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The Early Teaching of Law in French Canada

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1. Introduction

Although the Faculty of Law at the University of Montreal can be linked to the law school established by Maximilien Bibaud in 1851, Bibaud was not the first public teacher of law in French Canada. His predecessor deserves to be remembered because of the peculiar circumstances with which he had to cope.

In 1663 Louis XIV established in New France a Sovereign Council invested with judicial power.¹ The Governor and the Bishop of Quebec, both ex-officio members of the Council, were to appoint five other members, an attorney general, and a court clerk. The Council could adjudicate, as a court of last resort, on all civil and criminal matters. It could also commission persons to hear cases, in the first instance, at Quebec, Montreal and Three Rivers. In its early years, the Council was plagued with quarrels, principally between the Governor and the Intendant, who was in fact the chief officer in charge of justice, finance and police. In 1678 the Council was reorganized and its members represented to the King that, because of the poverty and ignorance of the inhabitants, the lack of experience of the counsellors, and the need to avoid unnecessary costs, the admission of lawyers would be prejudicial to the welfare of the colony. The King agreed with this recommendation² and thus it happened that, though the several lawyers and law graduates who lived in the colony took part in various proceedings, they could not legally charge a fee. As a result, many self-appointed attorneys-in-fact, notaries and bailiffs wrote petitions, conducted cases and collected whatever fees their clients were willing to pay.³

In 1703 the Council was reorganized for the second time. The Intendant was to be one of the ex-officio members of the Superior

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1. LeJeune, *Dictionnaire général du Canada*, vol. 1, Ottawa, 1931, pp. 426-428.

2. P. Beullac and E. F. Surveyer, *Le Centenaire du Barreau de Montréal*, Montréal, 1949, pp. 9-10; M. Nantel, *Les avocats à Montréal*, *Cahiers des Dix*, Montréal 1942, No. 7.

3. J. Edmond Roy, *Histoire du Notariat au Canada*, vol. 1, Lévis, 1899, pp. 22-23; E. Z. Massicotte, *Les Tribunaux et les officiers de justice à Montréal sous le régime français*, *Trans Royal Soc. Can.*, vol. 1, 1916, p. 273 seq.

Council, as it was now called, and the number of appointed counsellors was increased to twelve. Few, if any, counsellors had legal training, though some of them had sizeable law libraries, that of François-Etienne Cugnet, for example, amounting to more than three hundred titles.⁴ In keeping with the rapid growth of the population and the prosperity of the colony, the number and complexity of cases referred to the higher court soon outgrew the capabilities of the counsellors. Accordingly, assessors were appointed to assist the counsellors in the discharge of their duties. And these assessors had to be trained.

In 1729 Louis-Guillaume Verrier, a lawyer in the Parliament of Paris, landed at Quebec.⁵ A man of thirty-nine, with vast knowledge of the law and well-read in practically every field of learning, he possessed a fine library, which he enriched during his years in Canada, where he died in 1758.⁶ In 1733, with little support from Governor De Beauharnois, Verrier inaugurated a series of public lectures on jurisprudence and ordinances. These lectures met with such success that, on the governor's recommendation, Louis XV declared, in 1741, that those who had received a certificate from Verrier would be commissioned as assessors to serve in the Superior Council and in lower courts. Among those who received certificates were the sons of counsellors, such as Guillaume Guillemain, one of the first to be appointed, and François-Joseph and Thomas-Marie Cugnet, both of whom were commissioned in 1754. These personalities, including Jean-Claude Panet, who became an assessor in 1751, his brother Pierre, who acted as attorney and became clerk in the jurisdiction of Quebec, and many more who had been commissioned as notaries, constituted, at the time that Canada became a British colony, a sizeable group that was well acquainted with jurisprudence and court practice.

Governor Murray did what he could to be fair to the new subjects but he was bound by the royal declaration issued after the Treaty of Paris. The declaration substituted English for French criminal law and directed vaguely that English civil law should be used when compatible with the customs of the people. Murray established a

4. Antonio Drolet, *Les bibliothèques canadiennes 1604-1960* Montréal, 1965, p. 42.

5. Claude Vachon, Louis-Guillaume Verrier, *Dictionary of Canadian Biography*, vol III, Toronto, 1974, p. 646-648.

6. Drolet, note 4 above, pp. 32 and 43.

Court of King's Bench at Quebec for civil and criminal cases. Trial by jury was to be resorted to if demanded by either party and there were to be no religious disqualifications for the jurors or for Canadian lawyers who were admitted to plead in the Court of Common Pleas.⁷

The first lawyers commissioned by Murray in 1765 were all English and Protestants. Four Canadians, including Guillemain, who died a few years later, received their commissions in 1766, but François Cugnet was to wait longer. He was then Road Surveyor of the province, having served as one of two attorneys-general appointed by Murray in 1760. In 1768, Sir Guy Carleton put Cugnet's wide knowledge of French law and of the colony's administration under the French regime to good use by appointing him his, and the Executive Council's, French secretary. Carleton had already ordered his attorney-general, Francis Masères, to report on a most important question: did the royal proclamation mean that all or part, and, if the latter, which part, of French law was to be swept away or retained? The fact was that Canadian lawyers were permitted to plead in their own language, that ordinances regulating the courts were published in French, and that, when "it suited the interests of a French-Canadian to be guided by English custom, he followed it even after its nominal abandonment. . .there were often persons who adopted such means only in order to shirk the more beneficent clauses in the French code. Seigniors, for instance, would make terms more advantageous for themselves than their own laws had allowed, or tenants would build wretched houses on smaller areas than was permitted by Canadian custom".⁸

It was clear to Carleton that English criminal law, generally well accepted, and French law, the law of the majority, should be retained. Masères, scion of a French Huguenot family that had migrated to England, made four suggestions, including the one favoured by Carleton. His first suggestion was to draft a fresh code, a task that he believed impossible because it could be achieved only with the help of lawyers in France. His two other suggestions were, in effect, to make English law universal while retaining some of the ancient custom, which would have to be tabulated.⁹ Masères publicly promoted these last two suggestions and was supported by

7. A. G. Bradley, *Sir Guy Carleton*, Toronto: U. Toronto Press, 1966, pp. 13-14, 343.

8. *Id.* 40-41

9. *Id.* 41-42

the Chief Justice, William Hey, civil servants, and English traders.¹⁰ To counter them, Cugnet made a compilation which was published in London under the English title: "An Abstract of the Several Royal Edicts and Declarations, and Provincial Regulations and Ordinances, that were in force in the Province of Quebec in the time of the French Government, and of the Commissions of the several Governors-General and Intendants of the said Province, during the same period, faithfully collected from the Registers of the Superior Council of Quebec, by François-Joseph Cugnet, Esq."¹¹

Cugnet's purpose was to demonstrate the soundness of the former administration. He also made it evident that there was no need to call on French experts to carry out the task suggested by Masères. About the same time, Carleton granted a leave of absence to Masères, whom he judged able and honest but prejudiced against French and Catholic Canadians. He then asked Cugnet to prepare an edition of the custom of Paris. In collaboration with two priests of the Quebec Seminary, J.-A.-Mathurin Jacreau and Colombar Pressart, and others whose identities are questioned, Cugnet submitted a much more complete compilation which was published in London in 1772 and 1773.

An abstract of those parts of the Customs of the Viscounty, Provostship of Paris, which were received and practiced in the Province of Quebec, in the time of the French Government, drawn upon by a select Committee of Canadian Gentlemen, well skilled in the Law of France and of that Province, by the Desire of the Honourable Guy Carleton, Esquire, Governor in Chief of the said Province. (London 1772).

An abstract of the Loix de Police, or Public Regulations for the Establishment of Peace and good Order that were of force, drawn up by a select Committee of Gentlemen.

The Sequel of the Abstract of those parts, etc. containing the Thirteen latter Titles of the said Abstract drawn up by the same gentlemen. (London, 1773).¹²

10. Ignatus (pseudonym of Thomas Chapais) *Notes et Souvenirs*. La Presse, Montréal, 2 juillet 1898, and Chapais, *Cours d'Histoire du Canada*, vol 1, Montréal, 1922, pp. 126-127.

11. N. E. Dionne, *Inventaire chronologique des ouvrages publiés à l'étranger dans diverses langues sur la Nouvelle-France et la Province de Québec depuis la découverte du Canada jusqu'à nos jours*. Trans. Royal Soc. Can. 1905 Sect. I appendix, p. 76

12. Id. 76-77

This compendium of more than two hundred pages was an important factor in the triumph of Carleton's views, which prevailed when the bill that was to become the Quebec Act of 1774 was introduced first into the House of Lords and then into the House of Commons¹³. In the words of Bourinot, it was "the foundation of the large political and religious liberties which French Canada has ever since enjoyed."¹⁴ Concerning the Legislative Council and the administration of justice, the Act specified that Catholics should no longer be obliged to take the religious oath, that recourse should be had to French civil procedure in all matters relative to civil rights and property, and that the criminal law of England should be retained.

During the absence of the Governor, Cugnet worked diligently on his *Traité de la loi des fiefs*. . . , *Traité Abrégé des anciennes Loix, Coutumes et usages de la Colonie du Canada*. . . , *Extraits des Edits, Ordonnances et Règlements et Déclarations de Sa Majesté très chrétienne*. . . and *Traité de la Police*. . .¹⁵ Dedicated to His Excellency Guy Carleton, this work was printed at Quebec by Guillaume Brown in 1775. A note under the long title of the first volume indicated that the treatise would be useful to all the Seigneurs of the province, new as well as ancient subjects, judges, and the Receiver General of His Majesty's rights.¹⁶ These volumes are the first of their kind to have been printed in Canada. They provided Canadian legislators, judges, lawyers and notaries with much needed legal documentation. Their appearance was due to Cugnet's determination and to his training under Verrier, to whom he paid tribute in his preface.

2. Legal Education

The need had arisen for the teaching of law. Carleton was about to sail for England in 1770 when he was presented with a petition signed by twenty-one French and English Canadians, among whom were Guillemain and others acquainted with Cugnet. They asked that he solicit His Majesty to reopen the Jesuit College in Quebec City, which was then used as a barracks for the garrison. When

13. Bradley, note 7 above, pp. 62-69

14. J. G. Bourinot, *The Story of Canada*, Toronto, 1899 p. 278

15. N. E. Dionne, *Inventaire chronologique des livres, brochures, journaux et revues publiés en langue anglaise dans la province de Québec de 1764 à 1904*, Trans. Royd Soc. Can. 1904, supplement, 13

16. Ignout (Chapais) *Notes et Souvenirs*, La Presse, Montréal 9 juillet 1898.

re-established, it would be called Royal George College and the personnel would include a professor of law.¹⁷ The petition failed.

Two other petitions met the same fate. In 1787, Carlton, now Lord Dorchester, appointed a committee of the Executive Council to promote education in the province. For various reasons, the committee, chaired by Chief Justice William Smith, was idle for two years. The arrival in Quebec of Rev. Charles Inglis, Bishop of Nova Scotia, whom Carleton had consulted, and whose ideas differed from his and Smith's (principally on the exclusion of the teaching of theology) prompted the chairman to call a meeting of the committee. Most of Smith's report was the answer of the Bishop of Quebec, Mgr Jean-François Hubert, though he felt that a university would be premature, suggested that "There is in the centre of Quebec a handsome and spacious College, the greater part of which is occupied by the troops in the Garrison. May not that College be drawn to its primitive institution by substituting instead of these troops, if it should be His Excellency's pleasure, some useful classes, such as the Civil Law. . ."¹⁸ In many ways, the committee concurred with the Bishop's views and resolved "that it is expedient to erect a collegiate institution for cultivating the liberal arts and sciences usually taught in the European Universities. . . .and that a society be incorporated for the purpose. . ."¹⁹

Before the Governor had an opportunity to formulate his recommendation to the Colonial Office, he received two very different propositions. The first, supported by eighty-nine prominent citizens, came from the priests of the Séminaire de Montréal, who maintained the Collège de Montréal. They asked him to lay at His Majesty's feet their project for founding and sustaining Clarence College, in which there would be a professor of civil law.²⁰ The second petition arrived a little later, after Simon Sanguinet, a judge of the Court of Common Pleas, had died and bequeathed his fortune of £15,000 for the establishment of a university. Although Sanguinet's will was immediately contested by his brothers, the Governor included in his despatch the proposal

17. P.A.C. Colonial Office Records "Q" Series, C.M.G. 11, vol. 7, p. 371-379: Memorial of the French Inhabitants of Quebec, Montreal, and Three Rivers to Governor Carleton, July 24th 1770.

18. William Smith, *History of Canada*, vol 2, Montreal, 1815, p. 189

19. *Id.* 198

20. Olivier Maurault, *Le Collège de Montréal, 1767-1967*. Montréal, 1967, pp. 19-20.

made by one hundred and eight-nine Montreal petitioners that such a bounty, if declared valid by the court, would be an asset to the university that he recommended.²¹

None of these efforts bore fruit and the teaching of law was delayed at least until 1840. After 1785, candidates for admission to the Bar were required to have been articled to a practicing lawyer for five years and to have stood for examination before a panel of the most able lawyers in the district, including the Chief Justice or two or more judges of the Court of Common Pleas. Upon favourable recommendation of the presiding judge, the candidate was granted a commission. The Advocates' Library was organized by Montréal lawyers in 1828. Twelve years later it became the Lawyers' Library and Law Institute. It was to operate as a centre for teaching law.²² In 1847, Justice William Badgley was appointed lecturer in law, without remuneration other than fees, in the Faculty of Arts of McGill College.²³

Things started to change rapidly when the Bar of Lower Canada, with sections in Quebec, Montréal and Three Rivers, was incorporated in 1849. The law permitted each section to form a committee to examine candidates for admission to practice. The Bâtonnier of the section, upon favourable report of the committee, was empowered to deliver to the candidate a diploma admitting him to practice in every court in Lower Canada. The Act further prescribed that no person could be admitted without prior study of five consecutive years as clerk or articled student to a practicing lawyer. If the candidate had followed a regular course of study in an incorporated college or seminary, and a regular course in law in an incorporated college or seminary, three years of keeping terms would suffice.²⁴

In the preceding year, 1848, the Jesuits, at the instigation of Mgr. Ignace Bourget, Bishop of Montréal, had opened their Collège Sainte-Marie. This college was envisaged as the start of a university. The fate of Bishop John Strachan's York College, which had become the University of Toronto, made Bishop Bourget fear that Lafontaine and Baldwin would establish a provincial university in Lower Canada. To avoid this possibility, Bourget wrote to the

21. Francis-J. Audet, *Simon Sanguinet et le projet d'université de 1790*. Trans. Royal Soc. Can. XXX, 1936, section I, p. 53-70.

22. Beullac and Surveyer, note 2, above, p. 12-14.

23. Cyrus MacMillan, *McGill and Its Story 1821-1921*, London, 1921, p. 188.

24. *Victoria, Cap.* 46 XXIV and XXVII, 1849.

Archbishop of Québec suggesting that the rich and powerful Séminaire de Québec take upon itself the honour and onus of founding a Catholic provincial university. In 1852, the Seminary was granted a royal charter for its Laval University but the Seminary insisted that the university remain under the exclusive jurisdiction of the Archbishop of Québec. The only concession that the charter made formally to Mgr. Bourget's ideas was that the university would be empowered to affiliate, under certain conditions, classical colleges and public institutions of learning. This was the source of future difficulties between Québec and Montréal.

Meanwhile, in 1851, Maximilien Bibaud had been admitted to the Bar. Born in Montréal in 1823, he was the elder son of Michel Bibaud, journalist, historian and poet, from whom he inherited his encyclopedic interests and strong work habits. After three years of theological studies, Bibaud had articulated to Toussaint Peltier, the first *Bâtonnier* of the Montreal Bar. Two of his examiners were so impressed with his talent that they advised him to take the initiative in lecturing publicly on law instead of privately as he had first intended. Together with Peltier and others, such as Come-Séraphin Cherrier, Antoine-Aimé Dorion and Amable Berthelot, all future *bâtonniers*, George-Etienne Cartier and Augustin-Norbert Morin recommended Bibaud to the Bishop of Montreal and the Rector of Collège Sainte-Marie, both of whom were much pleased with his project.

Arrangements were then made with Father Félix Martin that Bibaud would pay rent for quarters in the new college building, not yet completed, that he would collect fees from his students, and that a committee of patrons and administrators, chaired by the Rector and composed of Cherrier, Cartier, Morin and, later, of Lafontaine, would exercise vigilance on doctrine only. Bibaud's law school had no other connexion with or recognition by the college, the incorporation of which was to come a year later. Eager to start as soon as possible, the enthusiastic teacher inaugurated his lectures on May 1st before six students at the Montreal School of Medicine and Surgery, where his younger brother Gaspard taught anatomy.²⁵

25. Paul Desjardins, *Le Collège Sainte-Marie de Montréal*, vol. II, Montréal, 1945, pp. 60-72; André Morel, Maximilien Bibaud, *Fondateur de l'Ecole de Droit*, and Georges Lahaise, *Centenaire de la première école de droit établie au Canada*, *Revue Thémis* II 1951, p. 8-29 (mostly based on Desjardins).

Bibaud's teaching was rather original. His first curriculum included the history of Roman, Anglo-Norman, French and Canadian law, terminology, methodology, legislation, obligations and contracts, all as prerequisites to "Canadian law as amended by the Ordinances of the French Kings registered in the country and by the imperial and provincial statutes, and compared with England's Common Law". At the end of all this came the teaching of procedure. There were three morning lectures a week, over an academic year of eleven months. The course was completed in two years. Bibaud was the only teacher until he was assisted by Achille Belle, who took on procedure in 1856, and J-O. Héту who looked after the candidates for the notariate. Since text books were non-existent, Bibaud dictated his lectures, which abounded with Latin and English quotations. At the request of his students, he published, in 1859, his *Commentaires sur les lois du Bas-Canada ou Conférences de l'Ecole de Droit liée au Collège des RR. PP. Jésuites*.

Bibaud's originality was that he did not rely on lecturing and that he did not believe in examinations. Following what he said was the example of German universities, every week and, later, every month, he held what he called a *repetitorium*, at which students were assigned to discuss the subjects covered during the preceeding week. He claimed that his classes were debating societies, what today we would call seminars. In addition, he held periodically what he called in his pedantic words "*Solemn repetitoria*", at which his students were examined publicly on a given subject by eminent lawyers and judges. There were no other examinations. However, he took his students to listen to the Bar's public examinations in order to prepare them for the tests they would eventually be required to take.

The success of the one man school (of which he dared to call himself the dean) was remarkable, but Bibaud's ambition and vanity soon brought him into conflict with Laval University, whose Faculty of Law was finally organized in 1854. Frustrated because he was not invited to the solemn inauguration in 1854, at which all the professors were awarded doctor's degrees, he found a way to have LL.D. degrees conferred upon himself and others, including Morin, by Fordham University. From then on, he was suspect to the Rector at Laval and also to McGill, whose law faculty had been established in 1853. His credibility further diminished when, almost immediately thereafter, he petitioned the Legislative Council, on his

own initiative, requesting that the Collège Sainte-Marie, where he claimed that the first chair of law had been created, be empowered to confer the bachelor, master and doctor's degrees in law. He was disavowed by his own Rector and withdrew his petition.²⁶

The backlash came in 1861 when the legislation governing the Bar was amended. The three years privilege that students of Bibaud's school had previously enjoyed was made available only to candidates who had taken a regular course of law in an incorporated college or university where chairs of law had been established, and taken a degree in law at the said college or university.²⁷ Bibaud's vigorous opposition to the bill was of no avail. Undaunted, he carried on and, when Mgr Bourget made his first unsuccessful attempt to affiliate the School of Medicine and his own school to Laval University, he flatly answered that he was not interested because a law degree was not necessary to be called to the bar. Moreover, he published his *Notice historique sur l'enseignement du droit*²⁸ in which there is no history but that of his school and his pretentious claims of birthright.

With the publication of this book, Bibaud's reputation was fast approaching its demise. A young lawyer, Gonzalve Doutre, the driving force of the recently created junior bar of Montreal, led a campaign to control the growth of the profession. Bibaud at first applauded the young crusaders but was stunned when he learned of how they intended to remedy the situation, namely, by making the Bar's examinations more difficult and less frequent than monthly. Such an outcome would deprive Bibaud of one of his pragmatic methods of training his students for these examinations. This was the beginning of a long and heated controversy. At one point, the Rector of the college, Father Firmin Vignon, suggested that Bibaud's school might need a certain degree of reorganization. Bibaud replied bluntly that it was none of his business.²⁹

The last session of the United Provinces Legislature is memorable on two counts: the Code civil du Bas-Canada, in preparation since 1857, was adopted, and important amendments were made to the Bar Act. One amendment authorized the Governor to require from any incorporated university or college in which it was pretended that courses in law were established, a full report on the details of such

26. Desjardins, note 25 above, pp. 76-86.

27. Victoria 24, cap 72, 1861.

28. Montréal 1862

29. Desjardins, note 25 above, pp. 89-100

courses. The Governor was authorized to declare that he approved or disapproved as he saw fit.³⁰ That was the end of the road for the lone ranger. He continued teaching for a year before announcing publicly that his school would be closed as of September 1st, 1867. He added that the new law had nothing to do with his decision. It is said that some three hundred lawyers and notaries had received the diploma signed by the Rector of the college and Bibaud. Among them were four Lieutenant-Governors of Quebec, federal and provincial ministers, senators, judges and eminent lawyers. Were it not for his obdurate spirit of independence and his provoking self-conceit, Bibaud might have done even better at a time when Montréal was in dire need of a Catholic university.

After a second fruitless attempt by Mgr Bourget, in 1865, to affiliate the School of Medicine with Laval, what he apprehended most did not fail to happen. The School of Medicine became the Faculty of Medicine in Montreal of the (Methodist) Victoria University of Cobourg. In 1867, a Faculty of Law organized by the Institut Canadien, whose president was the well-known free thinker Joseph Doutre, was also affiliated to Victoria University. In 1870, the Jesuits and a group of lawyers, including Cherrier, were trying to reopen the law school at Sainte-Marie; another group was at the same time attempting to open a law school with the anticipated help of the Sulpicians. When Laval learned of these intentions, it offered to open a branch of its own faculty in Montreal, but the conditions were so drastic that the offer was refused.

Two years later, the Bishop of Montreal persuaded the Jesuits to petition the Legislature for amendments to the charter of their college; the amendments would authorize the college to confer degrees in arts, law and medicine. The petition was a failure, due to the opposition of Mgr. Elzéar-Alexandre Taschereau and his dramatic recourse to Rome. By that time Doutre's faculty had gone over to McGill and another Medical Faculty, established by the University of Bishop's College, had been set up in Montreal. In a meritorious effort to solve the endless difficulties between the two rival cities, the Roman Congregation responsible for colleges and universities suggested that Laval establish a branch in Montreal with parallel legal and medical faculties in Québec and Montréal. This would have required amendments to the university's Royal Charter and the Québec Seminary was not willing to go that far.

30. Victoria 29-3 Cap. XXVII 25-28, 1866.

When Laval was established canonically in 1876, it was enjoined to open branches of its faculties in Montréal. Mgr. Bourget, who was seventy-seven and very ill, resigned. Mgr. Edouard Charles-Fabre, who succeeded him, met with unsurmountable difficulties on the part of the School of Medicine, which resisted for twelve more years. However, a branch of the Faculty of Law was easily assembled under the deanship of the eighty-year old Cherrier who had been a pillar of strength in Mgr Bourget's initiatives. Three of its part-time professors, Louis-Amable Jetté, Adolphe Chapleau and Alexandre Lacoste, were Bibaud's alumni.

Mgr Bourget died in 1885. Soon after, Mgr Fabre became the first Archbishop of Montreal. Freed from the jurisdiction of Mgr Taschereau, who was made the first Canadian Cardinal, he obtained from Rome authorization that the Laval branch would thereafter be administratively autonomous. The School of Medicine finally yielded and joined with the Montréal branch of Laval. This was accomplished through amendments to its charter. The Montreal branch of the Faculty of Law was also incorporated in 1892. One of the few links that remained with Laval was that Laval conferred its degrees on the Montreal students. This practice lasted until 1920 when the Quebec Legislature granted a charter to Université de Montréal, after the Holy See had granted full autonomy to the Laval branch in Montréal. The rest is not silence but quite recent history.

A few major changes have taken place since 1920. Only those who have taken a university course in law can be called to the Bar, and only after they have been examined by it. The everlasting quarrel between practicing lawyers over theory and practice should (hopefully) be settled by cooperation between the Bar and the universities. A Faculty of Law was organized by Université de Sherbrooke when it was established in 1954, and a Faculty of Civil Law also exists at Ottawa University. Full time professors are now teaching in all these universities. The B.A. is no longer required for admission to the faculties, which now admit graduates of the Collèges d'Enseignement général et professionnel, commonly called CEGEPS.