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JUSTICE RAND'S COMMERCIAL LAW LEGACY: CONTRACTS AND BANKRUPTCY POLICIES

Thomas G. W. Telfer*

An article on Justice Rand's commercial law jurisprudence provides a number of challenges. Much has been made of his contributions in constitutional law and the impact of "policy considerations" on freedoms of speech and religion.¹ His voice, it has been said, "reverberates even in our most recent constitutional jurisprudence, be it federalism, civil liberty or social justice."² His decision in *Roncarelli v. Duplessis*³ stands as a classic in constitutional law, leading one author to conclude that "during his time on the Supreme Court of Canada, Justice Rand almost stands alone among Canadian judges as the most aggressive and assertive defender of individual liberties."⁴ Yet little has been said of his contribution to the commercial field. Justice Rand participated in sixty-nine broadly classed commercial law and contracts cases.⁵

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¹ Donald E. Fouts, "Policy Making in the Supreme Court of Canada, 1950-1960" in Glendon Schubert & David J. Danelski (eds.), *Comparative Judicial Behaviour: Cross Cultural Studies of Political Decision Making in the East and West* (New York: Oxford University Press, 1969) at 262.

² "Biography of Ivan C. Rand", online: University of New Brunswick <<http://law.unb.ca/library/BiographyofRand.php>>.

³ [1959] S.C.R. 121; See also *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 (religious freedom a foundational component of any political organization); David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 *University of British Columbia Law Review* 551.

⁴ Randall Balcome, et al., *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 132; E. M. Pollock, "Mr. Justice Rand: A Triumph of Principle" (1975) 53 *Canadian Bar Review* 519, at 533 (noting Rand's concerns for matters of liberty and abuse of power by persons of authority); W. Kaplan, "Introduction: Ivan C. Rand, 'Role of Supreme Court in Society'" (1991) 40 *University of New Brunswick Law Journal* 173; Graeme A. Barry, "Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State" (2005) 31 *Manitoba Law Journal* 149 (Justice Rand's observations on the role of the court and the executive "still resonate in the twenty-first century").

⁵ The statistics are drawn from those broadly classified cases on the University of New

Does Justice Rand's commercial law jurisprudence have a legacy? This essay seeks to answer that question.

What constitutes "commercial law" is open to debate.⁶ In Canadian law schools, there are a variety of approaches to its teaching. Sales, consumer protection, secured transactions, banking and bankruptcy may all find a home in a broad commercial law survey course. Alternatively, instructors may teach each of these topics as stand-alone courses. This paper does not examine every facet of commercial law. Nor does it purport to cover corporate law,⁷ banking law⁸, intellectual property⁹ or restitution.¹⁰ Roy Goode suggests that commercial law is "that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade."¹¹ This definition implies that commercial law's core consists of sales, secured transactions along with underlying contract principles. To this list, one can add bankruptcy law, as each commercial transaction raises the possibility of the financial failure of one of the parties.¹²

Even after narrowing a definition of commercial law to contracts, sales, secured transactions and bankruptcy law, one must consider the impact of significant statutory reform since Justice Rand's time on the Supreme Court of Canada. Thus, what he had to say about conditional sales contracts will be mere history to a twenty-first century commercial lawyer practicing secured transactions. Personal property security legislation has revolutionized the law of conditional sales, floating charges and chattel mortgages in each of the common law provinces and territories.¹³ Thus,

Brunswick's website. "Subject Guide to Supreme Court of Canada Judicial Decisions by Rand", online: University of New Brunswick <<http://law.unb.ca/library/Randcasessubjectguide.php>>.

⁶ Justice Rand's decisions on the University of New Brunswick's website have been classified by subject matter including "commercial law", now printed here *infra* at pp. 323 *et seq.* However, this essay takes a much narrower view of commercial law.

⁷ *Gatineau Power Co. v. Crown Life Insurance Co.*, [1945] S.C.R. 655; *International Power Co. v. McMaster University*, [1946] S.C.R. 178; *Oxford Paper Co. v. Inverness (County)*, [1948] S.C.R. 115; *Rathie v. Montreal Trust Company*, [1953] 2 S.C.R. 204; *Ghimpelman v. Bercovici*, [1957] S.C.R. 128.

⁸ *Niles v. Lake*, [1947] S.C.R. 291.

⁹ *Spun Rock Wools Ltd. v. Fiberglas Canada Ltd.*, [1943] S.C.R. 547, Rand J., dissenting.

¹⁰ *Deglman v Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725. Stephen Waddams links *Deglman* to the modern revival of restitution as a "flexible and growing system" in Canada: Stephen Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at para. 359. See also G. H. L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 32-33 (evolution of extra-contractual remedy first approved by the SCC in *Deglman*).

¹¹ R. M. Goode, *Commercial Law*, 3rd ed., (London: LexisNexis, 2004) at 8.

¹² Consumer law is excluded from this essay as many of the modern consumer statutes were enacted after Justice Rand left the bench.

¹³ Ronald C. C. Cuming, Catherine Walsh, Roderick J. Wood, *Personal Property Security Law*

this essay need not consider cases¹⁴ involving the various statutory and common law regimes governing secured transactions prior to such enactments or other commercial statutes or regulations that have long been repealed.¹⁵ Finally, there are too few sales cases to identify any trends. The Supreme Court of Canada did not consider any general principles arising under provincial Sale of Goods legislation.¹⁶ Therefore, the law of contracts and of bankruptcy will be the focus of this article.

A final challenge is that Justice Rand's commercial law decisions may not have raised matters of national importance, given that Rand's time on the bench predated the 1975 abolition of appeals as of right in civil matters.¹⁷ The unrestricted right of appeal had led the court to devote a "disproportionate amount of its time and effort disposing of issues which raised no new or important questions for the country."¹⁸ Despite these restrictions, a commentary on Justice Rand's commercial law jurisprudence helps "complete the judicial profile" of one of Canada's most important jurists.¹⁹ It offers insights into a largely ignored aspect of Justice Rand's opinions and a perspective on Canadian commercial law in his time.

A) LAW OF CONTRACTS

One work suggested that, although Justice Rand had a "well-defined and developed background theory" in civil rights cases, in common law matters "there appears to be no background theory and, perhaps because of this, very few notable accomplishments."

(Toronto: Irwin Law, 2005) at 1 - 4.

¹⁴ *Traders Finance Corp. Ltd. v. Williams*, [1956] S.C.R. 694; *Canadian Acceptance Corporation Ltd. v. Contractors Supplies Ltd. (Liquidator of)*, [1958] S.C.R. 546.

¹⁵ *Gold Export Act*, S.C. 1932, c. 33; *Canada v. Williams*, [1944] S.C.R. 226; *The Special War Revenue Act*, R.S.C. 1927, c. 179; *Canada v. Dominion Engineering Co. Ltd.*, [1944] S.C.R. 371; *Consolidated Regulations Respecting Trading with the Enemy* (1939), ss. 28(1) and 44(1); *Canada (Secretary of State) v. De Rothschild*, [1946] S.C.R. 403; *Income War Tax Act*, R.S.C. 1927, c. 97; *Mahaffy v. Canada (Minister of National Revenue)*, [1946] S.C.R. 450.

¹⁶ *Canadian Atlas Diesel Engines Co. Ltd. v. McLeod Engines Ltd.*, [1952] 2 S.C.R. 122; *Cie d'Entrepreneurs en Construction Ltée. v. Simard*, [1952] 2 S.C.R. 444; *Canadian Indemnity Insurance Co. v. Andrews & George Co.*, [1953] 1 S.C.R. 19.

¹⁷ *Greenbank v. National Supply Co. Ltd.*, [1944] S.C.R. 59 (mechanic's lien, which has never since been cited).

¹⁸ E. M. Pollock, "Mr. Justice Rand: A Triumph of Principle" (1975) 53 *Canadian Bar Review* 519, at 524.

¹⁹ Jacob Ziegel's review of Bora Laskin's commercial, contract and corporate law jurisprudence begins by noting the number of similar obstacles and challenges facing an author asked to review an important public law figure. Jacob S. Ziegel, "Bora Laskin's Contributions to Commercial, Contract and Corporate Law" (1985) 35 *University of Toronto Law Journal* 392, at 393.

He was according to this same work, “a member of a court which was not noted for breathtaking advances in the common law.”²⁰

There are few extra-judicial writings to discern Justice Rand’s approach to the common law. He articulated his vision of the common law and the role of the courts, asking “what means are there which justify modifications of the common law?” Justice Rand presented a more modern conception of common law thinking than existed in nineteenth century England:

Today we have something else. We are introducing social considerations. We are beginning to see that the common law really is pushing forward under the urge of changing social demands and as it pushes ahead, it has behind it the accumulated judicial experience.²¹

...

Because the laws cannot change every day and the courts are bound to be proceeding backwards, they are looking at the past and are not anticipating possible changes but are viewing actual changes. We then come to see the scope that is open to any Court of Appeal as well as the Supreme Court of Canada to modify the law.²²

Justice Rand concluded, “we are reaching the stage where we can safely trust our highest tribunal to the exercise, the application of our common law as an instrument of modification.”²³

One might expect this judicial philosophy to pervade his common law decisions. This openness to modifications in the common law was best articulated in his two landmark judgments in *Union Steamships Ltd. v. Barnes*²⁴ and *Dawson v. Helicopter Exploration Co. Ltd.*²⁵ In *Barnes*, Justice Rand found himself in dissent; and yet the principles he articulated have found implicit resonance with more recent developments in exclusion clauses. Modern courts have come to rely upon *Dawson*, which is perhaps Justice Rand’s signature contracts case. That decision continues to be cited for the principle that courts should seek to find a promissory bilateral agreement, binding on both parties, rather than an offer of a unilateral contract. These two decisions will be discussed below. However, *Barnes* and *Dawson* remain exceptions.

²⁰ Randall Balcome, *et. al.*, *supra* note 4, at 110.

²¹ Ivan C. Rand, “The Role of Supreme Court in Society” (1991) 40 *U.N.B.L.J.* 173, at 180.

²² *Ibid.*, at 182.

²³ *Ibid.*, at 192.

²⁴ [1956] S.C.R. 842.

²⁵ [1955] S.C.R. 868.

Many of the Court's contracts cases made modest and somewhat unremarkable contributions to contracts jurisprudence. Judgments were short and in many instances, the Court cited few authorities. Other cases involved interpretation of a detailed set of facts or contractual terms,²⁶ leaving little room to break new ground or establish path breaking contract principles.²⁷

Some decisions pre-dated significant common law developments. For example, *Salmon River Logging Co. v. Burt*²⁸ considered the scope of an exclusion clause. This 1953 decision came well before the judicial debate in England over the doctrine of fundamental breach and its effect on exclusion clauses.²⁹ The Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*.³⁰ would later adopt a new framework for exclusion clauses. The Court in *Tercon* (2010) has concluded that the time had come to lay the doctrine of fundamental breach "to rest".³¹ Under the new three-part test the Court first asked whether the exclusion clause applied to the circumstances in the case. If the clause did apply, Justice Binnie went further and asked whether or not the exclusion clause was "unconscionable at the time the contract was made".³² Finally, if the clause was still valid at that stage, the Court could refuse to enforce an otherwise valid clause "because of the existence of an overriding public policy...that outweighs the very strong public interest in the enforcement of contracts."³³

In *Salmon River*, the Court refused to give effect to an exclusion clause and applied a construction approach. In the case, a logging company contracted with a trucking company to haul logs. The negligence of the logging company's employees let a tree fall on one of the trucking company's trucks. When the trucking company

²⁶ *Bellavance v. Orange Crush Ltd.*, [1955] S.C.R. 706.

²⁷ *Farah v. Barki*, [1955] S.C.R. 107 (fraudulent misrepresentation); *Scharfenberg v. Kortez*, [1956] S.C.R. 273 (substantial performance). Justice Rand also concurred in two cases *J.A. Gosselin Ltd. v. Péloquin*, [1957] S.C.R. 15 (fraud); *Lambert v. Levis Automobiles Inc.*, [1957] S.C.R. 621 (nullity of contract).

²⁸ [1953] 2 S.C.R. 117.

²⁹ *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866 (C.A.); *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 (H.L.); *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd.*, [1970] 1 Q.B. 447 (C.A.); *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.). See John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 754-764.

³⁰ (2010), 315 D.L.R. (4th) 385 (S.C.C.); also *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 (C.A.); *Solway v. Davis Moving & Storage Inc. (c.o.b. Kennedy Moving & Storage Inc.)* (2002), 62 O.R. (3d) 522 (C.A.); *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 245 D.L.R. (4th) 650 (Alta. C.A.).

³¹ *Tercon*, *ibid.*, at para. 62.

³² *Ibid.*, at para. 122.

³³ *Ibid.*, at para. 123.

pursued a claim in negligence, the logging company relied on an exclusion clause. A majority of the court held that the exclusion clause did not apply. The contractual obligations only involved loading, hauling and dumping of the logs. Although negligence by the logging company's employees damaged the truck, the damage did not arise in the context of loading. Cartwright J. concluded that the loading operation did not "fall within the four corners of the contract", even though "it was being carried on "in the immediate vicinity of the truck." Justice Rand adopted a similar view. The exclusion clause related only to the damage "arising out of the use or operations of the said trucks."³⁴

The accident here was not of the nature so envisaged; it arose out of work carried on exclusively by the [logging] Company; the fact that the truck was in its vicinity awaiting loading cannot in any sense stamp the resulting damage as arising out of that fact.³⁵

The construction approach would later find favour in the House of Lords in *Photo Production*.³⁶ In *Salmon*, there was no discussion of unconscionability or even the public policy factors found in the recent case of *Tercon*. Justice Rand's construction approach was in sharp contrast to his judgment in *Barnes*.

In *Barnes* the court split 3-2³⁷ in favour of upholding an exclusion clause. Justice Rand's dissenting judgment was a stinging commentary on the approach of the majority judgment of Locke J. A steamship operated by the appellant carried passengers and cargo on the west coast of British Columbia. The respondent and family boarded the appellant's vessel to purchase the tickets, because the appellant did not maintain a ticket facility on shore. In cross-examination, the respondent said that on receiving the ticket he knew there was some writing on the front of the ticket but he did not read it. Nor did he look on the back of the ticket. The front of the ticket contained the following in red print:

This ticket is issued subject to the conditions of carriage of passengers and baggage endorsed on the back hereof and those posted in the Company's office.

The following statement appeared on the other side of the ticket, also in red print:

³⁴ *Salmon River Logging Co. v. Burt*, [1953] 2 S.C.R. 117, at para. 5.

³⁵ *Ibid.*, at paras. 1 and 5.

³⁶ *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.).

³⁷ Cartwright J. also dissented in a separate and brief judgment.

... [T]he person using [the ticket] assumes all risk of loss or injury to person or property while on the vessel or while embarking or disembarking, even though such loss or injury is caused by the negligence or default of the shipowner, its servants or agents, or otherwise howsoever.

The holder hereof in accepting this ticket thereby agrees to all the conditions stipulated thereon.³⁸

Wanting to retrieve some items out of his luggage the respondent made his way to the ship's hold. En route, the respondent fell down a hatchway and suffered injuries. The appellant had failed to keep the hatchway sufficiently lit.

Locke J. held that the exclusion clause applied. In looking to earlier English authorities, Locke J. found the judgment in *Nunan v. Southern Railway Company*³⁹ to best summarize the general principles in this area. In *Nunan*, Swift J. concluded that when a contract was formed by delivery of a document, stating the terms of the contract and its limits, such a form must be considered the offer of the party who tendered the document. If the form was accepted by the other side without objection, this act amounted to acceptance of the offer, "whether he reads the document or otherwise informs himself of its contents or not."⁴⁰ In this situation, the conditions in the document were binding. If there was any dispute about the true intentions of the parties then a court must determine whether the party delivering the form or ticket gave reasonable notice to the other party.

For Locke J., the admission by the respondent that he saw writing on the front of the ticket was crucial:

I think he must be taken to be thereby affected with knowledge that what was written referred to the contract of carriage and with notice of what would have been disclosed had he read it.⁴¹

Locke J. rejected the notion that the respondent had no reasonable opportunity to read the ticket. Here there was reasonable notice of the limiting conditions on the ticket because:

... the endorsement on the face of the ticket printed in red ink and referring to the conditions endorsed on its reverse side constituted a reasonable attempt to bring to the passenger's attention the terms of the contract and

³⁸ *Union Steamships Ltd. v. Barnes*, [1956] S.C.R. 842, at 849.

³⁹ [1923] 2 K.B. 703.

⁴⁰ *Ibid.*, at 707.

⁴¹ *Supra* note 38, at 856.

I consider that his acceptance of the ticket without protest and embarking upon the voyage precludes him from reprobating its terms, relying upon the fact that he did not read it.⁴²

The suggestion that the respondent was fixed with knowledge of the terms on the ticket became a focal point of Justice Rand's dissent.

Justice Rand began his decision noting that the respondent purchased the tickets on board but after the boat had left the dock. He also found that the respondent noticed printing on the front of the ticket but did not read it. Unlike Locke J., Justice Rand put the transaction in context. It was 5:00 am and the respondent "was in a hurry to get his children abed which called for some clothes in the baggage."⁴³ Justice Rand characterized the issue to be answered not as a mere legal issue but rather a higher principle: "...was what was done by the carrier reasonably sufficient to bring to the attention of the passenger...this exceptional condition?"⁴⁴ For Justice Rand the terms of the ticket were "extreme and unusual", leading him to claim that it was "absurd" to think that the shipping company had given reasonable notice in light of the hurried nature of the transaction. Justice Rand made the context of the transaction the main point of his judgment:

In the circumstances here it seems almost absurd to say that the passenger, already on his voyage, can be said to have been given reasonable notice of such an extreme and unusual term of the ticket, or, as it is put, that the carrier had taken reasonable steps to bring it to his attention. Everything was hurried; his getting aboard, the vessel getting under weigh [*sic*], the purchase of the tickets with the steward at his elbow, the settling of the family in the stateroom and the hastening for the baggage. One has only to imagine the incongruity of stopping to examine a ticket in such surroundings to ascertain its terms.⁴⁵

Where Locke J. found that the respondent should be fixed with knowledge, Justice Rand invoked notions of "incongruity." Surely, no reasonable person would stop to examine the ticket for terms in the context of the hurried events. He went one-step further when considering whether anyone would stop to examine the ticket in that context: "by no person and none would anticipate such a condition."⁴⁶

Beyond criticism of the contract terms and the context of the transaction, Justice Rand took direct aim at the business practices of the shipping line. Since the

⁴² *Ibid.*

⁴³ *Ibid.*, at 844.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 845.

⁴⁶ *Ibid.*

shipping line was carrying passengers only at their own risk, Justice Rand speculated, “one would have thought that common candour would make this known not by small letters on a small ticket but, at least in addition, by means that would make that important fact known almost to the dullest.”⁴⁷ He asked, why would the shipping company “object to advertising its terms in the suggested manner?”⁴⁸ He could think of no reason other than that “such an advertisement would not promote patronage.”⁴⁹ The printed tickets containing words on each side would mean that passengers did not read the conditions and that there was no reason for the shipping company “to provoke discussion on the matter unnecessarily.”⁵⁰ The shipping company could point out the limiting conditions to the passenger whenever an injury occurred.⁵¹ “Accidents would be relatively few and injuries would not be as objectionable a means of publication as the open notice.”⁵² None of the other justices found that there had been any misrepresentation on the part of the steamship company. However, Justice Rand came close. In concluding that the exclusion clause should not be given effect, he stated, “such a conditioned service could amount to a virtual deception of passengers.”⁵³

What led Justice Rand to condemn the practices of the steamship company in such strong terms? It was not just a question of whether the respondent had received reasonable notice of limiting terms on the ticket. It was a question of a rule of law; and once Justice Rand peeled away the layers of the business practices of the steamship line, he discovered “virtual deception.” There were clues to Justice Rand’s point of view in the House of Lords decision that he cited. *Hood v. Anchor Line*⁵⁴ considered a steamship ticket with limiting terms. Although the House of Lords found that the steamship line had taken all reasonable steps to bring the terms to the attention of the passenger, Viscount Haldane found that there was a duty of the steamship line to passengers. That duty depended upon an accepted standard of conduct. Under that duty:

...a reasonable man ought to behave in these circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forbearance and consideration.⁵⁵

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* On the effects of misrepresentation on exclusion clauses, see *Curtis v. Chemical Drycleaning & Dyeing Co.*, [1951] 1 K.B. 805 (C.A.).

⁵⁴ [1918] A.C. 837.

⁵⁵ [1918] A.C. 837, at 843.

Such an approach would not permit the “virtual deception” that had occurred in *Barnes*. Necessities of community to act with forbearance and consideration would seem to preclude a steamship line from hiding behind a ticket that a patron had not read or understood.

Justice Rand found *Henderson, et al. (Steam-Packet Company) v. Stevenson*⁵⁶ to be “peculiarly apposite in indicating the background of general considerations in which the question is to be viewed.”⁵⁷

When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted.... and if the effect of your Lordships’ affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law, and *in protecting the ignorant and the unwary*.⁵⁸

For Justice Rand, this was not a mere matter of construction. Whether the clause was part of the contract was “ancillary to the equities of the situation.” If the steamship owner had a responsibility to ensure that the passengers arrived safely, “this proposition could only be rebutted where the owner had made a concerted effort to bring contrary policies to the customer’s attention.”⁵⁹

Justice Rand’s protection of the unwary in a hurried transaction brings to mind modern approaches to the interpretation of exclusion clauses in Canada. One might draw an analogy to concepts of “unconscionability” and “public policy” found in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*.⁶⁰ Similarly, in *Tilden Rent-A-Car Co. v. Clendenning*⁶¹ the Ontario Court of Appeal, in referring to an exclusion clause in a signed contract, refused to uphold the clause. The court noted that the car rental agreement had been carried out in a “hurried, informal manner.”⁶²

*Dawson v. Helicopter Exploration Co. Ltd.*⁶³ was the high-water mark in Justice Rand’s contracts jurisprudence. Was a series of letters exchanged between the parties a binding bilateral contract or was there merely an offer of an unilateral

⁵⁶ (1875), L.R. 2 H.L. Sc. 470.

⁵⁷ *Supra* note 38, at 846.

⁵⁸ (1875), L.R. 2 H.L. Sc. 470, at 481, Lord O’Hagan [emphasis added].

⁵⁹ Randall Balcome, *et. al.*, *supra* note 4, at 107.

⁶⁰ *Supra* note 30.

⁶¹ (1978), 18 O.R. (2d) 601 (C.A.).

⁶² *Ibid.*, at para. 23.

⁶³ [1955] S.C.R. 868.

contract that could be withdrawn at any time prior to performance? Dawson, a mining engineer, discovered a mineral deposit in British Columbia and contacted Helicopter Exploration about exploiting the property. The parties exchanged correspondence about financing of the exploration and payment to Dawson for showing the company the location of the mineral deposit. In the end, Helicopter Exploration pursued the claim on its own without informing Dawson. When Dawson sued for breach of contract, Helicopter Exploration argued that the correspondence only evidenced a unilateral offer that was to be accepted by Dawson through performance. According to Helicopter Exploration, the unilateral offer could be revoked at any time prior to Dawson's act of taking Helicopter Exploration to the site. This would leave Dawson, the offeree, without a remedy.⁶⁴ Justice Rand found Helicopter's reasoning erroneous. In the unilateral context, the "offer contemplates acts to be performed" by the offeree while "the offeror remains passive"⁶⁵ This was not the situation here.

He concluded that the terms proposed involved action on the part of both parties and thus found a bilateral contract. Earlier jurisprudence strengthened this conclusion, as it was "the tendency of courts to treat offers as calling for bilateral rather than unilateral action when the language can be fairly so construed."⁶⁶ As a unilateral contract might be revoked at anytime before complete performance, many courts had adopted a "promissory construction where that can be reasonably given."⁶⁷ A bilateral agreement enabled the parties "to close a business bargain on the strength of which they may, thereafter, plan their courses."⁶⁸ Once the court transformed the unilateral offer into a bilateral contract, "the offeror is bound if the offeree performs or is willing to perform."⁶⁹ In a bilateral situation, the contract formed immediately and both parties were bound to carry out their obligations.⁷⁰ Given that a unilateral contract "can put the offeree at an extreme disadvantage an attitude to such contracts which puts the onus of showing the parties arrangement was unilateral and not bilateral on the offeror can be justified."⁷¹

However, in reaching his conclusion, that there was a binding bilateral agreement, Justice Rand did not limit his judgment to a consideration of English case law.⁷² Two significant American authorities enriched his opinion. First, he quoted from

⁶⁴ Angela Swan, *Canadian Contract Law*, 2nd ed. (Toronto: LexisNexis, 2009) at 100.

⁶⁵ *Dawson v. Helicopter Exploration Co. Ltd.*, [1955] S.C.R. 868, at para. 23.

⁶⁶ *Ibid.*, at para. 25.

⁶⁷ *Ibid.* For an examination of the history of unilateral contracts, see P. Tiersma, "Reassessing Unilateral Contracts: the Role of Offer, Acceptance and Promise" (1992) 26 *University of California Davis Law Review* 1.

⁶⁸ *Supra* note 65, at para. 25.

⁶⁹ Angela Swan, *supra* note 64, at 100.

⁷⁰ Randall Balcome, *et. al.*, *supra* note 4, at 105.

⁷¹ Angela Swan, *supra* note 64, at 100.

⁷² *The Moorcock* (1889), 14 P.D. 64.

the leading American text, *Williston on Contracts*.⁷³ Secondly, he cited Cardozo J.'s judgment in the well-known New York Court of Appeals case of *Wood v. Lady Lucy Duff Gordon*.⁷⁴ The two American authorities signified a shift away from formalism.

According to Williston:

Doubtless wherever possible, as a matter of interpretation, a court would and should interpret an offer as contemplating a bilateral rather than a unilateral contract, since in a bilateral contract both parties are protected from a period prior to the beginning of performance on either side -- that is from the making of the mutual promises.⁷⁵

Williston noted that, at the beginning of the twentieth century, courts were looking for clear promises on each side in order to find a bilateral contract. However, the 1936 edition of *Williston on Contracts* noted that "courts are now more readily to recognize fair implications as effective."⁷⁶ Justice Rand strengthened that point by quoting Cardozo J.'s judgment rejecting a formalistic approach:

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. A promise may be lacking and yet the whole writing may be 'instinct with obligation' imperfectly expressed.⁷⁷

Justice Rand would later review *Dawson* with University of New Brunswick law students to illustrate the court's role in modifying the law. In his lecture, Rand asked the students whether there was a bilateral agreement or a unilateral offer? "Did the company agree to anything? Did it agree to accept [Dawson's] services to the exclusion of any other person? Did they agree to forebear any search until he had had his opportunity to lead them to it?"

⁷³ Samuel Williston, *A Treatise on the Law of Contracts*, vol. 1 (New York: Baker & Voorhis, 1936) at 76-77.

⁷⁴ 222 N.Y. 88 (1917). Two American authors refer to *Dawson* as one of the few foreign cases to cite *Lady Duff Gordon*. See Robert A. Hillman "'Instinct with an Obligation' and the 'Normative Ambiguity of Rhetorical Power'" (1995) 56 *Ohio State Law Journal* 775, at 776; Robert C. Bird, "An Employment Contract 'Instinct with an Obligation': Good Faith Costs and Contexts" (2008), 28 *Pace Law Review* 409, at 412.

⁷⁵ Samuel Williston, *supra* note 73, at 76-77.

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 74, at 98. Not all commentators have agreed with the "instinct with obligation" philosophy. Professor Fridman raised the concern that this approach "would tend to give too paternalistic a role to the courts." He was of the view that "as it is there is much scope for judicial creativity and interference in interpreting the language and conduct of the parties" to determine whether the parties had reached a contract: G. H. L. Fridman, *The Law of Contracts*, 5th ed. (Toronto: Thomson Carswell, 2006) at 25.

But where do you draw the line? There is no way of drawing the line at all unless you say that they agree that he should have that exclusive right to lead them to this mine if he could. And the Supreme Court held that that was a bilateral contract arising out of the necessary implication of what passed between the two parties. There was an emphasis placed upon the fact that a business relationship of that sort is intended to be effective and that it can be effective by bringing out in objective form what is necessarily implied in the relations between them for what was understood but not spoken.⁷⁸

He concluded by stating: “That is a good example of how the law of contract can be extended by implication from the actual circumstances of the dealings between the two men.”⁷⁹ Rather than follow the formal rule that unilateral offers might be revoked at any time, the rule was ignored in favour of finding a bilateral contract.⁸⁰ The result in *Dawson* effectively “destroyed” the offeror’s power to revoke “by the simple expedient of finding that there was a bilateral contract.”⁸¹

However, not all commentators have agreed that the finding of a bilateral contract is always possible. Although courts have expressed a tendency to find a bilateral contract, “in some cases the only reasonable interpretation of the facts is that the offeror bargained only for a completed act.”⁸² It might be easy to find a bilateral contract where there had been a series of letters documenting the parties’ position as in *Dawson*. On the other hand, it might be more difficult to find a bilateral contract in the case of an offer of a reward for a lost pet.⁸³ Further, the imposition of a bilateral contract might not always represent the parties’ expectations in that “they may have agreed that the offer could be withdrawn at anytime before the completion of the act that is acceptance.”⁸⁴ But on the facts in *Dawson*, Justice Rand must have believed that he was granting to the plaintiff what he expected under the contract. The result protected “the plaintiff’s expectation interests.”⁸⁵ Indeed, if Justice Rand began, not with the question of whether there was a contract but rather whether Dawson ought to recover, then the answer was obvious.⁸⁶ Whether he extended the common law or merely responded to one legal doctrine with another remains an open question. However, he reached a decision that was “arguably the best possible resolution of the problem at hand.”⁸⁷

⁷⁸ Ivan C. Rand, *supra* note 21, at 183.

⁷⁹ *Ibid.*

⁸⁰ John Swan, “Consideration and the Reasons for Enforcing Contracts”, in Barry J. Reiter and John Swan (eds.), *Studies in Contract Law* (Toronto: Butterworths, 1980) at 43.

⁸¹ *Ibid.*, at 44.

⁸² Stephen Waddams, *supra* note 10, at para 157.

⁸³ John Swan, *supra* note 80, at 44.

⁸⁴ *Ibid.*, at 45.

⁸⁵ *Ibid.*

⁸⁶ Randall Balcome, *et. al.*, *supra* note 4, at 106.

⁸⁷ *Ibid.*, at 104.

Dawson continues to have an impact on modern jurisprudence. The Supreme Court of Canada in *Sail Labrador Ltd. v. Challenge One (The)*⁸⁸ referred to *Dawson* noting “this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed.”⁸⁹ Justice Cardozo’s phrase “instinct with obligation”, which featured in Justice Rand’s judgment, has also been considered in other Canadian cases.⁹⁰ In *Great Eastern Oil & Import Co. Ltd. v. Chafe*⁹¹ the plaintiff argued that there was “a lack of mutuality of obligation.” Citing *Dawson* the court held that:

It should be taken that the parties intended that the agreement have business efficacy and, while a specific promise by the plaintiff is lacking, the whole writing is “instinct with an obligation” imperfectly expressed which is regarded as supplying the necessary reciprocal promise.⁹²

On balance, Justice Rand issued far more unremarkable contracts decisions than *Barnes* and *Dawson*. Although he emphasized that the common law was open for modification, that principle was rarely applied. However, when the facts provided him with an opportunity to embrace that principle, as they did in *Barnes* and *Dawson*, he illustrated a much more dynamic form of reasoning.

B) BANKRUPTCY AND INSOLVENCY LAW

Bankruptcy law has long sought to satisfy two general objectives. First, the legislation provides for distribution of the bankrupt’s assets to creditors. Secondly, it discharges the bankrupt’s liabilities.⁹³ Bankruptcy law also includes questions of priority. Some creditors are given enhanced or special status under the legislation. This section of this article begins with the priority question and examines Justice Rand’s contribution in the area of unpaid employees. The article concludes with a discussion of the discharge and demonstrates how modern thinking about the discharge has radically changed from earlier periods. Discharge was not always available as part of the bankruptcy regime and an historical discussion will provide context to Justice Rand’s own views on this topic.

⁸⁸ [1999] 1 S.C.R. 265.

⁸⁹ *Ibid.*, at para. 41; also *Can-Euro Investments Ltd. v. Industrial Alliance Insurance* (2009), 273 N.S.R. (2d) 325 (S.C.), at para. 104.

⁹⁰ *Martynek v. Hinton*, [1976] A.J. No. 230 (Dist. Ct.), at para. 10; *Bergen v. Billingham*, [1972] 28 D.L.R. (3d) 99 (Man. Q.B.), at para. 25. Cf *Degoebriand v. Radford*, [1985] 41 Sask. R. 43 (Q.B.), at paras. 14-15 (court holding that plaintiff had failed to establish defendant had made a binding reciprocal promise).

⁹¹ [1956] 4 D.L.R. (2d) 310 (Nfld. S.C.).

⁹² *Ibid.*, at para. 12.

⁹³ Anthony Duggan, Stephanie-Ben Ishai, Thomas Telfer, Roderick Wood and Jacob Ziegel, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 2009) at 26.

1. Unpaid Employees

The position of unpaid employees in a bankruptcy has always posed a significant policy problem for Parliament. Unlike other creditors, employees are likely the last to know that a firm is failing. Employees are not able to diversify their credit risk and are unable to switch employers at the first sign of trouble.⁹⁴ Parliament has long grappled with how best to protect unpaid wage claims. Traditionally, the *Bankruptcy and Insolvency Act*⁹⁵ (*BIA*) provided for a preferred claim, *i.e.*, one that would rank behind secured creditors but ahead of general unsecured creditors.⁹⁶ The position of unpaid employees has been considerably improved with recent enactment of the *Wage Earner Protection Program Act*⁹⁷ (*WEPPA*) in 2005 which gives unpaid employees the ability to be paid out of the proceeds of current assets up to \$2000.⁹⁸ This new provision will provide unpaid wage claimants priority over current asset secured creditors.

Aside from the question of priority, one must consider who is entitled to priority. Under the *BIA*, the person making the claim must be a “clerk, servant, travelling salesperson, labourer or worker.”⁹⁹ The scope of this definition acts as a gate-keeping function restricting priority to those who are said to deserve it. Decisions issued shortly after the *Bankruptcy Act of 1919*¹⁰⁰ came into force adopted a liberal approach to unpaid wage claims. For example, *Re Specialty Bags Co.*¹⁰¹ considered whether a travelling salesman was entitled to a preferred creditor status:

In my opinion, the statute should be given a wide meaning and the words construed liberally. This section of the Act is aimed at protecting one who was, three months prior to the bankruptcy, in the employment of the debtor as a servant, clerk, travelling salesman, labourer or workman.¹⁰²

*Re Gordean Furniture Co.*¹⁰³ expressly identified the object of the section:

⁹⁴ *Barrette v. Crabtree*, [1993] 1 S.C.R. 1027.

⁹⁵ R.S.C. 1985, c. B-3. [hereafter *BIA*].

⁹⁶ *BIA* s. 136 [prior to 1 July 2008, which was the date of the coming into force of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47.] [hereafter *WEPPA*].

⁹⁷ S.C. 2005, c. 47.

⁹⁸ *BIA*, s. 81.3. See David E. Baird and Ronald B. Davis, “Labour Issues” in Stephanie Ben-Ishai and Anthony Duggan, (eds.), *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (Markham: LexisNexis, 2007) at 68.

⁹⁹ *BIA*, s. 81.3.

¹⁰⁰ *Bankruptcy Act of 1919*, S.C. 1919, c. 36.

¹⁰¹ (1923), 53 O.L.R. 355 (S.C.) aff’d 4 C.B.R. 276 (Ont. C.A.).

¹⁰² *Ibid.*, at para. 11. See also *Re Vancouver Dress Co.*, [1931] 3 W.W.R. 220 (B.C. S.C.); *Re Sexton* (1930), 66 O.L.R. 133 (C.A.).

¹⁰³ *Re Gordean Furniture Co.*, [1923] 4 D.L.R. 1198 (Alta. T.D.).

The purpose of the section seems to be to protect that class of persons who depend upon the financial return from their personal services for their livelihood to the extent that they have rendered such service to the bankrupt or assignor within a specified time.¹⁰⁴

In 1946, the scope of the wage earner preferred claim came before the Supreme Court of Canada in *Guillot v. Lefavre*.¹⁰⁵ According to Justice Rand, the legal issue was “whether the appellant is a workman within section 121(1) of *The Bankruptcy Act*, and entitled to be preferred as for compensation for services rendered to the bankrupt.”¹⁰⁶ In this case, the bankrupt had entered into an agreement with the appellant whereby the appellant completed brick work and scaffolding. The appellant and his three employees completed the work for the bankrupt. The appellant held himself out as an entrepreneur and a mason. After completion of the work, the appellant paid his employees in full. After the bankruptcy, the appellant submitted a priority claim for the appellant’s wages, his employee’s wages (which the appellant had paid in full) and a sum for the overall profit. The appellant asserted a preferential claim under s. 121 of \$1,018.20.

In a brief 5-0 decision, the Court dismissed the appellant’s priority claim. Justice Rand rejected the appellant’s argument that he, by way of subrogation, was entitled to include in his preferred claim amounts he had paid out to employees. Looking to the “plain language” of the statute, Justice Rand concluded that, in order to obtain a priority, the claim “must be by ‘a workman’ in respect of ‘services rendered to the bankrupt.’”¹⁰⁷ Here he found the appellant to be a sub-contractor “in form and substance” and not a workman.¹⁰⁸ That was the essence of Justice Rand’s short decision.

In contrast to the earlier jurisprudence, the plain meaning approach appeared to negate the need to appeal to the purpose of the section. However, the relationship between the plain meaning and the object of the section was never articulated. Justice Rand chose not to discuss the purpose or object of the provision.¹⁰⁹ Nor did the Court refer to earlier cases that had tended to favour a liberal interpretation of the provision. Instead, the Court implicitly adopted a gate-keeping function by restricting, quite

¹⁰⁴ *Ibid.*, at para. 28; also *Re Corson Shoe Co.*, [1924] 1 D.L.R. 555 (Ont. S.C.).

¹⁰⁵ [1946] S.C.R. 335.

¹⁰⁶ *Ibid.*, at para. 27.

¹⁰⁷ *Ibid.*, at para. 31.

¹⁰⁸ *Ibid.*, at para. 32.

¹⁰⁹ The “plain meaning” approach had early origins. See *Sussex Peerage Case* (1844), 8 E.R. 1034 (H.L.) cited in *R v. McIntosh*, [1995] 1 S.C.R. 686. The relationship between the plain language approach and one that enables a court to look at the object of the Act is not always clear. Randal Graham asks “how ‘clear and plain’ must a statute’s language be before the legislative purpose can be ignored?” in Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001).

properly in this case, the scope of the provision through statutory interpretation. A more explicit form of reasoning, in which the Court articulated the purpose of the provision, might have appealed to future courts.¹¹⁰

2. The Bankruptcy Discharge

While *Guillot v. Lefaiivre* might be classified as a straightforward application of statutory interpretation, two subsequent decisions would explore the very policy underlying the bankruptcy statute. *Industrial Acceptance Corp. v. Lalonde*¹¹¹ and *Re Moratorium Act*¹¹² made significant contributions about the purpose of the bankruptcy discharge.

The discharge, which provides a debtor from a release of all debts provable in bankruptcy, has a long history. Its original purpose was significantly different from modern day conceptions. While one can trace the origins of the first English bankruptcy statute to 1543,¹¹³ the discharge was not established until early in the eighteenth century.¹¹⁴

Limitations on creditors' collection efforts lay at the heart of the first bankruptcy statute enacted in 1543.¹¹⁵ The absence of a collective proceeding at common law and the inability of creditors to control the conduct of debtors prompted the legislative intervention. The preamble illustrated that the legislation had little to do with the concerns of debtors. It spoke of people who:

...craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living against all reason, equity, and good conscience.¹¹⁶

¹¹⁰ Only three courts have cited *Guillot v. Lefaiivre: James (Re)* (2000), 18 C.B.R. (4th) 220 (B.C. S.C.); *Mayfair Lumber Co. v. Lamarre* (1949), 30 C.B.R. 103 (Q.C. C.S.); *Graham v. Magny*, [1951] R.L. 39 (Q.C. K.B.).

¹¹¹ [1952] 2 S.C.R. 109.

¹¹² [1955] 5 D.L.R. 736.

¹¹³ *An Act Against Such Persons As Do Make Bankrupts*, 34 & 35 Hen. VIII, c. 4 (1543); see William J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period* (Philadelphia: American Philosophical Society, 1979).

¹¹⁴ *An Act to Prevent Frauds Frequently Committed by Bankrupts*, 4 & 5 Anne, c. 17 (1706).

¹¹⁵ 34 & 35 Henry VIII, c. 4 (1543). See *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Canada, 1970), sections 1.1-1.3.

¹¹⁶ 34 & 35 Henry VIII, c. 4 (1543), cited in J. Hoppitt, *Risk and Failure in English Business, 1700-1800* (New York: Cambridge University Press, 1987) at 19. The marginal notes adjacent to the preamble in the original statute state, "Evil of Debtors absconding or keeping

The legislation, characterized as a criminal statute, aimed to control fraudulent bankrupts. The legislation referred to the bankrupt as an “offender.”¹¹⁷ The first bankruptcy statute did not include a discharge.

Subsequent bankruptcy statutes continued to refer to debtors in a pejorative way. In 1571, the preamble stated that unless “some better provision be not made for the repression of debtors and for a plain declaration...[of] who...ought to be taken and deemed a bankrupt” their numbers would increase excessively.¹¹⁸ By 1604, the preamble referred to debtors as “frauds and deceits, as new diseases, daily increase.” Such debtors “wickedly and wilfully become bankrupts.”¹¹⁹ The 1604 statute included the sanction of the pillory and the nailing of the debtor’s ear to the pillory, which would then be cut off.¹²⁰ This sanction applied to debtors who committed perjury by failure to disclose their assets to the Commissioners in Bankruptcy.¹²¹

In England, the discharge was not available by statute until 1706.¹²² The bankruptcy discharge was often viewed as one essential element of modern bankruptcy law. However, the historical context of 1706 made clear that debtor rehabilitation was not the prime motivating factor behind the legislation. Its title conveyed a purpose other than rehabilitation: *An Act to Prevent Frauds Frequently Committed by Bankrupts*.¹²³ Prior to 1706, the absence of a discharge, and cruelty on the part of creditors, encouraged debtor misbehaviour. If the original goal of the Act of 1543 had been to prevent debtor fraud, debtors continued to devise ways to avoid their creditors and bankruptcy proceedings. The promise of a discharge became the only effective way in which to deter fraudulent debtor activity. The discharge, by promising the release of debts, would encourage co-operation on the part of the debtor and generate more returns for creditors.¹²⁴ As the discharge provided a form of limited liability, the

House, their Debts unpaid”, 34 & 35 Hen. VIII, c. 4 (1543).

¹¹⁷ Emily Kadens, “The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law” (2010) 59 *Duke Law Journal* 1229, at 1240.

¹¹⁸ 13 Elizabeth I, c. 7 (1571), Preamble.

¹¹⁹ 1 James I, c. 15 (1604), Preamble.

¹²⁰ *Ibid.*, s. 9.

¹²¹ *Ibid.*, s. 8. See Gino Dal Pont and Lynden Griggs, “The Journey from Ear-Cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995” (1995), 8 *Corporate and Business Law Journal* 155.

¹²² 4 & 5 Anne, c. 17 (1706).

¹²³ *Ibid.*

¹²⁴ Robert Weisberg, “Commercial Morality, the Merchant Character, and the History of the Voidable Preference” (1986) 39 *Stanford Law Review* 3, at 5-9; J. McCoid, “Discharge: The Most Important Developments in Bankruptcy History” (1996) 70 *American Bankruptcy Law Journal* 163, at 169-172. On the role of Daniel Defoe [1660-1731] see Michael Quilter, “Daniel Defoe: Bankrupt and Bankruptcy Reformer” (2004) 25 *Journal of Legal History* 53. Defoe’s principal commentary on bankruptcy was *Essay on Projects* (1697).

debtor had a strong incentive to submit to the bankruptcy proceedings.¹²⁵ Generosity to debtors did not motivate Parliament.¹²⁶ Creditor interests lay at the heart of the reform and the change had only a limited beneficial effect on most debtors.¹²⁷

While the legislation was renowned for its introduction of the discharge, it also contained a less well-known feature. In 1706, Parliament made fraudulent bankruptcy a capital offence.¹²⁸ While this was abolished in 1820,¹²⁹ Emily Kadens has argued, “the role of discharge as an innovation that changed the nature of bankruptcy cannot be fully appreciated without taking the capital punishment provision into account.”¹³⁰

In Canada, there have been parallel developments.¹³¹ While Canadian bankruptcy statutes have never adopted the pillory or capital punishment to deal with debtors, the discharge became the focus of an intense debate in the nineteenth century. Parliament adopted legislation in 1869¹³² and 1875¹³³ and sought to make the discharge more difficult as decades progressed. Throughout the 1870s, Parliament debated whether there should be a bankruptcy law at all. Behind that question lay a fundamental divide over the role of the discharge. On the one hand, debtors required a fresh start and it was unjust to burden them with the shackles of debt for life. However, bankruptcy law interfered with the debtor’s higher moral duty to repay all debts. Notions of forgiveness competed unsuccessfully with the idea that all debts had to be honoured. In the end, Parliament repealed the *Insolvent Act* of 1875 in 1880,¹³⁴ leaving

¹²⁵ Jay Cohen, “The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy” (1982) 3 *Journal of Legal History* 153, at 156.

¹²⁶ V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995) at 17; Robert Weisberg, *supra* note 124, at 30; Ian Duffy, “English Bankrupts, 1571 – 1861” (1980) 24 *American Journal of Legal History* 283, at 287.

¹²⁷ Michael Quilter, *supra* note 124; Charles Jordan Tabb, “The Historical Evolution of the Bankruptcy Discharge” (1991) 65 *American Bankruptcy Law Journal* 325, at 332; W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989) at 231.

¹²⁸ Emily Kadens, *supra* note 117, at 1232.

¹²⁹ 1 George IV, c. 115 (1820).

¹³⁰ Emily Kadens, *supra* note 117, at 1232.

¹³¹ Thomas Telfer, “Access to the Discharge in Canadian Bankruptcy Law and the New Role of Surplus Income: A Historical Perspective” in Charles E. F. Rickett and Thomas G. W. Telfer (eds.), *International Perspectives on Consumers’ Access to Justice* (Cambridge: Cambridge University Press, 2003) 231; Thomas Telfer, “A Canadian ‘World without Bankruptcy Law’: the Failure of Bankruptcy Reform at the End of the Nineteenth Century” (2004) 8 *Australian Journal of Legal History* 83; Thomas Telfer, “The Canadian *Bankruptcy Act* of 1919: Public Legislation or Private Interest?” (1994-95) 24 *Canadian Bankruptcy Law Journal* 357.

¹³² *The Insolvent Act of 1869*, S.C. 1869, c. 16.

¹³³ *The Insolvent Act of 1875*, S.C. 1875, c. 16.

¹³⁴ *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, S.C. 1880, c. 1; and, E. Martel, “The Debtor’s Discharge from Bankruptcy” (1971) *McGill Law Journal* 718.

Canada without any bankruptcy law of general application until 1919.¹³⁵ Repeal also left debtors with an opportunity to obtain a discharge.

The re-emergence of bankruptcy law after World War I raised the question of whether the discharge was the driving force behind the legislation. In 1919, the Solicitor General stood in the House of Commons and announced “one great object to be attained by a Bankruptcy Act in Canada is the discharge of the honest debtor”.¹³⁶ However, there was no broad consensus that the discharge was designed for the purpose of debtor rehabilitation.

The new acceptability of the discharge reflected the underlying interests of creditors who demanded reform. The *Bankruptcy Act* of 1919, while it enabled debtors to obtain their discharge, had little to do with concepts of debtor rehabilitation. Canada opted for a discharge because it met the legal needs of the credit community. Provincial legislation did not adequately deal with debtors. The absence of compulsory proceedings and the lack of a discharge created collection difficulties for creditors, as debtors often engaged in deceptive conduct. Creditors came to accept the necessity of the discharge as a means of improving their collection efforts. The Canadian Credit Men’s Trust Association (CCMTA), an organization that represented various authorized trustees operating under the provincial assignment statutes, was well placed to recognize the needs of creditors. The Bankruptcy Bill reflected their influence. The conservative English discharge provisions provided the ideal solution and the CCMTA’s solicitor, who drafted the Bill, closely followed the English model.¹³⁷

Early case law that emerged shortly after enactment of the *Bankruptcy Act* of 1919 reflected traditional attitudes towards the discharge. In one of the earliest discharge cases under the new Act, the court in *Re Sceptre Hardware Co.*¹³⁸ concluded that, in discharge applications, it “must have regard not only to the interests of the bankrupt and his creditors, but also to the interests of the public.”¹³⁹ Other cases expressed dissatisfaction with the operation of the discharge. *Re Green*¹⁴⁰ acknowledged, “it is undesirable that a citizen should be so weighted down by his debts as to be incapable of performing the ordinary duties of citizenship.”¹⁴¹ However, in the same decision the

¹³⁵ *Bankruptcy Act of 1919*, S.C. 1919, c. 36; and, Thomas Telfer, “Access to the Discharge in Canadian Bankruptcy Law”, *supra* note 131, at 231.

¹³⁶ *House of Commons Debates* (2 May 1919) at 2004 (Guthrie).

¹³⁷ Thomas Telfer, “The Canadian *Bankruptcy Act of 1919*”, *supra* note 131.

¹³⁸ [1923] 1 D.L.R. 1201 (Sask. K.B.).

¹³⁹ *Ibid.*, at para. 4.

¹⁴⁰ (1925), 5 C.B.R. 580 (N.B.S.C.).

¹⁴¹ *Ibid.*, at para. 3; also, *Beerman v. Sands* (1925), 28 O.W.N. 252 (S.C.) at para. 9. See *Ex parte Painter; In re Painter*, [1895] 1 Q.B. 85, at 88.

court concluded, “laxity in the administration” of the discharge “has been one of the principal causes of dissatisfaction with the present Act”¹⁴²:

The Bankruptcy Court should not be converted into a sort of clearing house for the liquidation of debts irrespective of the circumstances under which they were contracted. It is not to be regarded as a sort of charitable institution.¹⁴³

In *Re Harold M. Young*,¹⁴⁴ the court cited the preamble to the 1543 English Act and noted that, in the early history of bankruptcy law, a bankrupt was considered “in the light of criminal or offender.”¹⁴⁵ Repeating the “clearing house” principle from *Re Green*, Barry, C.J. in *Re Young* wrote: “I am tired of listening to the appeals of counsel who come here and plead for the discharge of the “poor debtor,” completely ignoring the rights of the poor creditors, almost, it would seem, as if creditors have no rights at all in bankruptcy legislation.”¹⁴⁶

Barry C.J. condemned the number of debtors who used bankruptcy courts to clear debts only to return:

It would be of the worst possible example if a debtor could come to the Bankruptcy Court with a plausible story, obtain his discharge as a matter of course, depart the Court with a light heart, and having paid his creditors little or nothing, proceed at once to accumulate another array of creditors, whom, when the proper time arrived, when his credit was exhausted, he would probably treat in the same manner.¹⁴⁷

Not all early cases took such a negative view of debtors and the discharge. In 1925, the court in *Re Newsome*¹⁴⁸ was of the view that “one of the objects of the *Bankruptcy Act* was to enable an honest debtor, who had been unfortunate in business, in securing a discharge, so that he might make a new start.”¹⁴⁹ While *Re Newsome* expressly adopted rehabilitation as the purpose of the discharge, it had little impact

¹⁴² *Re Green* (1925), 5 C.B.R. 580 (N.B.S.C.), at para. 3.

¹⁴³ *Ibid.*, at para. 4.

¹⁴⁴ (1928), 10 C.B.R. 53, at 55 (N.B.K.B.).

¹⁴⁵ *Ibid.*, at para. 2.

¹⁴⁶ *Ibid.*, at para. 6. The clearing house principle in *Re Green* and *Re Young* have at times been cited in modern jurisprudence. See *Re Legault* (1994), 112 D.L.R. (4th) 666 (B.C.C.A.); *Re Spooner* (1968), 63 C.B.R. (N.S.) 172 (Sask. Q.B.); *Re Posner* (1960), 67 Man. R. 288 (Q.B.); *In re Palach*, [1955] O.W.N. 278 (S.C.); *Re Campbell* (1982), 45 C.B.R. (N.S.) 188 (Sask. Q.B.).

¹⁴⁷ *Ibid.*, at para 11.

¹⁴⁸ (1925), 8 C.B.R. 279 (Ont. S.C.).

¹⁴⁹ *Ibid.*, at para. 11.

at the time, given the other prevailing judicial attitudes. In many respects, this 1925 decision was well ahead of its time. Few cases relied upon *Newsome* between 1925 and 1939.¹⁵⁰ It has had greater appeal in more modern jurisprudence.¹⁵¹

Indeed, courts had few opportunities to express their views on the discharge between 1919 and 1949. During this period, bankrupts had to initiate their own application for a discharge. Large numbers did not apply for their discharge during this era. Debtors might not have realized that they had to apply. Even if they had the knowledge, cost might have provided a barrier. Further, debtors could have believed that discharge would be of little use because they had so little property that creditors might seize.¹⁵² By 1949, Parliament removed the need for a discharge application, making the initiation of bankruptcy proceedings an automatic application for a discharge.¹⁵³ The creation of an automatic discharge reflected a fundamental shift in attitude and allowed rehabilitation of the debtor to become a more significant theme in bankruptcy policy.

In 1952, the Supreme Court of Canada handed down its unanimous ruling in *Industrial Acceptance Corp. v. Lalonde*.¹⁵⁴ While English courts¹⁵⁵ and the United States Supreme Court¹⁵⁶ had given emphasis to the importance of the discharge as rehabilitation in earlier cases, the *Lalonde* case marked the first Supreme Court of Canada decision on the purpose of the discharge.¹⁵⁷ While it was not the first Canadian decision for the rehabilitation principle,¹⁵⁸ the case marked an important statement by the Court. Although Justice Rand did not write a concurring judgment, he was a

¹⁵⁰ *Re Frederick* (1939), 20 C.B.R. 157 (Sask. K.B.), at para. 1; *Re Stadelman* (1939), 21 C.B.R. 164 (Ont. S.C.), at para. 6. Other cases during this period recognized rehabilitation without citing *Newsome*: *Re Daniel & Co.* (1934), 16 C.B.R. 21 (N.B.K.B.); *Re Beerman v. Sands* (1925), 5 C.B.R. 781 (Ont. S.C.).

¹⁵¹ Westlaw Keycite shows that seventeen cases since 1953 have relied upon *Newsome*.

¹⁵² John Honsberger, "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37 *Osgoode Hall Law Journal* 171, at 182.

¹⁵³ *The Bankruptcy Act*, 1949, 2nd Sess. (Can.), c. 7, s. 127(1).

¹⁵⁴ [1952] 2 S.C.R. 109.

¹⁵⁵ *Ex parte Painter*; *In re Painter*, [1895] 1 Q.B. 85 at 88. Vaughan Williams J. concluded that the State had an interest in a debtor being relieved "from the overwhelming pressure of his debts and it is undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship."

¹⁵⁶ *Williams v. U.S. Fidelity Co.* 236 U.S. 549, at 554-555 (1915); *Local Loan Co. v. Hunt*, 292 U.S. 235 at 244 (1915). See John Honsberger, *supra* note 152, at 173.

¹⁵⁷ Rose Murphy, "Bankruptcy Exemptions: The Need for Uniformity in the United States and Canada" (2001-02) 21 *New York Law School Journal of International and Comparative Law* 127; John Honsberger, *supra* note 152, at 173.

¹⁵⁸ *Re Newsome* (1925), 8 C.B.R. 279 (Ont. S.C.), at para. 11; *Re Frederick* (1939), 20 C.B.R. 157 (Sask. K.B.), at para. 1; *Re Stadelman* (1939), 21 C.B.R. 164 (Ont. S.C.), at para. 6; *Re Daniel & Co.* (1934), 16 C.B.R. 21 (N.B.K.B.); *Re Beerman v. Sands* (1925), 5 C.B.R. 781 (Ont. S.C.).

member of the panel. Justice James Estey wrote for the court: “the purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts.”¹⁵⁹ The court balanced the “rehabilitation as a citizen” principle with the notion that the discharge was not a “matter of right” and that the Act indicated, “in certain cases the debtor should suffer a period of probation.”¹⁶⁰ On the other hand, the Court recognized that an absolute refusal of a discharge should only be imposed where the conduct of the debtor had been “particularly reprehensible, or in what have been described as extreme cases.”¹⁶¹ Unfortunately, Justice Estey did not cite any cases in support of these propositions so it was impossible to tell what specifically influenced the Court.

Lalonde has had a significant impact on modern bankruptcy jurisprudence. The British Columbia Court of Appeal in *Gatzke v. Doucette*¹⁶² described *Lalonde* as the “leading authority in Canada on discharges.”¹⁶³ *Lalonde* has been cited by eighteen first instance cases, three provincial courts of appeal¹⁶⁴ and twice by the Supreme Court of Canada.¹⁶⁵ In *Vachon v. Canada (Employment & Immigration Commission)*,¹⁶⁶ the Court declared that the distribution of the debtor’s assets was not the sole purpose of bankruptcy law. Relying upon *Lalonde*, the Court in *Vachon* affirmed the rehabilitation principle.¹⁶⁷

Although Justice Rand participated in the hearing and signed onto the unanimous ruling in *Lalonde*, the case did not provide any insight into his thinking on the discharge. However, in a lesser-known decision issued some four years later, he articulated his own vision of the purpose of bankruptcy legislation. In *Re Moratorium Act*,¹⁶⁸ the Court was asked to rule on the constitutional validity of the Saskatchewan *Moratorium Act*.¹⁶⁹ The terms of the provincial legislation enabled the Lieutenant Governor to postpone payment of debts. In addition, the legislation permitted the suspension of proceedings or the prohibition of any legal or extra-legal process against the debtor’s property. The Court had to decide whether such provincial legislation interfered with the Dominion power over bankruptcy and insolvency. In a unanimous

¹⁵⁹ *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at para. 34.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² (1990), 79 C.B.R. (N.S.) 67 (B.C.C.A.). See also *Re Arthur* (1996), 45 C.B.R. (3d) 66 (B.C. S.C.).

¹⁶³ *Gatzke v. Doucette* (1990), 79 C.B.R. (N.S.) 67 (B.C.C.A.), at para. 15.

¹⁶⁴ *Gatzke v. Doucette* (1990), 79 C.B.R. (N.S.) 67 (B.C.C.A.); *Re Clark* (1986), 60 C.B.R. (N.S.) 305 (B.C.C.A.); *Irwin (Re)* (1994), 112 D.L.R. (4th) 164 (B.C.C.A.).

¹⁶⁵ *Vachon v. Canada (Employment & Immigration Commission)*; *Kozack v. Richter*, [1974] S.C.R. 832, Abbott J. dissenting.

¹⁶⁶ [1985] 2 S.C.R. 417.

¹⁶⁷ *Ibid.*, at para. 39.

¹⁶⁸ [1956] S.C.R. 31.

¹⁶⁹ S.S. 1943, c. 18.

7-0 ruling, the Court held that the provincial legislation was *ultra vires*. The case remains better known for its contribution to the division of powers jurisprudence than for its contribution to discharge policy.¹⁷⁰

In separate reasons for judgment, Justice Rand articulated the important distinction between bankruptcy and insolvency:

Each of the two words, bankruptcy and insolvency, must be given its full force. Bankruptcy is a well-understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditor.

...

Insolvency, on the other hand, seems to be a broader term that contemplates measures of dealing with the property of debtors unable to pay their debts in other modes or arrangements as well.¹⁷¹

From a constitutional perspective, Justice Rand concluded that, if a "province steps in and assumes the general protection of the debtor...it is acting in relation to insolvency and assuming the function of Parliament."¹⁷² While Justice Rand was not the first to consider the distinction between bankruptcy and insolvency,¹⁷³ his judgment remains influential in constitutional jurisprudence. In 2001, the Supreme Court of Canada in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*¹⁷⁴ quoted from Justice Rand's definition in order to determine the meaning of bankruptcy within s. 91(21) of the *Constitution Act*.

A less well-known aspect of *Re Moratorium Act* was Justice Rand's own articulation of the purpose of the discharge. Justice Rand concluded that, to bankruptcy proceedings:

¹⁷⁰ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007) at 25-2 and 25-7.

¹⁷¹ *Re Moratorium Act*, [1956] S.C.R. 31, at 46.

¹⁷² *Ibid.*, at para. 54.

¹⁷³ *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Attorney-General of Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *A.-G. B.C. v. A.-G. Can. et al., Reference re Farmers' Creditors Arrangement Act, 1934*, [1937] A.C. 391.

¹⁷⁴ [2001] 3 S.C.R. 978. See also *Re Antwerp Bulkcarriers, N.V.*, [2001] 3 S.C.R. 951, at para. 34; *Principal Plaza Leaseholds Ltd. v. Principal Group Ltd. (Trustee of)*, [1996] 9 W.W.R. 539 (Alta. Q.B.); *Re McIntosh-Marshall Equipment Ltd.*, (1964), 48 D.L.R. (2d) 619 (Alta. S.C.); *Alberta (Attorney General) v. Nash* (1964), 7 C.B.R. (N.S.) 92 (Alta. C.A.), at para. 12.

...not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.¹⁷⁵

He also articulated the purpose of insolvency legislation. With insolvency mechanisms a debtor might “avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors” and “these means of salvage from the ravages of misfortune are of the essence of insolvency legislation.”¹⁷⁶

Justice Rand’s decision stood in sharp contrast to earlier prevailing attitudes toward the discharge. While it followed *Lalonde*, in many ways Justice Rand’s thinking on the discharge was broader. First, he recognized the “personal stigma” that attached to a bankrupt, something the court in *Lalonde* had not done. Courts have continued to recognize the stigma of personal bankruptcy in modern jurisprudence.¹⁷⁷ Secondly, he concluded that bankruptcy might impose restrictions on the debtor to engage in business in the future. Thirdly, he understood that, without a release of the bankrupt’s debts, a debtor would be unable to rehabilitate himself “economically and socially.”¹⁷⁸ Although *Lalonde* also recognized the rehabilitation principle, Justice Rand did not qualify that principle as the Court had done in *Lalonde*. Finally, when setting out his definition of insolvency law, Justice Rand considered the broad purpose of insolvency provisions. If bankruptcy was a coercive procedure to bring the control of assets into a single proceeding, insolvency provisions were designed to avoid the consequences of a bankruptcy. Justice Rand concluded that insolvency provisions were the “means of salvage from the ravages of misfortune.”¹⁷⁹ Such a statement rejected the traditional attitude towards debtors. Justice Rand recognized that debtors failed or approached bankruptcy through the “ravages of misfortune”, rather than through some fault of their own or some moral failing.

While most courts and legal scholars have focused on *Re Moratorium Act*’s contribution to constitutional law, Justice Rand has also made a significant contribution to discharge jurisprudence. The Supreme Court of Canada in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*¹⁸⁰ concluded that Justice Rand’s judgment contained “important

¹⁷⁵ *Re Moratorium Act*, [1956] S.C.R. 31, at 46.

¹⁷⁶ *Ibid.*, at 46; and *Re Drummie* (2002), 37 C.B.R. (4th) 241 (N.B. Q.B.), at para. 16..

¹⁷⁷ Other cases have since recognized the problem of stigma. However, they have done so without citing *Re Moratorium Act*. See *Jones & MacLean v. All-Temp Trailer Service Ltd.* (1994), 26 C.B.R. (3d) 33 (N.B.C.A.), at para. 37; *Re Nelson* (2006), 18 C.B.R. (5th) 304 (Ont. S.C.J.), at para. 10; *Re Mernick* (1992), 14 C.B.R. (3d) 263 (Ont. (Gen. Div.)), at para. 23.; *Re 539618 Ontario Inc.* (1987), 66 C.B.R. (N.S.) 2 (Ont. S.C.), at para. 41.

¹⁷⁸ *Re Moratorium Act*, [1956] S.C.R. 31, at 46.

¹⁷⁹ *Ibid.*

¹⁸⁰ [2001] 3 S.C.R. 978.

‘public policy’ objectives of bankruptcy legislation.”¹⁸¹ The Ontario Court of Appeal, in relying upon *Re Moratorium Act*, articulated those public policy objectives:

An important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society -- subject to reasonable conditions -- by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met.¹⁸²

Justice Rand’s articulation of the discharge as rehabilitation rejected the traditional view that the debtor’s financial failure was attributed to some moral failure or that the debtor’s failure was a result of reckless behaviour designed to deceive creditors. In other words, the debtor’s failure was traditionally attributed to his or her own fault. It was that notion that Justice Rand sought to overcome in his decision.

However, in recent years the rehabilitative purpose of bankruptcy law has been undermined by statutory amendments. Legislative changes to the *BIA* have moved the law away from rehabilitation as the underlying theory for the discharge.¹⁸³ Straight bankruptcy followed by a discharge has been made more difficult. Debtors are required to meet surplus income requirements and some debtors with surplus income may have to remain bankrupt for a longer period. Stephanie Ben-Ishai has suggested that the 1997 amendments “signalled a return to the ‘debtor deviant’ construct” and the more recent 2005 and 2007 amendments “hold the potential to entrench this construct in Canada’s consumer bankruptcy system.”¹⁸⁴ While the courts should not ignore the wording of the new provisions, the courts still have the jurisdiction to interpret the sections in light of Justice Rand’s economic and social rehabilitation and allow debtors to avoid the “ravages of misfortune.”

C) CONCLUSION

Does Justice Rand have a commercial law legacy? In the area of contracts and bankruptcy law one finds numerous decisions where Justice Rand was called on to interpret the terms of a contract or statute. These cases, of which there were many, will long be forgotten and make little contribution to Justice Rand’s commercial legacy.

¹⁸¹ *Ibid.*, at para 65.

¹⁸² *Simone v. Daley* (1999), 43 O.R. (3d) 511 (C.A.), at para. 27. See also *Ironwood Investments Joint Venture v. Leggett (Trustee of)* (1996), 38 C.B.R. (3d) 256 (Ont. Gen. Div.), at para. 25.

¹⁸³ On the 1997 amendments, see Thomas Telfer, “Access to the Discharge in Canadian Bankruptcy Law”, *supra* note 131, at 231. On the 2005 and 2007 amendments see Stephanie Ben-Ishai, “Discharge” in Stephanie Ben-Ishai and Anthony Duggan, eds., *supra* note 98, at 356.

¹⁸⁴ Stephanie Ben-Ishai, “Discharge”, *ibid.*, at 358.

Most of these cases ignored larger policy questions and broke little new ground in the common law of contracts or in the interpretation of bankruptcy legislation. The question remains whether these numerous, non-descript cases outweighed his other contributions.

When given the right set of facts, Justice Rand sought to modify the common law of contracts or to articulate the policy underlying bankruptcy law. In *Barnes*, although in a minority, he provided the ‘contract in a hurry’ context to a ticket case involving an exclusion clause. Rather than rely upon a construction approach, as he had followed in earlier cases, Justice Rand criticized the owner of the shipping company and implicitly considered the bargaining power of the two parties. Here he found “virtual deception.” His reasons did not appeal to the rest of the Court. However, his approach may well have been ahead of his time. Modern exclusion cases, while not explicitly citing his *Barnes* judgment, implicitly adopt his approach.

Dawson remains Justice Rand’s most significant contribution to the law of contracts. Rejecting the notion that there was an offer of a unilateral contract, he found promissory intent and a binding bilateral contract. The result provided Dawson with a remedy and perhaps the most just result in the circumstances. The decision marked abandonment of a formalistic approach in favour of American authorities, providing Justice Rand with flexibility to find a binding bilateral contract as “instinct with obligation.” Both *Barnes* and *Dawson* illustrated this robust approach. The boundaries of the common law, the expectation interests of the parties and a just resolution were all in play.

In the field of bankruptcy law one finds an example of formalism at play. In *Guillot v. Lefavre*, Justice Rand adopted a plain language approach to interpret the unpaid wage claim provisions in the bankruptcy statute. He declined to discuss the underlying objective of the provision. In contrast to this formalistic approach, in *Re Moratorium Act*, he articulated the very policy foundations of the bankruptcy discharge which remain influential today. It is unclear why his case law showed such a contrasting style.

One would have hoped that his robust approach, in constitutional law cases and in *Barnes*, *Dawson* and *Re Reference Act*, would have been applied to the numerous other commercial law cases. Does Justice Rand have a commercial law legacy? The large number of judgments, which made little or no contribution to the law of contracts or bankruptcy, certainly weigh against such a legacy. However, the strength in *Barnes*, *Dawson* and *Re Reference Act* on balance establishes it. Indeed, one wonders how the legal world would have unfolded without these significant judgments. These leading cases help to “complete the judicial profile”¹⁸⁵ of Justice Rand.

¹⁸⁵ Jacob S. Ziegel, *supra* note 19, at 393.

