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## The Early Days of Law Teaching at McGill

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# Notes and Comments

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Stanley B. Frost\*

The Early Days of Law Teaching  
at McGill

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When the British acquired Canada in 1763, there were immediate schemes for the rapid anglicization of the Province. The map was redrawn to impose English county names on the French countryside, schemes for universal education were drafted to teach English to francophone youth, the new-burgeoning commerce was conducted in association with English firms employing English terminology and in accordance with accepted English practices. A Legislative Assembly was promised and Canada was to become as English as New England: even more so, for the Church of England was to be established as the National Church as in England, Wales and Ireland.

But within a short while, the Colonial Administration began to have second thoughts. It quickly found itself at odds with the new traders who had come in from New York, Albany and across the Atlantic, and the British authorities found it politic to make friends with the French Canadian seigneurs, and with the authorities of the Roman Church and if possible to win the allegiance of the French-speaking peasantry.

“The Proclamation of 1763 had promised English laws; but from the beginning, the Court of Common Pleas began to settle French-Canadian disputes according to the rules of the Custom of Paris. The Proclamation had also promised English freehold tenures; but as early as 1771, in anticipation of the Quebec Act, the authorities decided that future grants of land in the colony were to be made *en fief et seigneurie*.”<sup>1</sup>

The result was, as far as the law was concerned, an immense confusion. James McGill in 1784 joined with his fellow merchants in a petition to the British Government, expressing the hope,

in full confidence that His Majesty would relieve them from the anarchy and confusion which at present prevail in the Laws and Courts of Justice in the Province by which their real property is rendered insecure. Trade is clogged, and that good faith which

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1. Donald Creighton, *Dominion of the North*, Toronto, 1957, p. 155.

ought and would subsist among the people, and which is the life and Support of Commerce, is totally destroyed.<sup>2</sup>

In testimony given before the Court of Common Pleas in 1787 he said:

I conceive it proper for me to add that until the introduction of the Coutume de Paris in 1775, I never heard any complaints touching the Administration of Justice, but since that period they have been loud and frequent, and in my humble opinion have arisen from the Anarchy and confusion which prevail in the laws and Courts of Justice in the province.<sup>3</sup>

The same doubt still persisted in the 1820's for when the Desrivières family contested James McGill's bequest of land and endowment for the establishing of McGill College, François Desrivières instituted a consultation in Paris with Maîtres Hennequin and Frainville to seek support for his case in French jurisprudence. However, it was determined that the issues should be judged with respect to English law, not French, and finally the two suits (they were parallel but distinct cases) were decided in favour of the McGill College trustees, by the Privy Council in England.<sup>4</sup>

With the law in the Province of Quebec in this confused state, it is not surprising that the teaching of law was also not very well organized. Both the French and the English professions had relied upon the apprenticeship system, whereby a young man 'articled' in a law firm until he was judged sufficiently proficient to be 'called to the Bar' and licensed to plead cases in court. Maximilien Bibaud in 1862 wrote a note, 'Les premiers écoles de droit', outlining the developments within the francophone branch of the Quebec legal profession.<sup>5</sup> Bibaud himself took the initiative in 1851 at the Collège Ste. Marie in Montreal by introducing a series of law lectures in French and this course continued until 1861 when a separate Institut des Lois was founded. Bibaud continued his teaching in that institution until 1867, when the requirement that

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2. M. MacSparran, *James McGill: A Critical Biographical Study*, McGill Thesis, 1930, p. 110.

3. *Ibid.*, p. 118.

4. See *McGill University: For the Advancement of Learning, Vol. 1, 1801-1895*, Montreal, 1980, p. 50f. (Cited below as *Advancement 1*).

5. 'Les Premiers Ecole de Droit' in André Morel, *Textes et documents d'histoire du droit Québécois*, La Librairie de l'université de Montréal, 1974-75, pp. 158-159. See also Leon Lortie, *The Early Teaching of Law in French Canada*, (1975-76) *Dalhousie Law Journal*, 521.

law qualifications must be obtained from a university brought about its closing. Meanwhile, however, the Université Laval had organized in 1854 a law course in Quebec City.

The difficulties facing anyone who attempted to study and, even more, anyone who attempted to teach the practice of law in Lower Canada before 1867 are well illustrated by M. Desiré Girouard, who was later to become a justice of the Supreme Court of Canada. Speaking in 1859 he affirmed that: 'nothing was more difficult than the study of law in Canada'. In bringing any issue to decision, the jurist must consult innumerable time-honoured French authorities, together with their commentaries, the relevant amendments and abrogations; reference must also be made to the prescriptions of Roman law, and to more recent interpretations of French jurists, even though the Napoleonic Code was not in force in Canada. One must further take into account the mass of decisions rendered in the past by courts in the United Kingdom and in the United States; and only then could one begin to consult the Acts and Statutes of Lower Canada, and give consideration to the judgments of the Superior Court of Quebec and of other Canadian tribunals. 'It is in the midst of this confusion that the Canadian jurist must seek the solution to his problem: what rule prevails in Lower Canada?' M. Girouard complains that the library tables of the jurist groan under the weight of authorities to be consulted; he might have added that the poor law student had every reason to groan even more loudly.<sup>6</sup>

The main reason for this fearful confusion was the Quebec Act of 1774:

The Act confirmed the feudal landholding system, specified that the 'Laws of Canada' were to be the rule in the settlement of civil suits, and gave the church statutory authority to collect the tithes. It was true the framers of the Act intended that this French and feudal constitution should be qualified at least by a few institutions which were English in origin and liberal in spirit. In the instructions given to Carleton, the new Quebec legislature was advised to introduce the right of habeas corpus, and to establish English law in commercial suits. But by a fatal decision these amendments were left out of the statute and reserved for the instructions. They did not have to be obeyed.<sup>7</sup>

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6. Cited by Edouard-Farbre Surveyer, 'Une école de droit à Montréal avant le Code Civil', *Revue Trimestrielle Canadienne*, June, 1920, p. 142.

7. Creighton, *op. cit.*, pp. 156-157.

Thus French law, poorly defined, was obligatory in civil suits, but English commercial law, and English common law practices in criminal proceedings became generally prevalent. In many situations there existed, as we have seen, considerable doubt as to which system should be followed.

Nevertheless the desire that some instruction should be given to new entrants to the profession was making itself felt both among the English-speaking population and among the French. The pressure came mainly from merchants who needed the services of competent lawyers, and from the articulated students themselves. Outside the Dean's Office in the McGill Faculty of Law hangs a framed document recording that in 1848 a group of twenty-three young men who described themselves as 'students composing the Law Class of McGill College' signed a document whereby they agreed to attend the lectures of Maître William Badgley, 'in accordance with the Resolutions adopted at a meeting held at the Court House on the nineteenth day of June'. The provenance of this document is unknown, and the registers of McGill College have no record of this *en masse* matriculation. The incident is somewhat reminiscent of the early days of the University of Bologna and Paris, when the students elected their professors. But it certainly shows that there was a strong desire on the part of articulated English-language students for some form of regular instruction.<sup>8</sup>

The merchants of Montreal also began to make their voice heard, and complained that McGill College, which had opened its Arts Faculty in 1843, was restricting itself to a purely classical curriculum and was not training young men for the professions or for commercial activities. The faculty of Medicine which had been giving lectures for more than twenty years was the one exception. In order to meet this criticism the first two non-classical programs (other than Divinity which was another form of the classical) introduced into the curriculum were French and law. The William Badgley named in the students' resolution, a prominent member of the Montreal bar, was appointed lecturer in law, in 1844, but as in

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8. In July 1848, Vice-Principal Leach informed the McGill Board of Governors that several law students desired to reside in College. The Board replied that the students should be encouraged to matriculate in the College either in the faculty of Law or Arts or both', but this reference to a Law faculty is a loose expression for Badgley's law classes. The requirements for the BCL were spelled out as three terms (one year) of Arts and six terms (two years) of law. See Minutes, Board of Governors, 7 and 15 July, 1848.

that same month of April he was appointed a circuit judge, his academic activities appear to have been somewhat sporadic. Indeed, in 1846, The Caput (as the McGill academic council was named) informed him that if he did not improve his performance his appointment would be discontinued. However, he must have amended his ways, for the next year his appointment was raised from a lectureship to a professorship, though he still continued in his office as circuit judge. This was still four years before Bibaud initiated his program at Collège Ste. Marie.

The group of Montreal merchants who were active in resuscitating the moribund McGill College 'visited' the institution, in the formal sense of the word, to examine its operations in 1847. In their report they specifically recommended that one or perhaps two professors of law should be appointed, as this would help revive the faculty of Arts 'from the state of almost total prostration in which it has so long remained'.<sup>9</sup> In 1852 these men were formally named the Governors of the University of McGill College (the style 'McGill University' was not adopted until 1885) and they could then begin to shape the institution to their own ideas. One of their first decisions was to give Badgley two young colleagues, and a year later they instituted a separate law faculty with Badgley as Dean, John Abbott and F.W. Torrance as professors and R.G. LaFlamme and P.R. Lafrenaye as lecturers. There was still much to be done before law as an academic function could be said to be thoroughly integrated in the academic program of the college but at least the initial steps had been taken.

A major problem was still the one described above by Desiré Girouard. In 1857 the judicial organization had been restructured, a process involving a de-centralisation which resulted broadly in the present court system. But the law the courts were to adjudicate remained urgently in need of organization and modernization. Partly in anticipation of confederation, and partly because the chaotic situation could not be allowed to persist any longer, a commission of three jurists was appointed in 1859 to produce a codification of the civil law for the new Province of Quebec. Three judges, two French, R.E. Caron and A-N. Morin and one English, Charles Dewey Day, were appointed as the commission to undertake the immense task, and they completed their work for

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9. See *Advancement 1*, pp. 109f. See also, Minutes of the Royal Institution for the Advancement of Learning, 4 April, 1848.

presentation to the Parliament of Canada in January 1865. The Royal Assent was given to the bill in September of that year; it was numbered 29 Vict., S.C. 1865, c. 41. Dean John Brierley has commented:

It is somewhat surprising how little is known about the circumstances surrounding the creation of Quebec's now century-old Civil Code which came into force 1 August 1866. Few sources give any picture of events leading up to the enactment of the 1857 Act which provided for the naming of three "fit and proper persons" to act as Commissioners to codify the laws. And what information we do possess respecting the actual working methods of the Commission, which began its work two years later, in 1859, is derived principally from the published *Reports* of the Commission itself, issued between 1861 and 1865. Apart from these *Reports*, the fullest account of the circumstances surrounding the Commission's work remains, even today, that provided by Thomas McCord, whose English-language edition of the Code, containing an informative *Preface* and *Synopsis of the changes in the Law*, was first published in 1867.<sup>10</sup>

Since Commissioner Charles Dewey Day was Chancellor of McGill University, and since Judge Thomas McCord, the English Secretary to the Commission, was a McGill graduate, the codification of the civil law, a *sine qua non* of good teaching, owed not a little to the English-language contingent in the Quebec legal fraternity.

The teaching of law was, however, to meet with many other difficulties in Montreal, Gonsalve Doutre was, in 1861, a young francophone McGill law graduate, so young that when he obtained his degree he had to wait two years to attain his legal majority and so be eligible to be called to the Bar. While waiting, he organized student dissatisfaction with the Bar's examination system and drafted a reform bill to be presented in the legislature. It became law in 1866. A year later, still only aged twenty-five, critical of the teaching at the Institut des Lois, the successor to the school at the Collège Ste. Marie, he organized a new French-language law school in connection with the Institut Canadien, in which he himself was the professor of civil procedure. But the same year brought a regulation that all law schools must be associated with a university.

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10. John E.C. Brierley 'Quebec's Civil Law Codification Viewed and Reviewed', *McGill Law Journal*, 14, 1968, no. 4, p. 523 f.

Since Laval, situated in Quebec City, was not interested in helping a rival school to establish itself in Montreal, Doutre turned to a Methodist institution, the Victoria University College in Coburg, and his school became the law faculty of that institution, even though he was a devout Catholic, and Upper Canada had now become the separate Province of Ontario. A similar arrangement for a breakaway French language medical school surprisingly lasted some forty years, but for Doutre's law school the arrangement proved less accommodating.<sup>11</sup> After four years only, Doutre and his colleague William Kerr and their students were welcomed into McGill. Doutre and Kerr were appointed professors in the faculty and in 1876 Kerr succeeded John Abbott as acting dean and from 1881-1888 served as dean of the McGill school.<sup>12</sup>

It was not until the founding of l'Université Laval à Montréal and its law school in 1878 that there was any institution outside Quebec City other than the McGill school to give instruction to the would be entrants to a profession sorely needed by the expanding economy of the new Province. But even at McGill, it was to be many years before the Law School could be called a truly viable institution. The main problem was that law professors could earn much more in their downtown offices than the University could afford to pay them in their lecture rooms. Badgley temporarily resigned his academic positions in 1855 and John Abbott became dean and professor of commercial law. He remained in those offices until 1880.

During those twenty-five years he served in the Legislative Assembly as the member for Argenteuil, and prepared and piloted through the House the Insolvent Act of 1864. He bought the Montreal-Bytown Railway, helped Sir Hugh Allan form the railway company which was to build a line to the Pacific coast and was implicated in the subsequent political scandal. He also wrote the historic contract between the federal government and the reconstituted Canadian Pacific Railway. At the same time he conducted a practice described by a contemporary as "of enormous proportions". But through it all he remained McGill's professor of commercial law.<sup>13</sup>

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11. For the story of l'Ecole de Médecine et de Chirurgie de Montréal, see L-D Mignault 'Histoire de l'Ecole etc.' *L'Union Médical du Canada* 55, October 1926, pp. 597-674. Also *Advancement*, 1, pp. 140-144.

12. *Advancement*, 1, pp. 277-278. Also DCB, X, s.v. Doutre, Gonsalve.

13. S.B. Frost and D.L. Johnston, 'Law at McGill: Past, Present and Future', *McGill Law Journal*, 27, no. 1, 1981, p. 33.



Dean John Abbott (who was to succeed John A. Macdonald as Prime Minister of Canada) obviously brought great prestige to the McGill law school, but he cannot have had much time for his students and his deanship. Frederick Torrance, the professor of Roman law, probably paid more attention to his academic duties, but he remained in practice until 1868, when he was appointed a judge of the Superior Court of Quebec. LaFlamme and Lafrenaye were also lawyers of considerable repute, so that they too were busy men. In 1887, the complaints that law lectures were given only irregularly became so persistent that Principal Sir William Dawson wrote a long letter to the Montreal *Gazette* headed 'The Relation of McGill University to Legal Education'.<sup>14</sup> In it he defended both the matriculation requirements for entry into the law courses, and also the teaching performance of the faculty, which by this time had grown to seven professors and one lecturer. He argued persuasively, but there is considerable evidence that the main problem remained unresolved until 1890, when Sir William Macdonald gave \$200,000 to endow two teaching positions in the faculty. Macdonald did not insist that the new professorships should be full-time appointments, but he underlined in his letter making the offer that any person appointed would be expected 'to devote himself zealously to the management and continuous advancement of the faculty and the instruction therein'.<sup>15</sup>

With these appointments, a new breed of law-teacher became possible at McGill, the academic lawyer, one who though he might retain strong professional relationships thought of himself as primarily a professor of the law rather than as a practitioner. Much still remained to be achieved, but at least the first steps had been taken on the road which would lead the McGill faculty to distinguished achievements in the second half of the twentieth century.<sup>16</sup>

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14. *The Gazette*, Montreal, 19 April, 1887.

15. Minutes of the McGill Board of Governors, 5 April, 1890.

16. See *Advancement* 2, (1895-1971), May 1984, and especially J.E.C. Brierley, 'Developments in Legal Education at McGill, 1970-1980', (1982-83) 7 *Dalhousie Law Journal*, 364.