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Universitd De Moncton's Common Law School: A Unique Experience

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I. The necessity of a French Common Law School

At their founding, the nine predominantly anglophone provinces of Canada adopted the English legal system patterning their legal institutions upon those of Britain and accepting English public and private law as it then existed. Quebec, on the other hand, modelled its legal system on that of France and most of the private law of Quebec is of French origin. As a result of this historical divergence, French language legal education in Canada, which has hitherto existed only in Quebec, has trained civilian lawyers who are unable to practise in other Canadian provinces.

The result of the situation has been that the francophone community outside of Quebec has not had access to legal services in its own language. There are, of course, many lawyers especially in New Brunswick and Ontario who come from French-speaking families but all have received their legal education in English-language institutions and, as a consequence, find it difficult to provide legal services in the French language.

This problem has been accentuated by the fact that it is now possible in New Brunswick, and to a certain degree in Ontario and Manitoba, to conduct legal proceedings in French. The danger is that these newly-acquired rights will remain hollow formalities if neither jurists or judges can work in the French language. If few lawyers, at this point, are eager to conduct legal proceedings in French, it is because of their insufficient knowledge of the necessary legal terminology and the lack of a standardized vocabulary for the common law in French. This same difficulty faces the presiding judges in all courts.

Moreover, according to a study made by Dr. Helmut J. Schweiger for the Senate of the Université de Moncton, in 1975, there was one anglophone lawyer in New Brunswick for each 1,200 anglophone New Brunswickers and only one francophone lawyer for every 3,300 francophone citizens. One can presume that such a gap exists in Ontario and other Canadian provinces with large

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French-speaking minorities.

It is important to recognize as well the political significance of a French common law School in contemporary Canadian society. The Acadians and other francophones outside Quebec will never feel that they have achieved full status as citizens if they cannot conduct their business and have access to public services in their own language. The number of French-speaking jurists serving the 215,000 Acadians of New Brunswick and 450,000 Franco-Ontarians is not very great. As a result, the provincial governments in New Brunswick and Ontario find it difficult to obtain the services of common lawyers to work in the translation of laws and the provision of legal services in French and francophone clients are frustrated in their attempts to exercise their linguistic rights. Two ways in which to fill these needs are the preparation of jurists able to serve the French-speaking community in its own language and the publication of books and manuals on both substantive law and legal procedure in the French language for lawyers and judges already in practise.

It thus became evident that Canada needed a Faculty to prepare jurists to face this new situation. In April 1975, the Board of Governors of *l'Université de Moncton* gave the administration the mandate to initiate the negotiations for the creation of a French language Faculty of Law whose challenge would be to train common law jurists able to provide the francophone community with legal services in their language.

After a very heavy and sometimes acrimonious public debate, the Council of Maritime Premiers accepted the creation of the new Law School at a meeting held in June 1977.

Until then, the Acadians had had to obtain their law degree in unilingual English universities, either at Dalhousie or Fredericton (U.N.B.). In a project financed by the Donner Foundation, some courses had been given in French at the Law Faculty at U.N.B. by Professors Claude Emanuelli and Fernand Landry. One of the drawbacks to the experiment was that francophone students found living in an entirely anglophone cultural milieu alienating. The departure of the two professors involved from the Law School put an end to that experiment.

Francophones in other common law provinces had to study in English, except for certain courses given in French at Ottawa University (Common Law Section), Windsor University and Osgoode Hall.

II. *The Site of the Law School*

The *Université de Moncton* campus seemed a logical choice to establish such a Law School. *L'Université de Moncton* is not a bilingual but a unilingual French institution which created a culturally homogenous environment which can ensure the development of the French language. Thus students will not be absorbed by an anglophone community or assimilated by a one-way bilingualism policy.

Moreover, the University had the necessary super-structure for the new law school. On a modern campus it has faculties of Arts, Administration, Sciences (including Engineering), Education, Behaviour and Social Sciences, Schools of Domestic Sciences and Nursing, a Central Library and a Sports Centre which is the pride of the campus.

The concentration of the francophone population in New Brunswick permits a greater cultural vitality than found in cultural minorities elsewhere in Canada. Finally, New Brunswick is legally, if not in fact, a bilingual province.

III. *The Founding of the Law School*

Professor Fernand Landry was named to coordinate the setting up of the Faculty. In February 1978, he was joined by Professor James Lockyer and Mrs. Simonne Clermont. In March, the Founding-Dean was nominated and in July, Professors Michel Bastarache, Donald Poirier and John Manwaring were hired. Professors André Braen, André Lareau, Richard H. Goreham, John H. Crabb and James Hathaway completed the group in 1979-80.

In September of 1978, the School opened its doors to a restricted number of students, thirty-one (31) for its first year of operations: twenty-two (22) from New Brunswick, three (3) from Manitoba, two (2) from Newfoundland, and one (1) from each of these provinces: Ontario, Nova Scotia, Alberta and Prince Edward Island. In September 1979, 35 new students joined their colleagues and we anticipate a first year class of 40 in 1980. A survey has shown that out of the twenty-three (23) students who accepted to participate in the inquiry last year, eighteen (18) chose our Law School because of its linguistic adherence, three (3) because of its location and (2) for other motives. Sixteen (16) had not made any application to an English-language law school, four (4) would have

gone to study civil law in Quebec if Moncton Law School had not existed.

IV. *The Objective*

The Faculty of Law at Moncton has set as its objective the creation of a capability to deal with the common law in the French language, both from the point of view of the lawyers it trains and the pioneering work it has undertaken in systematic translation of the common law. Of course, the teaching of the common law in French is not an entirely new experience. Quebec is governed by a system of public law modelled on that which took form in England. Legal scholars in Quebec have produced much French language pedagogical material in the public law area. It is primarily in the area of private law (e.g. contracts, property and tort law) that difficulties arise. For the student and the practitioner, there is an urgent need for texts and manuals in French and our Faculty will be concentrating on research and publication in this area.

It is evident that, because the objective of our School is to prepare common law jurists for the francophone Canadians, we had to create an institution which would satisfy the particular needs of that group.

Thus, a particular emphasis has been put on optional courses that will permit students to specialize in fields concerning the economic development of the francophone population (commercial law, company law, fiscal law, cooperative law . . .) or its social evolution (law and poverty, minority rights, labour law, family law, law of local collectivities . . .).

Moreover, because the Faculty of Law at Moncton has set as its objective the creation of a capability to deal with the common law in the French language, it was essential to prepare text-books in French.

Already, an amount of \$25,000 a year has been set aside on the general budget of the Law School for the translation of teaching materials. Grants of \$117,500 from the Donner Canadian Foundation and of \$20,000 from the Canadian Legal Information Council have permitted the employment of two legal translators, M. Gerard Snow and Mrs. Leonie N. Garambe, who, with the assistance of two general translators, have prepared and published a dictionary of French terms in Property and a book in Company law including usual forms. The Government of New Brunswick has

recently asked the School to translate the Rules of Civil Procedure of the Supreme Court of New Brunswick.

Legal translation at the Faculty of Law will provide us with a unique collection of documents. These documents will be valuable for the Faculty, for the practising lawyer and also for the teaching of comparative law in all French language schools throughout the world.

V. *A New Teaching Experience*

As we have now said the teaching of common law in French is a new experience only in the area of private law. For more than a century Quebec law schools (including the civil law section of the University of Ottawa) have taught public common law. As a matter of fact, Quebec is submitted to the same federal common law as the nine other provinces of Canada and some of its provincial laws were greatly influenced by the English, Canadian and American common law (e.g. administrative law, corporation law). Thus, it is not more difficult to teach public law in French here than in Quebec. For subjects like constitutional law¹, criminal law², public international law³, administrative law⁴, fiscal law, company, law, etc., basic text-books have been published in French and a French vocabulary has been established through long usage.

So it is in private law that our Law School had to innovate and already some progress has been made. For property law a major effort of translation has been undertaken. Professor Michel Bastarache supervised the work for our translator and as early as September 1978 our students had received a basic glossary on property law and a text on fundamental principles of real property. Very soon a book shall be published in French on this subject.

The course on torts did not present such a considerable challenge. It had been taught in French before at the University of New Brunswick (1976-1977) and in the Common Law Section of the University of Ottawa. Moreover, many books have been published

1. Herbert Marx, *Les grands arrêts de la jurisprudence constitutionnelle au Canada*, (P.U.M., 1974) 761 p.

2. Fortin et Viau, *Droit pénal général*, (Thémis, 1978), 618 p.

3. Lebel, Woehrling and Rigaldies, *Droit international public* (Edition Thémis, 1977) 708 p.

4. Dussault, *Traité de droit administratif* (P.U.L.) 2031 p.; Pépin et Ouellette, *Précis de contentieux administratif*, (Cours Thémis, 1977), 412 p.

on this subject in the French language⁵ and excellent articles have appeared mostly in the *Revue Internationale de droit comparé*. Nonetheless, Professor Donald Poirier accomplished much by preparing a five hundred page French supplement to the text book used⁶ and a detailed outline.

Professor John Manwaring is putting a finishing touch to a French language case-book on contracts and Professor James Lockyer was sent to France and England for a year to prepare the essential documentation for his courses in commercial law. Professors André Lareau, André Braen, Richard Goreham and myself are teaching public law (fiscal, administrative, constitutional law, criminal law) and use mostly teaching materials from Quebec. The course on conflict of laws and philosophy of law are under the responsibility of John Crabb from Geneva, Switzerland, who has been teaching these subjects in American universities for years. Ernest Drapeau (criminal law), Adelard Savoie (wills), Alexandre Deschenes (insurance), Terrence Wade (trusts), Fernand Landry (restitution), and Claude Emanuelli (methodology) are now part-time lecturers at the school.

VI. *The Library And The Material Facilities*

The Law School occupies the Holy Cross Residence, on the Campus. The main floor includes five suites for professors, the general secretariat, the faculty meeting room and the office of the Dean as well as a meeting room for students and the Students' Council office. The second floor has two classrooms, one seminar room, the Moot Court, twelve suites and the Legal Translation and Terminology Center. Finally, the basement of the Law building has been converted into a library with a capacity of 75,000 books, 80 reading cubicles, plus nine private offices for research assistants.

On April 19th, 1978, the librarian, Mrs. Simonne Clermont, a library technician, Miss Simone Girouard, and two assistants began

5. *Inter alia*: Pierre Grégoire, *Le droit anglo-américain de la responsabilité civile*, (Bruxelles: CIDC, 1971); Morier-Genau, *Le trespass, Etude de droit anglais*, (1958); Yves Leservoisiere, *La responsabilité civile résultant due transport gratuit de personnes en droit français et en droit anglais*, (Paris; R. Pichon & R. Durand, Auzias, 1966); Henriette Immarigeon, *La responsabilité extra-contractuelle de la Couronne au Canada*, (Montréal; Wilson & Lafleur, 1965); René, David, *Le droit anglais* (3e édition, 1975); Pierre Patenaude, *La protection des conversations en droit privé* (Paris: L.G.D.J., 1976);

6. Wright and Linden, *Canadian Tort Law Case, Notes and Materials* (6th edition, Toronto; Butterworths, 1975), p. 768

their work in setting up the library. On May 1st, a secretary, a third assistant and a librarian in charge of cataloguing (Miss Carmel Allain), were hired to complete the library team. By June 1st, a thousand cases of books had been emptied and the books placed in a temporary order on the shelves. The library collection now totals, as of June 1980, 49,820 volumes and 2,761 microfilms.

Obviously, one major difficulty is that of acquiring every common law book written in French. Their number is very limited and many of them out of print. For the English and American common law, Bloustein's book on *Common Law in French* (Oceana Publication, 1974) has been very useful. As for the Canadian public law, the excellent publications from Quebec furnish a valuable source of information. The following statistical data shows the actual development of our library.

**STATISTICAL ANALYSIS OF THE PRESENT HOLDINGS OF THE LAW LIBRARY
AND BOOKS ON ORDER
AS OF JUNE 28th, 1980**

| | | Texts | Legal reports | Periodicals | Statutes | Proceedings & debates & miscellaneous | TOTAL | Microfilms |
|-------------------------------|---------|-------|---------------|-------------|----------|---------------------------------------|-------|------------|
| Numbers of volumes in library | French | 4714 | 683 | 1502 | 702 | 757 | | 121 |
| | English | 11160 | 18543 | 6332 | 1858 | 686 | | 2761 |
| | TOTAL | | | | | | 49820 | |

*Approximately 15,000 volumes are now on order.

V. *The future*

Now that the implementation has been realized, the faculty has initiated a long-term study on the objectives of the law school and the means to attain them. Lawyers, Governments, Social Groups and Students will participate to a research that will permit the Moncton Law School to be original not only in its linguistic adherence but also in its basic philosophy. Certainly, this School will have to be activist in the field of group rights because it will educate the future lawyers that will serve a population whose fundamental rights (linguistic and economic) has never been respected.