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CANADIAN LEGAL HISTORY— RETROSPECT AND PROSPECT

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This edition of the Osgoode Hall Law Journal is devoted to examining the past efforts and future prospects of Canadian legal history, based on papers presented to the Canadian Legal History Conference in 1981. When invited to address the Conference and to preface this edition, I accepted not without a certain reticence as I did not feel wholly competent to draw a fair evaluation of the subject with respect to common law provinces. I shall deal principally, therefore, with the history of Quebec law and readers may draw whichever parallels and contrasts that are justified.

The first question that we should ask ourselves at this point is: exactly what do we know about Canadian legal history?

Professor Risk in his article entitled *A Prospectus for Canadian Legal History*¹ gave a short, clear answer when he wrote that “we know almost nothing about our legal past. We have not even accumulated and organized most of the major facts, let alone thought about them.”² This rather pessimistic view was shared by Peter Maddaugh when he published his *Bibliography of Canadian Legal History*.³ He confessed that he was “astounded by the vast expanse of virgin territory awaiting exploration.” And he added: “To date, we have only tentatively traced the outlines of this vast terrain and, within these borders, the surface has been barely scratched.”⁴ The Symons’ *Report on Canadian Studies*⁵ also presented Canadian legal history as a par-

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¹ Risk, *A Prospectus for Canadian Legal History* (1973-74), 1 Dalhousie L.J. 227.

² *Id.*

³ *A Bibliography of Canadian Legal History* (Toronto: York University Law Library, 1972).

⁴ *Id.* at ii.

⁵ *To Know Ourselves: the Report of the Commission on Canadian Studies* (Ottawa: Assoc. of Univ. and Colleges of Canada, 1975) at 214.

ticularly neglected field startling in its lack of research and writing. Indeed, in the last decade, those who examined the condition of legal history in Canada were virtually unanimous in judging it to be very poor. Things have changed since then, but is the change significant?

I. THE LEGACY OF THE PAST

Anyone interested in Canadian legal history is aware of the fact that this field of knowledge has received rather sporadic treatment from historians. There has been no consistent interest over the years, but rather a kind of wave motion which started, as far as Quebec is concerned, around 1870. The first wave lasted until the turn of the century, but throughout the last one hundred years, interest in our legal history has been a recurring phenomenon with periods of twenty to thirty years marked by considerable activity, followed by almost equal periods when no one seemed to pay any more attention to the subject. As a result, the work appears disconnected and is often repetitive.

Those who contributed to the exploration of our legal history in the late nineteenth century and during the first half of the twentieth were mostly amateurs, seldom professional historians. They recruited themselves principally among lawyers and notaries; their main concern was twofold: on the one hand, biographies of judges, lawyers and legal administrators, and on the other hand, short articles that can be classified together as anecdotes or quaint stories. For example, many are familiar with those too numerous articles relating to such topics as "The first capital execution in Canada", "The first State trial", "Early bench and bar in the province" and so on. Unfortunately, this sort of literature takes us nowhere. It is of little assistance in broadening the understanding of our legal institutions of the past.

There have been, nonetheless, some few exceptions to the rule. At the end of the last century, two books were published which still to this day are noteworthy. I refer to Joseph-Edmond Roy, *Histoire du notariat*⁶ and to Edmond Lareau, *Histoire du droit canadien*.⁷ The latter presents a general survey of Quebec legal history from the beginning of the seventeenth century to the end of the nineteenth. Of course, the work looks largely outdated now, mainly because of the great emphasis laid on political events and legislative history. Despite its obvious shortcomings, however, Lareau's book remains a landmark that, to the best of my knowledge, has no counterpart in English Canada. Unfortunately, no one has since undertaken to write a similar work that would consider a wider range of legal history in light of improvements in historical knowledge and methodology.

Contrary to what might have been expected, Lareau's work did not generate any renewed interest in legal history. It was not until the post First World War years that a revival occurred, led in Quebec by E.Z. Massicotte and P.-G. Roy, contemporaries of W.R. Riddell in Ontario, and whose publications were, incidentally, quite comparable to Riddell's. In this period,

⁶ *Histoire du notariat au Canada depuis la fondation de la colonie jusqu'à nos jours* 4 vols. (Levis, 1899-1902).

⁷ *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours* 2 vols. (Montréal: A. Périard, 1888-1889).

however, few major works were written with respect to Quebec law. Those worth mentioning are DuBois Cahall's study on the *Sovereign Council of New France*,⁸ W.B. Munroe's *The Seigniorial System in Canada*,⁹ which is still a valuable source of reference on the matter, and Hilda Neatby's *The Administration of Justice under the Quebec Act*.¹⁰

On the whole, the number of pages written on or about our legal history before 1960, is quite impressive. However, the inventory of what may be considered "fundamental" is surprisingly low. Apart from very few books and a small number of articles, the legal historian of the 1960s almost had to start anew.

The most valuable legacy of the past years remains the publishing of primary sources. During the nineteenth century, two important series of sources concerning Quebec legal history were printed: first, a large selection of the colonial legislation of the French regime,¹¹ and second, a full text of the judgments of the Superior Council of Quebec.¹² By subsidizing these two publications, the Quebec government of the time was actually a forerunner. Since then, the public archives, both federal and provincial, have taken over the task of publishing documents relating to the constitutional history of Canada, the legislation of the provinces, and the administration of justice.¹³ All historians are well acquainted with these texts but their meaning and importance for legal historians have not yet been fully apprehended.

Referring to Professor Risk's statement quoted earlier, I am not far from agreeing with him when he wrote that "we know almost nothing about our legal part."¹⁴ I would have subscribed to his opinion without hesitation if he had expressed it ten years earlier but, in 1973, many things had already changed and there were indications of new and promising trends.

II. NEW TRENDS

The teaching of history at the university level has given rise to a new generation of historians who have broadened their vision of history and have become aware of the importance of legal sources for a better knowledge of the

⁸ *The Sovereign Council of New France* (New York: Longmans, Green, and Co., 1915).

⁹ *The Seigniorial System in Canada* (New York: Longmans, Green, and Co., 1907).

¹⁰ *The Administration of Justice Under the Quebec Act* (Minneapolis: The Univ. of Minn. Press, 1937).

¹¹ *Edits, Ordonnances Royaux, Declarations et Arrêts du Conseil D'état du Roi concernant le Canada* 3 vols. (Québec: E.R. Fréchette 1854-1856) (being an enlarged edition of a former one in 2 vols. published in 1803-1806).

¹² *Jugements et délibérations du Conseil souverain de la Nouvelle-France* 6 vols. (Québec, 1885-1891), covering the years 1663 to 1716.

¹³ Shortt and Doughty, eds., *Documents relating to the Constitutional History of Canada* 3 vols. (Ottawa: Public Archives of Canada, 1918-1935) (covering the years 1759 to 1828); Kennedy and Lanctôt, *Reports on the Laws of Québec 1767-1770* (Ottawa: Public Archives of Canada, 1931); *Reports of the Public Archives for the Year 1913, 1914-15, 1918* (Ottawa: Public Archives of Canada, 1914, 1916, 1920) (legislation from 1759 to 1791); *Rapport des Archives nationales du Québec* (Québec, published yearly since 1920-21).

¹⁴ *Supra* note 1.

past. In Quebec, scholars such as Louis Lavallée,¹⁵ Gilles Paquet and Jean-Pierre Wallot¹⁶ have drawn historians' attention to the significance of notarial deeds as a source of social and economic history. At the same time, others have undertaken intensive research in the judicial archives of the civil and criminal courts. Their work has produced some impressive results, for instance that of John Dickinson¹⁷ who has written about the Provostship of Quebec, André Lachance's thesis on the criminal justice system¹⁸ as well as his other writings on the French regime, and the recent research conducted by Douglas Hay¹⁹ and Louis Knafla²⁰ on English criminal justice in Quebec.

If a similar development of legal history has indeed taken place in the law schools, it is far from having had a similar impact. Those who teach legal history to law students are no longer recruited from amongst the most junior faculty members. They are not amateurs anymore, yet they are not numerous either, especially those devoting themselves to the study of Canadian legal history, as opposed to French or English legal history. However, in many law schools, Canadian legal history has as yet no place at all. Some legal historians have turned to the teaching of other areas of the law. Consequently, the paucity of research and writing²¹ emerging from the law schools is not surprising.

The evident disparity which has developed over the years between historians who are interested in legal institutions and legal historians in the law schools should be a matter of concern to us all.

Professor Risk is correct when he says that "legal history should not be the monopoly of lawyers."²² But this is not to say that both historians and lawyers should pursue the same objectives with the same means; or that, while examining the same source documents, they should aim to discover the same things. In fact they do not, for our modern conception of legal history is much wider than it was some years ago. Legal history is no longer a flat and unattractive description of legal institutions. It has, instead, a much more ambitious purpose. It must meet a challenge which is both great and complex and anyone who explores the history of the law contributes to its understanding according to his own interests, skills and limitations.

Nevertheless, the study of legal history requires a fair amount of technical knowledge, which lawyer-historians do possess, but which is most uncommon

¹⁵ Lavallée, *Les archives notariales et l'histoire sociale de la Nouvelle-France* (1974), 28 RHAF 385 (Revue d'histoire de l'Amérique française).

¹⁶ Paquet et Wallot, *Les inventaires après décès à Montréal au tournant du XIX^e siècle: préliminaires à une analyse* (1976), 30 RHAF 509; see also Morin, *La représentativité de l'inventaire après décès, l'étude d'un cas: Québec au début de XIX^e siècle* (1981), 34 RHAF 515.

¹⁷ *Justice et justiciables, La procédure civile à la Prévôté de Québec, 1667-1759* (Québec: Presses de l'Université Laval, 1982).

¹⁸ *La justice criminelle du roi au Canada au XVIII^e siècle, Tribunaux et officiers* (Québec: Presses de l'Université Laval, 1978).

¹⁹ Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774," in Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfrid Laurier U. Press, 1981) 77.

²⁰ *Id.*

²¹ *Supra* note 5.

²² *Supra* note 1, at 229.

among historians who have not undergone legal training. No blame may be attached to the latter, for if anyone is to be blamed it is the lawyers who are at fault for not having provided their knowledge. This is one of the consequences of the stagnation of historical research in the law schools. As a result, some historians venture into the field of legal institutions without sufficient legal knowledge. Their effort and research, therefore, often suffers from unfortunate misinterpretations which may not be apparent to a non-lawyer reader. In fact, any legal historian (be he a lawyer or not) should acknowledge his own limitations.

Canadian legal history has made more rapid progress in the last fifteen years or so than it has during the whole preceding century, and the main contributions have come from non-lawyer historians. Nevertheless, our knowledge remains very incomplete and, in some cases, quite wrong. The research topics are numerous and every legal historian has an abundance of themes and materials to choose from. Some general outlines of prospective research can be drawn, however, by way of certain observations.

Legal institutions have traditionally been a favourite subject. Not surprisingly, therefore, this need not be a priority of the discipline. In this country, constitutional history has been overstudied and has become boring, as have the redundant descriptions of the courts, their structures and their jurisdictions. Nevertheless, our knowledge of the legal institutions remains unsatisfactory. Those who, like John Dickinson,²³ have set aside the traditional descriptive approach and have studied the actual functioning of the courts through the judicial records, have demonstrated that there is room for more varied research.

The superior governing and administrative bodies have always drawn the attention of historians, unlike the subordinate institutions which have been consistently disregarded. What do we know, for instance, about local government or inferior tribunals, such as the Seigneurial courts in Quebec?²⁴

It may be that the history of the common law in English Canada does not exist as a separate topic; that, because of its very nature, it is part of the study of the common law itself. But as regards the civil law of Quebec, such is not the case. Of course, the legal doctrines, the customary or statutory rules of the law are known, or are accessible by any legal historian. But no one may be certain that the law which is stated in the law books is the law that was practised between individuals in society and applied by local tribunals. Rather, it is more likely that there has existed a discrepancy between the official law and the living law, but to what extent we do not know. What were the significant influences that caused the adjustment of the law to new environments? These are the real questions that confront the legal historian if he is at all concerned with the history of the private law. The answers to these questions cannot be found by anyone other than lawyer-historians, and not before they devote their energies to the meticulous investigation of the materials in the archives and to the shrewd analysis of private deeds and court records.

²³ *Supra* note 17.

²⁴ Dickinson, *La justice seigneuriale en Nouvelle-France: le cas de Notre-Dame-des-Anges* (1974), 28 RHAF 323.

Until recently the criminal law had been the most neglected part of our legal history. It is now the area that exerts the most powerful attraction to researchers, for it is the most spectacular branch of the law and the most violent expression of society's attempt to enforce its values and its notions of social order. The many research endeavours carried out over the last few years in England as well as in France on this subject, are almost a prerequisite to any serious attempt to understand and evaluate the nature and the meaning of the criminal law in Quebec pre-1760 and in Canada after the Conquest. A comparative approach is not only useful but necessary.

It is not advisable that I should try to enumerate a series of research topics, since anyone who ventures into the field of our criminal law history is a pioneer and personal preferences and expertise will naturally dictate one's choice. Of course, legislative history, description of substantive law and procedures and legal theory, should neither be avoided nor underestimated; but I cannot but feel confident for the future when I observe that many of those who have undertaken research on our criminal law are paying so much attention to the daily practice of courts, as this type of research is apt to disclose the local adaptations of a criminal system received from abroad and also the deviations from that system in the living law.

Finally, one of the most pressing needs is the undertaking of a treatise on Canadian legal history. This requirement may seem irrational insofar as we have not yet accumulated sufficient knowledge of our legal past and a comparative survey of the discipline may, at first glance, appear to be premature. Occasionally, however, unreasonable dreams turn into profitable results.