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A J. Hobbins
McGill University

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A.J. Hobbins*

Designating the Dean of Law:
Legal Education at McGill University and the
Montreal Corporate and Professional Elite,
1946-1950.

The nature of legal education has been the subject of an ongoing debate in all Canadian jurisdictions. A central theme of this debate for much of the twentieth century was whether legal education should be restricted to training for the local Bar as opposed to studying law as an academic discipline in addition to such professional training. A decanal vacancy at McGill University brought this question to the fore in 1946 when the anglophone members of the Montreal Bar exerted a great deal of influence on the selection process. The matter was complicated by the opposition of the corporate elite to candidates with socialist leanings. The University went through five deans in five years before a long-term appointment was made. The final appointment, which initially appeared to represent a triumph for those who wished to restrict the McGill Faculty to teaching Quebec civil law in English, actually hastened the broadening of the curriculum and the introduction of graduate studies.

La formation juridique a fait l'objet de vifs débats dans toutes les provinces canadiennes. Le thème central de la controverse oppose une formation ciblée sur la préparation à la pratique du droit et l'appartenance au Barreau, à une formation à caractère académique axée sur la science juridique. Le débat est devenu aigu lors de la recherche d'un nouveau doyen pour la Faculté de droit de l'Université McGill en 1946, au moment où les membres anglophones du Barreau de Montréal ont pesé de tout leur poids dans la sélection du nouveau doyen. L'élite anglophone de Montréal s'opposait alors vigoureusement au choix d'un candidat aux affinités socialistes et faisait la promotion d'une formation en anglais restreinte au droit civil positif. Ces représentants qui luttaient pour maintenir une vision restrictive de la formation en droit croyaient avoir remporté une victoire avec la sélection du doyen de leur choix; mais l'histoire nous démontre plutôt que ces événements ont en fait accéléré un mouvement qui allait se traduire par l'ouverture du curriculum et l'introduction des études supérieures.

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Introduction

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Introduction

Visitors to McGill University's Faculty of Law, which traces its origins to 1848, will see illustrations of a rich history on the walls of its buildings. There are graduating class and other photographs, lists of deans and faculty members, and other memorabilia.¹ While such exhibits are always interesting, they sometimes raise questions that require deeper study to answer. For example, the list of deans demonstrates an unusual difficulty encountered in selecting a dean during the period immediately following

1. The installation of these memorabilia is comparatively recent. In 1984 Dean Roderick Macdonald initiated the project after consultations with two former Deans, John Durnford and John Brierley, and with Blaine Baker, a professor who had an interest in the history of academic legal institutions. Durnford undertook the original task of finding suitable material and continued it in 1989 with the assistance of Professor Nicholas Kasirer.

the Second World War. Within a five year period the deans are listed as: Stuart LeMesurier² (1936-1949); John Peters Humphrey (1946); Gérald Fauteux (1949); Sydney Bruneau (1950); and William Meredith (1950-1960). While there are acting deans elsewhere on the list, Humphrey's name is followed by the unique appellation "Designate."³ Missing from the list for that period is Frances Reginald Scott, the person many observers would have considered the most appropriate for the position. Since the normal decanal term varied between five and ten years, and was sometimes longer, the rapid turnaround in the post-war period bears further examination.

While the position of dean is an important one in any time period, it perhaps carried greater prestige and significance in the post-war period than in modern times. In an era before vice-principals and a host of senior staff officers had become commonplace at McGill, planning was done by the principal in concert with the deans' committee, whose members therefore influenced all areas of the University and often represented the institution to the outside world. The dean of law, apart from the internal management of the Faculty, played a pivotal role in liaising with the local professional legal community, which perceived itself to have a vested interest in the training of lawyers. The dean was also a key player in an ongoing debate in Canada about the nature of legal education. The central themes of that debate were the questions of whether legal education should be university-based and, if so, whether it should be restricted to training for the local Bar as opposed to studying law as an academic discipline in addition to such training. As a result of that conflict there were powerful lobby groups with strong views about the right sort of person to be dean. Those interests made the selection process an extremely difficult one for the University administration.

Throughout the 1930s and 1940s, the conservative political and business establishment of Quebec had sought to marginalize left-wing elements of society. At McGill, the establishment was represented by the board of governors and the left-wing elements by those professors and lecturers

2. LeMesurier, of Channel Island descent, always wrote his surname as two words, but in all documentation it appears as one word. The latter usage has been preserved for this article.

3. When the list was first posted, Humphrey was also accorded the title of Acting Dean. He complained to Durnford that he had been asked by the Principal, F. Cyril James, to be Dean and had fulfilled that role for a short while. Durnford could find no University documentation confirming that Humphrey had ever been offered a position other than Acting Dean, and so felt he could not list Humphrey as Dean. However, accepting Humphrey's word that a verbal offer had been made, he came up with the compromise title of Dean Designate and the list was altered accordingly.

with socialist views.⁴ Those teachers without tenure, such as Eugene Forsey and Leonard Marsh, had been terminated during the Second World War. For those with tenure, like Scott and Humphrey, more subtle measures were employed to curb their influence. While the Board realized that overt attempts to stifle freedom of speech were doomed, a number of measures were attempted to pressure faculty into dissociating their views from their University position. In particular, the board would certainly be averse to giving such faculty a more prestigious University appointment.

A second and, from the Law Faculty's perspective, more fundamental factor in the appointment of a dean dealt with the question of control of the curriculum. Historically in Canada lawyers, generally with an undergraduate Arts degree, had gained their professional status through articling for some five years followed by successful completion of the Bar examinations. When universities began giving undergraduate law degrees, tensions arose between the concepts of studying law as an academic discipline and teaching law as professional training. That debate, carried on at various times in every province, was summed up by Dale Gibson in 1974: "the chief weakness of contemporary legal education is the same that has plagued most of its history: failure to resolve the practice-theory dilemma satisfactorily."⁵ In Quebec, the debate had a particular flavour since university-based legal education had been available from McGill in 1848, Laval soon after, and the Université de Montréal by 1878. After the First World War, a committee chaired by McGill Dean of Law, Robert Warden Lee, recommended to the Canadian Bar Association that all provinces follow a modified version of the "Harvard" method in which law students would attend university for three years full-time for their degree, taking the bar examinations subsequently for professional accreditation. However, no standard appeared nationally and various methods were employed in the different provinces. In Quebec as in most other provinces, professional accreditation could still be obtained either through the university program or through articling until soon after the Second World War. Whatever the method employed throughout the country, the various bars jealously controlled their influence over the curriculum.

At McGill, where the unique mission was to teach civil law in English,

4 For an excellent account of the struggle between the establishment and faculty with politically left-wing views, see Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999), especially c. 6, "Socialism and Academic Freedom at McGill".

5 R. Dale Gibson, "Legal Education – Past and Future" (1974) 6 *Man. L.J.* 21 at 28. For further analysis of the history of Canadian legal education outside Quebec, see generally John McLaren, "The History of Legal Education in Common Law Canada" in Roy J. Matas & Deborah J. McCawley, ed., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) at 111.

pressure came not so much from the provincial Bar, the Barreau du Québec, but rather from the anglophone members of the Montreal Bar, an autonomous section of the Barreau. Since the dean could have a profound influence on the curriculum, the local bar attempted to influence the selection processes of successive deans to the extent possible. It was interference by the board of governors and the members of the local bar that made the selection of a dean so difficult from 1946 to 1950.

1. *The Wartime Faculty of Law*

At the outbreak of the Second World War, in addition to Dean LeMesurier, the Faculty had three full-time faculty members: former Dean (1928-1936) Percy Corbett, Scott and Humphrey. There were also a number of part-time or sessional appointments including Orville S. Tyndale (later Associate Chief Justice of Quebec and Chancellor of McGill), Sydney Bruneau and Gérald Fauteux. Corbett, whose interests lay chiefly in the field of public international law, was one of the Faculty's great scholars and, as dean, had recruited both Scott (1928) and Humphrey (1936) to the Faculty. In January 1939 he had made a speech over the Canadian Broadcasting Corporation concerning his view of Canada's obligations in the event of a British declaration of war. He believed that since the 1931 Statute of Westminster a British declaration would not automatically commit Canada as a belligerent. He recommended that Canada delay any declaration of its own for a reasonable period to demonstrate its independence as a nation to the international community. These remarks were badly misunderstood as advocating neutrality and demonstrating disloyalty. Corbett was vilified in the press by editorialists who had not even heard the speech. As a result of that treatment and his failing health, Corbett severed his connection with McGill in 1943, going to Yale University and later Princeton University.⁶

While Corbett became suddenly controversial in 1939, Scott had always been viewed with mistrust in mainstream circles. A socialist and civil libertarian, he co-founded the League for Social Reconstruction and later the Cooperative Commonwealth Federation (CCF). He had traveled to the Soviet Union and had written articles in the popular press extolling the virtues of Stalin's Russia. Throughout the Second World War, Scott

6. For greater detail on Corbett's speech and the reaction, see A.J. Hobbins, "Mentor and Protégé: Percy Ellwood Corbett's Relationship with John Peters Humphrey" (1999) 37 Can. Y.B. Int'l Law 3 at 36-44.

continued to expound views that made him unpopular with the anglophone Quebec elite, in particular the legal community and McGill's board of governors. Indeed, some of his views were considered treasonous, at least in some quarters, during wartime. Even after the war, those conservative attitudes persisted in a fashion that Humphrey found baffling. In 1949, during a vacation from the UN spent in the Laurentians, he confided to his diary:

Sitting in the sun outside after lunch we entered into conversation with two elderly ladies. One of them considering her background was almost progressive in her ideas, but the other — Oh God, Oh Montreal! Such anti-semitism I have not witnessed in many months. Perhaps the most depressing thing about Montreal is the complete reaction of its wealthy class. It is the kind of thing that brings into relief and explains the hate with which radical groups are held in Montreal. When you think of a man like Frank Scott, for example, in the perspective of what is going on in the rest of the world, he seems relatively safe and conservative. He appears as a radical when one thinks of him in the perspective provided by Montreal.⁷

Scott's political activities were so controversial that his brother, William Bridges Scott, a prominent member of the anglophone Montreal Bar, did not speak to him for twenty years following his 1942 stance on the conscription issue.⁸

Scott's relationship with J.W. McConnell, owner and publisher of the *Montreal Star*, appears to have been even worse. According to one generally accepted view, George Ferguson published a 1944 editorial in the *Montreal Star* accusing the CCF of failing to respond to the points made in a previous critical editorial.⁹ Scott (elected National Chairman of the CCF in 1942) wrote to point out that the party had responded but the paper had not printed the response. Nor did it print that second response. Scott therefore approached McConnell directly:

7. A.J. Hobbins, ed., *On the Edge of Greatness: the Diaries of John Humphrey, First Director of the United Nations Division of Human Rights*, Vol. 1 (Montreal: McGill University Libraries, 1994) at 121 (entry for 7 March 1949). "Oh God, Oh Montreal!" is the refrain from British author Samuel Butler's "A Psalm of Montreal" (1875).

8. See Sandra Djwa, *The Politics of the Imagination: A Life of FR. Scott* (Toronto: McClelland & Stewart, 1987) at 200. W.B. Scott was bâtonnier of the Montreal Bar (1951-1952) and succeeded Tyndale as Associate Chief Justice of Quebec (i.e. Chief Justice, Montreal District Superior Court) on the latter's death in 1952.

9. *Ibid.*

A stormy confrontation between Scott and *The Star's* publisher, J.W. McConnell, brought no satisfaction. McConnell simply insisted that CCF principles promoted foolish notions and lies and refused to listen to arguments to the contrary, even from the eloquent Scott.¹⁰

Denied the chance to respond in the media, Scott had his rebuttal privately printed and circulated broadly, with copies to every member of McGill's board of governors. Members of the board were said to have been sympathetic and to have teased McConnell. Principal James is even alleged to have stated: "That was a good letter you wrote, Frank." Sandra Djwa, Scott's biographer, concluded: "The all-powerful McConnell was not accustomed to being thwarted. He retaliated by barring the use of Scott's name in *The Star* columns." The problem with that account, from an historian's perspective, is that its source is a 1983 interview that Djwa had with Scott. There can be problems simply accepting the word of an octogenarian recalling events of almost four decades earlier.¹¹ Nor is it easy to find corroboration of the account. Stanley Frost, the official McGill historian, was more circumspect: "To deprive Scott of publicity, he ordered, it was said, that the professor's name should never appear in the columns of the *Montreal Star*."¹² There do appear to be inconsistencies between the Djwa-Scott account and the documentary record. Scott's rebuttal¹³ contained an attack on McConnell for exercising a monopoly on the media and censorship of the C.C.F., and the included letter was to Morgan Powell, not George Ferguson, concerning the failure of the *Montreal Star* to report any C.C.F. activity or even allow paid advertising for its events. McConnell sent a copy of the pamphlet to James suggesting it be distributed to each of

10. *Ibid.* at 222.

11. Scholars, such as Roderick A. Macdonald (*infra* note 34), writing about the effects of Scott's political activities on his academic career, discovered that the source of most information, directly or indirectly, was Scott himself. Djwa (*supra* note 8 at 456) discovered that the facts Scott gave in later interviews were not always accurate, writing: "It is a commonplace of autobiographical writing that most individuals remake their vision of their past with each passing decade. Scott was no exception to this general rule. ... The task of his biographer was thus to find concrete evidence... that would determine, as far as was possible, the accuracy of views expressed in taped interviews. And, as was the case, when some of these beliefs proved to be without foundation, the distortions of memory had to be reinterpreted in the light of discovered fact."

12. Stanley Frost, *McGill University for the Advancement of Learning*, Vol. 2 (Montreal: McGill-Queen's University Press, 1984) at 423. Humphrey recalled "[t]he Star had orders never to publish anything Frank said" or presumably wrote, which has somewhat different implications. Humphrey is quoted in R. St. J. Macdonald, "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights, (1991) 29 Can. YB. Int'l Law 3 at 32.

13. A four-page pamphlet entitled "The Montreal Star and the C.C.F.: Another Monopoly at Work" was published by the Quebec Provincial Section of the C.C.F. A copy is in McGill University Archives (MUA), (RG2, Box 105, File 02861 "Law Scott and CCF").

the governors for a fuller discussion.¹⁴ James, expressing his opinion to Chancellor Morris Wilson, wrote:

You have undoubtedly seen the C.C.F. pamphlet entitled "The Montreal Star and the C.C.F." about which I have had two or three discussions with J.W. McConnell during the past few days.

Although in my judgment the University cannot do anything about Frank Scott's political activities, and probably would not want to, we should, I think, insist that he do not use his University connection for political purposes, and that he should refrain from inaccurate statements regarding the University such as that about Eugene Forsey¹⁵ which appears in the pamphlet.¹⁶

Thus it appears that McConnell's censorship was generally directed at the C.C.F., not Scott in particular, and that the pamphlet was distributed by James not Scott. However, it is undoubtedly clear that there was ill-will between Scott and McConnell.

John Humphrey, the third and most junior member of the Faculty, also held views that were unpopular. While he had become friendly with Scott in 1926 when they were both undergraduates, he had been of a conservative disposition when he graduated in 1929.¹⁷ However, on his return from Europe in 1930, he found Montreal in the throes of the Great Depression and was appalled by the misery.¹⁸ His politics changed rapidly, partly through the influence of Scott, and he joined the League for Social Reconstruction.¹⁹ By the mid-1930s, however, under the increasing influence of Corbett, Humphrey became interested in the international scene and felt the focus of Canadian socialists was too narrow. He confided to his diary:

14. Letter from McConnell to James (28 March 1944), *ibid.*

15. In discussing the newspapers refusal to publicize a speech by Eugene Forsey, Scott referred to him as a former McGill professor. Dorothy McMurray noted in the margin that Forsey was "a lecturer as Mr. Scott knows very well", *ibid.*

16. Letter from James to Wilson (3 April 1944), *ibid.*

17. For a more detailed examination of Humphrey's early relationship with Scott see A.J. Hobbins, "'Dear Rufus...': a Law Student's Life at McGill in the Roaring Twenties from the Letters of John P. Humphrey" (1999) 44 McGill L.J. 753 at 760ff.

18. On 2 May 1932 Humphrey wrote to his sister: "We're all sweating from the first to the last, under fear of losing our jobs... Of course, I am one of the fortunate ones. I live in comparative security; but there are those who don't. When I think about these things — it's not theorization. Unfortunately there are too many concrete examples all around us — I want to go out and tear someone to pieces." Cited in Macdonald, *supra* note 12 at 10, n. 16.

19. See generally A.J. Hobbins, "Humphrey and the Old Revolution: Human Rights in the Age of Mistrust" (1995) 8 *Fontanus* 121.

My experience, even in Canada, has been that socialists are so preoccupied with domestic questions that they had no energy and time left for what is happening in the international community. This is true even of as enlightened and intelligent [a] person as Frank Scott.²⁰

Differing views on the League of Nations, which the League for Social Reconstruction stated was merely established for the defence of the "principles of property," led to the decisive break with the Canadian socialists:²¹ Humphrey believed that the best hope for peace lay in collective security. As a result, Humphrey did not join the CCF and his socialist views were not generally known thereafter. He did, however, promote his views that social security and official bilingualism were essential to the accomplishment of Canadian unity during several wartime broadcasts on national CBC radio.²² As a known adherent of Corbett, Humphrey too became suspect after 1939. LeMesurier himself was considered politically sound but quite remote from the legal and business community, a situation that owed more to his reclusive personality than to any commitment to scholarship. As a result the Faculty acquired the appearance if not the character of an "ivory tower".

II. *The Decanal Vacancy*

In 1946 LeMesurier informed the Principal that he would like to step down as dean after ten years in that office. Within the Faculty there was general agreement that an internal appointment was preferable either to a part-time practitioner or, since the Faculty had a unique role, to an external academic unfamiliar with the local situation.²³ There was also agreement that Scott was the logical choice. He was viewed as an outstanding teacher and had the best record of scholarship, after Corbett's departure, in an admittedly weak field of colleagues. Additionally he had six years' seniority over Humphrey, the only other viable internal candidate. Accordingly,

20. Hobbins, *supra* note 7, Vol. 2 at 262-63.

21. See generally Macdonald, *supra* note 12 at 27-28.

22. See generally A.J. Hobbins, "Canadian Unity and Quebec in 1942: a Roundtable Discussion among John Humphrey, Hugh MacLennan and Émile Vaillancourt" (1993) 6 *Fontanus* 119.

23. The preference for someone knowledgeable about Quebec civil law probably represented the view of the Bar, advocated by the part-time practitioners on the Faculty. Certainly the Faculty had gone to Great Britain with some success for its first full-time Dean, Frederick Walton (1897), and his successor, Robert Lee (1914), both of whom were experts in Roman law but had no in-depth knowledge of Quebec civil law. Corbett, while a Quebecker, had received his legal education at Oxford University.

LeMesurier recommended Scott's appointment to Principal James. James had no objections until the suggestion was put to the board of governors. As Humphrey put it:

There was no doubt whatsoever that the new dean should have been Frank Scott. But, because of his well known radical views and political commitment to the socialist C.C.F., he was unacceptable to some of the governors of the university, including J.W. McConnell, a generous benefactor who, it was hoped, would continue to benefit the university. Scott was therefore passed over.²⁴

Indeed, McConnell was not a good enemy to have in the post-war era of McGill. Apart from being a prominent member of the elite establishment with close connections to Maurice Duplessis and the provincial government, he was one of McGill's greatest benefactors and a long-serving member of the board. His opinions had to be taken seriously by the principal. In 1944 McConnell was solely responsible for raising \$7 million for the University, and in his lifetime raised over \$18 million. More than \$30 million was given to the University after his death from the foundation he set up. In addition to the engineering building that bears his name, he would, in 1948, purchase the J.K.L. Ross mansion for the University.²⁵ Many of the Board shared or sympathized with McConnell's view of Scott. Indeed it seems unlikely that McConnell would be teased, or that the principal

24 J.P. Humphrey, "Life is an adventure" [unpublished manuscript] at 117, MUA (MG4127, Cont. 20, File 16).

25 A fuller list of McConnell's gifts can be found in Frost, *supra* note 12, Vol. 2 at 422-424. McConnell did not purchase the mansion for the Faculty of Law specifically as is often reported. Indeed, it was originally a men's residence named McConnell Hall in 1949. At that time James formed a committee to decide whether the mansion should be given to Law (then sharing Purvis Hall with the School of Commerce), to Music or to Fine Arts. Remarkably, during the committee meetings, LeMesurier, in virtually his last act as Dean, insisted the Faculty did not really want this building (see letter from James to Dean Noel Fieldhouse, 4 June 1949), MUA (RG2 Box 134, File 03816, "Law: McConnell Hall"). Tyndale and Fauteux subsequently overcame that difficulty and McConnell Hall was given to the Law Faculty. McConnell then requested that his name be removed from the building, suggesting it be changed to Tyndale Hall. Tyndale said if the name were changed it would have to be to one of four distinguished individuals with a McGill connection: Charles Dewey Day; Sir Wilfred Laurier; Eugene Lafleur; or Pierre-Basile Mignault. He recommended Day, if McConnell's name could not be used. McConnell opposed the notion of Chancellor Day Hall as being too dated. Eventually the compromise of Eugene Lafleur Hall was reached, and James prepared a dedication speech to that effect. At the last moment McConnell relented and Chancellor Day Hall became the name. McConnell's refusal to let his name be used was probably because of his modesty rather than an unwillingness to have his name associated with the Law Faculty, since he did have the building refurbished at his own expense after he knew who the tenants would be (*ibid.*). Interestingly, McGill did use the names McConnell Hall (for the new residence built in 1961) and Tyndale Hall (for the entrance lobby of the 1953 Redpath Library extension, since demolished).

would risk his wrath, simply through distaste for yellow journalism as Djwa has suggested.²⁶ Elsewhere Djwa asserted:

Not only were Scott's politics the wrong kind, but he had incurred the serious displeasure of one of the most influential governors, J.W. McConnell, who as editor had banned publication of Scott's name in *The Montreal Star*. It was also well known in Montreal in the forties and fifties that McConnell had said Scott would never be Dean of Law as long as he remained on the Board of Governors.²⁷

It was natural that Scott's name should resurface every year until 1950 as the best candidate for Dean. It was also evident that Scott would be unacceptable, not just to McConnell but to a majority of the Board. It should be noted that Scott's external activities were not solely motivated by his beliefs, but also by the need for more income. When James questioned Scott's political activities as an impediment to an appointment as dean in 1947, he responded that, since his position at McGill was uncertain, he could not simply wait for a resolution of the matter. He needed "work of a remunerative character", and now had an opportunity to act as counsel in the *Roncarelli* case, which ultimately went to the Supreme Court of Canada twelve years later.²⁸ Roncarelli had his liquor license revoked by the Duplessis government allegedly because he repeatedly furnished bail for members of the Jehovah's Witnesses.²⁹ It is ironic that Scott took this and other cases because he needed money, while the anti-establishment nature of the cases apparently rendered him ineligible for promotion to dean of law with its concomitant salary increase.

III. *Humphrey's candidacy*

Returning to the 1946 search, James informed LeMesurier of the evident impossibility of getting Scott's appointment past the Board. On LeMesurier's recommendation, James verbally offered Humphrey the

26. See Djwa, *supra* note 8 at 222. However, James and Scott appear to have had a relatively harmonious and mutually respectful relationship. In early November 1946 James noted in his diary: "The other day Frank Scott said that never in his experience had he known McGill to be as intellectually alive – and, even though he may have meant alive to C.C.F. gospels I took heart at this comment and was on top of the world." (Stanley B. Frost, *The Man in the Ivory Tower: F. Cyril James of McGill* (Montreal: McGill-Queen's University Press, 1991) at 150).

27. Djwa, *supra* note 8 at 238.

28. *Ibid.* at 240.

29. *Ibid.* at 297.

position, and the offer was accepted. Humphrey described the situation following the elimination of Scott's candidacy as follows:

There remained two possibilities. Either the new dean would be a judge or some practicing lawyer on a part-time basis, or it would be me as the next and only career professor in line, there being no question at that time of employing a fourth career professor.³⁰ Stuart LeMesurier... was strongly of the opinion that the deanship was a full-time job and that the new dean should be a career professor. Any other solution would be a retrograde step and not in the interest of the Faculty. I had every reason to believe that Frank, although he naturally resented being passed over, shared this view; but many years later he told me that, in his opinion, I should never have accepted the deanship. He never quite forgave me for accepting.³¹

It seemed that James' problem was satisfactorily resolved, except for some hard feelings within the Faculty. However, after news of the appointment leaked out but before the board could approve it, James contacted Humphrey again, who recalled:

The news of my appointment was not well received in certain circles on St. James Street – the then financial centre of Canada – and about a fortnight later, James called me on the telephone. There were, he said, some difficulties and the wiser course would be not to give any further publicity to the appointment until the commotion had blown over. I asked him what the difficulties were. I was too young — 41 — he said and I had no administrative experience. ... I later learned there were other objections to my appointment, the strongest of which came from Frank's brother, not because Frank had been passed over, but because I was "tarred with the same [political] brush" as Frank, an objection in which there may have been some substance.³²

Humphrey's sources, whoever they may have been, were accurate. W.B. Scott wrote to James, upon hearing of the possibility of Humphrey's appointment as dean, that Humphrey was not "a suitable person to be appointed to this important position."³³

30. Humphrey was wrong in that assertion. James used his extensive contacts in Great Britain and Australia in an unsuccessful attempt to find a suitable candidate for Dean throughout the period. When no senior candidate was found in 1946, Louis Baudouin was hired as a fourth full-time professor at a more junior level (see below), raising the number of faculty to the level enjoyed prior to Corbett's resignation.

31. Humphrey, *supra* note 24 at 117.

32. *Ibid.* at 118.

33. Letter from W.B. Scott to James (14 June 1946), MUA (RG2, Cont. 105, File 2859 "Law: Selection Committee. Gale Chair and Civil Law, Prof. J.P. Humphrey").

Scott's intervention was only the latest attempt in the ongoing efforts of Montreal anglophone practitioners to control the nature of legal education at McGill. The Faculty had been founded in the mid-nineteenth century by local practitioners, whose control of the curriculum continued for half a century and may partially explain the ongoing proprietary interest of the Bar.³⁴ In 1897 Frederick Parker Walton, the first full-time Dean, came from Scotland not from the local community, and he added diversity to the curriculum. He was succeeded by another British academic, Robert Lee. In 1918 McGill began to offer a four-year LL.B. program with a business orientation, aimed at those students who did not intend to practice in the profession in Quebec. LL.B. graduates could, however, transfer into the second year of the BCL program, and so obtain both degrees. That curricular development pre-dated the National Programme by fifty years and was somewhat similar in concept. It was not to last, however, as:

[t]he elite anglophone Bar of Montreal was hostile to any development which, by the dispersal of McGill graduates across the country, might lead to a weakening of its representation in the Quebec legal profession. Other law societies, and especially the Law Society of Upper Canada, strenuously resisted university based legal education, and even as McGill's common law degree was achieving official recognition in the U.S. it was scorned in Ontario.³⁵

The bar regained political ascendancy with the 1923 appointment of Justice R.A.E. Greenshields, despite the opposition of Principal Currie, as part-time dean to replace a full-time scholar. The common law degree was dropped immediately afterwards, and the Faculty concentrated on civil

34. See Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal. L.J. 211. For the early involvement in McGill legal education of local practitioners, whose approaches were more ambitious and progressive than later interventions, see G. Blaine Baker, "Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848-1868" in Carol Wilton, ed., *Essays in the History of Canadian Law*, Vol. 4 (Toronto: University of Toronto Press for The Osgoode Society, 1990) 45 at 51ff. For a general examination of the problems of legal education in Quebec in the post-war period see J.E.C. Brierley, "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" (1986) 10 Dal. L.J. 5.

35. Macdonald, *ibid.* at 260. For similar attempts to control legal education by the Law Society of Upper Canada see C. Ian Kyer and Jenane E. Bickenbach, *The Fiercest Debate. Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957* (Toronto: University of Toronto Press for The Osgoode Society, 1987). There is, in fact, a rich literature covering the question of legal education in various individual provinces. The first substantive national studies were published by Maxwell Cohen beginning in 1950. A complete listing of those assessments can be found in R. St. J. Macdonald, "Maxwell Cohen at Eighty: International Lawyer, Educator and Judge" (1989) 27 Can. Y.B. Int'l Law 3.

law training for the Montreal Bar. However, under Corbett's deanship and with an increase in full-time faculty in the 1930s, the bar began to lose its control once more.

When James asked for further elaboration, W.B. Scott explained that his disenchantment with McGill as a whole had been growing for some years. He sent James a copy of a letter that he had written to the chairman of the McGill Associates, Greville Smith, the previous month that expressed "more fully the views which I know are held not only by myself but by a large number of graduates, parents and informed members of the general public".³⁶ This letter stated, *inter alia*:

Since 1938 I have followed with some attention undergraduate life in the Faculties of Arts, Commerce and Law and feel discouraged and disheartened at so much that was put out in certain quarters by the professorial staff. It seems to me that a philosophy of cynicism and sneers has been far too prevalent, all leading to a disbelief in fundamental principles and values. Most of the students are possessed of a moral fibre that is able to withstand such assaults, but a certain percentage of mental casualties has resulted.

During the last years I have had an opportunity of meeting many of the present students. Those who have come to McGill from the armed services are a splendid group and have undoubtedly improved the tone of the University as a whole. Nevertheless idealism and faith in our best things are still in danger of being lost or weakened by the subjective teaching and propaganda of those set in authority who have done so little and talked so much throughout the years.

This imperfect expression of what is in my mind must not be construed as having anything whatever to do with individual views on party politics, social abuses, necessary reforms and the like. Nothing is further from my mind.³⁷

Evidently W.B. Scott viewed McGill professors with socialist tendencies in much the same way as Anytus viewed Socrates as a corrupter of youth. It should perhaps be noted that, in so far as Corbett, Frank Scott and Humphrey were concerned, while they may have talked a great deal through the years, the charge of doing so little was unfair. Corbett deferred a Rhodes Scholarship in 1914 to volunteer for military service. Though initially

36. Letter from Scott to James (17 June 1946), MUA, *supra* note 33.

37. Letter from Scott to Greville Smith (12 May 1946), *ibid*.

rejected on the basis of poor eyesight, he did join the Black Watch in 1915, was twice wounded in action, and was awarded the Military Cross for conspicuous gallantry in 1917.³⁸ In 1918, Scott volunteered for military service on five different occasions but, having lost one eye two years before in an accident, he was rejected.³⁹ On the outbreak of war in 1939, Humphrey, who had lost an arm as a child, wrote to Prime Minister William Lyon Mackenzie King volunteering his services in any capacity whatever. All three men were strong nationalists, but the visions of Canada they promoted would have to wait some three decades for a favourable popular reception. It would seem, therefore, that the patriotism and courage of those three scholars could not reasonably be questioned.

James temporized, arranging a lunch with Scott to explore his concerns further. There, he appears to have expressed the intention of recommending Humphrey as dean at an upcoming meeting of the board. The following day, Scott wrote an even stronger letter explaining his reservations about Humphrey, his feeling that the dean should come from outside the Faculty and specifically from the Anglophone Quebec legal community, and his general concerns about McGill professors. He asked that the board delay further action until representatives of the bar could be consulted, and elaborated on his discontent with the Faculty. Scott was also upset when he heard through his board contacts the still confidential news that McGill was hiring a new professor from France to teach civil law.

[W]e cannot understand why McGill should suddenly have decided to bring over a member of the French Bar to teach our civil law at McGill.⁴⁰ In the first place he does not know our Code; secondly, and more important still, it will be many years before he can absorb our long line of jurisprudence interpreting our laws. Finally I venture to say it will be many years before anyone can be sure of the loyalties of a Professor who has come to us direct from France. I have heard nothing but criticism of the announcement that a total stranger to our whole system of law should be brought here to teach our young men. As, however, McGill would appear to be committed in this respect, I do hope it is not too late to save the position of Dean for someone who will command the fullest respect within and without University circles.

38. Hobbins, *supra* note 6 at 7-10

39. See Djwa, *supra* note 8 at 40. William Scott also lost an eye a year before Frank, but as a result of enemy sniper fire at the front.

40. Scott's use of "our civil law" refers to the fact that Quebec civil law derives in part from old French law, specifically the Custom of Paris, with which a modern French jurist, brought up on the Code Napoleon, would be less familiar. Scott's views may have been coloured by his understandable mistrust of anyone who had held professional office under the French Vichy government.

... [M]any of us felt that the Law Faculty and Arts and Commerce had in some respects been used as an unfortunate propaganda agency, both prior to and during the war. To my own personal knowledge many "mental casualties" have resulted from the curious teaching put forward during the past few years. Recent events in our Criminal Courts have illustrated the unhappy results of preaching a philosophy of cynicism and sneers.⁴¹

If the Bar were not consulted before the appointment of a dean, Scott mused "we may have someone installed in this position for the next fifteen or twenty years, without the possibility of removing him." He offered Walter Johnson, K.C. as a possible candidate.⁴²

Certainly he has an intellectual and moral background that should be acceptable to the Students, Bench, Bar and the public, in addition to being a man whose character could be trusted implicitly under any circumstances. A disbelief in fundamental, spiritual and moral principles and values has become far too prevalent and in the Law Faculty we particularly need a wise and understanding leadership to restore a loss of faith in all that is best in our past and present. For these reasons I am writing to ask that before the question of this appointment reaches the Executive Committee a full consultation be had with representative members of the Bar. By the nature of things it is most important that the English speaking Bar should have a Dean in whom they can have the fullest confidence. Consultations of this nature take place with the doctors and they are just as necessary in the Law Faculty.⁴³

There is a typed attachment to that letter offering advice to James. Although it is unsigned, it was the habit of the long-serving secretary to the principal, Dorothy McMurray, to give her views in that fashion. The note reads in part:

41. Letter from Scott to James, 25 June 1946. MUA *supra* note 33.

42. Walter Seely Johnson (1880-1969) was one of the most scholarly local practitioners. He had written a number of books including the three-volume *Conflict of Laws* (Montreal: J.D. de Lamirande, 1933-1937) and *Maxims of the Civil Law: Essays in the Evolution of Law* (Montreal: Wilson & Lafleur, 1929). For a more complete list of Johnson's accomplishments, see his obituary in (1969) 28 *Revue du Barreau du Québec* 613-617. Scott's suggestion showed that he, at least, recognized a place for scholarship in the Law Faculty, and the University did follow up on the idea.

43. Letter from Scott to James, 25 June 1946. MUA *supra* note 33. Scott's parallel with the Faculty of Medicine is inexact. It is true that in 1942 it was agreed that the University would consult with the teaching hospitals on appointments via the Joint University Hospital Committee, having previously made appointments to the Faculty without such consultation. That was done because individuals generally needed to have joint appointments in the university and the hospital. However, the Faculty did not allow practicing members of the profession to dictate to it in matters of curriculum or appointments. See Frost, *supra* note 12 at 167.

There is no doubt at all that this letter reflects faithfully the attitude of the profession towards the Faculty and I think this being so it would even at this late date be wiser to tell Humphrey that you cannot make him Dean because he apparently has not earned their respect — yet. And see if the appointment of a strong Dean of the type so much wanted in the office by the profession will not bring us all into much happier relationships. At the present time and for the years since LeMesurier took over we are completely out of sympathy up there with the profession and the situation is not healthy.⁴⁴

Scott's mention of "mental casualties" and "recent events in our Criminal Courts" appears to be a reference to the *Rose* trial. Member of Parliament Fred Rose was tried for, and subsequently convicted of, espionage as a result of the Gouzenko defection and the Royal Commission on Espionage (the Taschereau-Kellock Commission).⁴⁵ In a postscript to an earlier letter to James, W.B. Scott had written:

I spent five hours on Saturday evening listening to the concluding stages of the Rose trial. Undoubtedly he was guilty. What is most distressing, however, is that some half dozen of McGill's younger graduates coming from families with an honest background should have allowed themselves to have become mixed up in anything involving a breach of trust to their country — oath or no oath and whether or not guilty as charged. This is something quite new in the life of our country. I have seen this coming for some years past and feel we are only reaping what we have sown. It indicates a destruction of fundamental moral principles. I only wish that fifty of our leading citizens had spent Saturday afternoon and evening attending in Court to learn what is going on not only amongst the Communists but with the fellow travelers. In many respects the latter can do harm to a greater number.⁴⁶

The University had decided on the fairly bold step of having a French academic teach civil law and was in the midst of confidential negotiations

44. *Ibid.*

45. The Commission's name was Royal Commission to Investigate Facts Relating to and the Circumstances Surrounding the Communication, by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power, making general use of the abbreviated title understandable.

46. Letter from Scott to James (17 June 1946), MUA, *supra* note 33.

with Louis Baudouin.⁴⁷ LeMesurier asked the Dean of Law in Paris for a suggestion, who cited Baudouin as a magistrate who wished to return to teaching. The Selection Committee, via Tyndale, asked the Canadian Ambassador, Georges Vanier, to handle the interview. Vanier's report was most positive including the fact that Baudouin spoke excellent English. Baudouin, a wartime magistrate on the Tribunal of the Seine with a pre-war academic background, did indeed accept McGill's offer and came to teach civil law that fall. While W.B. Scott's fear about loyalty of anyone connected with the Vichy government might be dismissed as part of the prevalent post-war paranoia of the day, his other concerns may not have been unfounded. There were complaints that Baudouin's lack of fluency in English, despite Vanier's assurances, proved a handicap in the classroom. Moreover, when his massive work on the civil law of Quebec was published in 1953, it received a mixed reaction.⁴⁸ There is a great deal of anecdotal evidence about Baudouin's weakness as a teacher and scholar. The possibility remains, however, that criticisms were not wholly based on any of Baudouin's particular shortcomings but also on residual anger at a Frenchman being brought in to teach Quebec law or ongoing suspicion of a man who served the Vichy government.

Meanwhile, James was in a dilemma. He had offered the position to Humphrey, but events were conspiring to force a retraction of that offer. When James' attempt to verify Scott's estimate of the feeling of the legal community proved inconclusive, he proposed a compromise to the executive committee of the board. James suggested that Humphrey be made acting dean retroactive to the beginning of the month, while deferring the question of appointing him as dean until a full meeting of the board the following month. The committee accepted James' proposal but when Humphrey was informed, he was, predictably, not pleased. He thought that James "should have had the courage of his convictions and having appointed me to the post he should have stuck to his guns."⁴⁹

In the midst of these problematic discussions, a wholly unexpected

47. Dorothy McMurray outlined the hiring process to refresh James' memory when Baudouin was being considered for promotion in 1950. MUA (RG2, Box 134, File 3813 "Law: General").

48. *Le droit civil de la Province de Québec; modèle vivant de droit comparé* (Montréal: Wilson & Lafleur, 1953). Nothing like that work had ever been attempted before. It was the first work to synthesize the entire civil law of Quebec (previous works analyzed articles of the code in succession) and the first general legal treatise written in Quebec in the field of comparative law. See (1953) 1 McGill L.J. 162-168 for reviews by George Challies, André Forget, Horace Friedman and Raymond Lachapelle, and (1953) 4 *Themis* 47-52 for a review by Philippe Gélinas. See generally Roderick A. Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23 Osgoode Hall L.J. 573, at 594 ff. Baudouin's work was said to contain a great deal of useful material, while its critics pointed to errors in law often based on French rather than Quebec perceptions of the topic.

49. Humphrey, *supra* note 24 at 118.

event occurred. Humphrey received a telephone call from Henri Laugier, a French academic and physiologist. Laugier had fled France after the collapse in 1940 and, since he arrived in the United States not speaking any English, a position was found for him at the Université de Montréal. He became very friendly with the bilingual Humphrey, whom he met through a mutual acquaintance, Émile Vaillancourt. That friendship was evidenced by the fact that, when Laugier returned to Free France in 1944 as Rector of the University of Algiers, he arranged for that university to award Humphrey an honorary degree. Soon after the war, Laugier was named UN Assistant Secretary-General for Social Affairs. When he telephoned Humphrey, it was to offer him a job as first Director of the UN Division of Human Rights. Humphrey asked for time to think about the matter, while informing James of the offer.⁵⁰

When James was leaving for vacation in mid-July, the matter had still not been resolved. He wrote to LeMesurier, unaware that he would receive Humphrey's resignation the following day but having a strong suspicion that it would soon come. He asked LeMesurier to follow up on Walter Johnson but, failing that, wondered "whether (along the lines of our discussion) there is a young international lawyer in England who would be interested in coming out to the position on the understanding that he would have to make himself proficient in the teaching of Roman Law."⁵¹

The lines of their discussion evidently involved LeMesurier's agreement that, should Humphrey resign and all else fail, he would continue as dean for another year. The one proviso he made, conscious of the wrong done to Frank Scott, was that if he continued Scott would replace Humphrey as secretary of the faculty and be given a raise of \$500.00 *per annum*.

The following day James received another missive from W.B. Scott, who was disturbed by the fact that Humphrey's appointment as acting dean might be changed to dean by a full meeting of the board, contrary to the wishes of some of the anglophone Bar.⁵² It may have given James some pleasure to respond to Scott confidentially with the news of Humphrey's UN post. It is "a position that will not only offer him a salary fabulously beyond the competence of the University to provide but will also provide an admirable opportunity for him to use during the next few years in the field of International administration the body of knowledge which he has accumulated during the past years of study."⁵³ James advised Scott that

50. See John P. Humphrey, "The Dean Who Never Was" (1989) 34 McGill L.J. 191; J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984) at 1 ff.; and Humphrey, *supra* note 24 at 118-119.

51. Letter from James to LeMesurier (16 July 1946), MUA, *supra* note 33.

52. Letter from Scott to James (16 July 1946), *ibid*.

53. Letter from James to Scott (17 July 1946), MUA, *supra* note 33.

LeMesurier would thus continue in office a little longer, but predicted "it will be no easy job for him to find somebody who can replace Humphrey in the teaching of Roman Law and Public International Law."

LeMesurier was delighted with this letter in that it might stop the interference from downtown, calling it a "masterpiece." He had to report failure in the recruitment of Johnson, however, who declined on the ground of age (he was sixty-five years old).⁵⁴ LeMesurier was also wrong to assume that James' letter would keep W.B. Scott quiet for a while. Scott was not enchanted with the prospect of LeMesurier continuing, and he had responded to James before LeMesurier even received the "masterpiece." He did not seem to feel any restriction about the confidential nature of the information James had passed on, sharing it with a number of colleagues, but his new concern was about the fact that the faculty maintained too much distance between itself and the English speaking bar:

We have a very real and vital interest in our Law School, whose primary function is to supply lawyers properly trained in our law to practice in this Province, and the majority of whom will be drawn from the relatively small English speaking community. There is a feeling that over a period of years a tendency has grown up to isolate the Faculty from the anglophone members of the profession, and that this should be overcome in the general interest.⁵⁵

Scott's concern went to the heart of a debate that had long raged over the question of whether the principal function of the faculty was the training of anglophone practitioners in civil law for the bar, in other words a law school, or whether it should deal with the study of law as an academic discipline in addition to the professional training function. Scott naturally felt that practical training for the bar should be the fundamental concern of the faculty. That view, perhaps ironically, was also shared by F.R. Scott, who was always as conservative in matters of curriculum as he was radical in other areas. W.B. Scott was also aware of the fact that Corbett, and later Humphrey, had moved the faculty to a more critical and scholarly orientation in the previous two decades, a situation he felt was exacerbated by LeMesurier's *laissez faire* administration.

With the question of the deanship resolved for a year, the faculty was able to hire a downtown practitioner, George Owen, to teach Roman Law and a full-time replacement for Humphrey, University of Manitoba gradu-

54 Letter from LeMesurier to James (27 July 1946), MUA (RG2 Box 134 File 3811 "Law: Dean").

55 Letter from Scott to James (19 July 1946), MUA, *supra* note 33.

ate Maxwell Cohen, to teach international law. At the time, Cohen's appointment did not seem particularly significant in the greater debate over the deanship, but subsequent events would show the error of that judgment.

James, perhaps feeling some guilt, dealt with Humphrey generously. His resignation was accepted as only applying to the deanship. At James' suggestion he applied for a two-year leave of absence to go to the UN, and that request was granted by the board in September. Even more unusually, in June Humphrey had been offered the Gale Professorship, the only named chair in the faculty at that time and previously held by Corbett. Again the Board confirmed that appointment and promotion to full professor at its September meeting.⁵⁶ Thus, Humphrey became a titular professor after he had left the faculty since he did not return when the leave of absence expired. When he returned to the faculty in 1966 as Full Professor, cross-appointed to the Faculty of Arts, J.J. Gow held the Gale chair. At its September meeting, the Board also confirmed F.R. Scott as secretary of the faculty with a stipend of \$500.00 p.a.⁵⁷

IV. *The search continued*

No satisfactory candidate was found early enough in 1947, and LeMesurier was once more persuaded to continue. During the following year a broad search was conducted with the active assistance of the new Chancellor, Orville Tyndale. Tyndale was intimately connected with the faculty, having lectured there for many years, and he knew well the Quebec legal scene where he was a judge. Early in 1948 LeMesurier wrote to James with suggestions as to how to break the impasse. He thought the new dean should be qualified to provide leadership in the four main areas of the Faculty's work. In no particular order, these were:

1. The preparation of students for the legal professions in this Province.
2. The preparation of students for public service whether in politics or government employment and for business.
3. The development of graduate study and research and though this may well be grouped with (3)
4. Maintenance of a highly scholarly staff.

56. James confirmed that appointment and promotion, noting that the Board accepted his resignation "from the Office of Assistant Dean" and granted a two-year leave of absence from the Gale Chair. Letter from James to Humphrey (14 September 1946), *ibid*.

57. See letter from LeMesurier to James (3 September 1946), MUA, *supra* note 54.

In this letter LeMesurier took the middle ground in the law faculty versus law school debate. However, it is worth noting the fact that in sending his son, Ross, to Osgoode Hall, officially a resolutely professional rather than research-oriented school in that period, he may have indicated a personal bias. LeMesurier also included in the letter his evaluation of four possible external candidates, all of whom he felt had deficiencies in one area or another. Of these, he felt a Jewish individual was "the least unsuitable," but he warned about such an appointment: "[t]here is of course the question of prejudice to be considered, particularly in our relationship to the Quebec Bar."⁵⁸ Anti-Semitism, while no longer so institutionalized at McGill and endemic in society as before the war, was still evidently a significant factor.⁵⁹ The Jewish lawyer, although too inexperienced to be seriously considered for dean at that point, had outstanding academic credentials and had been an Elizabeth Torrance Gold Medal winner. He went on to a long and distinguished career at the bar, served ten years on the board of governors, and proved to be a great friend of the faculty. His name was Philip Vineberg. After rejecting him, LeMesurier could only suggest canvassing the field in England or reconsidering Scott and Humphrey.

James asked Tyndale for his opinion of LeMesurier's suggestions. His answer revealed clearly his view of the role of the faculty and requirements for the dean.

I think it is highly advisable, if at all possible, to find someone who has had experience in the Courts of this province. While I am sympathetic with the idea that the Faculty of Law should develop along the lines suggested by LeMesurier, I still feel that the principal roll [sic] of the Faculty is to train students for the practice of law in this province. Moreover, contact with the Bar is of great importance, and for an outsider, that would be very difficult.⁶⁰

58. Letter from LeMesurier to James (2 February 1948), *ibid.*

59. For example, the Quebec Bar held its 1948 conference at Mont Tremblant Lodge, a facility that did not admit Jews. Although the owner finally agreed to make an exception for the event, many Jewish lawyers boycotted it. For a fuller examination of the question of anti-Semitic prejudice in the local legal community see Mario Nigro & Clare Mauro, "The Jewish Immigrant Experience and the Practice of Law in Montreal, 1830 to 1990" (1999) 44 McGill L.J. 999.

60. Letter from Tyndale to James (6 February 1948), MUA, *supra* note 54.

Tyndale also stated he could not support two of the names that LeMesurier had suggested.⁶¹ He continued to seek local alternatives with little success, in consultation with bar and board members Alan Magee, John O'Brien and William Macklaier. Four local lawyers declined to consider the appointment: William Meredith, K.C., George Challies,⁶² Miller Hyde,⁶³ and R. deW. Mackay.⁶⁴ Tyndale then suggested two other names that LeMesurier had mentioned, George Van Vliet Nicholls and Alistair Watt, of whom he favoured the former. He was even prepared to consider Frank Scott, provided he resigned from the executive of the CCF, but did not believe the board of governors would ever approve his appointment. His over-riding concern was to retain a local candidate. "I do not believe that an 'outsider,' however distinguished he might be, would be satisfactory, particularly at the present stage of our development and in view of the changes which are shortly to be put in effect by the Bar."⁶⁵

V. *The Bar and the Ivory Tower*

After discussions with Tyndale, Nicholls and Watt agreed to submit applications for the position. They were asked to address the question of how the faculty should develop in the future. Few documents of the period place the debate surrounding the role of a law faculty in sharper contrast. Watt, a local practitioner and part-time lecturer at McGill, wrote:

61. Tyndale gave no reason for thinking the two, Vineberg and the fourth possibility, Frederick Mundell Watkins, inappropriate. LeMesurier had noted that Watkins had "every quality excepting that of a knowledge of law." Watkins was then Bronfman Professor of Political Science at McGill with a strong publishing record. Tyndale may have felt that Vineberg, who had graduated six years previously, lacked sufficient experience despite his academic credentials and reputation for brilliance, while Watkins' lack of legal training provided an insurmountable impediment. However, in North America there were many Deans of Law who had no legal training.

62. George Swan Challies had scholarly credentials including an M.A. (1933) and an M.C.L. (1947), in addition to his B.C.L. (1935), all conferred by McGill University. The first edition of his important *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* was published in 1940. A local practitioner, he was named as Judge of the Quebec Superior Court in 1949 and later, while Chief Justice, Montreal Division Superior Court, was one of the codifiers of the 1965 Code of Civil Procedure.

63. (George) Miller Hyde (1905-1996) had been a classmate of Humphrey. He was in private practice at that time, but was named to the Quebec Court of Appeal in 1950.

64. Robert de Wolfe MacKay, a local practitioner, was the son of the late Ira MacKay, who had taught at the Faculty (1921-1924) and later served as McGill's Dean of Arts (1925-1934).

65. Revisions to the *Bar Act* were eliminating the possibility of gaining professional accreditation through articling for five years, but were adding a fourth year of practical training after the degree within the law faculties. Letter from Tyndale to James (31 March 1948. MUA), *supra*, note 54.

The existence and development of the Faculty of Law are conditioned in the foreseeable future by two unalterable facts: Quebec is a civil law island in a common law continent and Commonwealth and this comparatively small island is divided between three law schools, Laval, Montreal and McGill. If you add to these considerations, the partial eclipse, as a result of the war, of the great civil law countries of France, Germany and Italy, it becomes evident to me that McGill cannot hope to become a center of legal research and scholarship with an international or even national reputation. Its attraction for students and teachers is, and must remain, provincial and the Faculty will have to content itself, in my opinion, with being mainly a professional school designed to furnish well-educated practitioners for the Bar of Quebec.

This does not mean that legal scholarship need be or should be neglected altogether, or that there is no room in the Faculty for those who do not intend to practice law in Quebec. With a four year course, there should be time for the more social aspects of legal study and the three plus one division of the four year course, as presently conceived, would permit the concentration in the fourth year of the more practical and clinical courses after the businessmen and bureaucrats had departed at the end of the third year with, or without, a B.C.L. degree. In its isolation, the Faculty needs the support of the Bar, which it has not been getting for reasons with which we are both familiar. With the support that the Bar could, and I think, would give to a school which had for its avowed purpose the training of professional lawyer, the Faculty could become the best in the Province and keep increasing its enrollment by drawing students from the French, as well as the English speaking, communities. That, it seems to me, is the direction and the limit of its potential development.⁶⁶

Watt therefore limited his vision to the view that McGill might one day aspire to be better than the other two Quebec law faculties if it should get the full support of the Bar.

Nicholls had graduated from McGill in 1932 and, after practising for a few years, was then editor of the *Canadian Bar Review*.⁶⁷ He had traveled all over Canada, soliciting articles for the *Review* and discussing legal problems with both academics and practitioners. He wrote James that he

66. Letter from Watt to James (17 December 1947), *ibid.*

67. Nicholls has been credited with overseeing the evolution of the *Canadian Bar Review* from a mediocre to a first class publication during his editorship. In the words of Association President Arthur Kelly: "With his keen and discriminating scholarship he combined great industry, an absorbing interest in his work, and a meticulous attention to detail. Under his editorship the *Review* achieved a unique position in the English speaking world as a scholarly legal publication." (Editorial, (1957) 35 Can. Bar Rev. 887.)

recognized professional training was the primary role of the faculty but continued:

In saying this I should not be taken as meaning that the Faculty of Law has fulfilled its purpose when it has turned out students capable of passing the Quebec Bar examinations. It is a truism to say that we are living in a changing world; but it is also a fact that law has not developed as rapidly as the world it serves. That this has not been recognized more generally is due to the conservatism of the legal profession and the hitherto limited nature of legal education in Canada. So far as constructive advances in its own science are concerned, the legal profession is many years behind, for example, the medical profession. Nowhere in Canada is provision made for post-graduate legal studies; a student wishing to continue his work beyond the undergraduate level has no choice but to go outside the country. In no Canadian law school are there facilities for organized research in the practical and vital problems that law must meet. Little real effort is made to integrate the advances of other sciences and to ensure that they find expression in the laws under which the citizen lives and works from day to day. Law is at the very centre of all the sciences; it is the keystone of the arch.

My work as editor of the official organ of the Canadian Bar Association brings me in constant contact with lawyers throughout Canada and it is clear to me that a ferment is working in the profession. It is awakening to its responsibilities to an extraordinary degree and the next twenty-five years will see changes in legal education, the practice of law and the science of law greater than in any comparable period. Canada with its two races, cultures and languages, and its ties with Europe and the Americas, has always been in a unique position to draw the best from other countries; McGill, in a province where the two great modern systems of law meet, the civil and the common law, has the best opportunity of any university to give leadership, and to train lawyers capable of giving leadership, in the inevitable legal developments in the next quarter of a century. If it is to do so some expansion of its facilities and services will be necessary; if it does not do so, some other university will.⁶⁸

Nicholls made clear to James that he would only be interested in coming to McGill if his vision was supported by the administration.

Members of the board and the bar, such as Magee who served on the selection committee, however conservative they might have been, were intensely proud of their institution. The narrowness of Watt's vision and

68. Letter from Nicholls to James (2 January 1948), MUA, *supra* note 54.

the fact that his aspirations were limited to the hope that McGill might one day be better than the provincial francophone institutions almost certainly doomed his candidacy.⁶⁹ Despite his reputation as a good lecturer, he does not appear to have even been given an interview.⁷⁰ Tyndale and Magee supported Nicholls' candidacy, but LeMesurier was unimpressed and also felt Nicholls' area of expertise duplicated what was already available in the faculty.⁷¹ Indeed, the breadth of Nicholls' vision may have been as disturbing as the narrowness of Watt's conception of the faculty. Ultimately the selection committee felt that Nicholls would not be suitable given the current climate despite the enthusiasm with which he had been recruited. As James wrote to him, "there was a strong feeling in the minds of several members of the Committee that in view of all the circumstances a member of the present staff should be appointed Dean or, alternatively, that Dean LeMesurier should continue in office."⁷²

Nicholls went on to an academic career of some distinction teaching civil law, but at Dalhousie University. He introduced the first Legal Research and Writing course given at that school and was instrumental in significantly upgrading the library resources.⁷³ He may have taken consolation in the fact that, over the next two decades, his vision for legal education at McGill did, to a large extent, come to pass.

At the same time as rejecting Nicholls, the selection committee had stated that a part-time instructor, Sydney Bruneau, would be acceptable as dean. Bruneau had a law firm and was a part-time professor, not merely a lecturer. Tyndale, at James' request, approached Bruneau, asking him to consider accepting the deanship. Bruneau was fully aware of the situation within the faculty and possibly of the bitterness Scott had felt over

69. That would have been the case even had James not added a note to Watt's letter (*supra*, note 66) stating: "Tyndale told me that at the Themis Ball, Watt was thoroughly drunk – not a good sign in the presence of many students."

70. See Minutes of the Selection Committee — Law (8 May 1948), MUA (RG2 Box 162 File 5645 "Law: Selection Committee").

71. Even before Nicholls' application, LeMesurier had described Nicholls to James as a "sound but somewhat pedestrian scholar" and that "as a teacher he would probably be very dull". He continued that he had always refused to offer Nicholls a part-time lectureship (Letter, *supra* note 58). LeMesurier's negative vote did not therefore represent a change of heart as a result of the interview.

72. Letter from James to Nicholls (10 May 1948), MUA, *supra* note 54.

73. Nicholls' reminiscences of his career at Dalhousie University were published in a special (December 1977) unnumbered issue of *Ansul* at 67-73. In this he discussed his views of legal education in Canada and also stated: "My own impression of the role of [the] Law [Faculty] at McGill had been that it was ... not the jewel [in the crown] but the poor cousin of the University," at 67. For a discussion of Nicholls' role at Dalhousie, see generally John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979), especially at 187 ff.

Humphrey's acceptance two years before. In declining their offer, Bruneau made his reasons entirely clear:

My understanding is that there is a good man available from the scholastic point of view but that his opinions are deemed by a majority of governors to disqualify him for promotion.

Brought up as a member of a very small and not too popular minority⁷⁴ I have learned by experience that a man possesses no more valuable treasure than his right to freedom of thought and expression. It is so much a matter of conviction that I cannot bring myself to consider the acceptance of a position under the present circumstances when by so doing I would lend any sanction, however insignificant, to the contrary view, which I have always regarded with positive abhorrence.⁷⁵

James was therefore obliged to ask LeMesurier one more time to extend his term to include the 1948-1949 year. As before, LeMesurier reluctantly agreed to do so.

VI. *A measure of success*

In the spring of 1949 James enjoyed his greatest measure of success to that date in the long search. He found a candidate willing to accept the job, and who was acceptable to the board, the legal community, and to most of the faculty. Quebec judge and part-time professor, Gérald Fauteux, agreed to take the position for the fall term. Frank Scott is alleged to have remarked bitterly to Charles Lussier on the irony of an English institution much preferring French lawyers to him.⁷⁶ Certainly Fauteux met all of Tyndale's criteria, being familiar with the Faculty, Quebec civil law, and the working of the courts. He had taught criminal law at McGill for fourteen years, had been Chief Crown Prosecutor for Quebec (1939-1947), and was at that time a judge on the Superior Court of Quebec. He had also served as Legal Counsel to the Royal Commission on Espionage in 1946. Fauteux became dean in June 1949. One can only imagine James' reaction when, a few months later on December 22nd 1949, Fauteux was appointed to the Supreme Court of Canada and resigned from the deanship.

74. Bruneau was a Quebec City Anglophone. Like LeMesurier he was of Channel Island descent.

75. Letter from Bruneau to Tyndale (15 May 1948), MUA, *supra* note 54.

76. Djwa, *supra* note 8 at 239. Djwa stated that the remark was made after both Fauteux and Bruneau had been appointed Dean. However, as seen *supra* note 74, Bruneau was not French despite his name. Scott, who was also an Anglophone from Quebec City, must have been aware of this.

James was on holiday when Tyndale broke the news to him. Indeed the Chancellor appears to have acted quickly and possibly without the necessary authority. He persuaded Bruneau to overcome his scruples in order to prevent chaos and to agree to serve as acting dean. It was clear however that Bruneau could not be induced to serve for more than a term, and the search would have to resume shortly.⁷⁷ When James returned he confirmed Bruneau's appointment as dean, not as acting dean. Perhaps it was felt that according Bruneau the full title might cause him to consider a longer term, but efforts in that direction were unavailing.⁷⁸

VII. *The final outcome*

The search reopened early in 1950. F.R. Scott was still the obvious candidate. James felt by this time that Scott might be acceptable to the board if he withdrew from the national chairmanship of the CCF. Tyndale too was prepared to consider him but also persuaded William Meredith to reconsider his decision of two years earlier. He was of the view that "we are not likely to get a candidate from the practicing Bar of Montreal with a better record from the point of view of scholarship and experience."⁷⁹ Scott was still interested in the position and did, in fact, resign as national chairman after the CCF Convention in July 1950.⁸⁰ He was still as worried about his personal finances as he had been in 1947, and responded to James' tentative offer with interest. He thought the faculty had the "opportunity, which is not yet fully realized, of giving real leadership to legal education in Canada," and was prepared to consider the deanship provided he could still find time for research and writing.⁸¹

Scott evidently hoped that the decanal stipend might lessen his dependence on remuneration from his advocacy. For his part, James hoped that Scott's withdrawal from socialist political activities at the national level would sway sufficient numbers of the board to overcome the McConnell factor. Tyndale, although not hopeful, added his support to the candidacy, writing to the executive committee:

77. Letter from Tyndale to James (29 December 1949), MUA, *supra* note 54.

78. "Memorandum concerning the Faculty of Law" Submitted by the Chancellor to the Executive Committee of the Board of Governors on the 5th April, 1950, *ibid.*, [Memorandum].

79. Letter from Tyndale to James (11 February 1950), MUA, *supra* note 53. Meredith had published two dated but well-received practitioner-oriented manuals - *Insanity as a Criminal Defence* (Montreal: Wilson & Lafleur, 1931) and *Civil Law on Automobile Accidents, Quebec* (Montreal: Wilson & Lafleur, 1940). (Macdonald, *supra* note 34 at note 144.)

80. See Djwa, *supra* note 8 at 245.

81. Letter from Scott to James (1 March 1950), MUA, *supra* note 54.

As some of you know, I consider that, from the academic view at least, Professor Frank Scott should be appointed. He is recognized as a sound scholar and an excellent teacher and he has served the Faculty faithfully and well for twenty years or more. I fear, however, that the majority of the Governors would not approve his appointment. If I am right in that respect, I hope that the Board will at least grant him a substantial increase in salary in recognition of his splendid work as a professor.⁸²

Tyndale's assessment was accurate. Although Scott was withdrawing from socialist politics at the national level, he became involved in two high profile cases through his commitment to civil liberties advocacy and a desire for extra income. Scott took up the challenge to the 1937 *Act Respecting Communist Propaganda*, known as the Padlock Act.⁸³ That legislation allowed the Attorney General to place a padlock on any building he believed was being used to propagate communism. The Duplessis government had a particular fear of communists, as was general in North America, and of Jehovah's Witnesses. Indeed, the attorney general was given such discretion that the law was also used against Jehovah's Witnesses. The other cause was the previously mentioned *Roncarelli* case. Both of them were taken to the Supreme Court and both were won during the next decade.⁸⁴

The difficulty that Scott's advocacy presented was that many members of the board, and especially McConnell, had a close relationship with the Duplessis government. They considered Scott's commitment to socialism a mere peccadillo compared to his active advocacy of communists and the Witnesses. The fact that Scott was fighting for civil liberties and may have had little sympathy for either creed did not mitigate the matter.⁸⁵ At that time the Canadian establishment, and particularly the Canadian Bar Association, was opposed to further protection for civil and political rights.⁸⁶

82. Memorandum, *supra* note 78.

83. S.Q. 1937 (1 Geo. VI), c. 11.

84. *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Switzman v. Elbling*, [1957] S.C.R. 285.

85. Although Scott had been enthusiastic about Stalin's Soviet Union in the early 1930s, he was appalled at the excesses later in the decade and the ultimate betrayal of the Nazi-Soviet Pact of 1939. See Djwa, *supra* note 8 at 184. Kenneth McNaught in his review of Djwa's biography shows Scott "could never, and never did become a Marxist" (Book Review, (1988) 33 McGill L.J. 422 at 424). Scott had been raised in a High Church Anglican household, his father having been Archdeacon of Quebec, and was never a Jehovah's Witness.

86. John Hackett, President of the Canadian Bar Association, worked jointly with his American counterpart, Frank Holman, on various initiatives to ensure the Universal Declaration was not adopted. When these initiatives failed they continued to attack the Declaration as an attempt to introduce socialism to North America. See A.J. Hobbins, "Eleanor Roosevelt, John Humphrey and Canadian Opposition to the Universal Declaration of Human Rights: looking back on the 50th Anniversary" (1998) 53 Int'l J. 325.

Indeed, it was because of these attitudes that Canada had abstained two years earlier when the Universal Declaration of Human Rights was put to a vote in the Third Committee of the UN General Assembly.⁸⁷ As a result, Scott's hopes for the deanship were put on hold for another decade. He would finally become Dean in 1961 after McConnell had retired from the board and was in the last year of his life. Sadly, at that stage and by all accounts including his own, the civil libertarian was a confirmed autocrat and he was not considered a particularly good or in any way progressive dean.⁸⁸

Tyndale made one last unsuccessful attempt to persuade Bruneau to carry on, and then recommended that James' selection committee enter negotiations with Meredith. He also pointed out that it would be impossible to recruit a qualified person such as Meredith without certain changes.

Such a person could not (as I know by confidential enquiries made during the past three years) be persuaded to accept the post at the present salary. I therefore urgently recommend that, if a suitable candidate can be found, the salary should be fixed at \$10,000.00 a year and that the Dean should be allowed (within certain limits) to retain such directorships as he might have and do consultation work.⁸⁹

Tyndale's suggestion to the board was based on what he knew, through his groundwork, Meredith would accept. The salary was good compared to that of former Dean LeMesurier (\$6,500) and Scott (\$6,250) and, ironically, close to the sum Humphrey received from the UN that shortly before had been "fabulously beyond the competence of the University to provide." Tyndale pointed out that \$250,000 had been budgeted for the purchase of a building for the Faculty and, since McConnell had just donated the Ross mansion, some of that amount could be used to cover the extra salary cost.

When Meredith entered negotiations with the University, James, primed by Tyndale, was able to offer everything that Meredith wanted, including the retention of his directorship and the ability to do a "reasonable" amount of consulting work.⁹⁰ Meredith finally accepted a contract that circum-

87. See William A. Schabas, "Canada and the Adoption of the *Universal Declaration of Human Rights*" (1998) 43 McGill L.J. 403.

88. Compare Djwa, *supra* note 8 at 367; Macdonald, *supra* note 34 at 284-289. Macdonald pointed out that Scott was remarkably conservative and blocked attempts at curriculum reform, pleading the necessity of Bar regulations, a position he had argued against for decades.

89. Memorandum, *supra* note 78.

90. Letter from James to Meredith (25 April 1950), MUA, *supra* note 54.

stances had evidently made more lucrative than could otherwise have been expected. He did, however, make some attempt to mollify Scott, but to no avail. Djwa reports that “[a]n unhappy correspondence between the two men ensued. Meredith felt that Scott had a better right than he to the job, but if the Board of Governors would not appoint Scott, then his own conscience was clear.”⁹¹ Indeed, just as Scott had reacted badly to Humphrey’s acceptance, he remained hostile to Meredith throughout the latter’s tenure.⁹² For James, however, the seemingly endless search was over and long-term administrative stability at last returned to the Faculty.

VIII. *Defeat from the jaws of victory*

Meredith’s appointment might be seen as a triumph for the establishment, in that Scott was passed over, and for the anglophone bar, in that one of their own reasserted control over the faculty. Yet that reassertion carried within it the seed of its own destruction: the departing Humphrey had been replaced by Maxwell Cohen. Cohen was an international lawyer with a common law background. He had attended Manitoba Law School, which was run jointly by the University of Manitoba and the Law Society of Manitoba. In 1931, the Manitoba Law School abandoned the approach of a three-year university course followed by a year of articling, and returned to one of part-time university attendance and service under articles. Cohen later did post-graduate work at Northwestern University and subsequently spent a year at Harvard University. Those experiences convinced him that that a university-based law degree was by far the best method of imparting legal education, and his early scholarship reflected those views.⁹³ At McGill, he was instrumental in establishing, at the graduate level, the Institute of International Air Law (1951) and the Institute for Comparative and Foreign Law (1966), both of which diversified the curriculum, the professori-

91. Djwa, *supra* note 8 at 239.

92. See generally Macdonald, *supra* note 34 at 276, n. 144.

93. See Maxwell Cohen, “The Condition of Legal Education in Canada” (1950) 28 Can. Bar Rev. 267, especially at 274ff. In this first of a number of studies on legal education in Canada, Cohen noted: “That such university direction and academic methods have led to “better” legal education is no longer a question at least for law teachers, as well as for large sections of the United States Bar and certain numbers of the Canadian, but of course from the “official” Bar view the question continues to remain the jugular one to be answered in any serious examination of legal education in Canada.” (*ibid.* at 275.) See also R. St. J. Macdonald, *supra* note 35 at 10ff, and William Kaplan & Donald McRae, eds., *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen*. (Montreal: McGill-Queen’s University Press, 1993), especially essays by Roderick A. Macdonald, “Dreaming the Impossible Dream: Maxwell Cohen and McGill’s National Law Programme” at 409 and J.P.S. McLaren, “Maxwell Cohen and the Theory and Practice of Canadian Legal Education” at 440.

ate, and the student body. In those initiatives, Cohen was generally opposed by Scott and LeMesurier, but supported by Baudouin.⁹⁴ Cohen's curricular ideas were cemented when, as Dean, he introduced in 1968 the National Programme that placed common law on an equal, if optional, footing within the Faculty. That initiative institutionalized the views of Lee, Corbett, and Humphrey in the curriculum and effectively ended the control over curriculum and appointments that the anglophone bar attempted to exercise. As may be imagined it was a number of years before the profession fully accepted the National Programme as appropriate legal training.

Cohen's initial appointment to the Faculty seems to have escaped notice in the greater debate surrounding the deanship. However, the establishment was not slow to take cognizance of what Cohen represented in terms of his views on legal education. Serious questions were raised in the Law Selection Committee each time he came up for promotion between 1947 and 1952. In 1948 he was promoted to Associate Professor against the advice of Tyndale and the Board representative, Magee, since he was supported by LeMesurier, the Senate representative B.L. Keirstead⁹⁵ of Political Science, Dean D.L. Thomson⁹⁶ of Graduate Studies and Dean A.H.S. Gillson of Arts and Science.

Cohen's opponents tried to build a stronger case when he was considered for full professor and tenure in 1950. Tyndale secured letters from Fauteux and Chief Justice E.K. Williams of Manitoba in 1949, as well as holding conversations with W.B. Scott and Macklaier to get the opinion of the local Bar.⁹⁷ Fauteux wrote:

Certain attitudes caused me some anxiety. They suggest he does not entertain for established authority — in the instance, the Board of Governors, the Principal, etc. — the consideration and respect which a rational sense of values would naturally call for. I even felt compelled, at times, to mention to you some of his comments and attitudes.

94. Compare Macdonald, *supra* note 34, at 274. Macdonald noted that the unlikely alliance of Cohen and Baudouin, despite their disparate backgrounds, was based on sharing a broader view of legal education than their more entrenched colleagues. They also shared the perspective, and stigma, of coming from outside Quebec.

95. In relation to Nicholls' candidacy, Keirstead expressed his opinion that "vocational training should take second place to the advancement of knowledge." Selection Committee — Professor of Law (Minutes of (30 April 1948), MUA, *supra* note 70. That bias made him a natural supporter of Cohen's ideology.

96. Thomson felt it important that the Faculty should make a contribution to "graduate training in the field of international law", and so, like Keirstead, almost inevitably supported Cohen (*ibid.*).

97. See Tyndale, "Confidential Memorandum re Faculty of Law" (24 March 1950), *ibid.*

To say that, as Dean, I had from him, notwithstanding patient efforts, an adequate co-operation unselfishly directed to the interests of the University, the Faculty, staff and students, or to say that, judged on a standard of healthy tradition, he had yet exhibited to me personal qualities indicative of a trend of mind one would require the tutor of one's own son to possess, I am unable.⁹⁸

...

I may be very exacting, but to-day the respect for due established authority has become a precious notion. It is one that must be fully possessed, acted upon and fostered as a duty and a responsibility by those concerned and entrusted with the education of youth. That applies, but with more force, with respect to legal education. How such responsibility is discharged to-day will, in some cases, only be known tomorrow.

...

A further consideration may be added. My appointment as Dean did not minimize the loyalty of F.S. [i.e. Frank Scott] to the Faculty and University. Whether the same measure of loyalty could be expected from the subject [i.e. Cohen], if placed in like circumstances and being then in the safe position of a professor, is still a question for which I have not yet a positive answer.

After all, he has only been connected with the Faculty since a few years. For all these reasons, while in office, I had not yet felt justified to deal one way or the other with that promotion. I thought it better to reserve judgment and such still would be my actual views.⁹⁹

Williams' *ad hominem* response was even more negative. Cohen was unpopular, he wrote, because of "too much omniscience and too much unctuousness." He continued:

From things that the aspirant let drop some of us came to the conclusion that he was inclined to be a bit of a Communist and discreet inquiries

98. Tyndale's negative recommendation might have been stronger if he had been able to interpret correctly this somewhat difficult and Germanic sentence. In fact he reported to James that: "Fauteux J., while appreciating the cooperation of Cohen and the serious work which he did, expressed the view that he would not like to see him obtain a permanent position in the Faculty". (*Ibid.*) Actually Fauteux felt he did not receive adequate cooperation from Cohen, although he felt it was too early to judge whether Cohen should get a permanent appointment.

99. Letter from Fauteux to Tyndale (15 March 15 1950), MUA, *supra* note 70.

satisfied me that that was so.¹⁰⁰ This, of course, may have been a passing phase. I may say I was surprised when I heard he had been taken on the Staff at McGill. I thought perhaps it was because at the time it was difficult to get full time men on any faculty.

I have heard indirectly that he again had hopes of getting on our staff. Some of his family, I believe, still reside here. In fact, as I am writing confidentially, I may say he seemed to have sold himself and some of his ideas about legal education to Gillson before the latter came here.

At my suggestion Gillson went on the Board [of Trustees of the Manitoba Law School] and his experience has satisfied him that the ideas were not sound. They certainly were ideas we would not accept here and under no circumstances would we appoint the individual to our staff.¹⁰¹

Gillson had resigned as Dean of Arts and Science the previous year to become President of the University of Manitoba. He required "re-education" since, when he sat on the Law selection committee, at McGill, he had been impressed by Cohen's theories concerning university-based legal education — theories that Williams emphatically rejected.¹⁰²

The Law Selection Committee was the first to consider Cohen's promotion in 1950. The Chancellor had the right to name two representatives to that body, and he selected Magee and Senator Adrian Hugessen. Since Tyndale did not himself sit on the committee, he presented the case against Cohen in writing, noting also the disadvantage of Cohen's common law

100. In the immediate post-war era, an accusation of communist sympathies was extremely damning in North America. It is perhaps worth noting that Williams had been the Chief Counsel for the Royal Commission on Espionage, a body that had set aside every legal safeguard in its pursuit of communist spies. Fauteux had been Legal Counsel to the Commission.

101. Letter from Williams to Tyndale (16 June 1949), MUA, *supra* note 54. Williams' letter contained the somewhat standard disclaimer: "I may say that the fact that he was a Jew had nothing to do with our decisions. We have three Jewish lecturers on the staff; they are excellent lecturers, popular with everyone, and one of them was recently elected to the Bench of the Law Society by a large vote over 60% of which was Gentile."

102. By ironic coincidence Williams presented his views on legal education in the same volume of the same journal as Cohen, *supra* note 93. See E.K. Williams, "Legal Education in Manitoba: 1913-1950" (1950) 28 Can. Bar Rev. 759. Williams noted: "Our experience in Manitoba led us to the conclusion that, however successful the American system might be in the United States, neither it, nor the modified system advocated by Dr. Lee's committee, would give the results that we in Manitoba desired to achieve" (*ibid.* at 765). Possibly owing to Williams' long tenure as Chair of the Board of Trustees, Manitoba was the last province to allow full-time legal education in a Faculty of Law. That happened in 1964 and was, to a degree, forced by the Ontario Bar's refusal to recognize the Manitoba LL.B. See R. Dale Gibson, *supra* note 5 at 27ff. See also Dale & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972), c. 7, "The Williams Years".

background and, based on his conversations with W.B. Scott and Macklaier, the fact that a "permanent appointment would be particularly regrettable in view of the Faculty's necessary relations with the active Bar of this Province and the provincial authorities."¹⁰³ He summarized the negative reports of Fauteux and Williams, adding his own opinion that Cohen's mind was "superficial." Things might have gone ill for Cohen especially since the Faculty of Arts and Science was now represented by H. Noel Fieldhouse, who was not as sympathetic an ally as Gillson had been. Hugessen was unable to attend the meeting although Magee presented his proxy vote against Cohen's promotion. However, Cohen's candidacy was strongly supported by Bruneau, Keirstead and the second Senate representative, F.R. Scott. The Committee was deadlocked, and it was eventually decided to table the matter until a new Dean was appointed.¹⁰⁴

When the Selection Committee considered the matter again in late December 1951, Meredith had replaced Bruneau and F.M. Watkins¹⁰⁵ replaced Keirstead. Hugessen and Thomson were unable to attend. All members voted in favour of recommending promotion except Magee, while James abstained.¹⁰⁶ The Board of Governors then asked James to establish a Statutory Selection Committee to consider the recommendation. From Cohen's perspective, had he been aware of the various attitudes towards him, the committee membership would not have looked promising. The members were James, Tyndale, Hugessen, George A. Walker,¹⁰⁷ and Meredith. Tyndale and Hugessen remained opposed, while Walker, citing confidential sources, confirmed the impression conveyed by Williams, noting that Cohen "obviously had some quality which antagonized people."¹⁰⁸ Magee wrote to the committee to state he was "unalterably opposed" to the promotion. Meredith, however, spoke strongly in favour of Cohen and noted that Scott, LeMesurier and Baudouin all shared this view. He quoted Scott as saying that "failure to promote Cohen would cause serious repercussions throughout the academic world outside the University." James confirmed that the full-time members in Arts and

103. Tyndale, Confidential Memorandum, *supra* note 97.

104. Law Selection Committee (Minutes of 28 March 1950), MUA, *supra* note 70.

105. See *supra* note 61.

106. Selection Committee — Professor of Law (Minutes of 14 December 1951), MUA, *supra* note 70.

107. Walker, a member of the Board of Governors, had recently retired from the Legal Department of Canadian Pacific Railway. He was a K.C. who had gained his professional accreditation in 1906 through articling.

108. "Appointment of Maxwell Cohen to Full Professorship" (Notes of a meeting held on 24 January 1952), MUA, *supra* note 70.

Science shared the view of their Law colleagues.¹⁰⁹ Indeed he noted that the academic members of three successive selection committees had unanimously supported the promotion. Walker, surprisingly in view of his background, appears to have been swayed by the pro-Cohen arguments, but Tyndale and Hugessen felt they would be forced either to absent themselves from Board meetings or argue against the majority recommendation of the committee at the Board level. The matter might have created a major crisis on the question of academic freedom, but a compromise was finally reached. The committee unanimously recommended that Cohen be promoted to full professor, but on a five-year contract without tenure.¹¹⁰ Thus Cohen remained despite the best efforts of the bar. By 1964 most of Cohen's detractors were either dead or no longer in positions of influence, and there was little external opposition to his appointment as dean. Over the next four years he was able to complete his curricular reforms ending with the introduction of the National Programme in 1968. The Bar was able to do little about those developments beyond expressing reservations about the new program.¹¹¹

Conclusion

McGill's post-war search for a Dean of Law raised problematic issues of academic freedom for individuals and for the institution. It illustrates on the one hand how careers can be affected for better or worse by political opinions and on the other how elements of society have dictated to the University about what have come to be regarded as internal academic matters. However, the interference by the establishment sometimes drew reactions that tended to hasten the end of a situation it sought to protect.

Frank Scott wanted to be dean and felt that he deserved the position.

109. While James had never committed himself for or against Cohen at previous meetings, generally preferring to defer any decision, his tacit support here is not surprising. James had known Cohen since the latter was a freelance journalist in Ottawa in 1941. After his wartime military service Cohen was appointed Head of the Economics and Political Science Department in the Khaki University, Leaverden, United Kingdom on James' recommendation. When he returned to Canada in 1946 James suggested he apply for the vacancy created by Humphrey's departure. See Macdonald, *supra* note 35 at 7-9.

110. The reason given for withholding tenure "was based on the evidence, from individual students and from the President of the Graduating Class in two successive years, that Cohen's teaching was not now satisfactory and the committee felt that an experimental period of this length, while gratifying Cohen's desire for the prestige of a Chair, would provide an opportunity for him to demonstrate his ability to make a real contribution to the development of the Faculty." ("Appointment...", *supra* note 108.)

111. See generally Macdonald, *supra* note 34.

His disappointment embittered him. Before the events in question he had enjoyed excellent relations with his colleagues despite the negativity with which he was viewed by some critics outside the Faculty. After Meredith's appointment he seemed to be at odds even with his colleagues, especially after LeMesurier's retirement. That alienation extended beyond Meredith to a long struggle with Cohen about the nature of the Faculty. Scott clung to the view that the Faculty's role was training anglophones in Civil Law for practice in Quebec, while Cohen followed the Lee-Corbett-Humphrey view of law as a subject for academic study. Yet, as Scott's relationships within the Faculty worsened, his public persona gained respect. He achieved wider fame as a constitutional lawyer and civil libertarian with his Supreme Court cases than he had as a marginalized socialist voice before and during the war. His views began to have influence on important mainstream political figures, such as future Prime Minister Pierre Trudeau. It is also worth noting that the treatment of Scott and others gave rise to faculty associations designed to prevent the abuses of the 1930s and 1940s, a movement in which Scott was a leading activist. Over the next decades the Canadian Association of University Teachers was able to entrench the concept of academic freedom in educational institutions across the country.¹¹² Thus, in many ways, Scott proved a greater thorn in the side of the establishment as a political activist than he could have as dean.

Humphrey certainly did not suffer for being considered an unsuitable candidate for Dean. He went to the United Nations and became one of a handful of key individuals responsible for the Universal Declaration of Human Rights.¹¹³ He remained at the UN for twenty years contributing to the development of instruments for the protection of human rights at the international level. He returned to teach at McGill in 1966, spending nearly three decades engaged in the political promotion of human rights at the national and international level. In 1928 he wrote to his sister:

When I die I want men to say "the world is a better place to live in because that man lived" and unless men are willing to say that about me then my life has been a failure. These are not just words although it may look that way on paper. It is my very religion. To me immortality is to live on in the contributions that one makes to humanity.¹¹⁴

112. See generally Horn, *supra* note 4.

113. Mary Ann Glendon has listed the principal architects of the UDHR as Eleanor Roosevelt, Charles Malik, P.C. Chang, René Cassin and Humphrey in her definitive study *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (N.Y.: Random House, 2001) at 241.

114. Letter from J.P. Humphrey to Ruth Humphrey (30 September 1928), MUA (MG4127, Accession 02-086, Box 2). The full context is given in Hobbins, *supra* note 12 at 775.

Humphrey came far closer to achieving that ambition than he might have had he remained at McGill for his entire career. It is clear, however, that he would have gone to the UN even if he had been named Dean.¹¹⁵ Thus, in the long run, both Scott and Humphrey benefited from being subjected to an inappropriate infringement of their academic freedom.¹¹⁶

McGill's deans of the early twenty-first century are chosen by a selection committee comprised of representatives from the board of governors, Senate, the Faculty and the "user" community. There is often a concurrent review of the Faculty with input from external peers. The selection committee is chaired by the principal (or delegate) and it is advisory. The recommendation is subject to confirmation by the board of governors, but this is essentially a formality. However, in the post-war era, the board of governors had a much more direct involvement in the process. Until 1935 decisions were taken by the Corporation, which included all governors and staff. That process became unwieldy, and a representative Senate, with responsibility for academic matters, was established based on a proposal by Corbett. The governors met separately, were responsible for financial matters, and took an active role in the approval of all appointments. In the Great Depression, under Chancellor Beatty, the governors had been asked to finance McGill's deficit out of their own pockets and it was therefore unsurprising they would have taken a more personal interest in the running of the University.¹¹⁷ They also felt that the anti-capitalist gospel preached by Scott and others was most unfair, akin to biting the hands that fed them.

The influence of the governors waned as McGill moved from the private to the para-public sector in the 1960s. Governmental influence and regulation increased but was remote. Governmental concerns tend to be about the curriculum and the direction of research only as they are perceived to benefit society, not about individual appointments. The influence that faculty members, individually or collectively, have on decanal selection has also increased significantly as universities have accepted a

115. Many years later Humphrey wrote: "The controversy occasioned by my appointment to the deanship was not a factor in my decision; for I would have accepted the United Nations post even if there had been no trouble on that score." Humphrey, *supra* note 24 at 119.

116. There seems no doubt that Humphrey, while by no means as embittered as Scott, did resent the treatment he received when being considered for Dean despite the happy outcome in terms of his career. He referred to the matter often, including in his first meeting with R. St. John Macdonald in 1965 (conversation with Macdonald, 4 November 2003). That resentment may account for his somewhat petulant insistence that the list of Deans be altered and his photograph not be placed under that of another Acting Dean.

117. See generally Frost, *supra* note 9 at 196.

more collegial approach to governance. Since a dean would have to have the confidence of the Faculty to be successful, faculty members now enjoy a greater *de facto* veto in the process than the governors' *de jure* one. Selecting a dean can still be an intensely political process, but the key players have changed.

In the 1940s, the mainstream view of the role of the faculty was that of teaching Quebec civil law in English for professional practitioners. Most anglophone members of the Montreal bar had taken some or all of their law degree at McGill.¹¹⁸ Over the intervening sixty years, not only has the curriculum been altered dramatically but the demographic makeup of the student body has also changed. French is now as common as English as a mother tongue in a bilingual, transsystemic Faculty, and many other mother tongues are listed for students at all levels. Students are no longer trained specifically in civil law, nor primarily to practice at the Montreal bar. They are trained to be comfortable in the law of many jurisdictions, as well as knowledgeable in comparative and international legal methods. Nor do all graduates practice law *per se*, but many of them use their skills in a variety of other occupations. Anglophone members of the Montreal bar, far smaller numerically and proportionally than heretofore, no longer take such a proprietary interest in the Law Faculty. While all members of the bar may have a concern about major changes in the curriculum, that interest does not reach down to the level of appointments. It seems unlikely that the principal of today would ever be obliged to face the type of external interference that James encountered. Controversies in the selection of deans, when they arise, now tend to be based on the internal politics of the faculty in question, or on the direction the University administration wishes a unit to take. Thus, from today's perspective, the five-year struggle to find a Dean of Law in the late-1940s seems barely comprehensible.

The great irony in the post-war search for a Dean of Law was that the machinations of the establishment served only to expedite the changes that it feared. Scott was free to preach his socialist theories, and one of his listeners was Pierre Elliot Trudeau. As Prime Minister, Trudeau introduced many of Scott's concepts into the social policies of his "just society."¹¹⁹ Socialism became liberalism, and even the Progressive Conservative, Brian Mulroney, termed the universality of social benefits like family allowances

118. A number of them would take part of their course at a francophone institution to become fluently bilingual.

119. Humphrey, too, had advocated governmental social security policies and official bilingualism during the war. See Hobbins, *supra* notes 19, 22.

and old age pensions as “a sacred trust, not to be tampered with” in 1984.¹²⁰ Such developments would scarcely have been music to the ears of the post-war Montreal business elite. Cohen, whose abiding interest at the time was the promotion of reform in legal education, proved to be an agent for change in diminishing the influence of the bar far more than Scott or Humphrey would have been. The promotion of scholarship, enhancement of graduate studies, and the introduction of the National Programme went far beyond what had been attempted by Lee after the First World War, nor was Cohen succeeded by a Greenshields to restore the balance in favour of the bar. Successive deans built on Cohen’s foundation, expanded the curriculum in many areas of legal study, and created a professorial staff with ever more varied interests.¹²¹ Those developments led ultimately to the introduction of the unique twenty-first century transsystemic program, which may initially be viewed with the same distrust by the profession as the National Programme. The National Programme was accepted when it became clear that the graduates were more knowledgeable and equally competent in the profession, and the same is likely to prove true for the transsystemic program. Innovative and dynamic programs tend to attract excellent students and, in turn and by their nature, excellent students tend to excel in their chosen field, thereby justifying the program by which they learned.

120. Brian Mulroney, speech in Stephenville, Newfoundland, 17 August 1984. See “Mulroney says Turner hiding economic contingency plans” *Globe and Mail* (18 August 1984) 1 at 2.

121. For a more detailed description of these developments see Macdonald, *supra* note 34, and J.E.C. Brierley, “Developments in Legal Education at McGill 1970-1980” (1983) 7 Dal. L.J. 364.