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Notes and Comments

Michel Bastarache*

Teaching the Common
Law in the French
Language

There are many difficulties associated with the setting up of a new law school; these difficulties were compounded at the Université de Moncton with considerations relative to the language of instruction, the particularities of the clientèle, it being relatively small and unconcentrated geographically, the lack of a legal tradition in French language communities outside of Québec. My purpose here is not to analyse in a general way the experience of the last four years at the Université de Moncton, but to consider only one aspect of this experience, the one which is the most often put to me in the form of a question: what are the difficulties of teaching the Common Law in the French language?

Before the experience actually began at Moncton, many opinions had been expressed on the difficulties involved. These opinions were summed up in a report prepared by Dean Daniel Soberman for the Maritime Provinces Higher Education Commission in 1976. Mr. Soberman was of the opinion that our legal system is founded on linguistic and cultural characteristics that are fundamentally English and that it would be impossible to communicate full knowledge of the Common Law without resorting to the English Language.¹ Convinced that a new faculty could not recruit sufficient numbers of qualified students or qualified teachers to form a unit of 20 full-time teachers and 250 students, which he considered a minimum, Mr. Soberman recommended that the faculty of law at the University of New Brunswick be expanded and become bilingual.

The question of the language of instruction in particular had been raised. The Université de Moncton immediately pointed out that the historic character of the Common Law is often over emphasized² and

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1. D. A. Soberman, *Legal Education in the Maritime Provinces, A Report to the Maritime Provinces Higher Education Commission* (Fredericton: August 1976), at 80.

2. Il ne faut pas exagérer ce caractère "historique" du droit-anglais. La vérité est que les Anglais aiment mettre en valeur ce caractère traditionnel, alors que les Français sont plutôt portés à mettre en valeur le caractère rationnel et logique de leur droit. Dans la réalité, la part traditionnelle et la part rationnelle qui entrent dans l'un et l'autre droit ne sont sans doute pas fondamentalement différentes, droit français comme droit anglais ayant eu à s'adapter à des changements et à faire face aux besoins de sociétés qui ont

that French and Latin have dominated as the spoken as well as the written language used by English lawyers for more than 500 years. In fact, it was not without interest that French-speaking lawyers in New Brunswick discovered the 1362 Statute of Pleading which sought to impose English as a language of proceedings in England. David Mellinkoff comments on this page of history:

Both before and after the Statute of Pleading, the all important writs were in Latin, with copies available in French translation... There was nothing written in English of immediate practical value to the practicing common lawyer or law student. Oral study of law at the Inns of Court was also in French.

This, the suggestion of the statute (and it was little more than a suggestion) that English be used in pleading had to be weighed by the practitioner against the absence of legal learning in English and the ubiquity of French.³

The reaction of the profession to the 1650 “Act for Turning the Books of the Law, and all Process and Pleadings in Courts in Justice into English” is also revealing:

There is evidence that the profession was less than enthusiastic over being ordered to talk and write English. Sir John Birkenhead parodied the title of the new law as:

An Act for turning all laws into English, with a short Abridgement for such new Lawyers as cannot write and read.

William Style had taken his notes in law French, and when his report was published in English, he assured his fellow lawyers that he did not subscribe to this lay nonsense.⁴

The law will in fact adapt to changing social and economic conditions; many countries⁵ now have mixed systems, many of which are bilingual. All have found the proper vocabulary to describe their own reality and there is no reason why this would not be possible in Canada. As for the reasons why a separate faculty was required for French-speaking Canadians outside Quebec, I will only refer the reader to an article written by the former dean at the Université de

toujours été et sont, à tout prendre, très semblables. René David, *Les grands systèmes de droit contemporains* (Paris: Précis Dalloz, 1978, 7e édition) at 321.

3. D. Mellinkoff, *The Language of the Law* (Boston: Little Brown and Company, 1963) at 113, 126-135.

4. *Id.* at 128.

5. *E.g.*, Scotland, Israël, South Africa, Louisiana, Québec.

Moncton Law School, Mr. Pierre Patenaude.⁶

There was in reality no difficulty in teaching public law in the French language,⁷ but some areas of private law presented very acute linguistic difficulties; this was specially true of land law, trusts and civil procedure. The law school at Moncton, conscious of its very special role in developing a workable language for the profession as well as basic tools to promote the accessibility of legal services in the French language, created Le Centre de traduction et de terminologie juridiques. Through this institution, the law school would develop vocabularies, forms, translate judgments and assist teachers and practitioners in their efforts.

The impact of the Center was immediate. It accelerated the production of teaching materials and drew lawyers closer to the law school. The Department of Justice in Fredericton awarded it a contract for the translation of the new Rules of practice. Permanent contacts were established with legal translators in Winnipeg, Toronto, Fredericton and Ottawa. Very soon a national committee was established to coordinate the efforts and present projects for funding to the Department of the Secretary of State. The University of Ottawa set up Le Centre de traduction et de documentation juridiques in cooperation with the Association des juristes d'expression française de l'Ontario. French-speaking lawyers in Manitoba gave themselves a spokesman.

At Moncton, the personnel of the Center grew from 2 to 10 and contracts were signed for the translation of all judgments of the Court of Appeal of New Brunswick and part of the Statutes of Manitoba. The Bar admission materials were translated. A working group was established to begin work on an English-French dictionary of the Common Law.

The impact of the law school and translation center was not limited to the production of legal materials. This impact was in fact greater on the attitudes and opinions in the New Brunswick legal community. As the law school established itself as a competent and cooperative partner within the legal profession, French-speaking lawyers came to depend on it to represent their views on certain issues, to do useful research and to provide assistance. This permitted exchanges between French and English-speaking practitioners that would be characterized by mutual respect and a frankness which had not been possible when French-speaking members of the Society

6. P. Patenaude, *The Université de Moncton's Common Law School, a unique experience*, (1980), 6 *Dalhousie Law Journal* 647.

7. This had been done in Québec for years and teaching materials were readily available.

played a subdued role. The Barristers' Society decided to assume a leadership role in bringing about a truly bilingual practice in New Brunswick; it set up a working committee on the integration of the two official languages in the practice of law. The law school played a very important role on this committee. Working sessions organized throughout New Brunswick would soon create a true sensitivity to present day problems. The Committee eventually presented a report which was far reaching and innovative.⁸ Though it caused some concern, the report was generally endorsed by the Society and the Department of Justice, which appointed a language coordinator borrowed from the Université de Moncton law school to study the mechanisms for the implementation of its recommendations.

In 1982, teaching the Common Law in the French language has to be easier than it was in 1978. There is a more uniform vocabulary in use, there are more judgments available in the French language, the Rules of Practice are bilingual, Bar admission materials are translated, more experienced personnel is readily available to assist the teacher in his preparation. Some of the difficulties that had been foreseen by Mr. Soberman have nevertheless occurred and continue to cause some concern. The number of acceptable candidates for admission to the law school is still relatively small and no more than 34 students come into first year in any given year, this number falling to 22 on the average by the end of the third year; experienced teachers have not been recruited, though qualified young teachers have been hired, as well as experienced part-time teachers from other faculties. The first four teachers now have four years experience in teaching!

A survey conducted among all students two years ago revealed that linguistic difficulties were experienced by only 7% of the student body, though another 5% found it awkward to work simultaneously in two languages.⁹ The problems experienced by the majority of students paralleled those of other Common Law faculties. It must be noted that bilingualism is a prerequisite for admission at the Université de Moncton law school; though a good understanding of written English is considered satisfactory, all students are fairly competent in English and speak it fluently. Most teachers at Moncton consider that students need assistance to enhance their skills in the French

8. *Report of the Committee on the Integration of the Two Official Languages in the Practice of Law* (Fredericton: Barrister's Society of New Brunswick, 1981).

9. In private law, most materials are available only in the English language (textbooks, articles, case law) though all instruction is conducted in French only.

language, rather than their ability to understand English materials.¹⁰ In fact, the amount of reading done in English by students is still predominant and the law school is now looking into the possibility of producing or at least translating some textbooks. All teachers are preparing casebooks which comprise a course outline, annotations and some cases in the French language, but it would be impossible to provide for a French only education in the Common Law at this time. The following constitutes a breakdown of library resources by languages as of October 1980; it provides an indication of the reading that students must do in each language.

Books in Library
May 21, 1982

	Textbooks	Law reports	Journals	Statutes
French	6662	716	1972	938
English	15255	20849	7083	2113
TOTAL	21917	21765	9055	3051

	Legislative debates & Government publications	Microtext	Total
French	779	505	11,772
English	700	3662	49,662
TOTAL	1479	4167	61,434

Law Library
Reserve

A) Number of volumes in reserve

	French	English
1978-79	7	19
1979-80	81	199
1980-81 (October 10, 1980)	56	168
1981-82 (May 21, 1982)	87	174

10. This is very revealing and demonstrates that the social objectives of the law school should not be undermined.

B) Consultations of volumes in reserve

	French	English
1978-79	68	177
1979-80	328	712
1980-81 (October 10, 1980)	74	93
1981-82 (May 21, 1982)	495	1331

Law Library
Registered Loans of Volumes

	French	English
1978	21	228
1979	267	286
1980 (October 10, 1980)	178	329
1981-82 (May 21, 1982)	720	1960

Many believe that the experience at Moncton can only be evaluated by looking at the performance of its graduates. There are only two classes that have reached the end of their training at Moncton; the first consisted of 15 students, the second of 21. These classes were made of students from eight provinces. Some students were accepted into the Master's program at Harvard, Columbia, King's College, The London School of Economics, Osgoode Hall, the University of Ottawa. Those who attended bar admission courses performed very well. As far as comments from the Bench are concerned, they were very positive and sometimes enthusiastic.

To the teachers at Moncton, these results came as no surprise; a very conscious effort has been made to maintain high standards and the need for bilingual practitioners is so great that the profession was expected to react favourably to the first few to be admitted to the practice of law. Part-time teachers with experience in other faculties had also assured us that our students would compare favourably with those of other law schools; this has been demonstrated to a point through our participation in the Jessup Moot Court Competition.

A survey was conducted among all teachers at the Université de Moncton law school in October 1980. They were asked to make an evaluation of the difficulties they were facing in their teaching. All teachers reported that they had no difficulty in teaching their subjects in the French language,¹¹ but that the preparation of courses was more

11. Provincial legislation and jurisprudence is referable to only one legal system; there is no necessity therefore to develop a French vocabulary that is entirely original or to make

demanding when reference materials were only in English. This was particularly true of teachers whose mother tongue is English. Most teachers gave a detailed account of their efforts to provide students with some reading materials in the French language and explained why articles and textbooks produced by European authors specialized in comparative law cannot be used.

On the whole, I must say that every teacher is very conscious of his responsibility and knows that a special effort is required of him or her during every session to transmit to students a knowledge of the proper legal vocabulary in both French and English. The law school must constantly monitor what is being done, provide assistance where it is needed and invite all teachers to make full use of the Centre de traduction et de terminologie juridiques. It must also encourage legal writing on subjects of Common Law in the French language and make sure that these publications are communicated to students and practitioners. The law school has just introduced a collection of small publications by third year students¹² and will look into the possibility of establishing a law review in the near future. Law teachers at Moncton have been quite active in legal research since 1978. Some 23 articles have been published and four masters theses completed, but most efforts have been spent in areas of public law. There is a very real need for a collection of articles on subjects of private law that would appear at regular intervals and be distributed widely.

The Moncton law school has a very specific and particular objective; it is not necessary or wise for it to attempt to assume its identity

great efforts to explain the particularities of technical expressions in each of our two legal systems. There is of course a very real need to find in translation words that will present concepts that are identical, equivalent or corresponding, but this can often be done without trying to modify everyday practice. The philosophy of the Université de Moncton law school is to develop a French vocabulary for the Common Law that is functional and correct. Often, expressions will be borrowed from Civil Law to designate a legal institution characterized by particularities that make it unique. The choice of "hypothèque" to translate "mortgage", a word of French origin, illustrates this approach. Though the "hypothèque" is very different from mortgage, it designates the corresponding institution; this French word is so widely used in Common Law provinces that to attempt to substitute another word is all but impossible. There is no need for substitution either; no one in New Brunswick or Ontario signing a mortgage is influenced by the rules of Civil Law applicable to the "hypothèque". There is need for an expanded French vocabulary in the Common Law provinces, for translating every expression possible, for integrating the French language to the actual practice of law and every effort is being made to accelerate the process.

12. The first four publications are: P. Finn, *l'Expropriation*; O. Snow, *Consumer Protection in New Brunswick*; P. Arsenault, *l'enchâssement des droits de la minorité canadienne-française dans les constitutions du Canada*; and A. Ouellet, *la réponse du droit en matière de transactions immobilières au Nouveau-Brunswick* (Editions de l'Université de Moncton, 1982).

by referring to any criteria other than those it has fixed for itself. Its unique function with regard to the French language community outside Quebec has given it a personality all its own. I believe it has an important contribution to make in our society; it can no doubt help demonstrate that our legal system can evolve into one that is more respectful of the Canadian duality. The efforts made to develop a French language expression of Common Law concepts is only one aspect of this duality that should be reflected; this is why the social objectives of that law school have continued to occupy a very important place in its priorities.

The Université de Moncton law school has now achieved respectability. It faces, as all faculties, the challenge of maintaining competency in the legal profession; this is a lifelong effort.