"THE MAVERICK CONSTITUTION" — A REVIEW OF *CANADIAN MAVERICK: THE LIFE AND TIMES OF IVAN C. RAND*, WILLIAM KAPLAN (TORONTO: UNIVERSITY OF TORONTO PRESS FOR THE OSGOODE SOCIETY FOR CANADIAN LEGAL HISTORY, 2009)

> When a man has risen to great intellectual or moral eminence; the process by which his mind was formed is one of the most instructive circumstances which can be unveiled to mankind.
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> It displays to their view the means of acquiring excellence, and suggests the most persuasive motive to employ them. When, however, we are merely told that a man went to such a school on such a day, and such a college on another, our curiosity may be somewhat gratified, but we have received no lesson. We know not the discipline to which his own will, and the recommendation of his teachers subjected him.
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> James Mill[1]

While there is today a body of Canadian constitutional jurisprudence that attracts attention throughout the common law world, one may not have foreseen its development in 1949 — the year in which appeals to the Judicial Committee of the Privy Council (Privy Council) were abolished and the Supreme Court of Canada became a court of last resort. With the exception of some early decisions regarding the division of powers under the *British North America Act, 1867*,[2] one would be hard-pressed to characterize the Supreme Court's record in the mid-twentieth century as either groundbreaking or original.[3] Once the Privy Council asserted its interpretive dominance over the *B.N.A. Act*, the Canadian approach to constitutional adjudication was typically hidebound by English precedent and out of step with the political realities of Canadian society.[4] Thus, when Professor Bora Laskin assessed the Supreme Court's constitutional legacy in 1951, he stated bluntly that "it is clear that the Court has not hitherto been regarded by the public at large as a potent element in Canadian self-government."[5] Later, as if to punctuate this assessment, he observed that "neither the Court itself nor (with a few exceptions) its judges have been subjected to appraisal in any book or article."[6]

If the number of biographies about former Supreme Court justices is a bellwether for the reputation of the Supreme Court, it appears that much has changed over the past 60 years.[7]

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1 As cited in Alexander Bain, *James Mill: A Biography* (London: Longmans, Green, 1882) at 56-57.

2 (U.K.), 30 & 31 Vict., c. 3, reprinted as the *Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5 [*B.N.A. Act*].

3 For early instances of the Supreme Court's interpretive attitude, see *Severn v. R.* (1878), 2 S.C.R. 70; *Re Provincial Jurisdiction To Pass Prohibitory Liquor Laws* (1894), 24 S.C.R. 170.

4 See e.g. *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.); *Hodge v. R.* (1883), 9 App. Cas. 117 (P.C.); *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 (P.C.); *Ontario (A.G.) v. Canada (A.G.)*, [1896] A.C. 348 (P.C.).

5 Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038 at 1040.

6 *Ibid.*

7 David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984); Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2001); Dennis Gruending, *Emmett Hall: Establishment Radical* (Toronto: Macmillan, 1985); W.H. McConnell, *William R. McIntyre: Paladin of the Common Law* (Montreal: McGill-Queen's University Press for Carleton University, 2000); Frederick Vaughan, *Aggressive in Pursuit: The Life of Justice Emmett Hall* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2004); Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2005); Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2003); James W. St. G. Walker,

William Kaplan's biography about Ivan Rand (who served on the Supreme Court from 1943-1959) is the latest in a series of judicial biographies, and it provides many important insights about a judge who was at the forefront of what might be called the "independence movement" in Canadian constitutional law.[8] Rand is a central figure in Canadian legal history, primarily because he was the author of a series of landmark opinions that are cornerstones in our common law constitution.[9] These cases stand out because Rand vindicated the rule of law and fundamental human rights, like freedom of speech and freedom of religion, without having the luxury of a bill of rights. What is equally impressive is that these decisions still have currency today even though the *Canadian Charter of Rights and Freedoms* was adopted and entrenched in 1982.[10]

However, as Kaplan's book shows, Rand's resumé extends beyond these cases. He was also a leading figure in the formative years of Canadian labour relations, a member of the United Nations Special Committee on Palestine, and the founding law dean at the University of Western Ontario. As a result, the book will be of interest not only to lawyers, but to anyone interested in learning about the political issues and institutions that shaped Canada's first century.

Ivan Cleveland Rand was born in Moncton, New Brunswick on 27 April 1884. His father, Nelson, was a foreman with the Intercolonial Railway and "was active in community life, particularly as one of the first stewards of the Central Methodist Church, … and as a member of the Masons, the Order of Oddfellows, and the Loyal Orange Order."[11] His mother, Minnie, was a Baptist and deeply religious, but deferred to her husband's religious beliefs during Rand's childhood.[12] Kaplan portrays Moncton as a town divided by prejudice over language (English/French) and religion (Protestant/Roman Catholic). He describes the young Rand, who attended Mount Allison Wesleyan Academy from 1905-1909, as a student driven by a Protestant work ethic,[13] but whose social skills "left something to be desired."[14]

Shortly after graduating from college, Rand chose to pursue a legal career despite the counsel of his mentor, Clifford Robinson, who was a prominent Moncton lawyer, politician, and fellow Methodist. But instead of apprenticing with another lawyer or attending Dalhousie, Rand enrolled at Harvard Law School, which was (and is) generally regarded as

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"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies (Waterloo, Ont.: Wilfrid Laurier University Press for The Osgoode Society for Canadian Legal History, 1997); John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002).

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

9 See e.g. *Reference in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248; *Boucher v. R.* (1950), [1951] S.C.R. 265 [*Boucher*]; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887 [*Winner*]; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299 [*Saumur*]; *Smith & Rhuland Limited v. R.*, [1953] 2 S.C.R. 95 [*Smith & Rhuland*]; *Switzman v. Elbling*, [1957] S.C.R. 285 [*Switzman*]; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*].

10 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference Re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.

11 Kaplan, *supra* note 8 at 4.

12 *Ibid.*

13 *Ibid.* at 6.

14 *Ibid.* at 11.

the best law school in the English speaking world.[15] After graduating from Harvard, Rand promptly moved to Alberta to seek his fortune. Kaplan does an admirable job of detailing Rand's early career as a frontier lawyer in Medicine Hat from 1913-1920. Rand's practice was typical for a small town lawyer — he represented whoever walked through the door on any given day, dabbled in local politics, and cultivated a small stable of institutional clients. But when the booming Alberta economy went bust after World War I and family tragedy struck back home, Rand returned to Moncton to practice law with his mentor. Among other things, Rand's decision to return to New Brunswick thwarted Henry Marshall Tory's plan to hire Rand as the first dean of the new law school at the University of Alberta.[16]

When Rand arrived back in Moncton, Robinson was serving as Minister of Lands and Mines in the provincial Liberal government. Later on, Rand was given his first (and only) opportunity to enter the arena of provincial politics when Robinson resigned his seat in 1924 to accept a Senate appointment. Rand's campaign was given a further boost by the Premier, an Acadian named Peter Veniot, who appointed Rand Attorney General in advance of the by-election. Unfortunately for Rand, he was embarrassed at the polls. Nevertheless, with the Premier's continuing support, Rand was elected later that year in Gloucester County, "a long-standing Liberal stronghold with an overwhelming Acadian base."[17] The bills that Rand sponsored during his brief time in government were consistent with the Liberal party's progressive agenda, but within five months Veniot's government was defeated in a general election and Rand's political career came to an abrupt end.

For the next 17 years, Rand was employed by the Canadian National Railway (CNR) — initially as regional counsel for Atlantic Canada and later as commission counsel for the entire railway. Once again, it seems that Rand's legal practice during this period was mixed, but he employed a common strategy: "[T]he railway almost never admitted fault and litigated everything."[18] What is more interesting, from an historical perspective, is that Rand joined the CNR at a time when its president, Sir Henry Thornton, introduced a series of radical reforms including a new approach to labour relations, which he called "Union-Management Co-operation."[19] Thornton's plan was to direct union leaders and local managers to engage in dialogue about how to improve working conditions and railway performance.[20] According to Kaplan, this approach was a huge success and taught Rand an invaluable lesson: that union representation was instrumental in elevating the welfare of employees, improving industrial efficiency, and maintaining social harmony.[21]

This lesson served Rand well in his later years as a Supreme Court judge, especially during the 1945-1946 Windsor Ford strike. The arbitration award that ended the strike

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15 *Ibid.* at 13.

16 Tory was the son of a Methodist minister, a graduate of Wesleyan College in Montreal, and the first president of the University of Alberta. Tory was determined to hire a graduate of Harvard Law School for his new law faculty, and Rand was highly recommended by Roscoe Pound, who was dean of Harvard at the time: see letter from Roscoe Pound to Henry Marshall Tory (17 June 1921); telegram from Henry Marshall Tory to Ivan Rand [n.d.]; telegram from Ivan Rand to Henry Marshall Tory (7 June 1921). All documents may be found in the University of Alberta Archives (Accession #68-69, Box 10, Folder 122).

17 Kaplan, *supra* note 8 at 49.

18 *Ibid.* at 68.

19 *Ibid.* at 76.

20 *Ibid.*

21 *Ibid.* at 82.

established the Rand Formula, a system whereby employers are required to collect union dues and employees are required to pay dues in exchange for union representation. Kaplan's personal experience as a mediator and labour arbitrator shines through as he sifts through the details of the strike, especially the vicious cycle caused by surplus post-war labour, management intransigence, and the provocative influence of communist sympathizers within union ranks.[22] Rand kept a remarkably cool head through it all, and his inventive award remains a landmark in Canadian labour relations.

Two themes form the backbone of Kaplan's book. The first concerns Rand's conflicted personality. In his famous decisions and most of his early professional life, Rand comes off as a cerebral, hard-working, liberal-minded individual who preached the virtues of rationality, tolerance, and mutual respect. But he also had a dark side. He was generally considered to be austere and aloof by his colleagues,[23] clients,[24] staff,[25] and (sadly) his children.[26] He was also male chauvinist,[27] whose political views turned increasingly reactionary once he retired from the Court.[28] Kaplan also claims that Rand harboured deep-seated prejudices against Acadians, Roman Catholics, and Jews. For instance, when his youngest sister married an Acadian against his wishes, Rand cut off his relations with her, and when Rand was asked to investigate Leo Landreville, a French-Canadian justice of the Ontario Supreme Court, for judicial misconduct, Rand allowed personal animus to get the better of him.[29]

The second theme, which features less prominently but is probably of more interest to lawyers and political scientists, concerns the intellectual history behind Rand's famous constitutional decisions. While this seems to have been the initial impetus for the book, Kaplan's message here is more muddled. Part of the problem is structural. The chapter about Rand's jurisprudence is divided into 14 subsections, which prevents him from probing Rand's decisions in any depth. Moreover, with the exception of a brief mention of Rand's Oliver Wendell Holmes Lecture,[30] Kaplan fails to explore Rand's extra-judicial writings about constitutional law.[31] Consequently, Kaplan's analysis of Rand's constitution and its legacy is broad ranging but shallow.

Nevertheless, Kaplan offers two different explanations for Rand's "maverick" constitution. The first is that Rand was inspired by his dark side when he defended civil rights. Kaplan notes that, when asked to explain the inspiration behind Rand's most famous opinions, one of his former faculty colleagues at the University of Western Ontario replied

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22 *Ibid.*, c. 5.
23 *Ibid.* at 315.
24 *Ibid.* at 23.
25 *Ibid.* at 92.
26 *Ibid.* at 82-83.
27 *Ibid.* at 84, 306, 313.
28 *Ibid.*, c. 8-10.
29 *Ibid.* at 351-73.
30 See Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135. The address was delivered at Harvard Law School on 26 February 1960. The text of the address was published in this article.
31 See e.g. I.C. Rand, "Louis D. Brandeis" (1947) 25 Can. Bar Rev. 240; Ivan C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1; I.C. Rand, "Man's Right to Knowledge and Its Free Use" (1954) 10 U.T.L.J. 167; Ivan C. Rand, "Except By Due Process of Law" (1961) 2 Osgoode Hall L.J. 171; Ivan C. Rand, "The Role of the Supreme Court in Society" (1991) 40 U.N.B.L.J. 173.

that "Rand had to decide who he hated less, French Roman Catholics or the Jehovah's Witnesses."[32] Without more, Kaplan asserts that it is "more likely than not that Rand's great civil liberties judgments were to some degree motivated by a dislike of Roman Catholics and French Canadians."[33] This seems uncharitable in light of the fact that Rand was able to forge positive working relationships with French Canadians, and "supported Israel to his dying day, even making personal contributions to the Hebrew University."[34] More importantly, there is absolutely no evidence that Rand employed the syllogism "the enemy of my enemy is my friend" in his famous decisions. Instead, he talked openly about constitutional principles such as the rule of law,[35] the "privileges and immunities" of citizenship,[36] and freedom of speech.[37]

Kaplan's second explanation, that Rand was influenced by his educational experience at Harvard, seems the more promising lead.[38] Unfortunately, Kaplan expends very little effort — three pages in a 437-page book — historicizing Rand's experience at Harvard. Instead, Kaplan stitches together what seems like a series of postcards sent home by a taciturn undergraduate, from which we learn only the bare essentials about Rand's time in Cambridge: what Rand paid for room and board, his frugal diet of soup and crackers, the importance of the case method at Harvard, and the fact that he studied constitutional law in his third year. While Kaplan does mention a few names from the Harvard faculty — Joseph Beale, Roscoe Pound, Ezra Thayer, and James Barr Ames — he fails to elaborate how these figures may have shaped Rand's later views about the Canadian constitution. And he says nothing at all about the shadows cast over Harvard by Oliver Wendell Holmes Jr., Louis Brandeis, and Learned Hand, whom Kaplan later notes were heroes in Rand's eyes.[39]

From what we know, Rand learned constitutional law from Eugene Wambaugh, a Harvard graduate who was appointed to the Langdell Professorship in 1903[40] and took over the course from John Chipman Gray in 1904.[41] Although Wambaugh did edit a series of casebooks[42] and was an editor with the *American Political Science Review* from 1906-1912, "he left no great monuments in writing."[43] Apparently Wambaugh thought that the case method of instruction meant that academic commentary should be confined to setting out the facts of relevant cases from which students might draw their own conclusions.[44] Even though Wambaugh published his casebook on constitutional law three years after Rand graduated from Harvard, its contents provide a window into the formation of Rand's thinking about the rule of law and

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32 Kaplan, *supra* note 8 at 427.
33 *Ibid.*
34 *Ibid.* at 433.
35 *Roncarelli*, *supra* note 9 at 142.
36 *Ibid.* at 141; *Winner*, *supra* note 9 at 919-20; *Smith & Rhuland*, *supra* note 9 at 99. For elaboration on this theme, see Matthew Lewans, "*Roncarelli*'s Green Card: The Role of Citizenship in Randian Constitutionalism" (2010) 55 McGill L.J. 537.
37 *Boucher*, *supra* note 9 at 288; *Saumur*, *supra* note 9 at 329; *Switzman*, *supra* note 9 at 306.
38 Kaplan, *supra* note 8 at 16, 425-26.
39 *Ibid.* at 105.
40 Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (Union, N.J.: The Lawbook Exchange, 1999) vol. 2 at 516.
41 *Ibid.* at 478.
42 See e.g. Eugene Wambaugh, *The Study of Cases* (Boston: Little, Brown, 1892); Eugene Wambaugh, *A Selection of Cases on Agency* (Cambridge: Harvard University Press, 1896); Eugene Wambaugh, *A Selection of Cases on Insurance* (Cambridge: Harvard Law Review Publishing Association, 1902); Eugene Wambaugh, ed., *Littleton's Tenures in English* (Washington: John Byrne, 1903).
43 Edmund M. Morgan, "Eugene Wambaugh" (1940) 54 Harv. L. Rev. 4 at 5.
44 *Ibid.*

constitutionalism. The third volume of the casebook, entitled *Some Provisions Protecting the Individual and Simultaneously Promoting Nationalism*,[45] examines the "privileges and immunities" clause of the fourteenth amendment in light of famous cases like the *Slaughter-House Cases*,[46] *Civil Rights Cases*,[47] and *Plessy v. Ferguson*.[48] What is interesting is that these cases outline a restrictive interpretation of the fourteenth amendment, culminating in the now discredited "separate but equal doctrine." Thus, while it may be an overstatement to say that Rand's constitution was "invented out of whole cloth,"[49] it seems that it was still innovative in the sense that it honoured the principle of equality set out in the fourteenth amendment in ways that the United States Supreme Court did not.[50]

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45 Eugene Wambaugh, *A Selection of Cases on Constitutional Law: Some Provisions Protecting the Individual and Simultaneously Promoting Nationalism*, vol. 3 (Cambridge: Harvard University Press, 1915).
46 83 U.S. (16 Wall.) 36 (1872).
47 109 U.S. 3 (1883).
48 163 U.S. 537 (1896).
49 Kaplan, *supra* note 8 at 111.
50 Lewans, *supra* note 36.