenue of redress for Third World victims. Ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World.

Let us consider a few horror stories which, for reasons of prudence, I will pick from the vast selection of cases outside Canada.

One of the most infamous is the *Unocal* litigation brought in the United States by individuals who claimed to have been victims of the building of a pipeline from Myanmar to Thailand. They allege their lands were taken without compensation. Farmers in the way of the project claim they were violently pushed aside and terrorized by government forces. The plaintiffs said egregious human rights violations were committed with the complicity of the defendant oil company. They sued in California under the *Alien Tort Claims Act* (ATCA), a measure enacted by the U.S. Congress in 1798 to deal with piracy and other claims under “the law of nations”. The statute has been interpreted in modern times as granting jurisdiction to U.S. courts to afford relief under customary international

30. *Supra* note 1 at 77.

law,³¹ which, of course, prohibits war crimes and crimes against humanity. The allegation against *Unocal* included complicity in forced labour, rape, torture and extrajudicial killings. These qualify as crimes against humanity. After years of procedural skirmishing up and down the U.S. court system³² the *Unocal* case was eventually settled just prior to a hearing by the full Ninth Circuit Court of Appeals in 2004.

The ongoing *Rio Tinto* case concerns a mine opened in Papua, New Guinea, in a fairly densely inhabited area. Such was the violence at the mine site that a civil war erupted that went on for 10 years and was put down by security forces, it is alleged, with great violence. The displaced villagers brought a claim against Rio Tinto in the United States federal court under the ATCA. Again, after much back and forth, a divided U.S. Court of Appeals for the Ninth Circuit agreed to allow the claims to proceed against Rio Tinto for genocide and war crimes, despite the plaintiffs being non-U.S. residents and the defendant being a British-Australian corporation. The court did not go so far as reversing the lower court's dismissal of the other claims (crimes against humanity and racial discrimination).³³ Rio Tinto has applied for leave to appeal to the U.S. Supreme Court.

Similarly, a company called Monterrico Metals PLC endeavoured to develop a mine in Peru in a sensitive part of the Amazon Rain Forest. Once again, villagers were displaced and protesters were confined by security forces for a number of days. They allege they were beaten and in some cases raped and at least one murdered with the knowledge and complicity of the head office of the mining company, then based in England. The English High Court accepted jurisdiction and granted an asset freezing injunction against Monterrico. Three months before the High Court trial was set to begin in October 2011, Monterrico settled with the plaintiffs without, of course, admitting liability.³⁴

Some critics (including Canada's Department of Foreign Affairs) argue that ATCA has been excessively deployed against corporations that have a very thin connection to the United States with respect to claims arising out of events that took place nowhere near the United States. It is said that this constitutes the extraterritorial application of U.S. law but this is doubtful. The U.S. courts have repeatedly held that ATCA is simply a grant of jurisdiction and that the substantive law being enforced is not the law of the United States but customary international law (i.e., ACTA as stated, speaks of enforcement of the "law of nations").

All this may be about to change. In the case of *Kiobel v. Royal Dutch Petroleum* now pending before the United States Supreme Court,³⁵ it is feared by plaintiffs,

31. The Court of Appeals breakthrough case, *Filártiga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980) is said to be to global human rights litigants what *Brown v Board of Education of Topeka* (No 1), 347 US 483 (1954) was for advocates of racial integration within the United States.

32. See *Doe v Unocal*, 395 F 3d 932 (9th Cir 2002), opinion vacated and reh'g en banc granted, 395 F 3d 978 (9th Cir 2003).

33. *Sarei et al v Rio Tinto, PLC*, 671 F 3d 736 (9th Cir 2011).

34. See "Zijin unit settles case over Peru torture claims" *Reuters* (20 July 2011).

35. The *Kiobel* case has an interesting history: The Court of Appeals for the Second Circuit sitting in New York blew a significant hole in the ATCA by holding that customary international law did not recognize any form of corporate liability (621 F 3d 111 (2nd Cir 2010)). It cited the trials at Nuremberg where corporations that ran slave labour camps were not prosecuted even though individuals responsible for the atrocities were held personally responsible. Several

and anticipated with optimism by corporate defendants, that the court will gut the utility of ATCA for purposes of global human rights enforcement. In *Kiobel* claims were brought by Nigerian plaintiffs against the British/Dutch oil multinational, alleging that in the 1990s while exploiting local petroleum resources the company aided and abetted the Nigerian military in gross human rights violations, including torture, extra-judicial executions and other crimes against humanity. It is true, of course, that the *Kiobel* facts offered little connection to the United States, but given that Nigerian troops were the primary offenders, Nigerian law is not about to acknowledge culpability (if culpability there be). It seems Royal Dutch Petroleum was not sued in its home jurisdiction.

It is not realistic to expect the creation of some sort of international tribunal to adjudicate such claims given the volume of complaints around the world particularly in the extractive industries; nor, if the present lack of progress is any indication, is it likely that the international community will agree on a convention defining the appropriate circumstances for domestic courts to take jurisdiction. For the foreseeable future domestic judges will either have to wash their hands of the whole problem or rethink some of the doctrines that stand in the way of granting relief.

The British Courts have taken significant steps to provide Third World plaintiffs with the opportunity to be heard in a court of law.³⁶

other appellate courts in the United States have taken a different view of the issue. If the position of the Second Circuit is upheld, and if Rio Tinto's more generalized attack on the scope of the statute based on extraterritoriality succeeds, the efforts to date by various U.S. courts to bring about a certain measure of corporate responsibility in the Third World will be severely diminished.

36. See recent developments in the law of *forum non conveniens* in the House of Lords in *Connelly v RTZ*, [1997] UKHL 30 and *Lubbe v Cape plc*, [2000] 1 WLR 1545, [2000] UKHL 41.

In *Connelly v RTZ*, a Scotsman had moved to Namibia, where he worked in mining for a local subsidiary of a parent company that was incorporated and doing business in England. The Scotsman developed throat cancer and sued the head office in England. The company obtained a stay of the proceedings by the lower courts based on *forum non conveniens* because the events and injury had occurred in Namibia. The House of Lords allowed the case to proceed in England in light of the complexity of the case (and the necessity to have recourse to medical expert witnesses). The lack of legal aid as well as the lack of ability to proceed on a contingency fee basis in Namibia meant that the plaintiff could not obtain justice abroad because of the financial strain that would result.

Similarly, in *Lubbe v Cape*, the House of Lords agreed to hear claims originating in South Africa, brought by a majority of South African plaintiffs. Lord Bingham reiterated that where *forum non conveniens* is argued by defendants in order to obtain a stay of proceedings, the burden is on the party seeking the stay to show that there is another suitable forum where the claims can be brought. Despite the House of Lords finding that the natural forum was South Africa, this was outweighed by the interests of justice. The availability of contingency fee arrangements in England, the lack of financial legal aid in South Africa, as well as the complexity of the case were said to weigh in favour of English courts.

While these cases dealt with arguments based on *forum non conveniens*, the underlying reasoning of the court is based on principles of fairness and access to justice. This is similar to the principles of order and fairness which underlie private international law in Canada (see *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077).

The forum of necessity doctrine already exists in other European countries—most importantly in Switzerland. Article 3 of the *RS 291 Loi fédérale sur le droit international privé* (18 December 1987), RO 1988 1776 states:

Art. 3

II. For de nécessité

Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger

The European Community³⁷ and the European Court of Justice³⁸ have affected important steps which, while not particularly aimed at Third World claimants, have greatly strengthened their position in European courts.

In the case of Canada, the overseas economic activity of our mining companies is enormous. Attempts at federal legislation have been unsuccessful. In the absence of statutory authority the courts have not yet addressed issues related to globalization and human rights with the sort of boldness and creativity we associate with great judges like Ivan Rand.

The Québec Court of Appeal recently declined jurisdiction in the case of *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117. Anvil is a company with Canadian connections whose major activity is the extraction of copper and silver in the Congo. The plaintiffs allege that Anvil was complicit in the brutal suppression by Congolese troops of an uprising at a mine in Kilwa in October 2004. The plaintiffs succeeded in Québec at first instance but jurisdiction was declined on appeal despite significant evidence that no other forum was available to the plaintiffs and that art. 3136³⁹ of the *Civil Code of Québec* expressly provides for discretionary jurisdiction founded on the forum of necessity doctrine.

se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes.

Québec has based its own art 3136 of the *Civil Code of Québec* on the Swiss provision on forum of necessity. The Minister of Justice of Québec explained the adoption of art 3136 as follows:

Cet article, de droit nouveau, s'inspire de la *Loi fédérale sur le droit international privé* suisse de 1987.

Les dispositions du Titre troisième visant à prévoir de manière exhaustive la compétence internationale des autorités québécoises, il convenait d'établir une nouvelle compétence pour les autorités québécoises afin de prévoir le cas où une procédure à l'étranger se révélerait impossible ou le cas où on ne pourrait raisonnablement exiger qu'elle y soit introduite. Il faut cependant que le litige présente un lien suffisant avec le Québec. (Québec, Ministère de la Justice, Commentaires du ministre de la Justice: le Code civil du Québec, t 2, Québec, Publication du Québec, 1993, page 2000.)

37. Under the *Brussels I Regulation*, a member state has jurisdiction to hear a case if the corporate defendant is domiciled in the member state—domicile is defined as the corporation's statutory seat, its central administration or its principal place of business (Article 60). Moreover, a plaintiff who brings a case in the UK against a corporate defendant (based on the defendant's domicile) can then decide to join other corporate defendants from other member states who are non-residents in the UK so long as the plaintiff shows that the claims against these other defendants are “so closely connected that it is expedient to hear and determine them together.” (Article 6, *Brussels I*).

The European Commission has proposed to make reforms to the *Brussels I Regulation* regime. These do not seem to affect the state of the law in regards to “mandatory” jurisdiction over corporate defendants. See <http://arbitration.practicallaw.com/0-504-5668>.

38. In *Owusu v Jackson* Case C-281/02, [2005] E.C.R. I-1383, the European Court of Justice effectively prevented EU member state courts from entertaining arguments of *forum non conveniens* where one of the parties to the proceedings is a resident of a member state. An EU court no longer has the discretion to decide *not* to hear a case brought by non-EU residents against a corporate defendant that is domiciled in its jurisdiction. Domicile is defined and interpreted broadly. In practice, this means that jurisdiction can be founded on a very limited connection to the EU member state so long as its court has jurisdiction pursuant to the *Brussels I Regulation*.

39. Art 3136 of the *Civil Code of Québec* states:

Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

There are at least three avenues that will eventually require resolution by the Supreme Court of Canada:

(i) *Jurisdiction of Necessity*

In *Club Resorts Ltd. v. Van Breda*, presently pending before the Supreme Court of Canada,⁴⁰ the plaintiff who was injured in Cuba argues (amongst other points) that if Canada does not hear her claim there is no satisfactory alternative.⁴¹ Canada, on this view, is a “forum of necessity.” The concept has been little explored in Canada although its existence was doubted by the Supreme Court of the United States in *Helicopteros Nacionales de Colombia v. Hall*, 466 US 408 (1984).⁴²

(ii) *The application in Canada of the compulsory norms of international law—the jus cogens.*

The “*jus cogens*” (literally, “compelling law”) commands peremptory adherence by all states. The *Restatement on Foreign Relations of the United States (Restatement)* defines *jus cogens* to include the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhumane, or degrading treatment or punishment; prolonged arbitrary detention and systematic racial discrimination.⁴³ At least, some international law scholars accept the notion of universal jurisdiction or, alternatively, jurisdiction of necessity, as a means to enforce the *jus cogens*.⁴⁴ Others express concern about extra-territoriality and fear of undermining other principles of international law—such as sovereignty and comity. If Canadian courts were to take jurisdiction (by “necessity” or otherwise), it would seem that the *jus cogens* provides applicable legal norms to govern the outcome of a dispute.

(iii) *Updating the doctrine of the “corporate veil.”*

The corporate veil demarcates the corporate entity from its shareholders. This concept, deeply rooted in corporate law, is used regularly to deny liability of the

40. The judgment was released subsequent to the lecture—see 2012 SCC 17—but the Court found it unnecessary to deal with the “jurisdiction of necessity” argument.

41. On 1 November 2012, the Supreme Court of Canada dismissed the application for leave to appeal the *Anvil* decision, thereby denying itself the opportunity to consider arguments on the doctrine of “forum of necessity”.

42. However the debate in that country is not over, see TL Troutman, “Jurisdiction by Necessity: Examining One Proposal for Unbarring the doors of our Courts” (1988) *Vand J Transnat’l Law* 401.

43. See, e.g., EJ Criddle & E Fox-Decent, “A Fiduciary Theory of Jus Cogens” 34 *Yale LJ of Int’l Law* 331.

44. Universal jurisdiction to enforce *jus cogens* has most famously been used by Judge Baltasar Garzón of Spain to issue an arrest warrant that led to the arrest of Augusto Pinochet. Garzón was eventually indicted for abuse of power for allegedly politicizing the judiciary by initiating investigations into Franco-era crimes and, in an unrelated case, was disbarred for 11 years.

head office, with its deep pockets, for the acts of its subsidiaries in the far flung regions of the world where, it is alleged, the wrongful acts occurred. In a corporate pyramid the profits flow up the chain to the top (or are taken at whatever corporate level seems most advantageous) but legal liability remains stuck at the bottom where there may be liability but shallow pockets.

However useful it is as a doctrine of corporate law, is it right that the idea of a “corporate veil” be used in 2012 to block the claims, for example, of Latin American villagers seeking compensation for the destruction of their environment by tailings from a Canadian owned mine? Why should the cost of the environmental destruction fall entirely on the heads of its victims? Why shouldn’t legal responsibility follow the money up the corporate food chain?

Unlike the *Charter* examples discussed earlier, there is no question here of the institutional competence of the courts. We are, in general, dealing with doctrines of the common law. It has been moulded for centuries by the judges to achieve order and fairness. Order and fairness have acquired a global dimension. I doubt if Justice Ivan Rand would have stood helpless in the face of the challenges of globalization.

Conclusion

It is all very well for us to look back with admiration to judges like Ivan Rand who addressed the problems of their own era with boldness and creativity. Globalization offers a different kind of challenge, but is no less demanding of the rule of law.

It is too much to ask that today’s judges rise to the challenges of today’s world with similar vigour? They have done so when the unity of the country was at stake. I have also acknowledged—indeed praised—the importance of judicial restraint where circumstances warrant. In the case of creating some form (and forum) of relief for Third World victims of globalization, however, we seem to have used restraint as an excuse for inertia.

When it comes to “Judging the Judges” the prize should not necessarily go to the faint hearted, the cautious, or the conscientious “magistrate” whose primary concern is not to be reversed on appeal. Judges need to be practical, but the greatness of a Lord Mansfield, or a Chief Justice John Marshall of the United States, or Justice Ivan Rand, rested on their capacity to see not only what the law is but what it should become.