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Symposium Proceedings

The Teaching of Legislation in Canadian Law Faculties

(The following transcription has been edited from the Proceedings of the Annual Meeting of the Administrative Law Section, Canadian Association of Law Teachers, 1986)

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Panelists: Professor T.G. Ison, Faculty of Law, Osgoode Hall Law School

Professor H.N. Janisch, Faculty of Law, University of Toronto

Professeur P.-A. Coté, Faculté de Droit, Université de Montréal

Wade MacLauchlan: On behalf of Pierre Issalys, who serves as co-President of the Administrative Law Section of the Canadian Association of Law Teachers, and myself, I would like to welcome you to our annual section meeting. The subject which has been adopted for today's meeting is: "The Teaching of Legislation in Canadian Law Faculties". We have the good fortune to have as panelists three of the most experienced and vital teachers of Administrative Law in the country. Professors Terry Ison of Osgoode Hall Law School, Hudson Janisch of the University of Toronto and Pierre-André Coté of l'Université de Montréal combine sixty years of teaching in various law faculties across Canada. Moreover, each has made his mark in specific areas related to legislation, Professor Ison in compensation schemes, particularly in workers' compensation, Professor Janisch in the area of regulated industries and Professor Coté in statutory interpretation.

Our panelists will be addressing the subject of teaching legislation in two aspects: its place in the law school curriculum, and pedagogical techniques for the teaching of legislation. They will also be treating the broader theme of the place of legislation in our legal culture generally. Obviously Terry Ison and Hudson Janisch will be considering the

experience of common law faculties while Pierre-André Coté will be concerned with the perspective of the civil law faculties. While a comparative exercise is not an explicit objective of the session, it will be interesting to see what potential lines of comparison emerge. For now, it is important that I not take more of your time and I therefore will turn the floor over to Terry Ison.

Terry Ison: The subject that we have been invited to discuss is legislation in the law faculty curriculum. As background for this, I will talk first about legislation in some other contexts. It is part of our conventional rhetoric that we are a democratic society, and of course we now have a *Charter of Rights* reaffirming that we are a free and democratic society, if only by implication. It also entrenches the right to vote. One would think that since the right to vote has now been elevated to a paramount right, it logically follows that what we are voting for should be considered important, and that laws which emerge through the democratic process from the legislatures ought to have some paramountcy over laws which are generated in other ways. Yet of course we all know that is not the way it is.

We have a diverse array of structures and pressures which operate to downgrade legislation. Together they generate a perception of legislation as subordinate to other forms of law-making, particularly judicial law-making, and to judicial discretion. The downgrading starts even in the process of preparing legislation. The preparation of legislation in the provinces and federally is generally in the hands of legislative counsel, a person in the mid-range to upper ranks of the public service, who ranks below the deputy ministers, and who certainly ranks below the judiciary. Yet when we think of what the job involves, it is more demanding intellectually than judging. Anybody who has done both will appreciate that if legislative drafting is done well, it is intellectually a more demanding job than judging. Yet we do not give it anything like the same social or economic prestige, we do not give it the same pay, and no car goes with the job. It is a relatively inferior position in the legal hierarchy. Similarly, with regard to the staff of legislative counsel's office, the number of staff is generally too small and the salaries are inadequate to attract a sufficient number with the calibre of intellectual talent necessary for the job.

Also peer group affiliations are generally wrong. Legislative counsel tend to be based in the Attorney-General's departments, and so the peer group affiliations are generally with lawyers in the Attorney-General's departments, many of whom tend to rival treasury officials as the "no-people" of the public service, with probably a much higher proportion of negative answers to almost any question than one would expect to find

in the more front-line departments of government. Moreover, the place where the work is done is generally too cloistered for any sensible understanding of the goals to be achieved. Legislative counsel tend to function in their own offices. When I once complained to a legislative counsel that he could not function properly in his own office, his answer was: "Quite right, I would rather be on a desert island."

Of course a certain phase of the work might be done most efficiently that way, but not the bulk of it, and certainly not the early stages. If it is going to be done efficiently, legislative drafting must be more closely coordinated with the work of people who have a clear perspective of the objectives of the legislation. Indeed, there is much to be said for the view that legislative counsel should not have offices. They should function within the departments whose legislation they are preparing, or at least in some other place that orients them to the significance of what they are doing. If it is health legislation, for example, put them in a hospital. The problem at the moment is that the orientation is too remote.

Another impediment reflected in legislative output is the imprint of the educational and personal background of the drafter. We usually see the imprint of the common law or civil law rather than of a background in public administration. I am speaking now of public policy statutes, which often read as if they were written by a common lawyer (which of course they usually were).

Perhaps above all the role of legislative counsel is commonly perceived as technical. Even basic political questions relating to a bill are commonly characterized in that way, and of course once legislative counsel has succeeded in characterizing them as technical, it follows logically that he is the person with the authority and experience to decide them. For example, decisions on what to include in the statute and what to leave to regulations are commonly regarded by legislative counsel as technical. Yet it is clear that such decisions can have serious political dimensions. Characterizing that sort of question as technical has the effect of excluding the political choice from the purview of those who are supposed to be responsible for the political decisions. Typically, the motivation is conceptual neatness, but this mode of achieving that goal enables it to triumph over other public policy objectives.

Coupled with this, we have seen in the last two or three decades a deterioration in other ways of preparing legislation. In the subject area most familiar to me, workers' compensation, we used to go about it in sensible ways. We used to have a one-person Royal Commission conducting a thorough inquiry, listening to all kinds of perspectives, undertaking some research, and reaching conclusions that could be enacted without much creativity from legislative counsel. It was relatively

sensible. Nowadays we have task forces, legislative committees, and an array of consultants: too many fingers in the pie. Above all we have responses to the political pragmatism of the moment without rational analysis of the long-term significance of what is being proposed. Thus at least in the areas that I am familiar with, the other ways of preparing legislation have deteriorated.

So my first point is that legislation commonly fares badly in its preparation. One might hope that it would do better in the Legislature itself, and that at least here there would be a substantial respect for legislation. Sometimes, of course, that happens. Often there is intelligent debate on bills, and a great deal of useful committee work on bills. Frequently, however, that is not the case. The legislatures often seem determined to spend most of a session on political nonsense, and then somehow to rush through a mass of legislation towards the end of the session. This is not the universal experience, but it has been a fairly common one. Sometimes it is as if legislators have an aversion to legislation.

Once legislation is passed and falls into the administrative process, it may not fare much better. Throughout our constitutional history, there has been some element of conflict between legislative sovereignty and claims for executive paramountcy. We had the Civil War over this, and when I was a student, we used to be told that the Civil War had settled the matter. Parliament was supreme; the conflict had been resolved by the Revolution Settlement. Even in school we were taught that. Yet it is common to find nowadays that adherence to statute law is not perceived as a paramount requirement in government departments and other agencies. Even in a department or agency that was created by statute, we commonly find that the statute is perceived within the agency as a sort of decorative literature. It gives respectability to the agency, like the flag over the front door, but it is not perceived as a body of law with which the agency must comply, and which the agency is responsible for implementing according to its terms.

Perhaps the matter of greatest concern over the past few decades has been the resurrection of the dispensing and suspending powers. One of the goals of the Civil War was to end (we used to think forever) the suspending and dispensing powers that had been claimed by Stuart Kings. Yet in recent years we have seen those powers resurrected on a broad scale. We saw it, for example, about 1975 with the anti-inflation program. Governments adopted an anti-inflation program and assumed that by making a policy pronouncement and passing an order-in-council, they had the authority to dispense with legislation. A more recent example occurred in Quebec. There was a prosecution under *Bill 101*

(the language statute) of a motel operator for having the word "office" outside the motel. The prosecution was *successful*. Following the prosecution, the Attorney-General announced that there would be no further enforcement of the statute, at least for the time being. Yet there was no apparent recognition, at least as far as the media were concerned (and one never heard of any recognition from government) that this was a most flagrant violation of the Bill of Rights, and a clear resurrection of the suspending power.

If statute law has fared badly in its preparation, enactment and administration, one might have hoped that it would fare better in the judicial process. Of course sometimes it does, but the history of this subject in the courts has certainly not been one of unflinching fidelity to statute law. Judges often feel free to set aside legislation, and they do it in a variety of ways. Apart from what might be called ambitious interpretation, they sometimes do it simply by attributing to the legislature an objective that appears to coincide with the judge's own values and then saying that because the case before the court lies outside the scope of that objective, the application of the statute can be set aside. It seems most likely to happen in situations where democratic influences have prevailed in the legislature over vested interests.

To say that some judges now feel free to set aside statute law anytime that they feel like it might sound, at first impression, like a flippant remark, and yet it is not out of line with the reality. We have seen some flagrant examples. We have seen, for example, the over-riding of privative clauses, we have seen the denial of strict liability offences, and of course the history of labour law is replete with examples of negative attitudes in the courts to statutes that would facilitate collective bargaining, and even to some that conferred individual rights. Now of course we have the *Charter of Rights*, which extends the dispensing power from the executive to the judiciary and effectively makes the implementation of all statute law a matter of judicial discretion.¹

Let me move on, then, to the treatment of legislation in the law schools. It is probably here that legislation has received its greatest disparagement. At least it is here that lawyers are trained to perceive of legislation as a second-rate source of law. Within days of entering law school, the student is trained to perceive of a world in which all human and corporate problems are resolved through bilateral conflict, and in which law is the creation of the judiciary, with the legislatures playing only a role of occasional interference. In the upper years, there are courses dealing with law of statutory origin, but even they tend to be

1. For further views of the speaker on this subject, see "The Sovereignty of the Judiciary" (1986), 27 *Les Cahiers de Droit* 503.

perceived as important only if the subject has generated a substantial body of case law. If there is no substantial body of judicial pronouncement, the subject area tends to be perceived as of secondary importance and allowed in the curriculum only as an accommodation for those showing idiosyncratic or deviational traits.

One might have expected that courses on constitutional law would play a corrective role, but this has not happened. For decades, courses on constitutional law consisted of nothing but federalism, with no coverage of those constitutional principles that one might have felt were more basic. That changed about two decades ago when we saw various faculty members introducing other components into constitutional law courses. These dealt with democratic and civil liberties issues, but those extensions are now being swamped by the *Charter of Rights*, again enhancing a perception of statute law as subordinate to case law.

Is there any hope? I think there are two possibilities. One is a course on legislative preparation, and I would like to see this go beyond legislative drafting. It sounds almost picayune, but I do not think that it is. Pierre Issalys gives a course of this type at Laval. (He ought to be on this panel, incidentally, but since he was an organizer of the panel he was too modest to include himself. I hope that he will say something later.) He gives a course of this type at Laval, and I believe that there may be some others. Insofar as I understand it, the course is a technical one. I would not object to it on that ground, because a large part of a lawyer's role is technical and a good lawyer must be a good technician, but I would like to see it extended to include the non-technical dimensions of statutory preparation. In particular, I think it vital to include what might be called the political-technical interaction.

We have too many statutes being passed that are a waste of taxpayers' money because they were never designed to achieve their goals, and they never will be unless the process of technical-political interaction is good. It is vital for the drafter of a bill to have a perception of what will happen in the subsequent administration of the Act. It is crucial, above all, to understand what the incidence of lobbying pressure is in the preparation of the bill, what the incidence of lobbying pressure will be in the passage of the bill, and how those compare with what the incidence of lobbying pressure will be in subsequent administration. A drafter who does not understand that is in no position to prepare the measures necessary to preserve the integrity of the Act and the achievement of its goals against subsequent negative pressures.

As part of this process, it is crucial to understand the future potential of the Act in the budgeting process. I remember a classic case, outside the legislative area, some years ago when the British government built a major hospital at enormous expense in Birmingham. After the building

had been completed, they decided that they could not afford the budget to operate it. We constantly do the same thing with legislation. We prepare statutes, we pass them and then we find that governments do not allocate the funds for enforcement, possibly because they are unwilling to pay the political price of enforcement. The statute becomes a form of deceit on the public. If the budget allocations are not going to be made, one might at least save the cost and the deceit of passing the statute. These are the sort of questions that need to be raised as part of the preparatory process.

The main point that I want to make here is that legislation cannot be prepared most effectively if the technical and political roles are cleanly separated and assigned to different people. Legislative drafting is a political as well as a technical function if it is going to be done well. Indeed, those roles are so intertwined that there is much to be said for the office of legislative counsel being reclassified as a political position rather than a civil service position. When a reform-oriented government is elected, it is not at all unknown to find that the real political opposition to its proposals lies in legislative counsel's office rather than in the legislature, and that legislative counsel is playing a role of political opposition rather than technical assistance. For a comprehensive understanding of the subject, therefore, it is important for a course on legislative preparation to include not only the technical aspects of drafting but also the political significance of the technical options.

Another course that is desperately needed but which has never been given as far as I know in a Canadian law school (though maybe someone has done it somewhere) is a course on sanctions. By and large we are bad at sanctions, and legislation is often defective for the lack of adequate sanctions. Parliamentary debate sometimes focusses almost exclusively on the substantive rules. Yet we find time and again that taxpayers' money is being wasted on legislation which predictably will be useless because the sanctions prescribed in the Act are unlikely to be invoked.

Similarly, in legal education it is possible and perhaps normal for students to graduate with little perception of sanctions except for sentencing in criminal cases and actions for damages. This subject of sanctions surely warrants sufficient attention to require a separate course (perhaps a companion course to legislative preparation). A separate course would enable the subject to be seen in a functional rather than a conceptual framework.

There is a great deal more to be said by way of detail on what could be done in the law school curriculum, so I will hand over now to my radical friend, Hudson, who has developed some thoughts on that.

Hudson Janisch:

1. *Introduction*

Legal advance of common law in courts may be ahead of legislatures — building up prestige of lawyers — rise of legislatures reduce power of lawyers — parliament in a sense a revolution against legal caste as protestant reformation a revolution against ecclesiastical class.²

I was very pleased to be asked to participate in a panel discussion on the state of the teaching of legislation at law schools for at least two reasons. First, my own school, in one of its periodic reviews of the curriculum, has decided to drop its first year course in Public Law. A major component of that course had been a systematic introduction to legislation.³ Second, I dimly recalled that one of my intellectual heroes at the University of Chicago, Ernst Freund, had fought and won a major battle with the Harvard Law School at the turn of the century over the place of legislation in a law school's curriculum.⁴ I also recalled, somewhat less dimly, a characteristically trenchant piece on the inadequacies of legal education with regard to legislation by one of Chicago's latter day heroes, Richard Posner.⁵

I thus thought that it would be useful to bring together some early and some contemporary ideas from a truly great law school to counteract what I sometimes think is excessive veneration of law schools such as Harvard and Yale. Unfortunately, my marching orders require me to look at the state of the teaching of legislation in the common law schools

2. William Christian (ed.), *The Idea File of Harold Adams Innis*, (Toronto: Univ. Toronto Press, 1980), at 2/3.

3. The course had sought to introduce first year students to the legislative process, legislation (including subordinate legislation) and statutory interpretation in the first term and to the administrative process in the second term primarily by way of a study of mass adjudication in workers' compensation from an historical and contemporary perspective and economic regulation by way of an analysis of contemporary developments in airline "deregulation".

4. The circumstances which gave rise to this battle was the proposal that the new law school at the University of Chicago be closely modelled on the Harvard Law School. Freund, who had received his legal education in Germany and a doctorate in political science from Columbia, visited Harvard at President Harper's suggestion. Dean Ames of the Harvard Law School was shocked at the very idea of having a non-lawyer teaching legislation by means other than the case method. His letter of barely controlled outrage may be found in "Ernst Freund Pioneer of Administrative Law" (1962), 29 *Univ. Chicago L. Rev.* 755 at 764-65. Not only is this correspondence of great interest as an indication of turn of the century values in legal education, but it is of current interest as well given more recent proposals for the further liberalization of law school education.

For Freund's unique contribution to the University of Chicago Law School, see Frank L. Ellsworth, *Law on the Midway* (Chicago: The Law School of the University of Chicago, 1977), *passim*.

5. Richard Posner, "Statutory Interpretation — in the Classroom and in the Court Room" (1983), 50 *Univ. Chicago L. Rev.* 80 (hereinafter Posner, "Statutory Interpretation"). Richard Posner is now, of course, Judge Posner, U.S. Court of Appeals for the Seventh Circuit. He is, as well, Senior Lecturer, University of Chicago Law School.

in Canada and I thus find myself somewhat restrained from indulging in a loyal alumnus' chauvinistic partisanship. However, do not be surprised should Freund and Posner pop up from time to time in the balance of my remarks!

2. *Survey of What's Happening at the Common Law Schools*

As you all know, law teachers have recently been roundly condemned for not undertaking empirical research.⁶ By way of a small counterweight to mere doctrinal introspection I undertook a non-random survey of primary source periodic iterations; that is to say, I read all the common law schools' 1985-86 calendars!

While not the most exciting research project I have ever undertaken, it was quite revealing. It turns out that five schools offer at least some exposure to legislation and the legislative process by way of a public law or legal process type course in first year and six offer upper year courses in "legislation". By far and away the most complete set of courses is offered at the University of Ottawa which, of course, offers both an LL.M. in Legislation and a Diploma in Legislative Drafting. Towards the bottom of the league is my own school which, with the passing of Public Law, offers neither an introduction to legislation in first year nor any course in the upper years in legislation, the legislative process or legislative drafting.⁷ We will be offering periodic week-long bridge periods in legal history, philosophy, economics and legal institutions next year (based on an experiment underway at Harvard) and it may be that legislation will be featured in one of these periods of concentrated study.

At one time Dalhousie was preeminent. Dean Horace Read had been a pioneer in developing published teaching materials in legislation at the University of Minnesota Law School and when he returned to Dalhousie he brought with him the innovative approach to legislation which had been developed at that school. This is how he described what he was doing by the late 1950's.

Legislation is a second-year course at Dalhousie since it presupposes at least an elementary knowledge of substantive law and some understanding of the judicial techniques of applying and developing the "common law". It is meant to be correlated with the course in Constitutional Law. It

6. See *Law and Learning*, A Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, (Ottawa: Supply & Services Canada, 1983).

7. We did offer "Public Policy Formation" taught by a political scientist. However, it did not focus directly on the legislative process. Our "Legal Process" course was concerned almost exclusively with the judicial process. Our "Law Reform" seminar did deal to some extent with pressure groups and legal change. What we did not offer were any courses which were concerned exclusively with the legislative process and designed to be taken by most students.

extends throughout the academic year. There are two hours of classroom discussion each week, and additional work is done in the Nova Scotia Center for Legislative Research. Essential insights are gained by students from participation in preparation of bills and other legislative measures. The classroom discussion of theory is therefore accompanied by as much collateral work in research and drafting as is practicable. While the objective of the course is not to train expert draftsmen, and little skill can be acquired in the available time, an appreciation of the difficulties involved in making laws cannot be learned as well in any other way.

To provide an opportunity for students to participate in the preparation of actual bills and to observe their fate in the legislature and afterward, the Nova Scotia Center for Legislative Research was established at Dalhousie Law School in 1950. The Center was the first co-operative project of its kind to be undertaken by a law school and a government, and is, on a very modest scale, an experiment in both legal education and public service. Its functions are, first, to provide law students with some experience in methods of research and drafting essential for effective legislation and, second, to make the result of their work, whatever its worth, available to the legislature. The long-range plan is to keep Nova Scotia laws under objective and politically disinterested study with the aim of discovering how to develop them best to fit the needs of the province.⁸

Over the years this modestly stated, but very ambitious, approach has given way to a more conventional course in legislation essentially similar to that offered at other law schools.

How, then, should we assess what is being done, or not being done, in Canada at the common law schools? It is, of course, difficult to determine what is actually happening in the classroom from calendars or handbooks. We all know that we should not judge a book by its cover, and prosaic course descriptions may well hide insightful and demanding teaching, while actuality may well fall far short of the ambitious pretensions as set out in glossy publications. Despite these problems with the data (and who in the brave new world of empirical research doesn't complain about the inadequacy of data) I am driven to conclude that what we do falls far short of what needs to be done.

8. Horace E. Read, "The Programme in Legislation at Dalhousie Law School" (1959-60), 13 *Univ. Toronto L.J.* 81 at 82. And see Read, "Aims and Practices of University Education in the Faculty of Law at Dalhousie" (1964), *Canadian Legal Studies* 3 at 10-11.

It is particularly unfortunate that the Canadian common law schools have not succeeded in addressing legislation in an adequate manner in view of the contributions of John Willis as well as Horace Read. Willis' "Statutory Interpretation in a Nutshell" is a classic account and analysis of the traditional "rules" of statutory interpretation and "... is probably the best-known single piece of Canadian legal writing." R.C.B. Risk, "John Willis — A Tribute" (1985), 9 *Dal. L.J.* 521.

Read's interest in legislation is kept alive at Dalhousie in the Horace E. Read Memorial Lectures. See, for example, the Tenth Lecture by Frank P. Grad, "The Ascendancy of Legislation: Legal Problem-Solving in Our Time" (1985), 9 *Dal. L.J.* 228.

Overall, the situation in Canada appears to be similar to that which Richard Posner sees in the United States.

While many academic lawyers are experts on particular statutes — which largely means experts on what the courts have said about the particular statutes they teach — few are experts on legislation. Few study legislation as an object of systematic inquiry comparable to the common law; few attempt even to translate the studies of economists and political scientists into language that lawyers can understand.⁹

3. *Why Should We Teach About Legislation?*

Having concluded that our response to legislation has been inadequate, it is incumbent on me to suggest a standard to which we should aspire. Why, indeed, should we devote scarce resources to teaching about legislation? There would seem to be three main reasons for doing so — the need to respond to the reality of the legal world around us; the need for balance in the curriculum; and the sheer intellectual challenge and stimulation to be derived from the systematic study of legislation and the legislative process.

None of us will seriously deny the contemporary importance of legislation.¹⁰ Even the most intransigent common lawyer cannot deny this reality. We do not, of course, have to be particularly gracious about it. (As Cardozo said, “The truth is that many of us, bred in common law traditions, view statutes with a distrust we may deplore, but not deny.”)¹¹ Our response is essentially one of confession and avoidance in that we acknowledge the overwhelming presence of legislation, but do not ourselves get around to doing anything about it in any systematic way.

We also hope that some sort of balance will emerge from our smorgasbord of elective courses. We hope that our students will think like well-rounded lawyers and not exclusively like common lawyers. We are pleased to think that they not only appreciate the strengths of the judicial process but also its limits, and that they have something of the

9. Posner, “Statutory Interpretation”, *supra*, note 5, at 801.

10. As Dean Read had put it: “The first half of this century has seen the emergence of legislation as the chief instrument of change and innovation in the law. Consequently, as almost any law report shows, the interpretation and application of statutes has become the main occupation of the courts and skill in the process has become a requisite for successful advocacy and counselling. Until recently, however, owing largely to persistence of the deep-rooted common law tradition of professional hostility to legislation, there was almost total neglect of the subject in the law schools.” *Supra*, note 8, at 81.

11. B. Cardozo, *The Paradoxes of Legal Science*, (N.Y.: Columbia Univ. Press, 1928) at 8. And as Erwin Griswold noted, “Slowly but surely much of our law either has been taken over, or has been deeply invaded, by statutes. We all know that fact, yet we are perhaps not fully aware of it in our habitual processes of legal thinking.” (“Preface: The Explosive Growth of Law Through Legislation and the Need for Legislative Scholarship” (1983), 20 *Harv. Jour. Leg.* 267.)

same balanced appreciation of the administrative and legislative processes. However, if we do not present them with positive possible alternatives to what Freund called, many years ago, the “monopoly of the judicial point of view in the study of law”,¹² our *actions* will inevitably outweigh our *intentions*, no matter how pious.

Take, for example, the situation in the University of Toronto’s public lawless first year. Having moved constitutional law into first year along with civil procedure, property, contracts, torts and criminal law, we send a very clear message to our entering students that the judicial process is *the* process of the law. My colleagues who teach constitutional law tell me that they continually point out the limits of the judicial process and on many occasions criticize the courts for venturing too far into the “political thicket”. However, unless students are simultaneously presented with the strengths and weaknesses of alternative law-making techniques, even the most articulate of pleading will either lead to too great a rejection of a creative judicial role because of some idealized vision of the administrative or legislative processes, or, more likely, to the swallowing hook, line and sinker of the myth of judicial omnipotence ameliorated by an occasional moment of doubt designed solely to placate the prof on the exam. We need to remind ourselves that what we *do* as teachers is, all too often, much more important than what we *say*.

While reality and balance are practical and, I would venture, persuasive arguments, it has also to be recognized that by largely ignoring legislation we have impoverished ourselves intellectually.

Consider, for example, some brief extracts from Freund’s proposal for a course in statutes in 1919, in which he calls for an approach totally distinct from conventional critical case analysis.

4. The study of Statutes assumes a new aspect when, instead of asking how a given situation, arising under a statute is to be dealt with, we inquire how a given situation is to be dealt with by a statute; when, instead of looking upon a statute as something to be judged after enactment, we look upon it as something to be fashioned before it becomes law.

* * *

16. The pedagogical value of a course in Statutes is two-fold. It teaches the student to read a statute, so that he can recognize the strength and weakness of its provisions and see, not only what is in the statute, but also what is not in it, but ought to be. It also teaches the student to think constructively, instead of thinking only critically. In other courses, there is likewise the possibility of constructive thinking, but as a rule there is no time to develop that phase of a subject.

12. Quoted in Julius Cohen, “On the Teaching of ‘Legislation’” (1947), 47 Columbia L.R. 1301 at 1307.

17. From the point of view of jurisprudence or legal science, the value of the course lies in opening the eyes of the student to the part played by legislative thought in the development of the law. In the law school, statute law becomes taught law only insofar as it has passed through the mind of a court for judicial purposes. The student never realizes that there is much in the way of necessary legal development that judicial thought, by reason of its inherent limitations, is incapable of producing, and that must come, and in large part has come, from the constant thought that is given in the community to problems of legislation¹³

In thus recognizing that a course in legislation should educate students in how to deal with a problem by means of a statute rather than simply how to deal with a statute once enacted, Freund, it seems to me, recognized the unique intellectual challenge in teaching legislation. It also would appear that Freund in the classroom was as good as his word in a course proposal. Writing at the time of his death in 1932, a former student, by then a dean of a law school, recalled:

Mr. Freund deliberately chose to teach the two hours immediately following lunch. Yet his passionate eagerness and dynamic enthusiasm for his subject made these classes, particularly the one in Statutes, the intellectual climax of each student's day. Not, however, that we claimed at that time that we understood him fully. Or that he made us content. On the contrary, we emerged from the class in Statutes uncomfortable, confused and bewildered. Most of us had spent more than two years in the orderly process of tracing the intricate designs of the mosaic of judge-made law, carefully laid down in the historical-approach casebooks of the period. But Mr. Freund swept us from the German Civil Code to the English Acts of Parliament, to the Statutes at Large of the Congress and into the myriad session laws and statute books of the several states, where could be found for our guidance no rationalizations, in written opinion or in treatise. Worse still, we were placed in the position of legislators or draftsmen facing prospectively a problem. Policies had to be determined, the appropriate devices discovered with which these policies could be best expressed and their administration and enforcement facilitated. It was our first contact with the distressing uncertainties involved in the constructive formulation of the law, our first attempt to cope with anticipated difficulties.

When, later, some of us worked with legislative bodies as so-called professional draftsmen, we were apt to blame him because he had not adequately taught us our trade. For we naively assumed that he had intended to make us skilled mechanics. But if Mr. Karl Llewellyn is right, in his preface to *The Bramble Bush*, in saying that a teacher must gain and not lose in retrospect, or be a failure, then Mr. Freund was a great teacher. For those seeds of attitude, of technique and awareness of difficulties have borne fruit in hundreds of minds that are still groping with the baffling

13. "A Course in Statutes" (1919), 4 *Amerc. Law Schl. Rev.* 504.

processes of legal engineering, now grateful, however, for the master who gave the impetus and the direction.¹⁴

This challenge to “think constructively instead of thinking only critically” is important enough in itself. It becomes even more intellectually worth-while should a course in legislation include, as well, study of the legislative process itself. It may be that courses in legislation have never been able to aspire to Freund’s initial vision because they have not been designed to explore either new theoretical studies or empirical data on the legislative process. Thus, in his review of the third edition of Horace Read’s *Materials on Legislation* in 1973, Richard Stewart concluded that it reflected “. . . the low intellectual estate of the conventional law school course on legislation.” He complained that it was dominated by judicial opinions on legislation and that a student would only emerge with the dimmest perception of how legislatures actually function, how one might be an effective participant in the legislative process, or how legislatures interrelate with other law making organs in the legal process. He continued:

This is not to urge the transformation of the work under review into a political science text. The capacities and functioning of the legislature as a lawmaking body, the impact of legislative procedures on outcomes, the relation of the legislature to other lawmaking bodies are issues that are not only relevant to lawyers but peculiarly their province, whether their concern be academic or the advancement of clients’ interests. The legislative process is not mere “politics” transformed into “law” only through the alchemy of judicial opinions.

* * *

In interpreting statutes judges must surely address the question of how legislative decisions are actually made. Every theory of statutory interpretation betrays an implicit model, real or idealized, of the legislative process.

* * *

An understanding of the legislative process in operation cannot resolve difficult problems of construction, but it is surely one prerequisite to wisdom.¹⁵

I will return in a moment to this “political science”/“law” dichotomy. I wish now to address the argument that as so many of our courses in the upper years are statute-based, our students do, in any event, learn all they need to know about legislation.

14. Maurice T. Van Hecke, “Ernst Freund As A Teacher Of Legislation” (1933), 1 Univ. Chicago L. Rev. 92-93.

15. Richard B. Stewart, Review of *Materials on Legislation* (1974), 11 Harv. Jour. Leg. 550.

4. *Interstitial Learning is Not Enough*

It would not seem to me that one can really learn about legislation interstitially in second and third years. In Administrative Law, for example, my colleagues and I grandly announce in the introduction to our text, "As will be seen there are very few cases in Administrative Law that do not ultimately turn upon the interpretation of a statute."¹⁶ But we include thereafter no systematic analysis of statutory interpretation. I know that Wade MacLauchlan enriches our materials with additional statutory readings, but I do not believe that he feels that, in a course dominated by judicial review, much can be done in the absence of earlier exposure to the legislative process. As it is, we do a pretty inadequate job of exposing our students to the administrative process, let alone the legislative as well. The fact of the matter is that all of us who teach in the upper years are inordinately vain about the substantive value of our courses. As Richard Posner put it:

Most teachers of statutory fields believe they have only enough time to introduce the students to the field — to give the students a sense of the field's scope and texture by working through the major statutory provisions and the principal cases construing them. They do not feel they have enough time to explore with the class the process by which the legislation is enacted, the political and economic forces that shaped it, or even the methods the courts use to interpret it, as distinct from the particular interpretations that the courts have made.¹⁷

5. *Why Have We Failed So Far?*

If you are at all with me this far, the obvious next question is why is it that we in the common law schools have failed to grapple effectively with legislation. There appear to me to have been three main reasons. First, the common law environment itself and the dominance of the case method and its court-centricity in our teaching. Second, recent fads and fashions in legal education have drawn us away from basics such as legislation. And third, substantial inherent difficulties render it difficult to make the teaching of legislation interesting, an important inhibition during a period of consumer sovereignty in legal education.

Terry Ison has talked about legislation and the development of the common law curriculum so I will be brief in that regard except to note that in our legal culture, "Statute law has an unenviable reputation."¹⁸ Nor has it exactly been made welcome. As Carl Fulda pointed out at a

16. Evans, Janisch, Mullan & Risk, *Administrative Law, Cases Text and Materials* (2nd ed. Toronto: Emond Montgomery, 1984) at 10.

17. Posner, "Statutory Interpretation", *supra*, note 5 at 801.

18. Frank Horack, "The Common Law of Legislation" (1937), 23 Iowa L. Rev. 41.

Legislative Round Table in Chicago in 1952, "In the beginning, God created heaven and earth and the common law and statute law arrived on the scene much later as an unwelcome guest who was put up in a modest room in the attic."¹⁹ Moreover, not only is the case method an inappropriate pedagogical technique for legislation, but it may have had, as Frank Horack has argued, an even more destructive effect. "Case law education has stressed the 'exception' and disparaged the 'general rule' to the point that few law school graduates would ever consider making a flat, unconditional statement even where as a legislator it is possible. Thus most statutes proceed from single instance to single instance and as a consequence are unreadable, disorganized and confusing."²⁰

These and other difficulties with legislation have gone largely unaddressed in recent major shifts in legal education. Neither the "relevance jag" of the 1970's nor the current surge of interest in legal theory has paid much attention to legislation. As James Willard Hurst put it in 1982, "Judge-made law is still the darling of legal philosophers."²¹ Indeed, far from focussing on unexplored areas of the legal system, legal theory seems destined to substitute theoretical judicial navel gazing for the doctrinal judicial navel gazing. *Plus ça change, c'est plus la meme chose!* Moreover, our friends in Critical Legal Studies, having set up the judges as straw person political eunuchs, have had great fun in deconstructing them, leaving behind only the promise of some form of idealized, loving, caring and sensitive Athenian democracy. None of all this has been helpful in addressing problems of the legislative process in the here and now.

It has to be recognized that teaching legislation in competition with common law cases is always going to be difficult. To the common law mind statutes are real kill-joys. As Robert Williams of Rutgers Law School has noted, there is a perception that there is ". . . *no fun* left when a statute enters the picture."²² Cases are seen to be more interesting and hold out more promise. As he went on to observe:

Because statutes usually are not applied by analogy beyond their express terms, they do not appear to contain the same potential as cases. In other words, a judicial decision will at once provide rules of law to decide the instant case and the raw materials for extrapolation in future analogous

19. Fulda, "Objectives in the Field of Legislation" (1953-54), 6 *Jour. Legal Ed.* 11.

20. Horack, "Objectives in the Field of Legislation" (1953-54), 6 *Jour. Legal Ed.* 18 at 20-21.

21. Hurst, *Dealing with Statutes* (N.Y.: Columbia Univ. Press, 1982) at 1.

22. Robert F. Williams, "Statutory Law in Legal Education: Still Second Class After All These Years" (1984), 35 *Mercer L. Rev.* 803 at 833.

This article contains a particularly valuable review and analysis of the parlous state of teaching of legislation at American law schools. To the extent that misery loves company, it is reassuring to know that things are pretty bleak there as well.

cases. Cases, therefore, hold a dual interest for the lawyer in a way not readily apparent in statutes. Not only are cases more interesting to read, but they also have these two levels of interest — the resolution of the instant case through the formulation of a rule and the foundation for common-law reasoning in the future. Future common-law decisions are put off for another day, while statutes seem to prejudge future cases.²³

Patrick Fitzgerald, in addressing the question, “Are Statutes Fit For Academic Treatment?” has suggested a number of reasons why cases are inherently more interesting than statutes.

- (i) A case is about real living people: a statute is abstract and disembodied, and it is only human to prefer a story to a formula.
- (ii) A law case contains that prime ingredient of the play, novel or story — conflict. Here again a statute differs: it may provide a solution to a conflict but the conflict itself is not apparent on the face of the statute.
- (iii) The judgment in a decided case provides the reader with what is one of the most attractive and appealing features of the legal process — the feature which above all others makes law an attractive thing to study — I mean the judge’s reasoning. Much of the fascination of legal study lies in examining how far a court’s reasons justify its conclusions. With statutes it is otherwise. Here we have no reasons, only provisions; no justifications, only conclusions. Reasons and justifications can often be found, but never inside the statute itself.
- (iv) There is the time dimension. Cases can be looked on as points of a line of development, and by working through a line of cases we can trace the growth, extension and continuous development of a doctrine; we can extract general principles. Statutes too have a time dimension, but the statute book presents us with a series of discrete jumps rather than the continuous growth which we find in case law. And new statutes, when they supersede their predecessors, make us overlook the importance of examining the statutes that have been superseded. As a result statute law provides no general principles, and a subject without principles is one of very little interest.
- (v) Common law cases evidence a fascinating counterpoint or dialectic between the individual disputants’ requirement for a particular decision and the society’s need of a general rule, resulting in a tension wholly absent from statute law.

23. *Id.*, at 145.

- (vi) Finally of course the judgments in the law reports are not only easily readable but also at times contain prose of very high quality indeed. The same can't be said of statutes.²⁴

His response takes us back to the “political science”/“law” dichotomy mentioned earlier.

- (i) If we were to look at the whole background and history of an Act, we should find that the Act itself seemed far less abstract and disembodied.
- (ii) Parliamentary and pre-parliamentary history would reveal the conflict as well as the solution.
- (iii) Hansard's reports can provide the legislators' reasons and justifications, just as the law reports provide those of the courts.
- (iv) To look at a statute as a point in a line of continuous development — and in many fields of law we do in fact do just this — would take account of the time dimension.²⁵

I will return to this central question of the appropriate breadth of approach to the legislative process in just a moment. In the meantime, let me briefly suggest what an ideal set of courses on legislation would look like.

6. *What Would an Ideal Set of Courses Look Like?*

First, there would be a major first year course to prevent students from becoming “case hardened”. Richard Posner has suggested that such a course would cover The Process of Legislation; Empirical Study of Legislation; Techniques of Judicial Interpretation of Statutes and Researching Legislative History.

As always Posner comes up with a number of crunchy observations. He notes, for instance, that it will be essential to impart basic information on the legislative process despite the reluctance of law professors “. . . to impart mere information in the classroom. . . .”²⁶ As for legislative history, he observes that very few lawyers know how to handle it, and concludes: “The mastery of research techniques is not so intellectually stimulating as other elements of a law school education, but library science is a recognized field of learning at first-class universities, and it would not demean the law schools to offer formal instruction in a highly relevant aspect of it.”²⁷

24. Fitzgerald, “Are Statutes Fit For Academic Treatment?” (1970-71), 11 (N.S.) Jour. Soc. Pub. Teachers of Law 142 at 144-45.

25. *Id.*, at 145.

26. Posner, “Statutory Interpretation”, *supra*, note 5 at 803.

27. *Id.*, at 804-805.

There is room for lots of debate on how much emphasis should be placed on the “legislative process” and “empirical study of legislation”. All that I can do here is to set up the ambit of such debate. I look forward to hearing from others as to where we should draw the line, if, indeed, there is a line to be drawn.

It is sometimes suggested that lawyers should recognize that they only play the role of midwife in the legislative process. As Reed Dickerson once put it, “Most legal functions are directed to serving clients, an activity which involves policy making by the lawyer only in the role of midwife. Certainly, the legislative draftsman is not essentially a policy maker, political scientist or lobbyist and thus is not having the baby himself.”²⁸ Putting Mayor Drapeau to one side, the midwife approach would draw the “political science”/“law” boundary in a manner which would emphasize drafting techniques and technical manipulation. On the other hand, if, to continue the analogy, it is considered desirable to involve law students at the conception of legislation, when it is no more than a gleam in the politician’s or lobbyist’s eye, the boundary would have to be shifted into what might be considered the realm of “political science”. As Posner has urged:

It is not enough simply to give students an outline of how the legislative process operates and a synoptic view of the scholarly controversy over the nature of what it produces. They should also be exposed to the results of empirical studies. They ought to learn what political scientists have discovered about the respective roles of Congressmen and staff in drafting legislation, the contribution of lobbyists and administration officials, and the time and care devoted to actual drafting, so that they can form their own judgment on whether it is realistic to suppose that statutes are drafted in the light of assumptions concerning the methods that courts will use to interpret them. They should also learn about the frequency and feasibility of legislative overruling of judicial decisions that interpret statutes contrary to the purpose of the legislation as conceived by either the enacting Congress or a subsequent one.²⁹

My own thinking is that we should err on the side of “political science” in order to create a course that is sufficiently interesting and challenging to be capable of competing effectively with the drama of common law cases, and intellectually rich enough to attract first-rate teachers to its design and implementation.

In addition, in my ideal world, law schools would offer problem oriented legislative drafting seminars in the upper years. I would suggest that a smidgen of legislative drafting be included in the first year course

28. Dickerson, “Legislative Process and Drafting in U.S. Law Schools” (1981), 31 *Jour. Legal Ed.* 30 at 36, fn. 15.

29. Posner, “Statutory Interpretation”, *supra*, note 5 at 803.

in order to induce some humility in loquacious common law students and respect for tight, precise use of language.³⁰ And again, ideally, as in Dean Read's Dalhousie venture, there should be a Legislative Research Centre where students could draft legislation "for real".³¹

7. *What are the Chances of Implementation?*

I am not at all optimistic about the short run prospects for a fully fledged, Posnerian course on legislation.

First, unlike the 40's and 50's, there appears to be little institutional concern. The 1983 SSHRC Study, *Law and Learning*³² placed no particular emphasis on legislation, and the 1982 symposium in the United States on *The Law Curriculum in the 1980's*³³ did not even include legislation among topics for possible curricular reform. The unexpressed assumption appears to be that now that we teach a large number of statute-based courses in the upper years, students will learn all they need to know by a process of osmosis.

Second, my proposals, if they were to be taken seriously, would have substantial resource implications and resources "is what we ain't got".

Third, a major new course in first year will require new and innovative teaching materials and teachers willing to immerse themselves in a new and unfamiliar terrain. There is a natural propensity to perpetuate common law methods; after all it is what we all know and feel comfortable with.

8. *What Can Be Done In The Meantime?*

In case any of you might feel that I have displayed unwarranted hostility to the common law, let me conclude by championing its unique ability to bring about change on an incremental basis. In other words, just because it may be impossible to attain all that is needed right away does not mean that we should not seek incremental improvement wherever we can.

30. As Reed Dickerson has observed, "In my opinion, legal drafting differs from most scholarly writing in the former's greater intellectual and verbal rigor, its more compelling need for succinctness and formal consistency, the lesser appropriateness of redundancy, and the less incidence of the emotive element, which is common even in scholarly writing while minimum or non-existent in drafting." *Supra*, note 28 at 32.

31. For a description of Yale Legislative Services, a student-managed program for which ungraded course credit is given, see Quintin Johnstone, "Some Thoughts on Legislation in Legal Education" (1984), 35 *Mercer L. Rev.* 845 at fn. 11. For information (admittedly somewhat out of date) on similar ventures at Harvard, Columbia and Michigan, see Joseph Dolan, "Law School Teaching of Legislation" (1969), 22 *Jour. Leg. Ed.* 63 at 77-79.

32. *Supra*, note 6.

33. (1982), 32 *Jour. Legal Ed.* 315.

Where can there be incremental improvement? First, I would say that we should seek to improve the quality of public law type courses we offer in first year. I am delighted to hear that Dalhousie will be offering a new Public Law course next year with about three fifths of it devoted to legislation. Overview introductory courses are always difficult to maintain at a consistently demanding level. The key is the level of *demonstrated* commitment by the faculty. For example, at the University of Toronto we most unwisely taught Public Law to all 160 first year students in our cramped and uncomfortable moot court room. The message sent to the students was that it should be treated with no more respect than it had been by the faculty. Only in its last year did we divide it into sections as we do our other courses, and student evaluations were much more positive. At least it can be said that at the University of Toronto, Public Law went out with a bang and not a whimper!

Second, legal writing and small group instructors could be required to include a major exercise in legislation. A number of years ago when I was teaching a small group in torts I set the first two assignments on the common law of occupiers' liability — and then had my students write briefs to a mock legislative hearing for their third assignment. As this not by chance coincided with the committee stage of the new Ontario *Occupiers' Liability Act*, the exercise culminated in a submission of a brief to the real legislative committee. I am sure that many of you have had similar experiences.

Third, those of our colleagues who are teaching statute-based courses in the upper years might be encouraged to spend more time exploring "...the process by which the legislation is enacted, the political and economic forces that shaped it or even the methods courts use to interpret it, as distinct from the particular interpretations that the courts have made." In order to avoid duplication or, more likely, buck passing, courses could be designated as legislation courses, and extra time and credit provided for this purpose.

Fourth, developments in information technology and greater flexibility in techniques of evaluation allow more opportunities to tackle complex statutory materials head on. We have much to learn about the Law Society of Upper Canada's computerized tax teaching project which is being required of all bar admission students. It may well be that the computer has the endless patience and infinite good manners necessary for statutory drill. With take home examinations it may now be possible to examine students on their comprehension of complex statutes and regulations more readily than could ever be done with the good old three hour lockup.

Fifth, those of us who sit on appointment committees might wish to keep our eyes open for would-be teachers with an interest in legislation. Maybe some day we will be as much impressed by a parliamentary intern as we are today by a Supreme Court clerk!

Sixth, as we wave our brightest and best off to graduate school, we might encourage them to think about legislation.

Seventh, we all need to know more about what Ottawa University is up to and what its experience tells us about what we should be doing in the other law schools.

9. *Conclusion*

One thing is clear. If there is to be change in the way we think about legislation and teach it in the common law schools, it will be a long time coming. Consider the following evaluation.

Our law schools have thus far given but slight attention to the law that Legislatures have made or ought to make. Both the field and the mechanics of legislative law making seem to have been regarded as outside the pale of professional law training. This neglect has doubtless been a factor in producing the attitude towards legislation which is characteristic of many lawyers. There seems to be a widespread notion that statutes are wanton interferences with the legal natural order. The mesh of the due process clause must therefore be woven fine, so that few statutes shall pass through. Law should be the distillation of a tradition from a remote past, rather than the application of a judgment as to the needs of an immediate present. Its exemplar is theology . . .

Its source is something higher than man, and its credos must not be altered by man. This is an attitude not uncommon among lawyers. It is reverential, rather than scientific; emotional, rather than intelligent. And our law schools have doubtless contributed to it, by devoting so much more attention to the doctrines revealed in judicial decisions than to the practical adjustments made by legislation.³⁴

For me this has a very contemporary ring to it. The only problem is that it was written in 1917!

Wade MacLauchlan: Maybe I'll exercise the chair's prerogative to make a brief commentary and see if you might like to react to it. I find it a bit ironic that this is the Administrative Law Section, that you are a principal author of the major published student materials in Administrative Law in common law Canada, the foreword to which says that Administrative Law is essentially about statutes, and yet we as Administrative Law teachers have escaped having to carry the can to introduce statutes and the legislative process into the curriculum.

34. Thomas Reed Powell, "Law as a Cultural Study", (1917), *Amerc. Law Schl. Rev.* 335.

Hudson Janisch: Well, first may I cop out, which is always the best out on all these matters. A judicial review Administrative Law course cannot pick up all the refuse left over by the rest of the curriculum. It sounds like the opening solo from a curriculum reform meeting. But I think it would be a little bit unfair to ask Administrative Law which, as developed in North America, is a judicial review course, to assume sole responsibility for the teaching of legislation. I guess really what I would see is that by emphasizing legislation in the first year, we would create a backdrop against which we could have a more sympathetic look at legislation, or a more knowledgeable look at legislation, in the Administrative Law courses. And indeed I think in my paper I say that we are not doing a terribly good job of introducing students to the administrative process in Administrative Law; it does not seem to me that the burden of introducing them to the legislative process should fall directly on Administrative Law courses. So I guess my plea is much more to broadening our approach, particularly in the first year. I'm really concerned that, particularly in my school where we offer no countervailing balance at all, our students *do* get a thoroughly judicial view of legal process. And although I am sure we can do more in Administrative Law, the proposal that I would make is more radical than simply jazzing up Administrative Law to pick up the slack from other parts of the law school curriculum.

Terry Ison: I don't want to be too anecdotal about this, but Hudson has a very strong point about the extreme reluctance in the law faculties to adapt. I remember that in New Zealand in 1972, a bill was passed which abolished tort liability for personal injury and substituted a statutory scheme of compensation for all accidents. When I went there in 1978, six years after the passage of the bill, four years after the implementation of the bill, I was interested in how the new system was operating, and I was also interested in the adjustment made by various institutions in New Zealand society to this change. To assess this, I visited the hospitals, doctors' offices, union offices, company offices, company local branches, plant operations, lawyers' offices, *etc.* All of New Zealand society seemed to have adjusted to the change, even the insurance companies had adjusted to the change — except for one institution — the faculties of law.

When I asked about their curricula, there was no course on the new accident compensation system. If it was dealt with, it was in the Torts course. The syllabus for the Torts course had hardly changed from the basic Anglo-Canadian Torts syllabus, with all the personal injury cases. The most that one could hope for was that the new accident compensation system would get some lectures in the Torts course after

the common law personal injury cases. It was amazing. When questioned about this there was some explanation, a little bit of justification, such as: "Well, those cases illustrate principles which are applicable outside the non-personal injury area", *etc.* But I'd say: "Why not use non-personal injury cases, they also illustrate the same principles?" There really was no explanation for it except this tremendous difficulty in adapting from common law learning to a statutory system.

Wade MacLauchlan: We have left the position of "clean up batter" to Pierre André Coté who, as the only member of our panel from a civil law faculty, will be left to clean up some of the mess described by Terry Ison and Hudson Janisch as regards the teaching of legislation in common law faculties.

Pierre-André Coté: I have been assigned two questions by our co-presidents: 1) the place of legislation in the curriculum of civil law schools; and 2) pedagogical techniques for teaching legislation. Let me say, by way of introduction, that a civil law student would be very surprised to know that it is the Administrative Law Section of the CALT that is organizing this panel: in Quebec, the required Administrative Law course on judicial review, which shapes most students' perception of administrative law, is devoted almost exclusively to case law. For a civil law student, the judicial review course is about as close as he will ever get to common law as opposed to statute law and administrative law is seen as case law whereas subjects like "property" or "contracts" are dealt with in the civil code and thus associated with legislation.

Legislation being so important in a civil law context, it is not surprising that all civil law faculties offer a course relating to legislation. These courses fall into two general categories: comprehensive legislation courses dealing with the legislative process, drafting and interpretation; and specialized courses dealing only with drafting or only with interpretation. Probably not totally by accident, the legislation-producing capitals of Ottawa and Quebec City offer comprehensive legislation and drafting courses, whereas the legislation-consuming cities of Montreal and Sherbrooke offer exclusively statutory interpretation courses. All of these courses have their own *raison-d'être* and respond to different needs. The important question seems to be: if only one can be offered which one should it be? And the answer to that question depends on many factors, like curriculum objectives and cost.

Comprehensive legislation courses are part of the curriculum at Laval and Ottawa (civil law section). As has often been the case, Laval University was a pioneer in this field with a course by Prof. Jean-Charles Bonenfant in the early seventies. This course is now called *Elaboration et Interpretation des Lois et des Réglements* and our President Pierre Issalys

is responsible for it at the present time. It is a general course dealing with "elaboration" (legislative process), drafting and interpretation. The course is offered to third year students as an option and, at the present, is attended by about 30 students. The civil law section of the University of Ottawa Law School also has a comprehensive legislation course for which Prof. Alain-Francois Bisson is responsible. Offered to second and third year students as an optional course, it presently has an attendance of about 40. On the content of such a general course, I hope Pierre Issaly will intervene in a few moments and give us more information.

As for the specialized courses, some deal with interpretation and others with drafting. Statutory interpretation courses are part of the curriculum at the University of Montreal, Université du Québec à Montreal, and Sherbrooke. McGill is also planning to offer a statutory interpretation course next year. At Montreal, the *Interpretation des Lois* course was initiated in 1974. It is a third year optional course attended by approximately 200 students divided into 3 sections of about 65. Starting next year, it will become a required course in the winter trimester of the second year. I cannot help but have mixed feelings about the decision to make the course a required one: it is, I guess, only human to think everyone should attend such a course and at the same time, I like to see people in my class who are there because they want to be there. At the Université du Québec, Prof. Katherine Lippel also teaches an optional course on statutory interpretation and about 90% of third year students take the course. As for Sherbrooke University, it offers a third year optional course on interpretation under the responsibility of Prof. Michael Krauss, who has been teaching the course since 1976 and who puts great emphasis, I am told, on the philosophical aspects of the interpretative process. Finally, the University of Ottawa, as you are well aware, has a masters degree in legislative drafting which includes a French language civil law section. About 10 French-speaking students take the program each year.

I think you now have a general picture of the place of legislation as such in the curriculum of civil law schools and I now turn to the second topic: how does one teach legislation? As far as the pedagogical aspects of the teaching of legislation are concerned, I believe there are some preliminary observations which should be made. There are several variables which influence the pedagogical technique chosen. In the area of legislation, I believe the most important variable is the course content. We cannot teach drafting in the same way as we teach interpretation; neither can interpretation be taught in the same way as the legislative process. Here we have what are basically several distinct subject matters, not just one.

The teaching method is also going to depend on the available time and the number of students. I normally have sixty-five to seventy students. I cannot teach legislative drafting to seventy students at one time. Drafting has to be taught by doing, by correcting, and it must be done in small groups. On that point, I concur with Hudson as to the problem of resources. Some of the avenues for teaching legislation are much more expensive than others.

I am not a specialist in pedagogical questions and, furthermore, I focus uniquely on statutory interpretation. Therefore my remarks are going to relate to my experience of approximately fifteen years of teaching interpretation of laws. I presently teach third-year students, who are in their second term, thus students who are finishing their law studies. They are in groups of approximately sixty-five. It is a course which deals with the interpretation *and* the application of statutes, not simply interpretation in the strict sense. I spend at least three weeks during the term on the temporal application of laws. Retroactivity and acquired rights are an example of very delicate questions which always arise; I devote a good deal of time to these issues.

In this course I have three principal objectives: one objective is knowledge of principles and methods of statutory interpretation; another objective is the application of these principles and methods; and a third objective is to evaluate these principles and methods. I will deal first with the objective of knowledge of the principles and methods of interpretation *and* of application, as well as of the means by which these principles are used by those who serve as a model, that is to say by the courts. During my early years of teaching, the greater part of the classroom lectures were devoted to this objective because I did not have teaching tools to convey this knowledge other than verbally. This absence of teaching tools was a serious problem which is now resolved by the publication of my text and I can now tell students to prepare in advance by reading extracts from the text and by reading one or two cases per week. The objective of knowledge, of acquisition of knowledge, should be attained by advance reading and by class discussion of the cases relating to the subject matter and by discussion of the most controversial aspects of the material which students are asked to prepare in advance.

With respect to the interpretation of statutes, I do a study of decided cases with a view of taking apart the arguments in the reasons for judgment, of putting a label on the arguments. I believe it is very important to be able to identify the arguments in a judgment which are used to support one thesis or another, and to make the reader, the student, conscious of the mechanism of reasoning and arguing in the area of statutory interpretation. That is the objective of knowledge.

The principal objective actually, that which I believe is the most important, is the objective of application of the principles to cases. I do not know exactly what the situation is in the common law faculties, but in the civil law faculties, the students spend very little time working with a legislative text. The professor explains to the students what the text says. But the students must learn to work by themselves with the text, not just to see what others have done with it. To achieve this objective of application, I have them obtain the *Quebec Highway Safety Code*. There are 550 sections in the *Code*. There is something in the *Code* for all tastes. There is some administrative law, criminal law, and all sorts of problems of interpretation. I have created about one hundred problems based on the *Code*. Each week we discuss these problems. The students have nothing but the text of the law and the problem itself. They must work with the text with the goal of solving the problem and, of course there is typically no single solution. Even if the students do not discover a single solution, they must at least see the dimensions of the problem and appreciate the freedoms and the constraints which vary according to the circumstances.

In these exercises the students develop their ability to read attentively and intelligently a text. I do not know what is the situation outside of Quebec, but in Quebec, many students do not have the training to read attentively and meticulously a text. They pass over the text itself very rapidly. I try to develop a kind of “unlearning” of these habits and to encourage students to be very aware of the text. My students tell me that they can no longer even read the newspaper without looking for problems of interpretation. They become obsessed. In time that passes, happily, but when they tell me this, I am satisfied that one of my objectives is attained, in that the students are sensitized to the importance of the textual material which they must work with. These exercises also train students to reason in a rigorous and ingenious fashion, beginning from a text. This is something which we do not necessarily learn in watching how others do it.

The third objective is an objective of evaluating of the principles. This year the Annual Meeting of the C.A.L.T. is devoted to the question of teaching values. A course on interpretation of laws is an excellent opportunity to teach values. The principles and methods have, at the same time, the function of revealing certain fundamental values of our legal system and of obscuring the value judgments which guide judicial decisions. Therefore, one of the goals of the course is to make students more aware of the value choices which have guided the establishment of the system of rules of statutory interpretation. Since it is a course which students take at the end of their programme, in their third year, the course

in Interpretation allows students to make some links between what was said by professors in courses in criminal law, taxation, municipal planning, regarding restrictive interpretation favouring personal liberty, favouring accused persons, favouring taxpayers. In the end, all these rules are essentially branches of certain guiding principles which reflect a hierarchy of values. Another example is the importance which is accorded to security, predictability, or stability in statutory interpretation when we talk of the doctrine of the plain meaning of the text, of the need to respect the law, of the principle of maintaining acquired rights. All these rules, which seek to ensure predictability and certainty, may stand in opposition to the needs of justice, or of reason and equity in the circumstances. In the end I believe it is a course which, in large measure, fills certain gaps which our students might otherwise suffer, considering the fact that there is not in Quebec a systematic program of courses in philosophy of law which are compulsory. Thus, it is a course which responds, in this respect, to certain needs.

At this time, I would like to ask myself at what point in the curriculum ought a course of this type be offered. I understand Hudson to prefer that it be done as early as possible in the law school programme. At Montreal, it is presently done in the third year, but it will be done in second year beginning in 1986-87. Perhaps we are simply moving closer to what we should be doing. I believe you need students who have a certain experience with law in order for them to see the implications of the choices which must be made.

The other aspect which links the interpretation of statutes to the teaching of values is that the principles of statutory interpretation often play the role of arguments, all packaged and prepared in advance, to justify one thesis or another. And the real reason for the outcome is not in the decision. Thus, a student who is more familiar with the principles of statutory interpretation is more likely to detect the cases where it is not really the interpretive principles which have guided the judge, where it is really a value choice. In that case the student can concentrate upon the political choice which has been made and which underlies the usual justifications which the judge may have used.

The students themselves, when they work on their exercises, often arrive at the conclusion that there is no "true" interpretation. There is no correct interpretation. Two or three interpretations are justifiable. Thus it is necessary to decide. I still have a great deal of difficulty to deal pedagogically with this element: What to decide and why. Several years ago, I would say: "*Ça vous regarde.*" Now I go a little further and I say: "*Moi, avec ce que je suis, pour telle et telle raison, voici ce que je ferais.*" But should we do that? That is a question which we can ask ourselves.

Should we say “This is what *I* would do. *You* could very well decide otherwise for this or that reason”? How do we teach students to make these choices founded on values rather than upon rules?

In conclusion, I want to echo Hudson’s remarks about statutes not being “fun”. I have been teaching legislation for 12 years and I enjoy it very much, and so do, I think, the students. So I say: Statutes *are* fun!

Wade MacLauchlan: Thank you Pierre-André, Hudson and Terry. I believe that we will try to proceed in the following manner. We will invite questions, commentaries or other interventions from members of the audience. I suspect that there are people who have experience in courses in legislation, or in trying to incorporate insights regarding the legislative process into your courses, who would like to make more extended interventions, and I invite you to come and do so at the microphone. By way of getting started, Pierre-André and Terry have both made reference to the experience of Pierre Issalys in his course called *Interpretation et Elaboration des Lois* at Laval, and Pierre, I was wondering if you would like to describe to us somewhat your experiences in teaching a course which certainly incorporates a large component on the legislative process.

Pierre Issalys: Well, as a few of you have referred to my course perhaps I could give the audience a general idea of what it contains. As Pierre-André said, this course, being built on a rather broader approach, incorporates several subjects and deals with several areas of the law. The first is legislative process as the word may be strictly understood; that is, the procedure of the parliamentary bodies as they adopt legislation. A second part of the course is devoted to actual drafting of statutes and the third part is devoted to interpretation. That latter part is, of course, very similar to Pierre André’s course in Montreal except that it is only part of my course so it is certainly not as in-depth in coverage as Pierre André’s course is. Perhaps the most unusual element in the course is the section on drafting which attracts much interest, perhaps not from the student population at large as the figures quoted by Pierre André make clear, but certainly much interest from the students who *do* take the course. They enjoy tremendously the experience of applying their minds to the drafting of statutes on a given topic that I set out for them each year. I sort of personify the Minister who is giving the order for a bill to a group of draftsmen and I have a number of meetings with the drafting committee to convey my instructions. Of course they have a set of written instructions but I elaborate on that in these meetings. The drafting process progresses as the course advances, and they hand in their final product about two or three weeks before the end of the course so that I can get feedback to them before the course is finished. This year for example the

assigned topic was the drafting of a statute about cheese labelling, incorporating also a program of government subsidies for cheese producers. We were working on the basis of an old statute, of 1885 or 1883 (I believe it is still in the statute book in Quebec), that deals with butter and cheese production. Part of the exercise was to amend the existing statute so as to ensure that it remained in force with respect to butter producing, and to draft an entirely new statute dealing with cheese production, incorporating some of the substantive elements of the old statute and some new elements in addition. So it was a very good technical exercise in careful drafting because you had to expunge the old statutes of all references to cheese so as to make sure that it applied only to butter, and you also had a creative aspect to the work in devising a new arrangement with respect to cheese.

Perhaps I would like to come back to some comments that were made by different speakers and to attract your attention to other features of our curriculum at Laval which seem to me to respond to some of the wishes expressed, perhaps in particular by Hudson Janisch. I happen to teach another course which is the basic Administrative Law course. I teach that in close cooperation with my colleague Denis Lemieux and for a number of years now we've turned that course, which is an introduction to Administrative Law, into what I think is very much a legislation course. When I arrived at Laval about eight years ago, the case book for that course was really mainly a case book with a couple of statutes in it, but mostly cases. Over the years Denis and I have completely changed the nature of the case book; indeed, it no longer is a case book. The number of cases has steadily declined and the volume of statutes and regulations has considerably augmented so I think that course responds to the very real need pointed out by Hudson Janisch to familiarize students with the actual understanding and application of statutes in real life environment. We have very mundane statutes in that set of materials, and we try to teach those first year students to set their minds to applying legislation and understanding what the actual words of the statute mean. At that stage in their training I suppose their minds are not too spoiled yet. They don't yet have the automatic reflex of rushing to the case books to see what the courts have to say about the subject. They are still prepared to think independently and just take the statute for what it is, a set of words that say presumably something about some aspect of society. I think it is a very fruitful exercise and students, I hope, retain some feeling for the application of statutes by government bodies of all sorts throughout the rest of their legal training.

Another point which I might underline concerning the curriculum at Laval is that the curriculum is just about to be reformed. When I

disembark from the plane in Quebec City in a few days time, I will join my colleagues in a very intensive session out of which should come the new curriculum. This subject has been over the fire for eight months now. It has been brewing slowly and we should soon approach the time when the soup is ready to be served. That new program will probably lay a little more emphasis on the acquisition of an understanding of legislation by students. I do not know exactly what the assembly of my colleagues will decide. Obviously there is a concern that this course about legislation should get some visibility in the curriculum, and the approach taken to public law teaching should remain what it is. That is an approach that gives fairly high priority to legislation as opposed to case law.

One final point perhaps that I would like to pick up from both Terry and Hudson — they've underlined the lack of research on subjects related to legislation, and I can only agree with them. There are very few places in Canada where any sort of organized effort is being conducted to produce research on subjects related to legislation, and I think Hudson explained very well why this is so. I think the subject of legislation at the moment is perhaps viewed by political scientists as lying partly beyond their scope of concern. They say: well, lawyers should care about legislation; and lawyers say: well, that is very political stuff, we'll leave that to the political scientists. So the result is that both groups fail to address the subject in all its ramifications and there is a field that is badly clamouring for attention at the moment. I think Europeans are far more advanced than we are in this area. I had the opportunity of getting acquainted with work done in various European universities, especially in Geneva where they have a Centre d'Études et de Techniques Législatives. This is an extremely interesting body of researchers working not only on the actual elaboration of statutes — and God knows that the Swiss are very compulsive about elaborating statutes; any piece of legislation takes decades before it comes to fruition in that country — but they are also (and that's more interesting I guess) very concerned about the application, the actual implementation, of statutes. What does a statute produce, as foreseen and unforeseen effects in a given society? That's a fascinating area of study which is very little touched upon in Canadian law schools. So I certainly support the implicit wish of my colleagues that research be undertaken in that area of the law.

Innis Christie: I would like to ask a specific question of Pierre Issalys by way of follow-up regarding his legislative drafting exercise for students. When the students are doing the drafting project, do you prepare a package of background information, the kind of information that a draftsman might get from a government department? Or do the students have to go dig up that information themselves?

Pierre Issalys: Basically they are responsible for digging out the information for themselves.

Fred Carruthers: I would like to add a little bit to what was said by members of the panel on what has been done and not been done in this area of the teaching of legislation. First, I suppose the grandfather of all this sort of thing, apart from the great-grandfather Ernst Freund, would be Laswell and MacDougall. I think you would concede that their approach of policy science has embraced the whole contribution of statute law to the nature of the law. I mentioned them also for the reason that Laswell was not a lawyer. Certainly I think you would accept the name of Calabresi at Yale as the leading person today in taking a jurisprudential approach to legislation. Thirdly I would like to mention a name that has, I think, long been forgotten, and that's Henry Melvin Hart of Harvard Law School who established a seminar that he called Legislation. He defined legislation as "how law is made". Considerable emphasis was put in that seminar to the legislative process as we understand the term. And of course the successor to that is Hart and Sacks and their materials which they call the Legislative Process. And if there is a Canadian equivalent of that, it is at least to be found in what Professor Schiff has been doing at the University of Toronto. I'm obviously going to be corrected on that but my understanding is that he has adapted, or did at the beginning adapt, Hart and Sacks to the Canadian environment. Horace Read's exercise at Dalhousie was really a one-man-band, and when he was not directly available to carry it through, it did not succeed. But it had a very good name, particularly the work that he did at the University of Minnesota. He was well recognized amongst the so-called Ivy League law schools. Reference has been made to the legislative drafting program at University of Ottawa. It was started by Elmer Driedger, as Deputy Minister of Justice, who has published three important works, two of them in their second edition, one on interpretation, one on the composition of legislation and one a four volume self-teaching exercise in how to prepare legislation. If he had only published those four as floppy backs it would have been a lot easier for someone to teach the course because he's laid it out so clearly that there's almost no need for an instructor. It's a lovely piece of work. The difficulty is that it's offered at the graduate level with options to third year students, but the seats are filled by graduate students who are there on financial assistance. But I think we should at least recognize that as a significant model for what might be done elsewhere.

I am immodest enough to make reference to a Jurisprudence course that I was responsible for at UBC from 1952 to 1964, the first half of which was legal theory in a conventional sense, and the second half of

which was the processes of law-making through legislation. The students and I together went out and got the extra-legal data that were necessary to the policy issue that we were looking at, and then we got down to the serious matter of determining what the options were. When we had thrashed through the options as policy choices, we then went into the exercise of drafting. And of those twelve years, three of them produced draft legislation, and they were not insignificant. One related to administrative law procedure, one related to the law of infants, codifying it in modern policy and legislation, and one dealt with public regulation of privately owned nursing homes, which I think showed a certain measure of foresight inasmuch as it was done in the late 1950's when the problem was seen but people were not concerned with it. So these are really footnotes to things which have already been done. It's a challenge, and I don't think that my students felt that the joy went out of legal studies when they chose voluntarily to enroll in a course which they knew would culminate in trying their hand at translating policy, based on extra-legal as well as legal considerations, into an operative piece of legislation.

Hudson Janisch: Fred, if I could just respond . . . First of all, just on the rather narrow point where I shook my head so violently as you noticed, I actually consulted with my colleague Stan Schiff. I think it is very significant what has happened with his course. The Hart and Sacks materials indeed were initially designed as legislative materials. But under the terrific pressure of trying to teach them in a common law school, they have steadily moved to being, in effect, a set of judicial process materials. He says that he teaches sort of half a class at the most on some sort of overview introduction to the legislative process. And I think that in itself is symptomatic of the decline of this interest. If you view across North America as a whole, of which Canada's contribution I think has been mainly through Dean Read, what happened in the 40's and 50's (I of course being a bit of a Chicago chauvinist have suggested that it all began and ended in 1920), it was true that some eastern law schools kept the torch lit, Yale and Harvard and so on. And you did have various efforts but all of them didn't really grasp the nettle. I have read through Frankfurter's course in Legislation at Harvard in the 30's and it is absolutely fascinating. The materials consist of cases about construing legislation. It is true that it is a legislation course but it is what judges think about legislation. It had abandoned or forgotten or was not interested in what Ernst Freund had been trying to do by way of confronting the legislation as legislation. And I think on the other matters you raised, your own course at UBC and so on, I am not suggesting in any way that there have not been individual efforts to try to confront this

overawing deference to the judicial process. I think there have been. The tragedy, of course, is that when you count up all the efforts that have been made at individual schools, that they have all been in and for themselves, valiant and I'm sure in many instances successful. But we are left behind really without a discernible tradition of good teaching of statutes in the common law schools, except for these individual courses which have not led to very much. The sad thing is that, reviewing the literature, which I did in preparation for this meeting, in the United States and Canada to the extent that we have a literature, it's really very sad that there have been waves of interest in the 20's, then again as part of the New Deal with legislation in the United States, with Landis, an incredible spokesman at Harvard for legislation, with Frankfurter. Then into the 50's and 60's, and there was a period in the 50's where any standard curricular review always said "the one thing we've got to do is to get legislation into the law schools". And then for reasons that I still cannot really fully explain, it fell off again, and so that now we are in a period, I think we are in a trough, in which I am trying to beat the drum a little bit to try and get interest back into thinking about legislation as legislation, in the unique sort of way as I say it was done in Chicago back at the turn of the century.

Rod Macdonald: I would like to add a couple of observations to reinforce Hudson's point. These grow out of my own experiences in teaching a course about legislation. When I went to Windsor in 1975, one of the first things I wanted to do was get a course in Administrative Law — *i.e.* not judicial review — into the curriculum. As a result of a curricular review process already in progress, Legislation looked like a good vehicle for such a move. So I wrote Dick Risk, who I knew had taught a course of that type at U of T for the previous few years. He replied in a one sentence letter which said something like: "Good luck, you have my profoundest sympathies". I called him up subsequently, and he gave me some very good advice. First, he warned me to be on guard against the tendency of your colleagues inadvertently to undermine you in their teaching of other courses. In both their teaching methods and the principal materials they use, they are against you.

The second thing he told me is that, for the course to have any hope of succeeding, it had to be taught in first year, before the onset of the unshakable mindset of the case-method — this from a professor whose own first-year course ultimately failed. So when we set up the course at Windsor, we also took one of the traditional private law courses out of first year in the hope of destabilizing the traditional common law assumptions of first year teaching. Goodbye Torts, hello Administrative Law. At the same time we added a couple of credits to Criminal Law so

that the total balance between legislation-centered courses like Criminal Law, Constitutional Law and Administrative Law and traditional private law courses was weighted in favour of the former. These then are the two major points: number one is “hit them early” and number two is “hit them massively”.

The third thing that Dick suggested is that you have to resist the temptation of filling up your materials with cases. You can't even call your materials a casebook, because if you give students anything that looks familiar, they will latch onto it; that is, they will prepare like mad the five cases in the book and completely ignore everything else. One of my colleagues who took up the course after I left Windsor in 1979 informed me that he had “significantly improved the materials” (and his course evaluations!) the first year I was gone by dumping all of the stuff like Mancur Olson, legislative committee reports, drafting manuals and primary materials, replacing it with cases on statutory interpretation. Now I would claim that there should be *no* cases in an ideal set of materials on legislation.

The fourth thing that Professor Risk suggested was that you have to make the course look like every other course. Now when he says you gotta take all the cases out on the one hand, this sounds impossible; but what I took him to be saying was that you can't let the students think that what you're doing isn't “law”. If your faculty has an Introduction to Law course or a Legal Process course you have to get into cahoots with the people teaching that course to encourage them to put their discussion of statutes first and to leave *stare decisis* till later; you also have to get in cahoots with the people running the Legal Writing program so that the first assignment is not devoted to writing a brief or parsing a case. The first legal writing assignment should be to take a relatively simple section of a statute and to break it down and have the students work back from the statute to the problem which led to its enactment. God knows they'll get enough cases in the rest of their career. All of those bits of strategy I think are terribly important to making a course in legislation fly.

The problems we didn't tackle at Windsor, and with which we're struggling in a similar course right now at McGill, are more fundamental. To begin with, there's just too damn much to do. You can't talk about a *course* in Legislation or a *course* in Administrative Law. Really what you've got to talk about is a *program* in legislation which infuses not only teaching in first year, second year and third year but also legal writing and other non-course offerings. If you haven't yet joined the 20th century and still have multiple moots, legislation has to infuse your mooting program too; somehow you have to transform moots into a legislation exercise; after all, they are the great “put on your robes and act like a lawyer” event for students.

A final thing that you have to do, something that we are still working on, is to sensitize all of your colleagues to the fact that even if you talk about interpretation or the politics of legislation as a “single” theme, the theme has several variations. It’s a different game when you talk about an administrative agency developing a series of regulations under a generic statute, from when you talk of a Civil Code Revision Office promulgating a new Civil Code, from when you have Parliament itself making the rules. Perhaps our greatest problem is that those of us who are interested in legislation haven’t got the guts to say to our colleagues: “Look, we don’t want three credits in the curriculum. We want eighteen.”

Wade MacLauchlan: Perhaps I will recognize myself and take the opportunity to raise several points that were brought to my mind largely by Dean MacDonald’s interventions but by some of the earlier ones as well. I think that one of the things that I have become aware of in only three years of teaching is that the case method is very much the undermining force of any attempt to encourage people to recognize other sources of law, and it especially undermines efforts to encourage students to turn to a legislative or a regulatory text as a source of law. I don’t agree entirely though with Hudson that it is the sexiness of cases as opposed to the aridity of statutes that is the problem. I think that what really makes students common lawyers, as Terry Ison said, within minutes of arriving in law school, is our primary method of evaluation, what Hudson Janisch refers to as the “three-hour lock-up”. Students, before they get across the threshold of the law school, are told that the way to jump through the hoops is to prepare for the OBF, the One Big Final, which is almost invariably a three-hour lock-up, by “canning” cases, by briefing them, by reducing them to the lowest common denominator. They are told to be prepared to identify issues on a final exam and to throw cases which seem analogous at these issues. So long as we persist in this method of evaluation and so long as this is the method of evaluation which washes over from other courses into public law courses, I think we’ve got a serious undermining force to contend with. The second thing that I think stands as a major impediment to efforts to do something serious about legislation is the emphasis in law school curriculum planning and in legal education upon coverage, upon doctrinal coverage as opposed to the development of student skills. So long as I, in my Administrative Law course, define my objective as getting through all of the grounds for judicial review and all of the remedies and all of the instances of judicial discretion and so on, then statutes get left out. And the students readily buy into this mindset of “doctrinal coverage as organizing force”. For example, in Criminal Law, which I teach, I try to emphasize the statute

as being of primary importance. In fact we devote most of the first semester to the criminal justice process, seen largely through the provisions of the Criminal Code. However, student evaluations consistently run along the following lines: "Much better organized in the second semester" or "Lack of structure in fall term." The spring term is the one where we get to the general part of criminal law and start the forced march across the various defences, excuses, *mens rea*, *actus reus*, etc.

The third thing, which is more of an anecdotal observation, is that I have developed a "front-end" element in my Administrative Law course, a supplement of primary materials, materials as ordinary as letters from a doctor about a worker's compensation case, claims forms, unedited legislation and regulations. But what I am faced with this summer is a decision as to whether I am going to be able to maintain that supplemental material in my course. And I suppose this goes to the coverage point. The competition for that space is now the *Charter of Rights*. I am looking quite seriously at jettisoning that "front-end" legislative and administrative material in order to accommodate some of the *Charter* jurisprudence, primarily that dealing with Section 7.

This leads me to a related observation which is that, for the past four years in Canada, we have had, more than on any other occasion in our legal history, an occasion to focus on a text, on a written source of norms, a text which was in need of interpretation, and in which every lawyer in the country was, or ought to be, interested. I think that the initial work of the Supreme Court of Canada in its interpretation of the *Charter* has been to take very much a textual approach. The Court has not fallen for the interpretive approach which was the primary mode of *Charter* analysis by legal scholars prior to and at the time of the coming into force of the *Charter*, that being to simply look at the case law under the *Canadian Bill of Rights* or to analyze United States jurisprudence in search of the "meaning" of the *Charter*. But what I see happening now is that the four-year initial period of interpretation is passing and we, as legal scholars and as lawyers and as judges, are going to slide back into the mode of treating the *Charter* as "interpreted". *Charter* interpretation will become a process of analyzing and interpreting and re-interpreting the *cases*. For example, an analysis of 11(d) of the *Charter* will no longer be based upon the text. We will no longer talk about the right to be "presumed innocent until proven guilty". Instead we will talk about *Oakes*, and *Currie*, and *Cook*, and *Boyle* and about a rational connection test between the presumed and proved fact and so on. Each section of the *Charter* will take on its own half-life, its own surreal world in the caselaw, without there necessarily being any serious analysis of the text.

Those are some observations from the Chair, maybe I'll turn things back to the floor if there are other interventions or observations.

Innis Christie: I just have a couple of things to add by way, I suppose, of historical footnote, as Fred Carruthers did. In good parochial Dalhousie style, I was delighted to hear the recognition of Dean Read's pioneering effort. Having been a student in his Legislation course, it was interesting to me to learn that Pierre Issalys' course, in its three parts, replicated pretty closely what I went through, right down to your answer, Pierre, to my question, about digging out the basics on cheese. I didn't do that with cheese but I did it with a truck route through the city of Halifax. I didn't find the experience boring at the time, and I appreciated it much more as the years went by.

I have just two other comments. First, particularly because these proceedings are recorded I'm not going to allow Fred Carruthers to get away with his comment about the one man band and the death of Legislation at Dalhousie. That program was carried on for a good number of years after Horace Read became Vice-President, by Bill Charles who was very much Horace's heir from a teaching point of view, although he hasn't published as much in the area of legislation, yet. Bill carried on much the same program, so that for a considerable time Dalhousie had both the basic Legislation course and the law reform seminar, with the Legislation course gradually acceding to the kinds of pressures that Hudson Janisch spoke about. Over time it became somewhat narrower, giving up this sort of very beneficial attention to particular problems, dealing with the likes of cheese and truck routes. Those exercises gave the students the sense of the drafting process that Terry Ison was talking about. But the law reform seminar, which was taken by a small group, continued to get that sense across to a limited group of students. It was really only when Bill became Dean that that program fell by the wayside.

That leads me to what may be a marginally more significant comment, this one coming out of something Hudson said. When the Legislation course bit the dust, a number of us were persuaded that an effective way to continue to teach legislation was in the context of some other substantive course, one heavily based on legislation. Family Law, which Hudson mentioned as being in the upper years at Toronto, was put in First Year at Dalhousie. It was put there partly because we thought it was a course of increasing social importance, partly because we had a surplus of family lawyers on faculty, and partly because there were a number of people in our faculty who had an interest in legislation. We saw Family Law as a good vehicle so we gave those people the joint mandate of teaching Family Law and teaching about legislation, by explicit attention

to Family Law legislation both in its drafting phase and in its interpretation phase. Unfortunately, from my point of view, bad currency drove out good, and some people whose concerns were with the doctrines and policy concerns of Family Law rather than with the legislation concerns, converted the course to a more traditional Family course. We were faced with a situation where one section was getting a real training in legislation, while the others were not. The students (and I think this is always a danger, too) like the pure Family Law, and in the end that course too bit the dust, at least in the form that we who wished to stress legislation had advocated. I put that experience before you as illustrating the danger in thinking legislation can be taught in that kind of double mandate course.

Wade MacLauchlan: Thank you Innis. I will now ask Pierre Issalys, as co-President of the Administrative Law Section, to bring the session to a close.

Pierre Issalys: Yes, if I may. Perhaps I will preface my closing words with a remark, and a question really, that cropped up in my mind as the discussion was going on. Various allusions have been made to the traditional attitudes of common lawyers, who are evidently much more interested by caselaw than by legislation: and that is, of course, logical in the juridical system of the common law. But it might come as a surprise that the civil law faculties in Canada find themselves in somewhat the same situation. Even students in the civil law faculties are probably very much influenced by the attitude of common lawyers. In the civil law courses, the students do not yet completely have the habit of racing past the text to the caselaw to see what the Code “means”. They still look first to the Civil Code. But once they find an interpretive problem in the Code, our students have an increasing tendency to turn to the case law to discover what the law means, rather than to stick with the text to discover what the law meant to say in the first place. Hence I am afraid that the reflex that our common law colleagues described as typical in their faculties is unfortunately evident in our civil law faculties also. It is thus very much the same challenge which faces Pierre-André and myself, to encourage students to look for answers in the text of the law, not just through the rationalization of certain values in judicial interpretation.

That said, I believe it is apropos to say Thank You to our panelists. When Wade and I conceived this subject for the annual meeting of the Administrative Law Section, we wondered if it might be a bit strange and we did not know exactly what might come out of it. But we were fortunate to be able to attract three persons eminently qualified to deal with the subject. Even if we did not know exactly what the results would

be, we had the intuition that our panelists would be brilliant, and that has been entirely confirmed today. I believe everyone will agree with me when I thank our three speakers for their lively and stimulating presentations. As this Conference comes to a close, this has been an extremely enriching and agreeable Section Meeting. Thank you.