

ROADMAP FOR A TRULY CANADIAN LEGAL EDUCATION

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The National Mobility Agreement 2013, a praiseworthy initiative of the Federation of Law Societies of Canada, will come into force following implementation by each law society. In the words of the Federation, this agreement “will extend the mobility provisions to permit Canadian lawyers to transfer between Quebec and the common law provinces with ease regardless of whether they are trained in Canadian common law or civil law.”

To give full effect to this initiative, a basic understanding of Canada’s legal diversity is arguably required. In order to determine the importance placed by Canadian law schools on courses emphasizing Canada’s legal diversity, the relevant course content of twenty law schools during the 2011-12 and 2012-13 academic years was surveyed. The objective was to identify optional and compulsory courses relating to:

- a) Aboriginal law;*
- b) Introduction to Canadian common law and Quebec civil law, offered in the context of stand-alone or comparative law courses;*
- c) Statutory interpretation, specifically the interpretation of bilingual statutes and of bijural or harmonized federal legislation.*

The survey reveals that there are major gaps in this regard and that this could affect the competence of law graduates.

Part 1 of the article spotlights the targeted courses available during the survey period. In Part 2, the author comments on the survey results and describes how law schools could easily incorporate course content that takes into consideration Canada’s diversified legal environment. In the event that law schools fail to act, the Federation should take the initiative since national mobility and knowledge of other legal systems, including knowledge of Canada’s common law and civil law systems, go

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hand in hand. The Federation cannot foster the one and ignore the other, particularly given the duty of all lawyers to be competent in the tasks that they undertake.

L'Accord de libre circulation nationale 2013, une initiative tout à fait louable de la Fédération des ordres professionnels de juristes du Canada, entrera en vigueur lorsqu'il aura été mis en œuvre par chacun des ordres professionnels de juristes. Pour reprendre les termes de la Fédération, l'Accord permettra « aux juristes canadiens de se déplacer facilement entre le Québec et les provinces de common law, peu importe s'ils ont fait leurs études en common law ou en droit civil canadien ».

Une connaissance de base de la diversité juridique au Canada est sans doute nécessaire pour donner plein effet à cette initiative. Dans le but d'évaluer l'importance accordée par les facultés de droit canadiennes aux cours mettant l'accent sur la diversité du système juridique canadien, une enquête sur la pertinence de leur contenu a été menée auprès de vingt facultés de droit durant les années scolaires 2011-2012 et 2012-2013. L'objectif était alors de recenser les cours optionnels et obligatoires consacrés :

- a) au droit des autochtones;*
- b) à l'introduction à la common law canadienne et au droit civil du Québec, dans le cadre de cours spécifiques ou de cours de droit comparé;*
- c) à l'interprétation des lois, et plus particulièrement, à l'interprétation des lois bilingues et de la législation bijuridique ou des lois fédérales harmonisées.*

L'enquête révèle qu'il existe à cet égard des lacunes importantes et que cela pourrait affecter les connaissances des diplômés en droit.

La première partie de l'article se concentre sur les cours ciblés donnés pendant la période de l'enquête. Dans la deuxième partie, l'auteure commente les résultats de l'enquête et explique comment les facultés de droit pourraient facilement intégrer aux différents cours, de la matière qui tient compte du milieu juridique diversifié du Canada.

Dans l'hypothèse où les facultés de droit refuseraient d'adopter des mesures en ce sens, la Fédération devrait prendre l'initiative, d'autant plus que la libre circulation va de pair avec la connaissance des autres

systèmes juridiques, y compris celle des systèmes de common law et de droit civil. La Fédération ne peut pas encourager l'un de ces aspects et ignorer l'autre, surtout en raison du fait que tous les avocats doivent se montrer compétents dans l'accomplissement de leur travail.

1. Introduction

In Canada, individuals wishing to enter the legal profession must first obtain a university degree in law. Degree in hand, they face a second hurdle: admission to a provincial or territorial law society in order to practice. These societies, created by statute,¹ are responsible for regulating the legal profession and are required to act in the public interest.² In particular, all law societies must ensure that persons who practise law within their jurisdiction meet standards of education, training, professional competence and professional conduct.³

Since the reach of each law society is limited to a particular province or territory, the need for a pan-Canadian approach in an increasingly mobile legal environment is obvious, and it is for this reason that the Federation of Law Societies of Canada (FLSC) acts as the national coordinating body of the law societies. According to its mission statement,⁴ the FLSC is committed, among other matters, to:

- bringing together Canada's law societies to set national standards and to harmonize provincial and territorial rules and procedures;
- providing a forum for the exchange of information of mutual interest to Canada's law societies;

¹ *Legal Profession Act*, SBC 1998, c 9; *Legal Profession Act*, RSA 2000, c L-8; *The Legal Profession Act*, 1990, SS 1990-91, c L-10.1; *The Legal Profession Act*, CCSM c L-107; *Law Society Act*, RSO 1990, c L.8; *Loi sur le Barreau*, RSQ c B-1; *Law Society Act*, 1996, SNB 1996, c 89; *Legal Profession Act*, SNS 2004, c 28; *Legal Profession Act*, RSPEI 1988, c L-6.1; *Law Society Act*, 1999, SNL 1999, c L-9.1; *Legal Profession Act*, RSY 2002, c 134; *Legal Profession Act*, RSNWT 1988, c L-2; *Legal Profession Act* (Nunavut), RSNWT 1988, c L-2.

² Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, Ont: LexisNexis Canada, 2011) at 5; see also William H Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Edmonton: Alberta Law Reform Institute and the Law Society of Alberta, 2000) at 4-5.

³ *Supra* note 1; see also, with respect to matters of competence and conduct, "Rules of Professional Conduct", Federation of Law Societies of Canada, online: <<http://www.flsc.ca/en/conduct-of-the-profession/>>.

⁴ "Our Mission", Federation of Law Societies of Canada, online: <<http://www.flsc.ca/en/our-mission/>>.

- undertaking national initiatives on behalf of Canada's law societies;
- speaking nationally on behalf of Canada's law societies.

Among the various national initiatives undertaken by the FLSC two are relevant in the context of this article: the first relates to the mobility of the legal profession⁵ and the second concerns the requirement for approving Canadian common law degree programs.⁶ The National Mobility Agreement 2013, will replace prior agreements and will allow lawyers to practice throughout Canada on either a temporary or permanent basis once it has been implemented by each law society.⁷ The second initiative, the National Requirement for Approving Canadian Common Law Degree Programs (National Requirement), sets the standard that graduates of such programs must meet, effective 2015, for entry to a bar admission program in a Canadian common law jurisdiction.⁸ The standard includes competency requirements consisting of skills competencies, ethics, professionalism and substantive legal knowledge. Both initiatives will be the subject of further comment in Part 3.

As will become apparent below, Canadian law schools have adapted to the second initiative. However, I argue that legal education in Canada must further adapt to take into consideration the country's unusual legal diversity and in particular, that a basic understanding of Canada's legal diversity is a prerequisite in order to give full effect to the FLSC initiative relating to national mobility.

I have previously commented on Canada's legal diversity. In 2008, I expressed the opinion⁹ that as a result of its common law, civil law and Indigenous law traditions, its two official languages and the recognition of numerous Aboriginal languages in its territories, Canada is an extraordinary place.¹⁰ I added that an enhanced knowledge by legal professionals of the

⁵ "National Mobility of the Legal Profession", Federation of Law Societies of Canada, online: <http://www.flsc.ca/en/national-mobility-of-the-legal-profession> [2013 Mobility Agreement].

⁶ "Approving Canadian Common Law Degree Programs", Federation of Law Societies of Canada, online: <http://www.flsc.ca/> [National Requirement].

⁷ 2013 Mobility Agreement, *supra* note 5; the full text of prior agreements is also available on the site.

⁸ National Requirement, *supra* note 6.

⁹ Aline Grenon, "Setting the Stage: Comparative Law in Canada at the Dawn of the XXIst Century" in Aline Grenon and Louise Bélanger-Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) [Grenon, "Setting the Stage"] at 19-20.

¹⁰ In the legal context, the concept of "extraordinary place" was put forward by Esin Orucu, "Comparatists and Extraordinary Places" in Pierre Legrand and Roderick

various legal traditions would make it possible for them to become aware of the strengths and weaknesses of their own traditions. This would allow them to begin or to pursue a critical examination of certain elements of their own traditions, to identify and perhaps to change certain components in order to remedy problems that emerge from that examination.¹¹

In order to determine the importance placed by Canadian law schools on courses emphasizing Canada's legal diversity, the course content of twenty law schools¹² during the 2011-12 and 2012-13 academic years was surveyed.¹³ The objective was to identify optional and compulsory courses relating to:

- a) Aboriginal law;
- b) introduction to Canadian common law and Quebec civil law, offered in the context of stand-alone or comparative law courses;
- c) statutory interpretation, specifically the interpretation of bilingual statutes and of bijural or harmonized federal legislation.

These courses were chosen because they are the ones most likely to instill in students a basic understanding of Canada's highly unusual legal environment. In my opinion, they constitute the starting point for the development of an inclusive perspective of Canadian law.

Munday, eds, *Comparative Legal Studies: Traditions and Translations* (Cambridge, UK: Cambridge University Press, 2003) at 46. According to Orucu, an extraordinary place exhibits *at least one* of the following characteristics: (1) a place that is not a territory of civil law or of common law; (2) a place in which extraordinary things are happening; or (3) "a place where there has been transmigration of laws between legal systems characterized by both a legal and socio-cultural diversity creating either legal pluralism, a mixed jurisdiction, a hybrid system or unexpected results under pressure from a dominant elite."

¹¹ Grenon, "Setting the Stage," *supra* note 9.

¹² The law schools of the University of Alberta, University of British Columbia, University of Calgary, Dalhousie University, Université Laval, University of Manitoba, McGill University, Université de Moncton, University de Montréal, University of New Brunswick, University of Ottawa, Université du Québec à Montréal, Queen's University, University of Saskatchewan, Université de Sherbrooke, University of Toronto, University of Victoria, University of Western Ontario, University of Windsor, York University.

During the survey period, three new law schools were setting up, those of Lakehead University (expected date of first graduating class – 2016), Thompson Rivers University (expected date of first graduating class – 2014) and Trinity Western University (date of first graduating class: unknown). These law schools were not included in the survey.

¹³ The data can be obtained by contacting the author at Aline.Grenon@gmail.com.

Part 2 spotlights the targeted courses available during the survey period. In Part 3, I comment on the survey results, describe how course content that takes into consideration Canada's diversified legal environment could be incorporated in the curriculum with relative ease, and set out the reasons why it is important to do so.

2. Course Content Reflecting Canada's Legal Diversity

Since the survey covers courses offered in 2011-12 and 2012-13, it provides a snapshot of a portion of the period during which law schools were modifying their curriculum in order to meet the 2015 deadline set by the FLSC with regard to the National Requirement.¹⁴ The survey reveals that optional course material in 2011-12 became compulsory in 2012-13 and that new courses were introduced. During that period, law school administrators and members of faculty were clearly striving to meet the deadline.

In the context of the National Requirement, the changes adopted in the area of Aboriginal law are instructive. During the survey period (2011-12 and 2012-13), all law schools offered a variety of optional courses relating to Aboriginal law.¹⁵ Two law schools had also introduced compulsory Aboriginal law content into their curriculum, no doubt as a result of the National Requirement, which requires "knowledge of core principles of public law in Canada, including: constitutional law (federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and *the rights of Aboriginal peoples of Canada*)."¹⁶ At the University of Victoria, the description of optional courses on Aboriginal law stated that there was compulsory Aboriginal law content in certain first year courses.¹⁷ In 2012-13 at the University of British Columbia, the following course became compulsory: *Law 100B* –

¹⁴ *Supra* note 6.

¹⁵ *Supra* note 13. The same courses were not necessarily offered from one year to the other, but as a general rule, at least one course was available. Perhaps because of the large Aboriginal population in the Western provinces, the law schools of the universities of British Columbia, Saskatchewan and Manitoba offered a wide variety of courses. In the Central and Eastern provinces, only two law schools, the University of Toronto and the University of Ottawa (Common Law Section), offered more than four courses in this area.

¹⁶ National Requirement *supra* note 6, s 3.2.a [emphasis added].

¹⁷ The course description for *Law 340: Indigenous Lands, Rights and Governance*, available in 2011-12 and 2012-13, states that it is an introductory course that builds on what students will have learned about Aboriginal rights law in their First Year courses in Property, Constitutional Law and the Legal Process; the course description of *Law 343 A01 Aboriginal Law in Practice*, available in 2012-13, contains a similar statement.

Constitutional Law: Aboriginal & Treaty Rights.¹⁸ The inclusion of compulsory Aboriginal law components in certain courses at the University of Victoria and the new compulsory course at the University of British Columbia is no doubt a response to the FLSC's requirement for approving Canadian common law degree programs.¹⁹ The National Requirement thus ensures that all law students will now obtain at the very least, a basic understanding of certain Aboriginal law concepts. In addition, in all the law schools surveyed, the students had access to at least one, and often many, optional Aboriginal law courses.²⁰ In short, all law schools, and the FLSC, have clearly understood the importance of Aboriginal law in the Canadian legal context.

A) Introductory Common Law or Civil Law Courses

The same cannot be said, unfortunately, with respect to basic civil law and common law concepts. Few law schools, particularly in common law jurisdictions, appear to have understood the importance of courses allowing their students to acquire a basic understanding of Canada's other legal system. In this regard, Canadian legal education remains primarily monojural as opposed to bijural.²¹ During the survey period, out of twenty law schools, the following eleven offered no such specific course to students enrolled in the general program: University of Alberta, University of Calgary, Dalhousie University, University of Manitoba, Université de Moncton, University of New Brunswick, Queen's University, University of Saskatchewan, Université de Sherbrooke, University of Victoria and University of Western Ontario. Three of these law schools did, however,

¹⁸ The course description contains the following:

This full year course provides an introduction to Canadian constitutional law. The course examines federalism and the division of powers between federal and provincial governments, the Canadian Charter of Rights and Freedoms, and Aboriginal and treaty rights. [...] Selected federal and provincial powers, Aboriginal and treaty rights, and rights guaranteed by the Charter will be examined.

¹⁹ *Supra* note 6.

²⁰ *Supra* note 13.

²¹ The words *bijural* and *bijuralism* were coined in Canada and commonly refer to the coexistence of the civil law and common law in the country. See a careful analysis of the concept in Jean-François Gaudreault-Des Biens, *Les solitudes du bijuridisme* (Montreal: Les éditions Thémis, 2007) at 7-13 (available online at <<http://www.editionsthemis.com/livres/livre-4657-solitudes-du-bijuridisme-au-canada-les-.html>>). See also Louise Wellington, "Bijuridisme canadien: questions d'harmonisation/Canadian Bijuralism: Harmonization Issues" (2000) 33 *L'Actualité terminologique/Terminology Update* 5 at 7; France Allard, "The Supreme Court of Canada and its Impact on the Expression of Bijuralism" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2d publication, booklet 3 (Ottawa: Minister of Justice and Attorney General of Canada, 2001) at 1.

offer optional courses that appeared to touch on the subject.²² As for the Université de Sherbrooke, although no course was available during the survey period to the students enrolled in its general program, the law school offers a program allowing students who have obtained a civil law degree to obtain a common law degree in the course of two summers.²³

The remaining nine law schools,²⁴ including four in Quebec, offered courses ranging from one optional course to complete programs. Of the nine, the Faculty of Law of McGill University is clearly the one most capable of ensuring that all of its students obtain a sound knowledge of Canada's bijuridical heritage. In 1999, the school implemented a transsystemic approach to legal education, allowing all its undergraduate students to obtain combined civil law and common law degrees as a matter of course. According to its web site, the transsystemic model allows students to study "the world's great legal traditions in an integrated fashion" and "ensures that students graduate with a cosmopolitan understanding of the law, one that is not confined to specific jurisdictions, or even legal traditions."²⁵

Given its location in Canada's capital, its bilingual mandate and the fact that the law school is composed of common law and civil law sections, the University of Ottawa is in theory well positioned to provide all its students with at least a basic understanding of the two systems, but this is unfortunately not the case, at least in the Common Law Section. Both the Common Law and the Civil Law Sections offer programs allowing law

²² University of Saskatchewan: *LAW 449.3 – Canadian Legal History*. The course was apparently available in 2012-13 but no professor or timeframe was assigned to it.

University of Manitoba: *Law 1620 – Comparative Law*. The course was available during both years of the survey period.

Université de Moncton : *DROI2321 – Histoire du droit*. The course was available during both years of the survey period.

University of Calgary: *LAW 595 Canadian Legal History*. This course was available during both years of the survey period, but it is unclear from the description to what extent, if any, the course touched on the subject.

²³ "Baccalauréat en droit avec diplôme en common law et droit transnational (Juris Doctor)", Université de Sherbrooke, online: <<http://www.usherbrooke.ca/droit/programmes/premier-cycle/droit-common-law-et-droit-transnational-juris-doctor/>>.

²⁴ University of British Columbia, Université Laval, McGill University, Université de Montréal, University of Ottawa, Université du Québec à Montréal, University of Toronto, University of Windsor, York University.

²⁵ "Transsystemic Legal Education", McGill University, online: <<http://www.mcgill.ca/centre-crepeau/transsystemic/>>.

graduates to obtain a common law²⁶ or civil law degree²⁷ in the course of an additional year of study. The Common Law Section also offers the *Programme de droit canadien*, open to 20 students who are enrolled for a maximum of four years).²⁸ These programs, however, apply to only a limited number of students.

In the Common Law Section, two optional courses were offered in the 2011-12 and 2012-13 January terms by visiting professors to students enrolled in the French and English general programs.²⁹ The Civil Law Section, on the other hand, offered a variety of courses in its general program:

- a compulsory course relating in part to legal traditions;³⁰
- a course on civil law reasoning in English and French, exclusively for students with common law degrees;³¹
- a compulsory one-credit course providing exchange students with an introduction to common law methods;³² and
- an optional course relating specifically to major legal systems.³³

Of these nine law schools, the following five deserve special mention. Their course descriptions, the number of courses offered, or the fact that

²⁶ “JD – National Program”, uOttawa Faculty of Law, online: <http://commonlaw.uottawa.ca/en/students/programs/jd-national-program>.

²⁷ “Civil Law Section”, uOttawa Faculty of Law, online: <http://www.droitcivil.uottawa.ca/index.php?option=com_content&view=article&id=2178:programme-national-jd-lll&catid=207:programme-detudes-de-premier-cycle&lang=fr>.

²⁸ The following are extracts from the description of the program from “Programme de droit canadien”, University of Ottawa, online: <http://commonlaw.uottawa.ca/en/students/programs/combined-programs/programme-droit-canadien>:

Beginning in September 2008, the Faculty launched a new program, the Programme de droit canadien (PDC), allowing students to earn both a JD and an LLL in three years, thus opening the doors to the practice of law across Canada and abroad. [...] Twenty exceptional candidates are admitted each year to the PDC. Students will spend three years, including summer course-work, at the Faculty of Law. Certain courses are designed specifically for PDC students, and most of the program will be offered in French though knowledge of English is required. [...]

²⁹ *CML 4114JC – Introduction to Civil Law* was offered by a visiting professor in 2011-12. The following course in French was offered by a visiting professor in 2012-13: *CML4506J – ÉTUDES EN DROIT PRIVÉ: Droit privé comparé*.

³⁰ *DRC 1503 – Fondements de droit*.

³¹ *DRC4793 – Pensée civiliste; DRC4393 – Civil Law Reasoning*.

³² *DRC1505 – Initiation aux méthodes de la common law*.

³³ *DRC4709 – Les grands systèmes de droit contemporains*.

some courses were compulsory, demonstrate an awareness on their part of the importance of the subject.

In both 2011-12 and 2012-13, the University of British Columbia offered an optional course “designed to give the students basic understanding of two leading traditions of the world: civil law tradition and common law tradition. [...] *The basic understanding of two legal traditions is vital for legal practice in Canada* because lawyers will face increasing number of cases in UK, U.S. and in Europe. *Moreover, since Quebec maintains the civil law tradition with respect to civil law, the basic understanding of similarity and difference between these two different legal traditions is essential for anyone who practices in Canada.* [...]”³⁴ In 2012-13, the University of British Columbia also offered a rather unusual compulsory course with the objective of providing “an introduction to the basic principles of public international law and to the animating ideas behind private international law. [...] *The course will also introduce the concept of comparative law and will consider how globalizing forces are influencing legal developments* [...]”³⁵

In 2011-12, the University of Windsor offered an introduction to Quebec civil law, taught in French and English. The description was the following:

Canada is not only a bilingual country but it also has a bijural legal system. Bijuralism means the coexistence within the same state of two legal traditions. It involves the sharing of values and traditions. All the provinces except Quebec are based on common law. The juxtaposition of these two legal systems of law within a federal state is a rarity which impacts the drafting of federal legislation.

This course will explore the historical introduction to Quebec Civil law from a comparative approach to the English common law. We will also be touching on the ten books contained in the Quebec civil code: persons, family, successions, property, obligations, hypothèques, evidence, prescription, publication of rights and private international law [...]”³⁶

The University of Toronto offered the following course during 2011-12 and 2012-13:

Over 150 countries and 60% of the world population are governed by “the other great Western legal tradition” – the civil law tradition. The larger part of Europe, Central and

³⁴ Law 342C.001 – *Topics in Comparative Law: Comparative Law* [emphasis added].

³⁵ Law 150 – *Transnational Law* [emphasis added].

³⁶ *Special Topics in Law – Introduction to Civil Law*.

South America, Asia, and Africa indeed uses a system of codified law molded more or less directly on either the French or the German Civil Code – as do Quebec, Louisiana, and Puerto Rico, in North America. In a globalized society, just about any kind of legal practice involves interacting with civil law jurists. In systems of codified law, legal reasoning and argumentation proceed very differently than in common law systems, which rely more heavily on judge-made law. This course aims to provide common law students with an overview of the civil law – its history, intellectual underpinnings, principal actors, and representative institutions. The aim is to enable students, not so much to practice in a civil law jurisdiction, as to communicate with civil law jurists. The first part of the course surveys the historical, philosophical, and socio-cultural origins of the civil law and offers a general understanding of the civilian “style of reasoning.” Concrete applications of the notions explored in this first part are then offered in the second part, which focuses on the central concepts and institutions of Quebec civil law. Some attention is also paid to the particular challenges (and promises) of “mixed jurisdictions” – jurisdictions that, like Quebec, strive to maintain a civilian legal system within the confines of a larger common law system such as Canada. Though the course is not specifically designed as a comparative law course, class discussion will include a significant element of comparison with the common law.³⁷

Osgoode Hall Law School offered a very wide variety of optional comparative law courses dealing with a variety of subjects,³⁸ including a course with the following description, available during both years of the survey period:

As legal practice becomes more global, law students need to prepare themselves for careers that increasingly require knowledge of more than one legal system. This course provides students with an opportunity to familiarize themselves with comparative law’s methodologies for the study of diverse legal traditions. The basic aims, traditions, methods and achievements of comparative law will be taken up while focusing on particular legal jurisdictions and regions. Given the global influence of both the common law system and the civil law system of continental Europe, the course will begin with a general introduction to the history, institutions and methodologies of the civil law. The common law tradition will also be examined through the prism of comparative analysis so that its historical contingencies and idiosyncratic configurations become illuminated from an external point of view. The course will also investigate several non-Western legal systems, introducing students to their distinct institutions, histories and motifs. The mutual influences, not always balanced, between Western and non-Western legal traditions, will also be explored. The proclivity of the discipline of comparative law to define itself in predominantly Euro-American terms will be

³⁷ *Law 516HIS – Introduction to the Civil Law Tradition* and *Law 516HIF – Civil Law*; the description is the same for both courses.

³⁸ For example, *LW3040N.03 – Comparative Law: International & Comparative Labour Law*; *LW3040S.03 – Comparative Law: Law of the Polar Regions*; *LW3040W.03 – Comparative Law: International Aspects of Intellectual Property Law*.

critically examined. Readings on the institutions and doctrines of legal traditions will be complemented with materials on the most significant social, economic, and political factors that shape legal cultures.³⁹

The Université de Montréal was unusual in that it offered in its general program two compulsory courses, one including the fundamental elements of the civil and common law⁴⁰ and the other relating in part to the creation and evolution of the civil and common law traditions.⁴¹ Two optional comparative law courses were also available during the survey period.⁴² In addition to the courses in the general program, students who have obtained a Quebec civil law degree can also obtain a common law degree at the Université de Montréal following an additional year of study.⁴³ Finally, the Université du Québec à Montréal was also unusual in that its students had access to three optional courses relating to the law of Quebec and Canada.⁴⁴

Of the twenty law schools surveyed, why did more than half, most of which are located in common law jurisdictions, fail to provide basic knowledge in this area to students enrolled in their general programs? Possible explanations include a limited number of professors with the required background, the vast array of knowledge and competencies that must be transmitted in a general law program and the limited time available in which to do so. It must be noted, however, that these reasons did not prevent all twenty law schools from providing courses on Aboriginal law during this period. These reasons also did not prevent law schools at the University of Montreal, Université Laval, Université du Québec à Montréal and University of Ottawa (Civil Law Section) from

³⁹ *LW2004.04 – Comparative Law.*

⁴⁰ *DRT1001 – Introduction au droit*: Notions de droit, de règle de droit. Sources de la règle de droit. Pouvoirs législatif, exécutif et judiciaire : composition et compétence. Éléments fondamentaux de droit civil et de common law.

⁴¹ *DRT1010 – Fondement du droit 1*: Introduction aux fondements du droit par l'histoire des institutions et des idées. Formation et évolution des deux grandes traditions juridiques occidentales : common law et droit civil.

⁴² *DRT3001 – Introduction au droit comparé*; *DRT 3021 – Droit comparé avancé 1.*

⁴³ "Common law nord-américaine", Université de Montréal, Faculty of droit, online: <http://droit.umontreal.ca/programmes/programmes-de-2e-cycle/>.

⁴⁴ *JUR5585 – Droit comparé*: L'objectif de ce cours est l'étude et l'analyse des grandes caractéristiques des principaux systèmes juridiques. [...] La méthode comparative et l'étude du droit canadien et québécois; *HIS4501 – Histoire du droit québécois et canadien*: Ce cours présente une perspective historique d'ensemble du système juridique canadien et québécois, depuis la Nouvelle-France jusqu'à nos jours. [...]; *JUR5615 – Introduction à la common law*: Étude historique et critique de la structure générale de la common law, de ses principaux champs (persons, contracts, torts, real property chattels, etc.) et institutions (tenures, trusts, etc.), de ses développements récents, de sa mise en œuvre au Canada et de son influence sur le système civiliste québécois.

offering optional and even compulsory courses dealing with the subject. There must be other explanations. Jean-François Gaudreault-Des Biens has posited that there exist in Canada obstacles that are difficult to overcome and that contribute to the “solitudes of Canadian bijuralism.”⁴⁵ He refers in particular to cultural obstacles that exist outside of Quebec as a result of language, socialisation and ideology. These obstacles will be discussed in more detail in Part 3.

B) Bilingual and Bijural Interpretation

There are many reasons why a basic knowledge of the rules of bilingual and bijural statutory interpretation is important in Canada. Insofar as federal legislation and the legislation of certain provinces are concerned, both language versions are authoritative⁴⁶ and a misleading analysis of legal issues because of a “failure to read half the relevant law” could give rise to a malpractice suit.⁴⁷ Cases have been won or lost on the basis of the French version of bilingual statutes⁴⁸ and of contracts.⁴⁹ At the very least, Canadian law students have to be aware of the need to review carefully both language versions of bilingual legislation and of legal documents. Students also have to be aware of the possible implications of sections 8.1

⁴⁵ Gaudreault-Des Biens, *supra* note 21 at 23-53.

⁴⁶ Manitoba, New Brunswick and Quebec are subject to constitutional requirements in this regard, whereas Ontario has adopted a less stringent requirement; see Robert Leckey and André Braën, “Bilingualism and Legislation” in Michel Bastarache, ed, *Language Rights in Canada* (Cowansville, QC: Yvon Blais, 2003).

⁴⁷ *Ibid* at 126-27: “The necessity of reading both versions surely raises the question whether a lawyer can diligently advise a client based on a reading of solely one language version [...] Can there be professional negligence on the part of a lawyer for what turns out to be, effectively, a failure to read half the relevant law?” See also Michel Doucet, “Le bilinguisme législatif” in Bastarache, *ibid* at 297: “*L’expérience montre que, pour l’interprétation des lois bilingues, la lecture des deux versions relève d’une nécessité fondamentale*” (Experience has shown that, in order interpret bilingual laws, reading both versions is a fundamental necessity) [translated by author].

⁴⁸ *R v Mac*, 2002 SCC 24, [2002] 1 SCR 856.

⁴⁹ “Telecom Decision CRTC 2007-75,” Canadian Radio-television and Telecommunications Commission, online at para 58-57: <<http://www.crtc.gc.ca/eng/archive/2007/db2007-75.htm>>. In a dispute before the CRTC involving an agreement between Rogers and Aliant, an apparently ambiguous provision in the agreement involving a comma was resolved by reference to the unambiguous French version of this provision; though successful on this point, Rogers nevertheless lost the dispute, but on other grounds.

and 8.2 of the *Interpretation Act*,⁵⁰ which can give rise to the non-uniform application of bijural federal legislation.⁵¹

The FLSC is obviously aware of the importance of statutory interpretation generally, since the National Requirement specifies that applicants must have acquired “[...] an understanding of the foundations of law, including [...] the process of statutory construction and analysis.”⁵² During the survey period, the following ten law schools with common law programs offered compulsory courses relating in part to the process of statutory construction and analysis: University of British Columbia,⁵³ University of Calgary,⁵⁴ Dalhousie University,⁵⁵ University

⁵⁰ These sections were added to the *Interpretation Act*, RCS 1985, c I-21 following the adoption of the *Federal Civil Law Harmonization Act, No 1*, SC 2001, c 4.

⁵¹ Aline Grenon, “Canadian Bijuralism at a Crossroad? The Impact of Section 8.1 of the *Interpretation Act* on the Judicial Interpretation of Federal Legislation” (2014) 51 *Osgoode Hall LJ* 501 [Grenon, “Crossroad”]

⁵² *Supra* note 6 at s 3.1.b.

⁵³ 2011-12: *Law 160 – The Regulatory State*: This course is a research-intensive introduction to statutory interpretation. It has two fundamental objectives. First, it gives students sustained instruction on writing and research. Second, it introduces students to theories of statutory interpretation within the specific context of a statute-based area of the law. [...] The final assessment will be based on a research paper or opinion that applies theories of statutory interpretation in the context of the legislation.

2012-13: *Law 160 – Public Law*; the course description is similar to the description of the course available in the preceding year.

⁵⁴ *LAW 403 – Legislation, Administration and Policy*: The fundamentals of the legislative process: policy development, legislative drafting, public bill process, statutory interpretation. [...] Emphasis is placed on skill development in oral advocacy and drafting both legislation and private law documents.

⁵⁵ *LAW 1003 – Fundamentals of Public Law*: This class provides students with an understanding of the constitutional and administrative structures of Canadian law and government. An emphasis is placed on developing the skills required of lawyers whose public law work may range from appearances before administrative tribunals, to giving advice on the formulation and articulation of policy. Primary among the emphasized skills is the ability to work with and interpret constitutional, statutory and regulatory texts. A perspective on the administrative model of decision making will also be developed. As a necessary background for the development of these skills and for the general study of law, this class introduces students to the Canadian governmental and constitutional system. Students will explore the legislative process, statutory interpretation, and the administrative system using human rights legislation as a model. Further, students will develop an understanding of the analytical framework of the Canadian Charter of Rights and Freedoms, through the study of the interpretation and development of equality rights.

of Manitoba,⁵⁶ Université de Moncton.⁵⁷ Université de Montréal,⁵⁸ Osgoode Hall Law School,⁵⁹ Common Law Section of the University of Ottawa (English⁶⁰ and French⁶¹ programs), Université de Sherbrooke,⁶²

⁵⁶ The University of Manitoba required students to take the following two compulsory courses, both of which included portions relating to legislation and statutory interpretation:

Law 1540 – Legal Methods: A clinical course that introduces skills essential to the profession of law, including legal research, legal analysis, statutory interpretation, writing of legal memos and opinions, drafting of court pleadings and preparation and presentation of oral advocacy in a courtroom setting.

Law 1530 – Legal System: An introduction to law as an integral part of a larger and complex social system, and an exploration of how law operates to organize and regulate societal affairs while seeking to promote various social objectives. Topics for analysis in the first term will include: the nature and study of law; legal history; the legal profession; common law and equity; the legislative process; statutory interpretation; the role of judges and lawyers; indigenous legal traditions; legal pluralism; international law; and dispute resolution. The second term will be devoted entirely to the Judge Shadowing program. [...] .

⁵⁷ *DROI1046 – Introduction au droit:* Initiation au droit et aux institutions législatives, exécutives et judiciaires des pays de la common law. Étude des techniques de création et d'interprétation du droit par les tribunaux, des modes de règlement des litiges civils et pénaux et des méthodes de recherche et d'analyse juridiques.

⁵⁸ *DRT2001 – Interprétation des lois:* Étude des « règles d'interprétation des lois » c.-à-d. de ces règles et principes qui guident l'interprète dans la détermination du sens et de la portée de textes législatifs et qui servent également à justifier ces déterminations.

⁵⁹ *State and Citizen: Canadian Public and Constitutional Law:* This full-year course addresses the relationship between the state, the individual, and communities. How does law shape these relationships, and how do these relationships create or shape law? The course introduces students to basic architecture of the Canadian legal system including the processes by which statutes and regulations come into being; the principle of the rule of law; the role of the judiciary and judicial review of legislation and government actions; statutory interpretation; the creation and amendment of the Constitution; the division of powers in a federal system of government; the relationship and roles of different branches of government; the relationship between Aboriginal peoples/nations and the Canadian state; and the entrenchment of rights in the *Canadian Charter of Rights and Freedoms*.

⁶⁰ *CML1104 – Public Law & Legislation:* [...] This course will provide an introduction to legislation and public law, focusing on the structure of the Canadian legal system, including: sources of law, the federal legislative process and statutory interpretation; the legal and political system's structure and constitutional basis; and the role of the courts in overseeing legislative and administrative action. [...].

⁶¹ *CML 1704 – Législation:* Introduction au droit public canadien, ses sources historiques et théoriques, et ses concepts de base. Introduction au système juridique canadien, ses institutions contemporaines et son interaction avec la législation et les règlements. Le cours cherche à donner aux étudiantes et aux étudiants un aperçu du droit public canadien et ses sources variées, les règles et principes qui les régissent.

⁶² *DRT213 – Interprétation juridique:* Se familiariser avec les diverses méthodes et règles d'interprétation des lois et des actes juridiques telles que les ont explicitées les

University of Victoria.⁶³ McGill University also offered a compulsory course, *Foundations of Canadian Law / Fondements du droit canadien*, taught by five different professors, but it was impossible from the general course description to determine what portion of the course, if any, dealt with the process of statutory construction and analysis.⁶⁴

Although not bound by the FLSC requirements, Université du Québec à Montréal required students to take a compulsory course relating to statutory interpretation.⁶⁵ This was also the case for Université de Sherbrooke⁶⁶ and Université de Montréal.⁶⁷ Université Laval offered a compulsory course that dealt in part with legal interpretation⁶⁸ as did the Civil Law Section of the University of Ottawa.⁶⁹

pouvoirs législatif ou administratif ou telles que les a développées et consolidées le pouvoir judiciaire.

⁶³ *Law 104 – Law Legislation and Policy*. Although this course is taught by four different professors, each of whom has drafted individual course descriptions, it is apparent from the descriptions that the courses involve elements of statutory interpretation; *supra* note 13.

⁶⁴ *Foundations of Canadian Law / Fondements du droit canadien*: Overview of the spirit, history, sources, techniques and aspirations of law reflected in the Canadian experience, including Aboriginal legal traditions. Comparative and social scientific methodology, literature, art and performance are explored as ways to answer fundamental questions of what law is and how to interpret it, and what law is for and how to evaluate it.

⁶⁵ *JUR4505 – Interprétation des lois*: Ce cours vise à atteindre des objectifs méthodologiques, des objectifs analytiques et des objectifs critiques, et à familiariser l'étudiant avec des règles et des méthodes d'interprétation des lois. Étude des règles et des méthodes d'interprétation des lois dans une double perspective de compréhension du sens et de la portée des textes législatifs et réglementaires et de leur utilisation comme outils d'argumentation. Analyse du rôle politique rempli par le pouvoir judiciaire à travers l'interprétation des lois.

⁶⁶ *DRT213 – Interprétation juridique*: Se familiariser avec les diverses méthodes et règles d'interprétation des lois et des actes juridiques telles que les ont explicitées les pouvoirs législatif ou administratif ou telles que les a développées et consolidées le pouvoir judiciaire.

⁶⁷ *DRT2001 – Interprétation des lois*: Étude des « règles d'interprétation des lois » c.-à-d. de ces règles et principes qui guident l'interprète dans la détermination du sens et de la portée de textes législatifs et qui servent également à justifier ces déterminations.

⁶⁸ *DRT1000 – L'univers du droit*: La juridicité. Les traditions et les systèmes juridiques. La pluralité des normes et des ordres juridiques. Le caractère pluridimensionnel du droit. Les sources du droit et la hiérarchie normative. Les théories juridiques. Les agents du système juridique et leur rôle. Les modes de prévention et de règlement des différends. Le système judiciaire. Les concepts et les catégories du droit. Le raisonnement juridique. L'élaboration, l'analyse et l'interprétation des textes normatifs. La rédaction d'une analyse d'une décision judiciaire.

⁶⁹ *DRC1503 – Fondements du droit*: Caractéristiques principales de différents systèmes de droit. Place du droit dans la société contemporaine. Interaction entre le droit

It is obvious from the descriptions of the courses contained in the footnotes that these compulsory courses cover a large number of topics in addition to statutory interpretation and it is impossible to determine whether or not the courses included segments relating to the interpretation of bilingual and bijural legislation. In order to obtain additional information, I contacted the 49 persons identified in the survey as teaching the relevant courses. On the basis of the comments received from the 28 who answered, it is difficult to arrive at any firm conclusion. With respect to the rules relating to the interpretation of bilingual statutes, answers range from:

- “nothing on bilingual statutes in 2012-13;”
- “issues are considered;”
- “some cases touch on the subject;”
- “odd mention;”
- 15 minutes, 30 minutes, one hour, 1,5 – 2 hours;
- “4 hours explicitly on statutory interpretation with reference to both official languages being authoritative;”
- “*nous discutons du rôle des deux versions d’une loi aux fins d’interprétation;*”
- “*l’interprétation de la législation bilingue a été couverte en détail.*”⁷⁰

Much depends on the individual teacher and it was also apparent that there are variations among different sections of a compulsory course offered in the same law school.⁷¹ Based on these responses and also on the lack of response (21 out of 49 failed to respond to my queries), I believe that it is fair to conclude that an indeterminate number of students graduating from the general programs do not know that insofar as federal legislation and the legislation of certain provinces are concerned, both language versions are authoritative⁷² and that a misleading analysis of legal issues because of a

et d’autres disciplines. Introduction au raisonnement et aux principes de l’interprétation juridiques. Notions de base de l’application de la loi dans le temps.

⁷⁰ The data is available on request; see *supra* note 13.

⁷¹ *Ibid.*

⁷² Leckey and Braën, *supra* note 46.

“failure to read half the relevant law” could give rise to a malpractice suit.⁷³ At a minimum, all law school graduates must be aware of that reality.

The rules relating to the interpretation of bilingual statutes are presumably included in optional statutory interpretation courses,⁷⁴ but given the importance of these rules in the Canadian context, all law school graduates should at the very least be aware of their existence and possible effects. In this regard, Randal Graham of the Faculty of Law of Western University sent me the following response relating to his optional course:

[...] Our course is “project” driven – students complete three statutory interpretation projects over the term, each project involving increasingly difficult interpretive issues. Every year, at least one of these projects relates to either the *Criminal Code* or the *Income Tax Act*. In preparing students for these assignments, I draw their attention to the fact that these are bilingual statutes, and I instruct students to pay attention to (a) both the French and English versions of the relevant legislation, and (b) the relevant parts of the *Interpretation Act*.

I try to ensure that any assignment relating to the *Criminal Code* or *Income Tax Act* raises at least one issue that can be resolved, in part, by comparing the two versions of the enactment. (This year’s assignment related to the “Prize Fighting” provisions in

⁷³ Doucet, *supra* note 47.

⁷⁴ The following law schools offered optional courses on the subject during the survey period: University of Alberta (LAW 508: *A1 Legislative Process and Legislative Drafting*); Dalhousie (LAWS 2075 – *Legislation*); Université Laval (DRT2200 – *Rédaction et interprétation des lois*); McGill University (LAWG517 – *Specialized Topics in Law 7 – Interprétation juridique*); Université de Moncton (2012-13: DROI2014 – *Droit législatif*); University of New Brunswick (Law 3083 – *Legislation*); University of Ottawa, Common Law Section (CML 3213 – *Statutory Interpretation*) and Civil Law Section (DRC4725 – *Élaboration des lois et interprétation*); Queen’s University (Law 636 – *Introduction to Statutory Interpretation*); University of Toronto (Law445H1S – *Statutes and Statutory Interpretation*; LAW338H1F – *Intensive Course: Purposive Interpretation in Law*); University of Victoria (Law 343 – *Statutory Interpretation*); University of Western Ontario (5775A 001 – *Statutory Interpretation*).

In 2012-13, the following course description was provided by the University of Saskatchewan, but no professor or timeframe was assigned to it: “LAW 343.3 – 1/2(3L) – *Topics in Advanced Legal Reasoning* – Examines, explicitly and in detail, techniques of legal reasoning. A significant portion of this course is focused on a detailed examination of precedent (*stare decisis*)-based reasoning, a significant portion on interpretation (*mainly statutory interpretation*), and a smaller portion on other selected issues differing from year to year (*which might include the relevance of comparative law, explicit discussion of the role of policy in legal reasoning, writing on symbolic representations of legal reasoning and use of artificial intelligence-aided legal decision-making, etc.*)...”

the *Criminal Code* ... the French and English versions have some interesting differences ... it was great fun making my non-bilingual students sort them out!) [...] ⁷⁵

Graham's comments illustrate that despite the best efforts of legislative drafters, difference do exist between the English and French versions of statutes. Although bilingual lawyers who are aware of this reality are best placed to deal with it, unilingual lawyers must also take it into consideration. The best place to start is in law school.

With respect to the rules relating to the interpretation of bijural as opposed to bilingual statutes, the responses were truly disappointing. One professor confused sections 8.1 and 8.2 of the *Interpretation Act* with section 8 and it was obvious that in the compulsory courses, very little if any time is devoted to the subject. ⁷⁶ The rules are relatively new, they are complex and they have yet to be the subject of careful analysis by the Supreme Court of Canada. ⁷⁷ But the object is not to ensure that students have a complete grasp of the subject. Rather, the object is to ensure that law graduates are aware of these rules and that they will take them into consideration if necessary.

3. Roadmap

During the survey period, why did so many law schools fail to provide basic knowledge relating to the interpretation of bilingual and bijural statutes to students enrolled in their general programs? Why did all twenty law schools provide at least one optional course relating to Aboriginal law but more than half, most of which were located in common law jurisdictions, fail to provide at a minimum one optional introductory course allowing their students to acquire an understanding of Canada's other legal system? As possible explanations, I earlier referred to the (possibly) limited number of professors with the required background and to the mass of knowledge and competencies that must be transmitted in a relatively short time span. It is telling, however, that such obstacles have not prevented the twenty law schools surveyed from providing in 2011-12 and 2012-13 an array of Aboriginal law courses. It has also not prevented all the civil law faculties from offering, in one form or another, courses relating to the common law. The difference in approach between Aboriginal law courses on the one hand and on the other, introductory civil law courses and course content relating to the interpretation of bilingual and bijural statutes, lends credence to the thesis put forward by Gaudreault-Des Biens to the effect

⁷⁵ *Supra* note 13.

⁷⁶ *Supra* note 13.

⁷⁷ Grenon, "Crossroad," *supra* note 51.

that specific obstacles stand in the way of exchanges between the common law and civil law.⁷⁸

It is impossible in a few paragraphs to convey the nuanced nature of the multi-faceted and multi-layered thesis put forward by Gaudreault-Des Biens. The best that I can do is to encourage a careful reading of his essay and to refer briefly to the obstacles he describes. The first obstacle, obviously, is linguistic.⁷⁹ The majority of lawyers in Canada's common law jurisdictions do not have the linguistic skills required to access legal information in French. As a result, Quebec civil law, together with the French versions of legislation and of French doctrinal texts and legal documents, are simply ignored. This occurs despite the risk that by doing so, lawyers could be found guilty of malpractice.⁸⁰

The second obstacle consists of a mind-set whereby lawyers identify exclusively with the common law tradition and view it as completely self-sufficient. Accordingly, knowledge of other legal traditions becomes unnecessary.⁸¹ Once again, this leads many lawyers with a common law background to discard the law of Quebec. This mind-set can even lead, in cases in which the civil law has influenced the common law, to an appropriation of civil law concepts and to an eradication of all references to the source.⁸²

The third obstacle rests on ideology and stereotypes.⁸³ The mind-set referred to earlier, whereby lawyers identify exclusively with the common law tradition and view it as completely self-sufficient, can give rise to a deep-seated belief that the common law system is superior to all others and to concomitant negative opinions of other systems based on self-serving arguments.⁸⁴

In order to overcome these obstacles⁸⁵ and to encourage the development of a more open and receptive Canadian legal culture,

⁷⁸ Gaudreault-Des Biens, *supra* note 21.

⁷⁹ *Ibid* at 23-34.

⁸⁰ *Ibid* at 33-34; see also, with respect to the possibility of malpractice, Leckey and Braën, *supra* note 46.

⁸¹ Gaudreault-Des Biens, *ibid* at 34-55.

⁸² *Ibid* at 40-42.

⁸³ *Ibid* at 57-111. This forms the central part of the thesis put forward by Gaudreault-Des Biens.

⁸⁴ *Ibid*. In particular, Gaudreault-Des Biens analyses the basis for arguments favoring the superiority of the common law; see e.g. *ibid* at 73-75, 75-84.

⁸⁵ In addition to the obstacles of a legal nature put forward by Gaudreault-Des Biens, I believe that other obstacles come into play. In particular, the two Quebec referendums and the subsequent failed constitutional negotiations, together with all-too-frequent

Gaudreault-Des Biens proposes a number of “micro-strategies”: the translation into English of major Quebec legal texts;⁸⁶ projects to enhance Canada’s role internationally in the sphere of comparative law;⁸⁷ and changes to the *Interpretation Act*.⁸⁸ He remains skeptical, however, and states:

[...] le refus du romantisme dont je me fais ici l’apôtre ne constitue en rien un refus des aspirations dont le bijuridisme peut être porteur lorsqu’on l’envisage sous l’angle culturel. Mais si l’on accepte que la réalisation de ces aspirations dépend avant toutes chose d’une évaluation réaliste des obstacles susceptibles de l’empêcher, alors il faut nommer ces obstacles et en comprendre l’origine. Seulement ainsi pourra-t-on agir, en toute hypothèse bien modestement [...]⁸⁹

I agree with the analysis of Gaudreault-Des Biens and I also share his skepticism. In order to overcome the obstacles in Canada that stand in the way of exchanges between the common law and civil law, assuming that this is even possible, a climate that encourages dialogue is required. National mobility will no doubt contribute but much more is needed. Apart from the micro-strategies put forward by Gaudreault-Des Biens, voluntary initiatives adopted by Canadian law schools could play a vital role. Law schools could, for example, provide their students with the following:

- (1) a compulsory course introducing students to major legal systems and traditions, including those that form part of the Canadian legal heritage; and
- (2) compulsory components in existing courses allowing students to understand the rules relating to the interpretation of bilingual and bijural legislation.

Law schools could also strongly encourage students to participate in one or two session exchanges with Canadian law schools that emphasize other legal systems or traditions.

inadequate or negative media coverage of events in Quebec, have led to resentment and incomprehension on the part of many Canadians. The unfortunate result is a tendency to ignore Quebec.

⁸⁶ *Ibid* at 114-17.

⁸⁷ *Ibid* at 117-20.

⁸⁸ *Ibid* at 120-23.

⁸⁹ *Ibid* at 148: [...] my refusal to adopt a romantic approach is not a rejection of the aspirations of bijuralism, viewed in a cultural context. But if we accept that attaining these aspirations depends above all on a realistic evaluation of the obstacles likely to prevent their attainment, it becomes necessary to identify these obstacles and to understand their origins. Only then are we in a position to act, although most likely in a limited manner [...] [Translated by author].

If the will exists, implementing such changes would be relatively simple. Because these changes would be voluntary, this would transmit a very positive signal throughout the country and abroad. Canada's diverse legal landscape lends itself particularly well to the adoption of such changes and I hope that some law schools will see fit to implement them.

If law schools fail to adopt such initiatives, Canadian law societies could include such information in their bar admission and continuing education materials, in order to ensure that lawyers met appropriate standards of professional competency. Although information relating to the interpretation of bilingual and bijural legislation could probably be adequately conveyed in this manner, I question whether such an approach would be sufficient to convey the more nuanced nature of civil law concepts and reasoning. Three credit courses in law faculties would be more appropriate for this purpose. Also, individual initiatives by law societies could result in a piece-meal approach that would fail to reach all members of the legal profession. National coverage should be the norm and the FLSC is best placed to ensure such coverage. Accordingly, in the event that law schools fail to move forward, I submit that the FLSC has a duty to act, in light of its national mobility initiative.

Once the 2013 Mobility Agreement comes into force, lawyers who are members of a Canadian law society will be allowed to practice throughout Canada on either a temporary or permanent basis.⁹⁰ According to the FLSC, the 2013 Mobility Agreement "will extend the mobility provisions to permit Canadian lawyers to transfer between Quebec and the common law provinces with ease regardless of whether they are trained in Canadian common law or civil law."⁹¹ For example, a lawyer with a common law degree who wishes to practice on a permanent basis in Quebec will not be required to pass a transfer or other examination. The primary requirements will be certification to the effect that the lawyer has reviewed all the materials reasonably required by the Barreau du Québec and competency in French.⁹² If that lawyer wishes only to practice on a temporary basis in Quebec, the requirements are very simple: section 41 of the 2013 Mobility

⁹⁰ *Supra* note 5 at ss 7-32 (temporary mobility among common law jurisdictions), 33-40 (permanent mobility of lawyers), 41-42 (temporary mobility among Quebec and common law jurisdictions).

⁹¹ *Ibid.*

⁹² *Ibid.*, ss 33-40. These sections deal with the permanent mobility of lawyers. In order for a member of a Canadian law society to practice on a permanent basis within the jurisdiction of another Canadian law society that has signed the 2013 Mobility Agreement, section 33 provides:

A signatory governing body will require no further qualifications for a member of another governing body [...] than the following:

(a) entitlement to practise law in the lawyer's home jurisdiction;

Agreement provides that the Barreau du Québec “will permit lawyers entitled to practise law in a home jurisdiction, on application under regulations that apply to the Barreau, to provide legal services in Quebec or with respect to the law of Quebec on a specific case or for a specific client for a period of up to one year, which may be extended on application to the Barreau.” In cases of practise on a temporary basis, there are no requirements with respect to competency in French.⁹³

Lawyers admitted to practise in a Canadian common law jurisdiction can easily move to another Canadian common law jurisdiction, since the underlying legal concepts are similar. However, mobility, no matter how desirable, between Canadian common law jurisdictions and Quebec’s mixed (civil law and common law) jurisdiction⁹⁴ gave rise to serious

(b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and

(c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.

Section 34 provides: [...] the governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:

(a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;

(b) disclose criminal and disciplinary records in any jurisdiction;

(c) consent to access by the governing body to the lawyer’s regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and

(d) certify that he or she has reviewed all of the materials reasonably required by the governing body.

Sections 37-40 set out the requirements relating to liability insurance.

With respect section 33(c) relating to “any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction”, the main qualification involves competency in French; section 35 of the *Charter of the French Language*, RSQ c C-11, is to the effect that “professional orders shall not issue permits except to persons whose knowledge of the official language is appropriate to the practice of their profession.” Exigences.

⁹³ *Charter of the French Language*, RSQ c C-11, s 37 provides:

The professional orders may issue temporary permits valid for not more than one year to persons from outside Québec who are declared qualified to practise their profession but whose knowledge of the official language does not meet the requirements of section 35.

⁹⁴ *Quebec Act, 1774* (UK), 14 George III, c 83, s 7, reprinted in RSC 1985, App II, No 2, allowed Quebec to retain the civil law tradition with respect to property and civil rights. The *Constitution Act, 1867* (UK), 31 George III, c 31, ss 91-92, reprinted in RSC 1985, App II, No 3, divided law-making power between the federal and the provincial governments that form part of the Canadian federation. Since s 92(13) provides that the provinces can legislate with respect to property and civil rights, Quebec continued to

concerns. These were resolved following the example of the European Union, where mobility among lawyers from different member countries with different legal systems has been the norm for many years, with no evidence that this has created problems.⁹⁵ The key lies with the strict ethical standards imposed on all lawyers. For example, in the FLSC's *Model Code of Professional Conduct*,⁹⁶ section 3.1 relates to competence. Lawyers should not undertake matters without "honestly feeling competent" to handle them or "being able to become competent without undue delay, risk or expense to the client."⁹⁷ Lawyers must also recognize tasks for which they lack competence.⁹⁸ The codes of professional conduct of all Canadian law societies contain similar requirements and are in any event in the process of being modified or replaced in order to implement the FLSC's Model Code.⁹⁹

In short, Canadian lawyers, all of whom are regulated by a particular law society and all of whom face disciplinary action if they fail to adhere to the duties imposed by their law society, must ensure that they have the required competency to act for a client in all situations.¹⁰⁰ This is the duty that forms the basis for the national mobility initiative.

Lawyers must accordingly acquire a basic knowledge of the legal system of the jurisdiction to which they have moved.¹⁰¹ As stated earlier, this is a relatively simple task for lawyers moving from one Canadian common law jurisdiction to another. It is a more complicated task for

retain the French civil law tradition. Insofar as matters of federal jurisdiction are concerned, however, the common law applies. It is on this basis that Quebec became what is known as a "mixed jurisdiction." See also John EC Brierley and Honorable Jean-Louis Baudouin, "Quebec" in Vernon V Palmer, ed, *Mixed Jurisdictions Worldwide – The Third Legal Family* (Cambridge, UK: Cambridge University Press, 2001) at 329-363.

⁹⁵ Marc-André Séguin, "Mobilité interprovinciale des avocats – Vers une mobilité totale sans précédent" (2013) 45:5 *Le journal – Barreau du Québec* at 10.

⁹⁶ *Model Code of Professional Conduct*, Federation of Law Societies of Canada, online: <<http://www.flsc.ca/en/model-code-of-professional-conduct/>>.

⁹⁷ *Ibid* s 3.1-2, commentary 5.

⁹⁸ *Ibid* s 3.1-2, commentary 6.

⁹⁹ *Ibid*: "The Federation has approved a *Model Code of Professional Conduct* which is in the process of being implemented in a number of law societies. Over time, it is expected that any significant differences in rules of conduct across Canada will be eliminated." For example, the Ontario *Rules of Conduct* were amended to implement the FLSC's Model Code effective October 1, 2014; see *Rules of Professional Conduct*, The Law Society of Upper Canada, online: <<http://www.lsuc.on.ca/with.aspx?id=671>>.

¹⁰⁰ *Supra* notes 97-98.

¹⁰¹ The FLSC acknowledges this since it has prepared and makes available materials for this purpose, including a 40-page manuscript prepared by Stéphane Beaulac and Jean-François Gaudreault-DesBiens, of the Faculty of Law, Université de Montréal, flagging the principal distinctions in Canada's civil law and common law traditions.

Quebec lawyers to transfer to another Canadian jurisdiction but because of Quebec's mixed legal heritage,¹⁰² such lawyers already have a basic understanding of common law concepts and reasoning and this will not doubt facilitate the transition. However, with respect to lawyers who transfer to Quebec from a Canadian common law jurisdiction, many if not most will probably have no basic understanding of civil law concepts or reasoning, for the reasons set out in Part 2. Presumably, they will acquire this knowledge after having reviewed the "materials reasonably required" by the Barreau du Québec.¹⁰³ Conscientious lawyers who have always been members in good standing of a Canadian law society will no doubt make every effort to acquire such knowledge, but I submit that lawyers who have acquired in law school a basic knowledge of Canada's legal systems and traditions will be much better placed to satisfy the competency requirement.

National mobility and knowledge of other legal systems, particularly knowledge of Canada's common law and civil law systems, go hand in hand. The FLSC cannot foster the one and ignore the other, particularly given the duty of all lawyers to be competent in the tasks that they undertake.

Whether or not lawyers move from one Canadian jurisdiction to another, the practice of law is no longer simply a provincial, territorial or even national affair. The issue of globalization, its impact on the practice of law in the twenty-first century and the need to adapt, have been the subject of numerous articles, conferences and comments.¹⁰⁴ Increased international trade and immigration, enhanced mobility for business or personal reasons, rapid communication and transportation across borders are now the norm. Lawyers in national and international law firms are commonly called upon to work on files with colleagues located in common law or civil law jurisdictions in Canada and elsewhere. All lawyers, even

¹⁰² Brierley and Beaudouin, *supra* note 94.

¹⁰³ *Supra* note 92.

¹⁰⁴ For example, the Internationalisation of Legal Education was one of the topics explored at the XIXth International Congress of Comparative Law, held in Vienna, Austria from July 20-26, 2014. A transcript of the address can be found: "International Congress of Comparative Law", International Academy of Comparative Law, online: <http://www.iuscomparatum.org/141_p_30597/vienna-congress-2014.html>. The general reporters responsible for the topic are currently working on the publication of their General Report and of the National Reports: Email from the general reporters (2 September 2014) to the author (available on request).

The global legal environment was also the topic of a unique International Conference on Legal Education held in Istanbul, Turkey on June 13-15, 2001; the papers and much bibliographic material are available in *Symposium: A Global Legal Odyssey* (2002) 43 S Tex L Rev.

in the most remote regions of Canada, and whatever their expertise, will invariably be called upon to work on files involving international components. All lawyers must be able to recognize and deal with these issues in a competent fashion. The courses available during the survey period at the University of British Columbia, Osgoode Hall Law School of York University and the University of Toronto demonstrate that some law schools are aware of the importance of acquiring such knowledge. The University of British Columbia course description states clearly that a basic understanding of two legal traditions is vital for legal practice in Canada because lawyers will face increasing number of cases in the UK, US and in Europe.¹⁰⁵ In its course description, Osgoode Hall Law School emphasizes the need for law students to prepare themselves for careers that increasingly require knowledge of more than one legal system, as legal practice becomes more global.¹⁰⁶ The University of Toronto description emphasizes that over 150 countries and 60 per cent of the world population are governed by the civil law tradition and that in a globalized society, almost all legal practice involves interacting with civil law jurists.¹⁰⁷

During the survey period, the relatively few Canadian law schools that provided students with introductory knowledge of the common law or civil law systems did so by means of optional courses offered in their general programs or by way of specific programs allowing students to obtain a transsystemic or bijural legal education.¹⁰⁸ Because optional courses and specific programs reach only a limited number of students, they are insufficient. If Canadian law schools opted to introduce all their students to major legal systems and traditions by means of a compulsory course, this would go a long way to ensuring that they all acquire the knowledge required to practice not only in a Canadian context, but also in an increasingly global legal environment.

If law schools fail to act, the FLSC's National Requirement could complement its national mobility initiatives and serve to remedy the major deficiencies identified in Part 2 of this article. Additional words about the National Requirement are in order. It is based on the report of a Task Force created in 2007, which pointed out that Canada's legal academic requirements were highly unusual in one respect:

Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree. The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and

¹⁰⁵ *Supra* note 35.

¹⁰⁶ *Supra* note 39.

¹⁰⁷ *Supra* note 37.

¹⁰⁸ *Supra* notes 23-33, 43.

revised in 1969. These have not been reviewed in 40 years and in any event have never been explicitly accepted by other law societies.¹⁰⁹

Following a description of the many changes that had occurred since 1969,¹¹⁰ the Task Force recommended that the FLSC adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions.¹¹¹ On the basis of this report, Canada's law societies agreed on the uniform national requirement that graduates of Canadian common law programs must now meet in order to enter law society admission programs.¹¹² Despite initial reservations, including concerns about academic freedom,¹¹³ the affected law schools fell into line and all the major common law programs now comply with the National Requirement.¹¹⁴

In order to fully incorporate the national competency requirements in their general programs, the affected laws schools were required to adapt. Part I of this article demonstrates that during the survey period, Canadian law schools were working to ensure that their common law programs satisfied the National Requirement. For example, they now provide a

¹⁰⁹ Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, *Final Report* (October 2009) at 3.

¹¹⁰ *Ibid* at 3. The changes listed in the report were the following:

- Recent provincial legislation respecting access to regulated professions that require transparent, objective, impartial and fair admission processes for applicants;
- An increase in the number of internationally trained applicants for entry to bar admission programs and the proposed creation of new Canadian law schools for the first time in 25 years, giving rise to a corresponding need to articulate what law societies regard as the essential features of a lawyer's academic preparation;
- Federal and provincial commitment to national labour mobility and harmonized standards, including an agreement whereby professions are viewed as national entities that must have the same admission standards, so that anyone certified for an occupation by a regulator in one province or territory must be recognized to practise that occupation in all other provinces and territories;
- National mobility initiatives adopted by the legal profession, beginning with the 2002 National Mobility Agreement.

¹¹¹ *Ibid* at 3-4, 7.

¹¹² *Supra* note 6.

¹¹³ See Marie-France Albert and Philip Bryden, "Response of the Council of Canadian Law Deans to the Consultation Paper on the Canadian Common Law Degree", online: (15 December 2008) <<http://www.cclld-cdfdc.ca/index.php/reports-and-publications>>; Richard Devlin *et al*, "Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada", online: (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102596>.

¹¹⁴ *Supra* note 6.

dedicated course on ethics and professionalism¹¹⁵ and ensure that all students acquire a basic knowledge of the rights of Aboriginal peoples of Canada in a constitutional context.¹¹⁶ Clearly, law schools will do what is necessary in order to satisfy the National Requirement.

Within a few years, I expect that the FLSC will review and probably modify the National Requirement. If law schools have failed to act on a voluntary basis, the review process would provide the FLSC with the ideal opportunity to correct the major deficiencies identified in Part 2 of this article: ignorance of other legal systems, including Quebec's civil law system, and spotty knowledge with respect to the interpretation of bilingual and bijural legislation. Changes to the National Requirement with a view to addressing these deficiencies would finally allow all law students to obtain a truly Canadian legal education and ensure that they have acquired essential competencies needed to practise law in Canada and in a global environment.

Whether or not the relatively minor changes to law school curricula described above are the result of voluntary law school initiatives or of enhanced Federation requirements, such adjustments would be beneficial in other respects, over and above matters of competence, national mobility and globalization. In particular, knowledge of other traditions would allow legal professionals to begin or to pursue a critical examination of certain elements of their own traditions, to identify strengths and weaknesses, and perhaps to change certain components in order to remedy problems that emerge from that examination. The existence of different legal traditions within the Canadian federation is an important asset, one that could give rise to dialogue and to productive exchanges, that would lead to greater openness by lawyers and the courts and that could give rise to better law. In short, increased interaction of legal cultures could make a powerful contribution to the development in Canada of the law generally.

4. Conclusion

Now is the time to ensure that law students acquire competencies that will allow them not only to be more competent and mobile but also to more easily interact with other legal systems and traditions, in Canada and abroad. Part 3 contains suggestions that can be adopted with relative ease. One can only hope that such steps will be taken in the near future, thereby ensuring that law students acquire a truly Canadian legal education, one that equips them for the practice of law in Canada and elsewhere.

¹¹⁵ *Supra* note 6, s C-1.4.

¹¹⁶ *Ibid.*, s 3.2. a.