

# A Walking Contradiction: A Review of *Canadian Maverick: The Life And Times Of Ivan C. Rand*

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D A R C Y L . M A C P H E R S O N \*

## I. INTRODUCTION

I, like many law students of my generation of the early-to mid-1990s, knew relatively little of The Honourable Mr. Justice Ivan Cleveland Rand. Of course, I was aware of his service on the Supreme Court of Canada—Justice Rand served on the Court from 1943 to 1959—even though it ended more than 15 years before I was born, and long before judges had the explicit guarantees of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> and the judgments penned to expound upon them by which to earn national attention. I also knew that he had developed the “Rand formula”, wherein no one is required to join a union even where the workforce is unionized, but the non-members are required to pay the equivalent of union dues; because the non-member benefits by the activities of the union, especially through its collective bargaining activities.

## II. BOOKEND SURPRISES?

Until recently, this short summary constituted the entirety of my knowledge of the man and his accomplishments. Then, I picked up

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\* Professor, Faculty of Law, University of Manitoba. Thanks are owed to both Ms. Melanie Wire, who offered wonderful research assistance and read drafts, and to the student editors at the Manitoba Law Journal for their editorial assistance.

<sup>1</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (UK), c 11 [the “Charter”].

*Canadian Maverick: The Life and Times of Ivan C. Rand* by William Kaplan.<sup>2</sup> For me, two of the most surprising things about this book are found at either end of it. In the preface, after discussing the biographies of other members of the Supreme Court of Canada, Kaplan writes:

To date, except around the edges, Canadian judicial biography has been, with a few exceptions, mostly uncritical and largely celebratory, written by unabashed admirers. To my great surprise, this book turned out to be different.<sup>3</sup>

In one sense, the first sentence in this excerpt is hardly surprising. Historical biographies should be written by people who have an interest in their subject. After all, how else can a person commit to a long-term project like a comprehensive book-length biography of a public figure?<sup>4</sup> With a few exceptions, most people have to find a way to identify with their subject. That usually means admiration and/or commonality with the subject.

However, historians, though they will likely have views on the facts that they are learning, should be ready to report what they learn, whether good, bad, or ugly. For producing an honest look at an important Canadian judicial figure, Kaplan deserves thanks. Rand might otherwise be forgotten in a generation or two, or at the very least, relegated to the annals of his short biography on the Supreme Court of Canada's website.<sup>5</sup>

But, the second sentence was certainly a surprise. To take an active dislike to a subject to which one has devoted a 20-year project would be rather unusual. Not only that, but as will be discussed in more detail below, Kaplan's changing view of (and one might even say his emotional response to) his subject affected the overall tone of the book.

The other end of the book was its final chapter. The concluding chapter is, for me at least, a very nice summary of that which preceded it. As will be discussed further below, where it falls down somewhat is that the conclusion is not terribly convincing at drawing together the disparate

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<sup>2</sup> *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto, Buffalo and London: University of Toronto Press, 2009) ["*Canadian Maverick*"].

<sup>3</sup> *Ibid* at xv.

<sup>4</sup> Interestingly, this particular project, according to the author himself, took approximately 20 years. See *Canadian Maverick*, *ibid* at xi.

<sup>5</sup> See Supreme Court of Canada, "The Honourable Ivan Cleveland Rand" (modified 4 September 2008), online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=ivan-cleveland-rand>>.

parts of a man described as “contradictory”,<sup>6</sup> nor does it satisfactorily explain the massive changes in tone throughout the book.

### III. CHAPTER SUMMARIES

In the first chapter, entitled “The Right Start”,<sup>7</sup> Kaplan begins by covering essentially the first third of Rand’s life: from childhood<sup>8</sup> to his student days at Mount Allison University in his native New Brunswick;<sup>9</sup> to Harvard Law School;<sup>10</sup> to a brief stop in Saskatchewan;<sup>11</sup> through courtship of and marriage to Iredell (Dell) Baxter;<sup>12</sup> to becoming a lawyer in Medicine Hat, Alberta;<sup>13</sup> and ultimately, to the decision to return to his native Moncton.<sup>14</sup> The account is detailed, but not dense, and thus an easy read. In fact, the entire volume is eminently readable, with prose that is lucid, but without unnecessary affectation or technicality.

The second chapter, “The Young Lawyer Tries Politics”,<sup>15</sup> shows that Rand was not good at everything he attempted. He was a capable lawyer, who received much work from the Province of New Brunswick to appear between both administrative tribunals and courts with respect to freight rates.<sup>16</sup> He was one of the lead counsel on the legal questions that would vex the creation of the United Church of Canada.<sup>17</sup> But as a prosecutor, he lost one of the most notorious murder cases in New Brunswick at the time.<sup>18</sup> While Rand was a successful advocate before tribunals and courts

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<sup>6</sup> *Canadian Maverick*, *supra* note 2 at 424.

<sup>7</sup> *Ibid* at 3-28.

<sup>8</sup> *Ibid* at 3-6.

<sup>9</sup> *Ibid* at 6-13.

<sup>10</sup> *Ibid* at 13-16.

<sup>11</sup> *Ibid* at 16.

<sup>12</sup> *Ibid* at 16-18.

<sup>13</sup> *Ibid* at 18-27.

<sup>14</sup> *Ibid* at 27-28.

<sup>15</sup> *Ibid* at 29-63.

<sup>16</sup> *Ibid* at 30-40.

<sup>17</sup> *Ibid* at 41-44.

<sup>18</sup> *Ibid* at 40-41.

in Canada, he had a losing record at the Judicial Committee of the Privy Council in London.<sup>19</sup>

Despite his ability in debate (detailed in the account of Rand's days at Mount Allison), Kaplan makes the point that Rand was not at his core a warm person, even with his own family.<sup>20</sup> Politics, particularly in Atlantic Canada, tend to be very personality-driven.<sup>21</sup> The voters often cast their ballot based on the personality of the candidate or that of the party leader. Without this warmth, Rand lost a by-election in his home riding,<sup>22</sup> and the Liberal Party of New Brunswick used one of its safest seats in a second by-election to get Rand elected, though by a smaller margin compared to previous elections.<sup>23</sup> As the pre-ordained attorney-general (the premier had named Rand to the Cabinet prior to the first by-election),<sup>24</sup> Kaplan points out that Rand was a reformer, but no radical.<sup>25</sup> Rand's political career was brief, as he and his party were both removed from office in the next provincial general election.<sup>26</sup>

Rand returned to his legal practice, but soon found himself offered a position with the Canadian National Railway. It is this period of Rand's life that is the subject of Chapter 3, "The Railway Counsel at Work and at Home."<sup>27</sup> What is interesting here is that it appears Rand had no problem burying whatever liberal tendencies might otherwise be in evidence, as Rand was in the upper echelon of a department that developed strategies to deny recoveries to complainants.<sup>28</sup> Representative cases were discussed through much of the chapter as the railway tried to navigate its public mandate of providing transportation services,<sup>29</sup> while still managing an

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<sup>19</sup> *Ibid* at 72.

<sup>20</sup> *Ibid* at 82-83.

<sup>21</sup> The author of the review grew up in the politics of Prince Edward Island where family members, friends, and acquaintances were all involved in or attached to political campaigns.

<sup>22</sup> *Canadian Maverick*, *supra* note 2 at 49.

<sup>23</sup> *Ibid* at 50-52.

<sup>24</sup> *Ibid* at 47.

<sup>25</sup> *Ibid* at 52-53.

<sup>26</sup> *Ibid* at 61-63.

<sup>27</sup> *Ibid* at 64-92.

<sup>28</sup> *Ibid* at 89-90.

<sup>29</sup> Transportation services, even when operated in the private sector, are an acknowledged public good. See the *Canada Transportation Act*, SC 1996, c 10, in

ever-mounting debt.<sup>30</sup> Perhaps the most interesting part of the chapter was the discussion of Rand's home life.<sup>31</sup> Rand's wife, Dell, was described as totally devoted to her family, particularly her husband.<sup>32</sup> Rand himself was a "stern, judgmental taskmaster",<sup>33</sup> who demanded that his two sons show the same work ethic that characterized his own personality. He placed a high value on loyalty and earning what one received, both with his sons and his siblings.<sup>34</sup> Rand had little time for his three sisters,<sup>35</sup> even charging rent to his youngest sister for living in their parents' home<sup>36</sup>—which had been bequeathed to Justice Rand—after their mother's death.<sup>37</sup>

In Chapter 4, "The Framework of Freedom",<sup>38</sup> Kaplan details in a very laudatory fashion Rand's significant contribution to the Supreme Court of Canada. Interestingly, while Rand is credited with writing some of the most memorable judgments in the history of the institution, it is as Kaplan claims, largely an impression.<sup>39</sup> But, there are members of the Court, both today and in the recent past, who were bellwethers on particular issues.<sup>40</sup> It appears that, in Kaplan's view, Rand's judgments made him a bellwether on issues of freedom against unwarranted government intrusion on the activities of minority groups.

Then, Kaplan points out that this judicial attitude did not seem to translate to his personal life. Justice Rand was known to counsel family

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particular, section 5 thereof.

<sup>30</sup> *Canadian Maverick*, *supra* note 2 at 75-80.

<sup>31</sup> *Ibid* at 82-89.

<sup>32</sup> *Ibid* at 82.

<sup>33</sup> *Ibid* at 82-83.

<sup>34</sup> *Ibid* at 83-84.

<sup>35</sup> *Ibid* at 84.

<sup>36</sup> Rand's father had predeceased his mother. *Ibid* at 85.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 93-164.

<sup>39</sup> *Ibid* at 143.

<sup>40</sup> For example, there can be no doubt that Justice Rosalie Silberman Abella (a current member of the Supreme Court of Canada) is one of this country's – and the world's – foremost authorities on the law of equality and human rights. When Justice Abella finds no credibility in an equality claim, there is a certain additional influence to this decision simply because of her background and specialized knowledge. One could make the same claim with respect to transportation law when discussing the career of the recently-retired Justice Marshall Rothstein, or the law of standing to maintain a lawsuit with respect to recently-retired Justice Thomas Cromwell.

members to avoid the Acadians in New Brunswick.<sup>41</sup> This is surprising, considering that the premier of New Brunswick during Rand's brief foray into politics was Acadian.<sup>42</sup> Kaplan explains this by saying that Rand's prejudices were subject to individualized exceptions.<sup>43</sup>

With respect to the next chapter, "Rand's Formula",<sup>44</sup> my major complaint is that the first thirty pages of the chapter had little to do with Rand. Rather, it focused on the struggle that precipitated the dispute that Rand was asked to resolve by the award that contained the famous formula that has become one of the mainstays of Canadian labour law.<sup>45</sup> The most interesting thing about Kaplan's account is that it portrays Rand as the conciliator, the negotiator who brought parties who had been fighting over many issues for a long time to a workable consensus on many of these. Justice Rand then proceeded to write an arbitration award that would implement a resolution in which neither side could declare an absolute victory over the other, but where nonetheless, each side could find that their respective legitimate concerns had been addressed in a meaningful way.<sup>46</sup> It seems as though there were three basic tenets or beliefs that motivated Justice Rand's approach to his task.

First, he believed that the idea that management and labour would be consistently, fundamentally, and diametrically opposed to one another was simply bad business.<sup>47</sup> Second, he saw that the relatively extreme positions of the parties on union security (management wanted no security for the union, financial or otherwise, while the union wanted all employees to have to be members of the union and pay dues, that is, the classic "union shop") as fairly unhelpful.<sup>48</sup> Third, he thus saw a need for a different approach, and his questions to the parties in the arbitration were directed at figuring out the potential of this different approach to avoid problems.<sup>49</sup>

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<sup>41</sup> *Canadian Maverick*, *supra* note 2 at 84.

<sup>42</sup> *Ibid* at 47.

<sup>43</sup> *Ibid* at 322.

<sup>44</sup> *Ibid* at 165-220.

<sup>45</sup> *Ibid* at 165-212.

<sup>46</sup> *Ibid* at 206.

<sup>47</sup> *Ibid* at 206-207.

<sup>48</sup> *Ibid* at 196.

<sup>49</sup> *Ibid* at 197.

By all accounts, including Kaplan's, Justice Rand did his job very well. But he did not do this alone. Horace Pettigrove would advise Justice Rand throughout the process.<sup>50</sup> What is interesting about this is not only that the two men did not get along from their initial meeting,<sup>51</sup> but that Pettigrove quickly became one of Justice Rand's few true lifelong friends to be dealt with at length in Kaplan's account.<sup>52</sup> The award written by Justice Rand changed the labour law landscape in a way that would be a made-in-Canada solution to the issue of union financial security.<sup>53</sup> This soon developed into a part of the legislative and policy choices that led to a long and sustained period of Canadian economic prosperity following World War II.<sup>54</sup>

In "Rand Tackles the Palestine Problem",<sup>55</sup> Kaplan does an admirable job in teaching the reader about the history of a problem (the division of what was then referred to simply as Palestine and creation of the modern state of Israel<sup>56</sup>) that was simply not part of my intellectual database—as a white, Anglo-Saxon, Catholic male born in 1975—up to that point. But, for me, there was an edge to some of Kaplan's writing that may not have been entirely fair to Rand. Though Kaplan describes some of Rand's ideas as "naïve" and "half-baked",<sup>57</sup> interestingly, Kaplan also admits that the ideas proposed by Justice Rand largely found favour with the majority of the United Nations Special Committee on Palestine.<sup>58</sup> The report of the Special Committee on Palestine ultimately led to the creation of the modern state of Israel, and its international recognition.<sup>59</sup> From my point of view, perhaps something else was at play for Justice Rand. Is it not possible that some of the details of Rand's proposal (which might have

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<sup>50</sup> *Ibid* at 194-195.

<sup>51</sup> *Ibid* at 195.

<sup>52</sup> The possible exception to this statement is the Right Honourable Chief Justice Sir Lyman Poore Duff. Though the two (Duff and Rand) would serve on the Supreme Court of Canada for less than a year, Duff would remain a friend to Rand until Duff's death in 1955. *Ibid* at 97, 106.

<sup>53</sup> *Ibid* at 216.

<sup>54</sup> *Ibid* at 217-220.

<sup>55</sup> *Ibid* at 221-251.

<sup>56</sup> *Ibid* at 223-224.

<sup>57</sup> *Ibid* at 249.

<sup>58</sup> *Ibid* at 246.

<sup>59</sup> *Ibid* at 250.

seemed unfair to the proposed Jewish state) were actually designed to show the Arab community that the Committee was not giving the Jewish representatives everything they were asking for? The Arab community was unlikely to accept any report of the Special Committee—many Arab leaders refused to meet with the Committee in the first place;<sup>60</sup> therefore, by making certain elements less than acceptable to Jewish representatives, he might have been trying to save the majority report from the criticism of being entirely one-sided.<sup>61</sup>

In Chapter 7, entitled simply “King Coal”,<sup>62</sup> Kaplan describes how Rand was asked to examine the diminishing coal industry in the early 1960s, as oil and natural gas rose to prominence as fuel sources. I must admit to a bit of bias on this subject. As the grandson<sup>63</sup> and son<sup>64</sup> of coal miners from Cape Breton, I have seen and heard about both the plight of miners on the one hand, and from outsiders, the complaints about Atlantic Canada in general, and how Cape Breton specifically is too dependent on government assistance. At points in the chapter, Kaplan seems to fall into this trap as well. He seems to point out the economic costs to the rest of the country of government support for Cape Breton miners.

Yet, he does not seem to recognize that, as much as the economic support was designed for the miners themselves, it was, in my view at least, equally designed to maintain a portion of the country, particularly where Cape Breton was the most economically depressed part of a largely non-economically-diversified province. Put another way, this was not about one person, one family, or even one industry. It was not about a way of life. Rather, this support was perhaps more accurately captured by the reality that massive displacement of individuals from Cape Breton due to a lack

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<sup>60</sup> *Ibid* at 230. The recognition of Israel was one of the few examples – if not the only one – of international co-operation between the United States and the Union of Soviet Socialist Republics during the period of the Cold War. On this point, see *Future Government of Palestine*, GA Res 181 (II), UNGAOR, 2<sup>nd</sup> Sess, Supp No 1, UN Doc A/RES/181 (1947) 131.

<sup>61</sup> *Canadian Maverick*, *supra* note 2 at 250.

<sup>62</sup> *Ibid* at 252-292.

<sup>63</sup> My paternal grandfather worked in the coal mines of Cape Breton from the age of 9 to the age of 64.

<sup>64</sup> My father spent a year in the mines at the age of 19 working alongside my grandfather.

of economic diversity (and, admittedly a dying industry) would not have been good for Canada. One sees this playing out again, with the current economic situation in Alberta. As oil prices began to wane, a single industry was no longer able to provide the bedrock of the economy in a much larger area of Canada.<sup>65</sup> Some may point out that the oil and gas industry has not sought any government assistance. But, the question is, if oil and gas were no longer economically viable without assistance, would the province be given help? I suspect that it would, simply because the displacement of a very large number of people will negatively affect not only those directly displaced, but also those who remain in the locale from which their neighbours have been displaced. As well, the new locales to which these large groups of displaced people are relocated may have trouble adapting to the influx of new people.

In “A Founding Dean of Law”,<sup>66</sup> Justice Rand’s time immediately following his retirement from the Supreme Court of Canada is detailed. His time at the University of Western Ontario<sup>67</sup> (between 1959 and 1964) was as the initial Dean of the Faculty of Law. Kaplan’s account in some ways portrays Justice Rand at his best. His experience made him a very knowledgeable lecturer,<sup>68</sup> and Kaplan argues that he really cared about the students.<sup>69</sup> He also taught a new course himself when no member of the teaching staff would agree to take it on.<sup>70</sup>

But, in some ways, this chapter also shows Rand at his worst. Kaplan describes a man who would use out-of-date teaching materials,<sup>71</sup> resort to autocratic behaviour (acting as if the opinions of other faculty members were irrelevant),<sup>72</sup> would not fight for raises and other benefits for his staff because it would be undignified to do so,<sup>73</sup> would interfere with—or at

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<sup>65</sup> Interestingly, the people of Cape Breton and Newfoundland are front and centre in another economic downturn, as many workers in Alberta’s oil and gas industry have been brought in, on a temporary basis, from both of these Atlantic Canadian locales.

<sup>66</sup> *Canadian Maverick*, *supra* note 2 at 293-330.

<sup>67</sup> The University of Western Ontario is now corporately branded as Western University.

<sup>68</sup> *Ibid* at 313.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* at 323.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at 315.

<sup>73</sup> *Ibid*.

least attempt to interfere with—the career plans of faculty members when they wanted to leave their respective posts,<sup>74</sup> and would openly discuss with other faculty members the possibility of dismissal of a professor for reasons that would be unlikely, by today’s standards at least, to justify this action,<sup>75</sup> among others. In some cases, such as the mistreatment of a professorial candidate because of his name, Kaplan would blame it on prejudice.<sup>76</sup> Matters were routinely left for the Dean to deal with.<sup>77</sup>

While much of what Kaplan writes is completely fair, there is one point where his criticism may have been unjustified. He questioned whether Justice Rand was the correct choice as Dean, questioning whether there was “sizzle” without the “steak”.<sup>78</sup>

In Chapter 9, “Canadian Gothic Meets the Mambo King”,<sup>79</sup> Kaplan’s approach is openly aggressive and even hostile to Rand. As Kaplan points out, in retirement, Justice Rand was asked to investigate the propriety of the activities of Justice Leo Landreville of the Supreme Court of Ontario.<sup>80</sup> The alleged misconduct was said to have arisen out of a stock deal conceived while Landreville was mayor of Sudbury.<sup>81</sup> At the time, there was no statutory mechanism to deal with the misconduct of judges.<sup>82</sup> Direct legislative intervention would be necessary to remove a judge from office.

To be clear, I agree with Kaplan that Justice Rand made mistakes. He reviewed on an *ex parte* basis a report of the Law Society of Upper Canada that found Justice Landreville guilty of misconduct and calling for his removal.<sup>83</sup> Justice Rand would also fail to follow the statutory requirements under the federal *Inquiries Act*.<sup>84</sup> For me, all of this is certainly sufficient to justify criticism of Justice Rand. At the same time, I

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<sup>74</sup> *Ibid* at 321.

<sup>75</sup> *Ibid* at 318.

<sup>76</sup> *Ibid* at 321-322.

<sup>77</sup> *Ibid* at 315.

<sup>78</sup> *Ibid* at 305.

<sup>79</sup> *Ibid* at 331-376.

<sup>80</sup> *Ibid* at 351. This court is now known as the Ontario Superior Court of Justice.

<sup>81</sup> *Ibid* at 340, 346-347.

<sup>82</sup> *Ibid* at 351.

<sup>83</sup> *Ibid* at 354-355.

<sup>84</sup> RSC 1985, c I-11.

am uncertain that Kaplan was not at least somewhat guilty of the same “offence” for which he holds Justice Rand accountable. Put another way, in my view, Kaplan argues that Justice Rand was overly aggressive in pursuing what Justice Rand perceived as an irremediable flaw in Justice Landreville’s character. Yet, Kaplan himself was not only descriptive. He seems to implicitly attribute Justice Rand’s excesses to prejudices against French speakers, and Roman Catholics, of which Justice Landreville was both.<sup>85</sup> But, one could question whether this was necessarily the case. Was Justice Rand allowing prejudice to pre-determine his outcome? Or was he simply applying his own view that judges are to be held to the highest possible moral and ethical standards? At the very least, Justice Rand had strong views about how judges ought to be expected to carry themselves, as was evident from the previous chapter, where Kaplan argued that asking for more money from the university was beneath the dignity of any judge.<sup>86</sup> Kaplan makes the case for prejudice. But, is it not also possible that Justice Rand knew that this was one of the first attempts to remove a section 96 judge,<sup>87</sup> at least in the modern era,<sup>88</sup> and therefore was trying to set the ethical bar for judges at a very high level? Perhaps Justice Rand recognized that it is very difficult to raise a moral standard that was much lower, as compared to lowering a standard that proves to be too high for modern usage. Of course, reading the mind of a man who died almost half a century ago<sup>89</sup> is impossible.

The chapter also discusses the creation of the Canadian Judicial Council<sup>90</sup> in response to the Landreville inquiry conducted by Justice Rand. Its creation was clearly designed to curb some of the procedural excesses of the Landreville inquiry, and to depoliticize the oversight of judges.<sup>91</sup> However, given recent events, we may not have moved as far away

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<sup>85</sup> *Canadian Maverick, supra* note 2 at 427-428.

<sup>86</sup> *Ibid* at 315.

<sup>87</sup> Section 96 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 provides that all superior court judges, among others, shall be appointed by the federal government.

<sup>88</sup> It would be difficult to prove that this was in fact the first case of attempted removal of a judge. But, given that it appears that there were no established procedures to deal with cases of this type, it would seem relatively obvious that these cases were not commonplace.

<sup>89</sup> Justice Rand died on January 2<sup>nd</sup>, 1969. See *Canadian Maverick, supra* note 2 at 422.

<sup>90</sup> *Canadian Maverick, Ibid* at 375.

<sup>91</sup> *Ibid*.

from character assassination as one might have hoped in disciplining judges who may have violated ethical standards.<sup>92</sup>

The final substantive chapter, called “Rand’s Disastrous Investigation into Labour Disputes”,<sup>93</sup> gives away much of Kaplan’s views of Rand’s work. In 1966, Justice Rand accepted a request from Ontario’s premier to serve as a one-person royal commission into labour unrest in the province. Justice Rand viewed picketing as something that needed to be stopped or severely curtailed.<sup>94</sup> He spent time going around the world looking at the approaches used in other jurisdictions.<sup>95</sup> Many people disagreed with this rather extreme approach,<sup>96</sup> and the recommendations found in the report produced by Justice Rand were not implemented.<sup>97</sup>

While it is undoubtedly correct on the facts, this chapter sees the use of hyperbole that, for me at least, was simply unnecessary. Even the use of the term “disastrous” in the title of the chapter seems unduly harsh. From my point of view, for a report to qualify as a “disaster”, more is required than a simple disagreement with the majority of people. In my view, one of the goals of any report like this should be to stimulate public debate. If this is true, then to that extent at least, the report was successful. If an extreme report causes people to see the virtues of the current system, this is positive. Calling it a “disaster” simply because it was not accepted by the government of the day seems unfairly harsh.

Some of the recommendations are also better understood in their historical context. As Justice Rand was writing in the mid-1960s, both Canada and the United States were experiencing an expansion of the modern welfare state. In the U.S., the “Great Society” programs under President Lyndon B. Johnson were some of the largest expansions of the welfare state since the New Deal era under President Franklin D.

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<sup>92</sup> The treatment of the Honourable Associate Chief Justice A. Lori Douglas (now retired) of the Manitoba Court of Queen’s Bench, Family Division, focused on “salacious” and “intimate” photographs of the judge before her appointment to the Bench posted on the Internet, and she claimed, without her knowledge, shows that perhaps we are still not above the vilification of judges when the judge does something that members of the public consider to be less than upstanding.

<sup>93</sup> *Canadian Maverick*, *supra* note 2 at 377-421.

<sup>94</sup> *Ibid* at 408.

<sup>95</sup> *Ibid* at 400-402.

<sup>96</sup> *Ibid* at 403, 410.

<sup>97</sup> *Ibid* at 420.

Roosevelt.<sup>98</sup> The Canada Pension Plan had recently been introduced.<sup>99</sup> Is it really all that surprising that Justice Rand believed that a new government tribunal could resolve labour disputes? Given Justice Rand's experiences in the Ford dispute—where picketers prevented non-striking workers from attending work.<sup>100</sup> Is it really surprising that Justice Rand would want to limit these problems? Justice Rand, when he was at the Supreme Court of Canada, authored the lead judgment in a case called *Aristocratic Restaurants*.<sup>101</sup> While it was intended to acknowledge workers' rights to picket, the case, according to Kaplan, caused the courts to be more hostile to picketing.<sup>102</sup> Is it not possible that by creating a tribunal outside the court system to deal with these disputes, Justice Rand was trying to implicitly acknowledge that the courts had not been terribly successful in dealing with these issues? During the Ford dispute, there was significant illegality that occurred, much of it between strikers on the picket line and others.<sup>103</sup> To my way of thinking, there may be at least two reasons why Justice Rand may have been more opposed to picketing in 1966 than he was twenty years earlier during the Ford strike. First, at Ford, the goal was to end a particular dispute. As Justice Rand acknowledged in his report, this criminality was for authorities other than Rand to deal with.<sup>104</sup> Also, by the time that Rand was writing his report, it was in the past.<sup>105</sup> In Ford, the past was irrelevant. The goal was to allow the parties to work together productively in the future. In his labour disputes investigation, on the other hand, the past needed to inform Rand's recommendations. If Justice Rand wanted to prevent future civil unrest, is it surprising that curbing the use of picketing would (in Rand's

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<sup>98</sup> Michael Nelson ed, CQ Press, *Powers of the Presidency*, 4<sup>th</sup> ed (United States of America: SAGE Publications, 2013) at 155-56.

<sup>99</sup> Employment and Social Development Canada, *Annual Report: Canada Pension Plan 2014-2015*, (Ottawa: Employment and Social Development Canada, 2015), online: <file:///C:/Users/lawjour/Downloads/408\_CPP\_Annual\_Report\_B&W\_EN2.pdf> at 35.

<sup>100</sup> *Canadian Maverick*, *supra* note 2 at 186.

<sup>101</sup> *Williams v Aristocratic Restaurants*, [1951] SCR 762, [1951] 3 DLR 769.

<sup>102</sup> *Canadian Maverick*, *supra* note 2 at 149.

<sup>103</sup> *Ibid* at 207.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid*.

experience at least) probably be one of the most effective and efficient ways to do so?

Again, we will never have definitive answers to any of these questions. But, I am not entirely convinced that all of the harshness heaped on Justice Rand in Kaplan's account was fully justified.

#### IV. COMMENTARY

This review has already mentioned some of the virtues of this book. It is well-written, without technicality or jargon. The largely laudatory chapter on Justice Rand's service on the Supreme Court of Canada provided insights about cases that I thought I knew quite well. The Palestine chapter was very proficient at laying out the problem in a way that was accessible to those unfamiliar with either its ancient roots, or its 20<sup>th</sup> century solution. The information in the chapter allowed me to have a better understanding of its impacts on conflict in the region in the 21<sup>st</sup> century.

But, in other ways, Kaplan's account is inconsistent, both in its overall tone and in the expectations it has of its subject. Perhaps a simple example would assist here. In Chapter 4, "The Framework of Freedom", there was a positive feel to the fact that Rand was the driving force behind the progressive approach of the Supreme Court of Canada to civil rights in the 1950s. By Chapter 6, "Rand Tackles the Palestine Problem", occurring in the late 1940s, however, his ideas were "naïve and half-baked", even though they largely found favour with both the majority of the Committee and the international community generally.<sup>106</sup> The Rand Formula was, according to Horace Pettigrove, "original thinking".<sup>107</sup> It is difficult for the reader—or, perhaps more accurately, it is difficult for me—to reconcile why and how both accounts could be true, virtually simultaneously. Was Justice Rand an "original thinker", sometimes leading the Supreme Court of Canada into an era of civil rights that would ultimately lead to the adoption of the *Charter*?<sup>108</sup> Or was he "naïve"?

Of course, it is possible that he was in fact each of these at different times, depending on the circumstances. Nonetheless, if this were the case,

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<sup>106</sup> *Ibid* at 248-249.

<sup>107</sup> *Ibid* at 205.

<sup>108</sup> *Supra* note 1.

it would have been interesting—again, to me, at least—for Kaplan to have provided his thoughts on what circumstances made the difference. In the Ford dispute, both parties knew that the dispute had to end at some point. In Palestine, on the other hand, the dispute had raged on, in some form, for decades, if not centuries. In other words, in Ford, Justice Rand was dealing with parties willing to settle their dispute, whereas, in the Middle East, it is at least questionable whether any final settlement was possible through this process, no matter how objectively “fair” or “reasonable” the resolution might appear to an outsider. In Ford, the parties were divvying up an economic pie. In the Middle East, the question was a right to remain in a place that at least for some, was the only place that they would consider to be “home”. Kaplan’s account<sup>109</sup> of the *Japanese Deportation* case<sup>110</sup> seems to focus on the unfairness of such a forced relocation. Could the fact that Rand had spoken against such action at home have affected his view of the similar situation in Palestine? Might the fact that Justice Rand was frugal have meant that he was more willing to bend in the Ford dispute, because it was clear that economically, both sides would get more than enough to survive, whereas in Palestine, there was less “middle ground” to work with, and a far greater non-economic impact on those affected? Therefore, possibly in Rand’s view, there had to be a “winner” in these circumstances. Simply asking these questions does not prove that Kaplan’s account is flawed. Rather, it simply suggests a line of argument that may resolve some of the contradictions that Kaplan appears to see in his subject. Would Kaplan agree with this? I am not sure, because Kaplan did not explicitly consider this in *Canadian Maverick*.<sup>111</sup>

Justice Rand himself may not have been entirely internally consistent, and the pages of a biography should be prepared to show this inconsistency. Nonetheless, the best biographies that I have read explain this type of duality in a single individual in a way that tends to humanize both the duality and the individual. In short, few people are entirely internally consistent. At its best, the internal inconsistency makes interesting reading, because the author provides an explanation to which others can relate. Kaplan does not do this in a humanizing way, but rather,

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<sup>109</sup> *Canadian Maverick*, *supra* note 2 at 106-110.

<sup>110</sup> *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race* [1946] SCR 248, [1946] 3 DLR 321 [*Japanese Deportation*].

<sup>111</sup> *Supra* note 2.