

“YOU MUST LEARN TO SEE LIFE STEADY AND WHOLE”:

IVAN CLEVELAND RAND AND LEGAL EDUCATION

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IVAN RAND: A MAN AND HIS TIMES

To understand properly Ivan Rand’s views on legal education, just as to understand properly his jurisprudence, it is critical to appreciate that he was born a Victorian and came of age an Edwardian. He came to national prominence in the Atomic Age – in the middle part of the twentieth century – but he was born in 1884, in the midst of the Mahdi’s Rebellion in the Sudan and a year before the Riel Rebellion in the old Red River Territory. His birth took place in the same year that the British Parliament enacted the Third Reform Bill,¹ and only two years after the *Married Women’s Property Act* came into force.² Rand was sixteen when Queen Victoria died and, while old enough to have enlisted in the Canadian battalions that fought in the Boer War, he was too old to serve in the First World War. He was thirty years of age when the “Guns of August” started and almost thirty-five when they fell silent in November 1918.

To consider Ivan Rand in this context can seem not a little startling, for we – at least those of us who are not students of the political history of the Maritime Provinces or of the Canadian National Railway – tend to think of him in terms of

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¹ *Representation of the People Act*, 48 & 49 Victoria c. 3 (U.K.) (1884). William Ewart Gladstone’s legislation extended the right to vote to mainly agricultural workers and thereby again tripled the electorate.

² 45 & 46 Vict., c. 75 (U.K.) (1882).

the foment of our times. His landmark judgments in the Jehovah's Witnesses cases³ are generally presented either as a presage to Quebec's Quiet Revolution or as a prelude to the constitutionalization of civil rights in Canada. Likewise, his formula for resolving disputes over the requirement to pay union dues (which now bears his name) is understood to be one of the key episodes in the post-War coming of age of Canadian labour law.

So, too, for those who know much about Ivan Rand's legacy in legal education. He assumed the founding deanship at the University of Western Ontario at the tail end of the struggle over control of legal education in Ontario, which was really a struggle over its modernization. Yet the fact remains that the intellectual assumptions which guided his life – the “inherited instincts, traditional beliefs, acquired convictions”, as Cardozo famously put them⁴ – were formulated when the present Queen's great-grandfather and great-great grandmother were on the throne.

In fact, Ivan Rand himself once described the economic, social and political forces at play in his youth. Though writing of the United States, with only slight modification, his observations held true for Canada too:

The quarter century between 1890 and 1915 saw in the United States the emergence of a phase of national life in which the dominant role was taken by the power of capital evolving in many manifestations through industry and control of natural resources. The nation had reached the geographical limits of its expansion and was settling into the intense development and organization of its economy. As the imagination of its captains swept back horizons, massive conceptions took shape. Here was a world in itself, holding open the greatest opulence of nature to the swift, the strong and the skilful. In the mounting crescendo came aggregations of economic interest, interlocking controls over money and industry, monopolistic establishments and rumblings of labour conflict.⁵

Though seldom quoted today, this passage captures, as well as anything else that he wrote, the challenges that Justice Rand felt the common law system faced in his lifetime – and, for present purposes, the challenges that lay before those who had responsibility for educating lawyers. We are all, to one extent or another, creatures of our time. His was a time, as his own words attest, of imagination and science. It was the moment when educated people could, without any sense of contradiction, embrace

³ *Boucher v. The King*, [1951] SCR 265; *Saumur v. City of Quebec*, [1953] 2 SCR 299; *Roncarelli v. Duplessis*, [1959] SCR 121; *Lamb v. Beniot*, [1959] SCR 321.

⁴ B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 12.

⁵ (1947) 25 *Canadian Bar Review* 240 (a review of A. T. Mason's biography of Justice Louis Brandeis).

a blend of high-Victorian idealism and classic liberal rationalism. It was also the moment when educated lawyers, of whom Justice Rand stood in the first rank, could see themselves in the vanguard of a new form of constitutionalism, whose mission was to civilize the industrial state. All of these things, though born of the tumult of more than a century ago, formed a thread which ran through his entire professional life and which remained at the core of his views on legal education.

IVAN RAND'S OWN EDUCATIONAL EXPERIENCES

While the first formal biography of him has just been published, the essentials of Ivan Rand's life are well known.⁶ Born in New Brunswick, into a working-class railway family, his father was chief engineer of the Inter-Colonial Railway in Moncton, which was then becoming known as "the Hub of the Maritimes". Yet, despite its working-class roots, the Rand family prized education and political debate. Ivan Rand accordingly developed a political literacy from an early age. Following high school, he went to work as an audit clerk with the Inter-Colonial, an experience which led to a life-long interest in accounting.⁷ After five years at the Railway, he enrolled at Mount Allison University, in Sackville, New Brunswick, where he studied first Engineering and then Arts.

Speaking many years later, he claimed that he had attended Mount Allison during its golden age – "between 1905 and 1909, when we had Professor Tweedie and Professor Hunton and Dr Smith and Dr Allison."⁸ Yearful nostalgia aside, his undergraduate years remain important for the legal historian for, as Marshall Pollock has noted, it was at Mount Allison that he delivered his first important public speech, the Valedictory Address of 1909.⁹ There is more than a little Allisonian Methodism in his words, but Pollock is correct when he says that Rand's valedictory gave the world the first glimpse of his personal philosophy and what would become the basis of his approach to professional life. While the whole address makes for inspiring reading even today, the golden nugget is in his final exhortation to his classmates:

⁶ Two good pieces about Rand's life have been written by E. Marshall Pollock, Q.C.: "Mr Justice Rand: A Triumph of Principle" (1975) 53 *Canadian Bar Review* 519 and "Ivan Rand: The Talent is the Call" (1979-80) 18 *University of Western Ontario Law Review* 115. Much of the biographical information on Rand's early life in the paragraphs which follow is taken from these two sources. The recently published work is 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).

⁷ George B Cooper, Q.C., to author, 9 July 2003.

⁸ "The Trouble is in Political Management", in L. A. Duchemin (ed.), *The Challenge to our Universities* (Sackville: Mount Allison University Publication No. 3, 1958) 17 at 18.

⁹ "The Talent is the Call", *supra* note 6, at 119.

As we go out let us take this as working principle: do the duty that lies nearest you – and let it be done honestly and thoroughly. If we do this, perhaps our living here will not be altogether in vain.¹⁰

Duty – an ethos converted to a near religion during Victorian times. But it was to be the watchword of Ivan Rand’s approach to his career and, as will be seen, a theme which underlay his feelings about the role of a law school. To borrow Pollock’s words once again, “Rand viewed the law with such respect as to deem it a power, an obligation, a vocation in par with a religious call.”¹¹ It followed that a law school should not be merely a professional school but rather should occupy a loftier plane; that the legal academy should serve as a professional seminary with the twin mission of teaching the law and inculcating its novitiates into the jurisprudential fraternity.

LANGDELL’S HARVARD

Following his B. A. studies, Ivan Rand served briefly as an articled clerk in the office of Robert W. Hewson, K.C., a prominent member of the Moncton Bar.¹² Unfortunately, we do not have any extant reminiscences of his time there.¹³ But in the Fall of 1909 – after a preparation which included committing to memory much of the first volume of Blackstone’s *Commentaries*!¹⁴ – he enrolled at Harvard.

The Harvard Law School was in almost every respect an extraordinary place. After his death, Chief Justice Cartwright recalled a letter that Justice Rand had written him in which he described a visit that he had paid to Harvard many years after his graduation. Justice Rand wrote that he had had

...a rush of feeling that made me realize that I had been one of the most favoured persons on earth to have been privileged to spend three years in such a surrounding and atmosphere. When one thinks about it, what an insignificant percentage of this world’s population ever do enjoy such a privilege.¹⁵

¹⁰ *Ibid.*

¹¹ *Ibid.*, at 122-123.

¹² George B. Cooper, Q.C., to author, 9 July 2003.

¹³ For a description of the old-fashioned scheme of legal education in New Brunswick, see G. A. McAllister, “Some Phases of Legal Education in New Brunswick” (1955) 8 *University of New Brunswick Law Journal* 33.

¹⁴ Pollock to author, 18 July 2003. See also “The Talent is the Call”, *supra* note 6, at 121.

¹⁵ Rt. Hon. J. R. Cartwright, “Ivan Cleveland Rand: 1884 – 1969” (1969) 47 *Can. Bar Rev.* 155, at 156.

Yet, for much of its life, Harvard had been, at best, mediocre.¹⁶ Standards were so low as to be virtually non-existent. James Barr Ames, Dean during Ivan Rand's first year as a student, once described Harvard Law School as it was at the time that he began his studies, forty years earlier. It was, he wrote

... a faculty of three professors giving but ten lectures a week to one hundred and fifteen students of whom fifty-three per cent had no college degree, a curriculum without any rational sequence of subjects, and an inadequate and decaying library.¹⁷

In fact, until 1878 Harvard Law School did not require that one actually pass any examinations in order to graduate. To receive the LL.B., one had only to remain in residence for a period of eighteen months.¹⁸ But by the time of Ivan Rand's enrollment, all of this had been swept away by the Langdellian "revolution", which followed from the appointment of that great visionary, Christopher Columbus Langdell, as Dean of Law in 1870. Langdell succeeded in laying the groundwork for a law school of a stature and reputation that will likely never be achieved again – and a law school culture which was to have a profound impact upon Ivan Rand.¹⁹

When he enrolled in September 1909, Rand joined a class of 243 students and a school of over six hundred.²⁰ Felix Frankfurter was one of his contemporaries. The then-new Langdell Hall, which represented the *ne plus ultra* in terms of teaching facilities, had been fully opened a year before, in 1908. The faculty consisted of nine professors (including Dean Ames) and five lecturers.²¹ The faculty-student ratio of almost 45:1 seems untenable by today's standards, but there was about the school a tremendous degree of intimacy and common purpose. Apart from Ames, other notable

¹⁶ See, for example, Dean Erwin Griswold's 1964 Hamlyn Lectures, published under the title, *Law and Lawyers in the United States: The Common Law Under Stress* (London: Stevens and Sons, 1965). Griswold did not pull any punches in describing his own *alma mater* in its early years.

¹⁷ J. B. Ames, "Christopher Columbus Langdell", in *Lectures on Legal History* (Cambridge: Harvard University Press, 1913) 467, at 477 (quoted also *ibid.*, at 48).

¹⁸ Griswold, *supra* note 16, at 44 and 51.

¹⁹ In fact, Langdell's achievements have over the years become mythologized and, in the late twentieth century, indirectly romanticized by books like S. Turow, *One L* (New York: Putnam, 1977) and H. Porter, *The Paper Chase* (Sydney: Angus and Robertson, 1966). We tend to confuse two strands of Langdell's innovation, the case method and the Socratic approach. In pedagogical terms, that the two were quite distinct even in Langdell's mind is evidenced by the fact that he himself stopped using Socratism by the late 1880s: C. Warren, *History of the Harvard Law School, and Of Early Legal Conditions in America* (New York: Lewis Publishing Co, 1908) vol. II, at 458 (reprinted by Da Capo Press, 1970).

²⁰ A. E. Sutherland, *The Law at Harvard* (Cambridge: Harvard University Press, 1967), 214-215.

²¹ *Ibid.*, at 222.

teachers included John Chipman Gray – who seemed to have had a particular impact on Rand²² – Eugene Wambaugh, Joseph Henry Beale and Samuel Williston. In 1910, Dean Ames died and was replaced by Ezra Ripley Thayer, son of Professor James Bradley Thayer.²³ Shortly afterwards, in Ivan Rand’s final year, Roscoe Pound joined the faculty.

Pollock has written wonderfully about Ivan Rand’s Harvard days, and the degree of industry and self-sacrifice with which he approached his legal studies.²⁴ While he did not leave much in the way of written recollection about his student life, there is happily a set of Ivan Rand’s student notebooks.²⁵ Seven in the set cover five subjects: Civil Procedure at Common Law (or Pleading), Torts, Agency, Equity (for which there are three notebooks), and an exotically named course called “Suretyship and Mortgages”.

An examination of the notebooks is fascinating in many respects. They cast light, for instance, on what was considered “leading-edge” in the years immediately following the infamous 1905 judgment of the U. S. Supreme Court in *Lochner v. New York*.²⁶ They also – a bit startlingly, perhaps – put the lie to any assumption that we today might have that even in the heyday of “Langdellianism”, faculty at the Harvard Law School had completely eschewed old-fashioned lecturing in favour of the case method. The notebook labeled “Pleadings”, for example, taught by Dean Ames, begins as follows:

Duties owed by one to another give rise, in case of violation, to cases. Rights of contract do not exist between men as men but depend upon special agreement. There are rights which exist between men as men - violation leads to action of Torts. Then there are acts not against individuals merely but communities - Crimes. Rights also spring from ownership of land.

But above all else, the notebooks reveal a student dedicated in the extreme to his studies. The books themselves are all hard-covered and contain a wide left-hand margin. The notes are written in a strong, confident hand and the case summaries seem both meticulous and to the point. Strike-outs are rare, and the class notes were

²² I am aware of several instances, all many years after law school, in which Justice Rand referred specifically to Gray and things said in his classroom. To my knowledge, he spoke of none of his other law teachers as often.

²³ As a further sign that anti-nepotism laws did not run at Harvard in those days, the father of a future Professor James Bradley Thayer was to join the Harvard faculty in 1922.

²⁴ “The Talent is the Call”, *supra* note 6.

²⁵ Library and Archives Canada, “Ivan Cleveland Rand Fonds”, MG30-E77, vol. 9 (R2355-0-5-E).

²⁶ 198 U.S. 45 (1905).

supplemented by a series of onion-skin additions that one assumes were pasted in afterwards. There are no apparent idle doodlings or marginal notes, except by way of headings and cross-references to substantive points. The notebooks match the image of Ivan Rand the law student offered to us by Pollock – the serious and intellectually curious young man, forced by lack of means to live a Spartan and materially deprived life, but who viewed himself at the beginning of a life-long commitment to work for the betterment of humankind.²⁷

IVAN RAND'S PHILOSOPHY REDUX

After Harvard, Ivan Rand returned to Canada to begin his professional career. He was not to have direct involvement again in the issues surrounding legal education for forty years. Rather, as he said shortly before retirement from the Supreme Court of Canada, he remained “a layman in education.”²⁸ He took pride, he said, “in the fact that I am in some of the front lines of the battle, in the pit, so to speak, and not in the ivory towers of intellectual isolation.”²⁹ That perhaps explained the purity with which he approached the issue of the proper function of a law school when he began to speak and write on the subject in the 1950s. Nonetheless, as the other chapters in this volume make plain, the personal philosophy, first given public expression in the Valedictory Address at Mount Allison and nurtured at Harvard, continued to evolve, mature, and receive articulation, during his extraordinarily varied years of professional and judicial life. In Marshall Pollock's words:

[t]he unifying theme in Rand's judicial pronouncements and, indeed, in his life's work, is this: we are privileged to be in a society of free persons the hallmark of which is the use of reason in the ordering of its affairs, the continued existence of which depends upon a high degree of individual responsibility.³⁰

Pollock was correct; this message came through loud and clear from a contextual reading of the judgments and speeches of Justice Rand. Indeed, Justice Rand himself reprised this theme from his 1909 Valedictory Address in the convocation address given to graduating students from Mount Allison in May 1945, just as the Second World War was drawing to a close. It is worthwhile to quote it at some length, not only because it set out his philosophy from the perspective of a sixty year old judge, rather than a twenty-five year old undergraduate, but also because it did so against the backdrop of the struggle between totalitarianism and common law democracy:

²⁷ “The Talent is the Call”, *supra* note 6, at 120-123.

²⁸ “The Trouble is in Political Management”, *supra* note 8, at 19.

²⁹ *Ibid.*

³⁰ “Mr Justice Rand: A Triumph of Principle” *supra* note 6, at 523.

I want to speak of our responsibilities as citizens. You must take up the leadership of your communities. The institutions and traditions of the past present to you the ordered system in which you live in this country, in freedom and security. But have you ever tried to conceive the struggle and effort that lie behind that system? You see at this moment the price we sometimes have to pay to preserve it. And can we seriously ask whether we owe anything to our own and to future generations for that inheritance? We owe not only its preservation but those modifications which are appropriate to our times. We are equally beneficiaries and trustees.

Now let me be more specific. The last six years have witnessed the greatest social cataclysm in history. At the moment, a vast community of people is disintegrating. The old Germany is in her death throes. She is dying because she attempted to destroy the dignity of man.

It is that dignity that democracy postulates as its first condition. Around the individual the duties of social and political life revolve. Its essence is subordination to a rule agreed upon. It is voluntary rule according to law as against arbitrary rule according to men. It is the acceptance of that fundamental basis that enable social stability and violent controversy to co-exist. Democracy is the condition of the greatest liberations of the human spirit.³¹

The first published evidence we have of Justice Rand's views on Canadian *legal* education is in the form of a lecture delivered at the University of New Brunswick in 1950, as part of its sesqui-centennial celebrations. Entitled "The Student at Law School",³² Justice Rand delivered this lecture just two and a half months after final abolition of appeals to the Judicial Committee of the Privy Council in Downing Street, London. Accordingly, he used the lecture as a forum in which to remind students of the increased responsibility that the Canadian legal profession had just assumed. In light of this, he pressed the need for a maturation of the system of legal education in Canada and for an increase in standards within law schools. His yardstick of professional excellence was the English bar. "The administration of justice in Great Britain", Justice Rand told the New Brunswick law students, "is of a standard unsurpassed by any that has existed among men."³³

This was a point that Justice Rand made on other occasions. In his 1945 Mount Allison convocation address, for example, he said: "Great Britain has attained

³¹ Rand Fonds, *supra* note 25. As important as it is, this speech has largely been forgotten, partly because it remains unpublished, and partly because it is filed at the National Archives in a way that does not immediately reveal its significance. It is contained in a file labeled "Speeches no date, 1951, 1958".

³² Saint John: UNB Sesqui-centennial Lectures, 1950, also published in (1950) 3 *U.N.B.L.J.* 7.

³³ *Ibid.*

the highest social stability but with the greatest freedom of speech: we have still to learn the lesson of the man exhorting from his soap box in Hyde Park. It is a matter of growing up.”³⁴

Likewise, in his report on “Legal Education in Canada”, he said “[t]he independence and neutral functioning of the barrister in England furnishes a standard which we should not lightly disregard.”³⁵ But for present purposes, what is most interesting in the UNB lecture is the emphasis that Justice Rand placed on what he described as the “artistry” of the law.³⁶ Law students should endeavour, he said, “to become artists in thinking.”³⁷

The main objective of a legal education, he continued, is “to produce a well-stored, sensitive and imaginative mind, and a polished implement of reasoning.”³⁸ But, importantly, the imagination has to be grounded in common experience. Legal rules, he asserted, “are or should be of the essence of the practical wisdom garnered from centuries of experience; and nothing in experience is, therefore, irrelevant to this purpose.”³⁹ Idealism and rationalism, in Justice Rand’s prescription, rolled into one.

THE RAND REPORT ON LEGAL EDUCATION

In 1948, the Canadian Bar Association resolved to conduct a survey of the legal profession in Canada. The desire stemmed from an emerging sense of unease about the place of the common law constitutional tradition in the post-war welfare state. In some quarters, views were in fact very pessimistic in this respect. In 1949, for example, Professor G. W. Keeton published a celebrated essay, entitled “The Twilight of the Common Law”, in which he suggested that “ordinary courts have exhausted their usefulness in the era of rapid change through which we are passing.”⁴⁰ Not surprisingly, sentiments like this – particularly when expressed by an eminent legal scholar like Keeton – were seen as a cause for considerable alarm. In the CBA’s view, an informed sense of what the Canadian legal profession looked like was a necessary pre-condition to any battle with public opinion.⁴¹

³⁴ *Supra* note 31.

³⁵ (1954) 32 *Can. Bar Rev.* 387, at 411. In the same piece, he argued that the legal profession should adopt standards such that “we shall be able to maintain the level of past judicature in which we have been in such measure the beneficiaries of pre-eminent British leadership” (at 416-417).

³⁶ *Supra* note 32, at 12.

³⁷ *Ibid.*, at 9.

³⁸ *Ibid.*, at 12-13.

³⁹ *Ibid.*, at 9.

⁴⁰ (1949) 145 *The Nineteenth Century and After* 230 at 231.

⁴¹ For more on the survey and its rationale, see the notes at (1948) 26 *Can. Bar Rev.* 972 and

As part of the Survey, Justice Rand agreed to prepare a Report on Legal Education, which was subsequently published in the *Canadian Bar Review*.⁴² In point of fact, the Report bears little semblance to a survey. Rather, it amounts to a lengthy exposition by Justice Rand of his own views on the subject of legal education, and on the proper role of a law school. Many of his themes had been visited in his speech at UNB four years previously, but they were all set out in the Report at greater length, and in a style which was clearly directed at the practicing bar.

In Justice Rand's view, the principal function of a law school should be to "bring the minds of students to a familiarity with the great ideas of law and to inculcate such a mastery in their use as will enable the student thereafter to grow in mastery of them substantially by his own efforts."⁴³ His view of the purpose of a university-based legal education was, in other words, grounded in utilitarianism. Though the law curriculum should be heavily weighted towards the jurisprudential – towards "the great ideas of law", as he put it – university law schools should exist to train better lawyers. It followed that there should be a close integration between academic study and practical training. That is why, for example, Justice Rand expressed the opinion that summer work in law offices should be compulsory.⁴⁴ It was also why he expressed doubt about the usefulness of moots and mock trials – "[t]here is too thick an air of make-believe about them."⁴⁵

Yet, it ought not to be thought that Justice Rand had any sympathy for the Law Society of Upper Canada in its battle to control legal education.⁴⁶ The timing of the Report, and the augustness of its author, could not help but ensure that it would

(1949) 27 *Can. Bar Rev.* 951.

⁴² (1954) 32 *Can. Bar Rev.* 387.

⁴³ *Ibid.*, at 405.

⁴⁴ *Ibid.*, at 412: "That the student should have as much early familiarity as possible with the law office, its ways and its work, as a professional home, I take as unquestioned; and it would, I think, remove the initial strangeness of the law school if the student were to enter an office, say, two or three months before taking up classes. Attendance during the periods between school years should, save in exceptional cases, be obligatory; even though the periods may not be longer than three months, they maintain the continuity of law interest and they should be in fact the opportunities to round out and reinforce the work done at school by private reading made alive by the surroundings".

⁴⁵ *Ibid.*, at 406. He continued: "For a small percentage of students they may be of some value, but I doubt that all the motions of moot courts are worth the first real encounter exhibited to the young lawyer". Interestingly, when he became Dean at Western he, at least publicly, adopted a different view. In his report to the President for 1960-61, for example, he wrote: "With the new facilities now available and particularly the splendid Moot Court Room, there is no reason why the introduction to advocacy of this nature should not lay the foundation of forensic competence which is too often absent in the proceedings of our judicial tribunals."

⁴⁶ For more on this battle, see C. I. Kyer's and J. E. Bickenbach's eminently readable study, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923 – 1957* (Toronto: The Osgoode Society, 1987).

cause “a minor stir”⁴⁷ and be assessed by both sides for its partisan value. There were, Justice Rand said early in the Report, “two general conceptions ... of what the product of a life spent in the profession of law should be.”⁴⁸ One, “is that of a craftsman, skilled in the use of rules of law ...”,⁴⁹ the other, “conceives a lawyer as a member of a profession which has become part of the constitutional structure of the nation; a ministrant of justice, to whom law is a branch of government.”⁵⁰ He then made plain which conception he favoured. The latter type of lawyer, he wrote, “is of a class to which the community will look for much of its political and community leadership and, in a democracy, for the organization of freedom and its cognate institutions, for the reconciliation of its conflicts, and for the vindication of government by law.”⁵¹ The Benchers of the Law Society surely could not have been pleased with this.⁵²

In terms of what should actually be taught in law school, Justice Rand was equally prescriptive, albeit in high terms. In a nutshell, law schools should aim to instill a “habitual vision of greatness.”⁵³ For, in his mind, greatness was “the negation of a denial of value to life: it adds the sense of fineness to achievement. It is essential ... to education in any field worthy of such a discipline.”⁵⁴ In addition, as he had suggested at the University of New Brunswick in 1950, the prospective lawyer had to learn to be an artist. He spoke of “[t]he art of the lawyer in reasoning, in the perception of acute distinctions, in the sense of relevance and analogy, in the power of creative synthesis”, and concluded that, to whatever type of legal career a student aspired – “from the eminence of Russell or Choate to the level of capable endeavour” – a sense of artistry was critical.⁵⁵

Intriguingly, especially in light of the present-day debate over the place of legal ethics as a compulsory part of the law curriculum, Justice Rand proved to be skeptical of what could be accomplished, particularly among students of an age to be attending law school. “Moral integrity, honesty in thought and deed, and dependability

⁴⁷ *Ibid.*, at 248.

⁴⁸ *Supra* note 42, at 391.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Having said this, it is worthwhile to note that in the late 1960s, when the Law Society of Upper Canada was negotiating with York University regarding transfer of the Osgoode Hall Law School from the former to the latter, the Law Society retained Justice Rand to provide an opinion as to its ability to award the LL.B. to barristers who had passed from Osgoode before 1957 (an ability which he concluded the Law Society did not have). In his opinion, he noted among other things that “[t]he Society, particularly in this Century, has moved somewhat slowly toward an academic method of legal education” (unpublished, Rand Fonds, *supra* note 25, vol. 6).

⁵³ *Supra* note 42, at 389.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 394.

in action, with all their implications” were, he acknowledged, “vital to the very life of the profession”.⁵⁶ But law school was too late a stage in life to be shaping a person’s character: “...at such an age, the attitudes, habits, ideals and discipline that manifest moral integrity in the home, the community, the schools, the colleges would long since have been moulded and ingrained.”⁵⁷ This being the case, an entire course in what today we would describe as Professional Responsibility was too much: “[a]ny special features in [the application of morality] to the practice of law could be stated in a single lecture, to be grasped instinctively by those of attitudes in harmony with them.”⁵⁸ He continued:

The late President Coolidge is said to have remarked: ‘The business of the United States is Business.’ Perhaps we should look first for the cultivation of general moral integrity in the heart of that life. I should say, without hesitation, that the law schools have no special responsibility for building up moral character.⁵⁹

Though entitled “Legal Education in Canada”, Justice Rand also offered in his survey some views on *pre*-legal education. His list of desired knowledge was a lengthy one: “...[i]n language, literature, history, psychology, science, economics and philosophy ... some degree of acquaintance acquired in preliminary education should be called for.”⁶⁰ For, “[w]ith this base of fundamental ideas, law will soon appear to the student as a mode of social control, and many of those ideas will be seen as postulates giving rise to legal rules and principles.”⁶¹ And he included a plea for higher standards of facility with English: “[t]he common law is expressed in the English tongue, yet appreciation of that language’s excellences and the artistry of its use cannot be said to be conspicuously evident in the generality of Canadian common-law lawyers.”⁶²

⁵⁶ *Ibid.*, at 400.

⁵⁷ *Ibid.*, at 401.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 396.

⁶¹ *Ibid.*

⁶² *Ibid.*, at 395. More than most that he wrote, Rand’s “Report on Legal Education” revealed something of his sense of humour. In a similar vein, for example, he also wrote: “We have actually reached the point of reading factums as legal argument, as in Parliament essays are read as political argument; and the pleadings presented to our courts are too often lacking in nothing except evidence of clear thinking and artistic expression” (*ibid.*, at 410-11). And in the part of the Report in which he addressed criticisms that had been made of the North American model of legal education by a U. S. lawyer – the familiar ones, that it was far too academic and not sufficiently practical – he wrote: “These rousing generalities, to which, in a class-day reunion mood, we can all fully subscribe, and the zestful confidence with which they are pronounced, express the rhetorical ideas, I fancy, of most lawyers who have taken up cudgels on the subject of education” (*ibid.*, at 399).

It would be unkind to say that Justice Rand's Report reads partly like an *hommage* to his own time at Harvard. Indeed, at least two of his recommendations were self-referential: that a prospective law student should work in a law office for two or three months before beginning law school (as he had done with Robert Hewson), and that he or she should read the first volume of Blackstone's *Commentaries* as a pre-law preparation (as he had).⁶³ Regardless, the Report stands as a lengthy reflection on the subject of legal education by someone who, by that time, was widely regarded as Canada's most illustrious, and most intellectual, lawyer. What makes it especially interesting to read today is that it was written at the cusp of his retirement from the Bench and his return to the legal academy, as Dean of Law at the University of Western Ontario, an appointment which he assumed in 1959 – at the age of 75!

IVAN RAND'S LAW SCHOOL

It is not completely clear how Justice Rand came to the attention of Dr. G. Edward Hall, then President of the University of Western Ontario, when Western began to plan its own law school.⁶⁴ Undoubtedly, the "Report on Legal Education" had something to do with it. Western was, in fact, a bit slower than Queen's and Ottawa in embracing the idea of re-founding its law school. Yet, once the arrangement had been worked out between the Law Society of Upper Canada and the universities, Western moved quickly.

It is little known that President Hall first approached John J. Robinette, Q. C., then at the zenith of his reputation as leader of the Canadian bar, with an offer of the deanship. But when Robinette expressed an unwillingness to accept,⁶⁵ Hall visited Justice Rand at the Supreme Court of Canada in November 1958 to present him with the idea of moving to London after his impending retirement from the Court. Hall wrote to Justice Rand on Remembrance Day with the formal offer. After a protracted period of reflection (the actual negotiations did not take long and largely centred on

⁶³ When Rand was Dean at Western, Book 1 of the *Commentaries* was listed as suggested reading for pre-law students in the Law School Calendar.

⁶⁴ In fact, *re-establish* is the more accurate verb. Western first founded its Faculty of Law in 1885 but, after only fourteen months, it was closed, along with the other university law faculties in Ontario, as a consequence of the Law Society of Upper Canada's mandating attendance at Osgoode Hall for three years as the sole route to admission to the profession in Ontario.

⁶⁵ Though he declined the offer of the deanship, Robinette did become an active friend of the new U.W.O. law school. He was the guest speaker opening the Faculty of Law building in 1961, and he held an Honorary Doctorate from Western. As such, he wore a Western D.C.L. gown when, as Treasurer of the Law Society, he presided over the first LL.B. convocation of the Osgoode Hall Law School! Dr. Hall's correspondence suggest that he viewed Robinette as an objective confidante, to whom he could put questions concerning the law school and its fortunes.

Justice Rand's insistence that he be allowed to spend each summer at his cottage in Shediac, New Brunswick), Justice Rand wrote to Hall accepting the offer in May 1959, just four months before classes in the new law school were to begin.

It must have been daunting to face the prospect of starting a law school from scratch in Middlesex County, Ontario, in the late 1950s – particularly when one's idea of a "proper" law school had been formed at Harvard in the heyday of its reputation as the foremost law school in the English-speaking world. Nonetheless, Ivan Rand turned to his task with his characteristic devotion to duty. In a note published in the *University of Toronto Law Journal*, Dean Rand set out his goals for the new law school, in terms which will seem familiar:

Among other things it may be said that the object of the school is to develop in the minds of its students the habit of thinking in terms of the dynamic tradition, in the broadest sense, of our law; of thinking in the manner of one who has attained a degree of intellectual mastery of legal ideas and their application to life, accompanied by an imaginative sense of reality, relevance and logic: the purpose, through knowledge imparted and method inculcated, is to start students on the appropriate way to achieve their own growth in thinking on the legal aspects of matters with which the law is concerned.⁶⁶

Of necessity, especially since Dean Rand also conducted the Royal Commission into the Coal Industry during the first year of the school's operation, much responsibility for day-to-day operations fell upon the next senior member of faculty, Professor Ronald St. J. Macdonald.⁶⁷ Yet Dean Rand imprinted his stamp on the school and its students from the very beginning. Indeed, the students were particularly devoted to him.⁶⁸ Writing many years later, for example, Roger Yachetti, a member of the third graduating class, spoke of a "mutual feeling of pride and self-satisfaction in the realization that we had been in the presence of greatness for a brief moment in time."⁶⁹

⁶⁶ (1961-1962) 14 *University of Toronto Law Journal* 107, at 108.

⁶⁷ In addition to Rand and Macdonald, the other two original members of faculty were Robert S. Mackay and Douglas M. Johnston. By a remarkable coincidence, I myself was taught at Dalhousie by half the original Western faculty – Macdonald and Johnston.

⁶⁸ I have seen, for instance, at least one graduate of the school during Rand's tenure who still keeps a framed portrait of Rand in his office.

⁶⁹ R. Yachetti, Q.C., "Ivan Cleveland Rand – The Teacher : A Student Viewpoint" (1979-80) 18 *U.W.O. Law Review* 145, at 151. In addition to being the Gold Medallist for his year, Yachetti was also Editor-in-Chief of the Law Review for 1964. He dedicated his volume to "Ivan Cleveland Rand, our beloved Dean".

He cared little for the *minutiae* of academic administration and his secretary, Margaret McNulty, bore a significant amount of immediate power.⁷⁰ Moreover, his annual reports to the University President on the state of the law school betrayed a degree of impatience with the failure on the part of the student body to achieve the standards that he considered the ideal. In his report for 1960-61, for example, he wrote:

In these days of multiple distractions too few Canadian students are committing themselves to that absorption in the subjects of instruction which characterize the foremost professional schools of both Europe and the United States; too many fail to appreciate the intensity of work done [there].

And in his report for 1961-62, he wrote that, while the final examination results “in the light of the standards set, are not disappointing, they are not as satisfactory as we would like. They call for keener perception of effectiveness in the teaching and of appreciation in its reception.”

The annual reports also bemoan the steady turnover in faculty complement.⁷¹ By the time of Rand’s final report, in 1964, his irritation was unmistakable:

Slight attention seems to be given to the effect upon the school of voluntary withdrawals. It seems to be assumed that the teacher is at liberty to leave the service at the end of any school year regardless of notice.... Whatever circumstances may attend the actual ending of his services, whether with or without notice, a university does not, seemingly, countenance the taking of any step of a penalizing nature; but that does not mean that circumstances and conditions could in no case dictate such a course of action.

Yet, for all this, the annual reports also suggested more than a little pride at what had been accomplished in a very short time, and in the face of significant financial obstacles. One sees, for example – *pace* the views expressed in his Report on Legal Education – a clear delight taken in early successes by Western’s mooted teams. Dean

⁷⁰ In fact, more than one student of the time has suggested to me that it was Miss McNulty who actually made admissions decisions – something which she strenuously denies!

⁷¹ Of the original faculty, for example, Macdonald left for the University of Toronto after the second year, and Mackay and Johnston left in 1964 – Mackay to become counsel to the McRuer Commission (though he was to return to Western in 1967), and Johnston to take up an appointment at Louisiana State University. Other faculty during Rand’s tenure included Arghyrios Fatouros (1960-63), John Flackett (62-63), J. J. Gow (61-63), Gary Keyes (61-62), Earl Palmer (62-...), Julien Payne (63-70), Ralph Scane (62-64) and J. F. W. Weatherill (63-64). Of the eleven faculty who began in Rand’s time, only Mackay and Palmer remained at Western for the greater part of their careers.

Rand, too, was meticulous in drawing to the President's attention the various "name" visitors to the law school during his tenure, and the impression that the students and faculty had made on them. He expressed particular pleasure in the emergence of two scholarly journals, one student-run⁷² and the other edited by faculty,⁷³ within the first two years of the school's foundation. Likewise, he lauded the scholarly efforts of his much younger faculty colleagues. In simple terms, the picture of the school that emerged during his deanship was one of a paternalistic autocracy – using that description in its most admirable and affectionate sense.

If Ivan Rand was irritated by administration, he clearly loved the teaching of law. During his term as Dean, from 1959-1964, he taught three subjects: Legal History, Constitutional Law, and Trusts. In terms of getting a sense of Ivan Rand the teacher, we are fortunate to have at Western a set of transcripts of a series of special lectures that he delivered on constitutional law. They range across a vast terrain, and weave together Canadian, English, imperial and U.S. history, in a way which might seem off-putting to today's law student. Yet, on reading them, one cannot help but get a sense of the pleasure with which they must have been delivered, and the excitement that they must have engendered in a student audience schooled in legal history. In a lecture on the division of powers under the Canadian Constitution, for example, Dean Rand began with a reference to a then contemporary complaint by Quebec Premier Jean Lesage, which segued into an analysis of the mind-set of Lord Watson, which in turn led to a discussion of the notion of sovereignty, and of its enshrinement in the United Nations Charter.

He then turned to the structure and text of the *British North America Act* (now the *Constitution Act, 1867*) but shortly digressed with a discussion of the parliamentary power over taxation and the causes of the English Civil War. Once more, though, he was back to the *BNA Act* and its treatment by the Privy Council, which soon evolved into a discussion of the nature of civil rights and their constitutional protection. This, in turn, emerged over time as a consideration of the notion of legal personality – which took the audience back to the starting point and the thesis: the position of the Dominion of Canada *vis-à-vis* the provinces under the Constitution, and how the Privy Council had erred in not according to the Dominion the full incidents of its constitutional personality. The lecture, like its sisters, each of which was in similar form, was a *tour de force*. Reading it today is at once exhilarating and humbling, for one realizes just how poorly-equipped one is, at least compared to someone like Ivan Rand, to teach law in a foundational way.

His love of teaching extended to a general enjoyment of interacting with students. Not surprisingly, he acted regularly as a judge in student moots. But his

⁷² *The Western Law Review*.

⁷³ *Current Law and Social Problems*.

interest in students extended beyond the law school. He acted as Governor General in Western's model parliament, for example, and he was the first invitee to the *very* 60s-sounding series of "Koffee Klatches" sponsored by the Western students' council. He served as Honorary President of the London Chapter of the African Students Association, and was a Director of the (again, *very* 60s-sounding) Canadian Foundation for Education in World Law. And in February 1964, shortly before his retirement, he took part (along with Professors Bora Laskin and Jacques-Yvan Morin) in a Law Students' Forum at the University of Toronto on the subject of "bi-nationalism".

After he left the University, Ivan Rand was frequently called upon to act as a reference for former students, especially those seeking admission to programs of post-graduate study, a task which he appeared to have accepted willingly. The National Archives contains several letters to and from students who had studied under him and which illustrate the degree of affection and veneration in which he was held.⁷⁴ In one of these letters, written two years after he had retired from the deanship, Ivan Rand offered what is perhaps his last word on legal education:

Education today seems to be in a mad race with chaos and the responsibilities of the coming generations are intensifying tremendously. Especially is this so for those who would be engaged in humane discipline and civilized regulation of human relations. Lawyers, more than those of other professions, must learn to see life "steady and whole" - a vision which stands out before you. The ideals which are the passion of the young should never be discarded even when the lesson is learned that they must advance with action, if at all, by slow degrees. Patience and a rounded-out conception of the problems of life on this planet are the essentials for effective intelligence today and hereafter; and you have gone far toward that awareness.⁷⁵

IVAN RAND AND LEGAL EDUCATION – A MAN AND HIS MISSION

At the outset I suggested that, in order properly to understand Rand's views on legal education, one has to appreciate that he was a creature of the English-speaking world as it existed before the First World War. To state the point more analytically, he was in basic professional outlook a pre-1914 liberal. He clearly had a romantically nostalgic view of his own time as a law student. He retained an instinctive reverence for the imperial connection and for English notions of professionalism. He also never failed to preach an idealistic line when exhorting law students. Yet, underlying virtually everything he said or wrote about legal education, was the belief that the common law was grounded in the experience of the ages, and that its future depended upon the strict application of reason to support its development.

⁷⁴ Rand Fonds, *supra* note 25, vol. 6.

⁷⁵ *Ibid.*, Letter from Rand to Kenneth Alexander, 24 July 1966.

It is difficult today to write fairly about Ivan Rand the man. He remains a person of living memory, but he could claim to have been taught by people who had direct recollections of a slave-holding society. In our materialistic world, his frugality and austerity can seem faintly ridiculous. His brusqueness and tendency to seem aloof, though couched shyness and genuine warmth, can seem haughty. His manner of written academic expression can seem off-puttingly turgid and archaic. But if we consider him in the light of his own day – if, in other words, we consider him in the only setting in which a person should be judged – what emerges is the picture of a principled man who thought deeply about the best way to enhance the standards of his profession as a means of strengthening and preserving for future generations the Rule of Law. When Ivan Rand spoke of things like “duty”, “greatness”, “artistry” and “imagination”, he did so with a view to arming law students with transcendental skills – skills which would stand the test of time and which would enable them to assume a place alongside the heroes of the common law, as guardians of our constitutional tradition of freedom. Would that we today could always be so inspired.