

McGill's Integrated Civil and Common Law Program

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The McGill Program, as we have come to call it at my university, is now in its third year of existence.¹ The first class to graduate will do so in June 2002. Simply put, the program is an attempt to integrate as fully as possible, in a three-year curriculum of 105 teaching credits, a bijuridical or bijural training in civil law and common law. Subject to certain qualifications which I will introduce later in this article, *civil law* means here the law in force in Quebec, set against the general background of the Napoleonic civil law tradition; *common law* refers to the law in force in Canada outside Quebec and, more generally, the Anglo-Canadian common law tradition. The design of the program began in 1995. It received final university approval in the fall of 1998. Full implementation will take until the spring of 2003, and new courses developed specifically for the purpose of transsystemic teaching are still being phased in.

Although bijural legal education appears to be gaining popularity in North America and in Europe, the McGill Program probably carries the idea of transsystemic teaching further than any other program currently offered by a Western university.² An overview of the program may therefore be useful. In explaining what it consists of, I will address three basic questions. Why did this program come into existence at McGill? What are its defining features and what are its objectives? What practical difficulties arise in the design and implementation of such a program?

Context and Raison d'Être of the McGill Program

The answer to the first question turns primarily on history and general context. A great deal could be said here for at least three reasons. First, the program fits the reality of the Canadian legal system, which itself has arguably practiced a form of bijuralism for longer than many other legal systems. In that sense, the justification for offering such a program was more compelling

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1. In Canada, of course, we spell it differently: it is the McGill Programme.
2. *Bijural* and *transsystemic* are used here as synonyms. At McGill, despite some reasoned opposition from certain members of faculty, the latter term has gained a de facto advantage over the other.

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in Montreal, and at McGill particularly, than it could ever have been in, say, Chicago or Bordeaux. Second, McGill is an old law school (it was founded in 1848), and the roots of its program run many decades back, deep into the history of the institution. Third, the program is also a response to a more recent combination of extrinsic factors which in the early 1980s and 1990s came to bear on the Faculty of Law at McGill and made a transsystemic curriculum institutionally attractive. These factors include the evolution of student demographics in Canadian law teaching, employment economics in the legal profession, and—forgive the cliché—globalization, as well as the state of Canada-and-Quebec politics since the 1980s. In short, the McGill Program did not take shape in a vacuum: it is McGill's institutional answer to a composite of internal and external pressures.

Since these influences have already been examined in published articles by a few of my McGill colleagues, I need not describe here in detail the specific context of legal education at McGill. The question, in any event, is bound to be of limited interest to observers outside McGill. But there is one general and preliminary point which is worth making, a point that may seem paradoxical. It might be thought that a transsystemic program, as an intellectual undertaking, will embody a comparatively more abstract and more universalist conception of the law, that its approach will be more detached from the local legal system than the conventional monosystemic approach common to a majority of law faculties. At the same time, however, the creation of a transsystemic program may in fact be a response to a highly specific and situated set of circumstances, so much so that the resulting curricular reform may not easily be transplanted to other jurisdictions.³ A succinct description of the McGill context is therefore appropriate here. It will underscore this paradox and convey a sense of the particularism that inspired the creation of the transsystemic program now taught at McGill.

These additional elements of information throw some light on the three reasons which I mentioned and to which they relate. They show, I think, why *local* history and context mattered so much in the design of the McGill Program, and why the outcome of this curricular reform was largely preordained by a combination of factors not found elsewhere.

First and foremost, there is the distinctive Canadian legal environment. Canada, as is all too well known, is a federal country, where two systems of

3. Two of my colleagues have touched on this question in articles that consider the implications of the McGill Program. Adelle Blackett underlines the tension between the local (geography, history, tradition, language, etc.) and the global or transnational law teaching. See *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 *Colum. J. Transnat'l L.* 57 (1998). Daniel Jutras writes:

[I]n large measure, cross-cultural legal education is a project for a law school serving a relatively limited market, or serving the needs of a very particular area of legal practice. It is a project for a law school that finds at least part of its identity outside the community that it serves immediately. If one makes the argument for cross-cultural legal education on a professional basis, there is no need for all law schools to envisage, as part of the basic degree in law, an integrated or sequential education in more than one legal tradition.

See *Two Arguments for Cross-Cultural Legal Education*, in *3 Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, eds. H. D. Assman et al., 75, 82 (Baden-Baden, 2001) (footnotes omitted).

private law—a civil law system in Quebec and one or several common law systems outside Quebec—have coexisted with greater or lesser felicity since the late eighteenth century. So much has been written on this question that delving into it in this article is unnecessary. Nor is this the place to take a position on the controversies that have arisen about the true identity of the Quebec civil law tradition—its faithfulness, or degree of adherence, to its French roots, and the merits of the 1994 recodification.⁴ Suffice it to say that for decades it was accepted among Canadian jurists—lawyers, judges, and academics alike—that they lived in a bisystemic country; most of them may have rarely had to deal with the “other” legal system, but its existence within Canada was never in dispute. During and after the 1970s the progress of legal bilingualism and of mobility within the legal profession, and the impact of the 1994 recodification of Quebec law on *federal* legislation, all noticeably enhanced the cause of bijuralism in Canadian law. Canada today is probably one of the rare countries (or federated conglomerations of states) that have a declared and sophisticated policy on bijural legislative drafting.⁵ In other words, the Canadian context of official, state-declared, positive law always seemed receptive to bijuralism, and it has become increasingly so in recent times. That may be one of the reasons why, in North American legal literature, words such as *bijural* or *transsystemic*, which are not commonly used,⁶ tend to be used by Canadians writing on Canadian law or on international law.⁷

4. I mean here by “1994 recodification” the process, begun as far back as 1955, that led to the replacement on January 1, 1994, of the Civil Code of Lower Canada, enacted in 1865, by the Civil Code of Québec, enacted in 1991.
5. Not long after the coming into force of the Civil Code of Québec, the implications of bijuralism were explored in a systematic way by a group of academic and government lawyers at the request of the Canadian government; see *The Harmonisation of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Department of Justice (Ottawa, 1997). A second collection of studies, again by academics and government lawyers, appeared under the same title and as a “second publication” in 2001, following the introduction in Parliament of harmonization legislation which bears the clear imprint of the theoretical work published in 1997. The First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain acts in order to ensure that each language version takes into account the common law and the civil law, S.C. 2001, c. 4, was given royal assent on May 10, 2001. According to a summary prepared by the Parliamentary Research Branch, the purpose of the bill was
 - (i) to enact three provisions relating to marriage (consent, the minimum age, and cases where a new marriage may not be contracted) that apply solely to the Province of Quebec; (ii) to repeal the pre-Confederation provisions of the 1866 *Civil Code of Lower Canada* falling within the legislative jurisdiction of the federal government; (iii) to amend the *Interpretation Act*, R.S.C. 1985, c. I-21, (iv) to include rules of interpretation recognizing the bijural tradition in Canada so as to clarify the law to be used as the suppletive law to federal law and the bijural provisions in federal statutes; and (v) harmonize the *Federal Real Property Act*, S.C. 1991, c. 50, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and a number of other federal statutes.”
6. A full-text search in Westlaw’s JLR database will not proceed for words such as *judicial* or *judicial*, obviously because they are too common. Even *jural* brings up several hundred references. By contrast, *transsystemic* yields only two references, as does *bijural*, while *bijuralism* yields six references.
7. For example, *transsystemic* appears in William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *La. L. Rev.* 677 (2000) [hereinafter *Mixed Jurisdictions*], and, oddly enough, in a 1974 review by Stanley L. Paulson of an essay published by Tony Honoré in the *Oxford Essays in Jurisprudence (Second Series)*, 1973; see 87 *Harv. L. Rev.* 898

It should not be forgotten, naturally, that the bijural profile of Canada is not without its peculiarities. As a general proposition, Canadian bijuralism confines itself to private law, which excludes, inter alia, constitutional, administrative, and criminal law. And even then, there are large swaths of private law proper (divorce, for example), as well as commercial and business law (e.g., business associations, banking and bills of exchange, bankruptcy, securities), or procedural and adjectival law (the structure of the courts, the adversarial system and civil procedure, statutory interpretation), where the common law tradition dominates or occupies the field through and through, or where law has become *asystemic*. It is in large measure because of the particular configuration of this mixity, or *métissage*, that some commentators have raised questions about the density of the civil law tradition still present in Canada.⁸

McGill, it need hardly be added, is not the only Canadian university that offers a legal education. Why did McGill and no other university react to this environment as it did? Interestingly, the strong tradition of teaching and scholarship in civil law and in comparative law that was built at McGill spans the period from the mid-nineteenth century to this day. This institutional inclination may originally have been due in part to McGill's favored position as an "establishment" law school, a description which may have been more accurate, or more complete, a century ago than today.⁹ Montreal at the time qualified as Canada's financial and industrial center of gravity. As the only English-speaking law school in Quebec, the Faculty had to face a particular reality: many of its graduates would practice law, and notably commercial law, across systemic boundaries, and they needed some exposure to private common law. But there would soon be more at stake than a mere practicality. In 1897 McGill had appointed as the dean of its Faculty of Law a Scottish civilian and Romanist from Glasgow, Frederick Parker Walton, who was succeeded in 1915 by an English Romanist from Oxford, Robert Warden Lee. Neither belonged to the local legal profession, both came from distant but prestigious academic quarters, and both brought to the institution a high degree of

(1974). *Bi-jural, bijural, and bijuralism* appear in William Tetley, *The Law of the Flag, "Flag Shopping," and Choice of Law*, 17 *Tul. Mar. L.J.* 139 (1993); Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 *Yale J. Int'l L.* 67 (1996); Bradly Condon, *Nafta at Three-and-One-Half Years: Where Do We Stand and Where Should We Be Headed? A Cross-Cultural Analysis of North American Legal Integration*, 23 *Can.-U.S. L.J.* 347 (1997); Blackett, *supra* note 3; Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 *San Diego L. Rev.* 1053 (1998) (as part of a description of the Canadian legal system); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *Tulsa L.J.* 15 (1998); Louise Lussier, *Enforcing Judgments Abroad: The Global Challenge—A Canadian Perspective*, 24 *Brook. J. Int'l L.* 31 (1998); Nicholas Kasirer, *Lex-icographie mercatoria*, 47 *Am. J. Comp. L.* 653 (1999); Tetley, *Mixed Jurisdictions, supra*; Jeff Berryman, *Teaching Remedies in Canada*, 39 *Brandeis L.J.* 565 (2001).

8. Notably Valcke, *supra* note 7; Catherine Valcke, *Legal Education in a "Mixed Jurisdiction": The Quebec Experience*, 10 *Tul. Eur. & Civ. L.F.* 61 (1995). But see also the telling observations of Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 61 *Tul. L. Rev.* 1591, 1602 (1992).
9. At the time of the Canadian Confederation in 1867, there were 110 McGill law graduates working across the country, two of whom would in due course become prime ministers of Canada.

commitment to the scholarly study of law. It is under their influence¹⁰ that the curriculum evolved toward a first bisystemic civil/common law program, which was offered sub rosa in the 1910s and officially between 1920 and 1924.¹¹ This curriculum was a first iteration of what would become known fifty years later as the National Program. Various reasons,¹² faintly echoed by some recent reactions to McGill's new transsystemic program, explain the failure of the program launched in 1920, but by any standard it was a bold and innovative initiative in legal education. Its stated objectives are worth recalling here, for they express in the language of the 1920s what would figure prominently among the stated objectives of our present program:

The Faculty now aims at giving a sound practical and scholarly education in the principles of:—The Civil Law of Quebec; The Common Law and Statute Law of Canada; Constitutional and Municipal Law; Public and Private Institutional Law; Institutes of Roman Law; Theoretical and Comparative Jurisprudence. The courses selected by students will largely depend upon whether they wish to practise law in the Province of Quebec or in some common law jurisdiction.¹³

The National Program, of which the short-lived 1920 curriculum was a harbinger, would be offered in the Faculty between 1968 and 1999. I will have more to say on the National Program in a moment, when I look at our current curricular structure. But my point here is that, for McGill's Faculty of Law, the design and the implementation of the transsystemic program would most likely not have been possible, and indeed might even have been unthinkable, had the Faculty not accumulated the institutional experience we gained over three decades with the National Program. The articulation between these two

10. And that of Herbert Arthur Smith, trained in Oxford, who had spent a number of years in the United States, and who was recruited by the Faculty in 1920 as professor of jurisprudence and common law. Lee had no formal training in civil law. He finished his career as professor of international law at the University of London.
11. A thorough and fascinating account of this period in the Faculty's history will be found in Roderick A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects*, 13 *Dalhousie L.J.* 211, 243–60 (1990). Macdonald, a former dean of the Faculty (1984–89), traces the distant origins of polyjuralism at McGill: “[B]y the late 1850s, the major elements of McGill's first polyjural, universalist and bilingual curriculum were in place.” *Id.* at 225. Throughout, a tension could be felt in the Faculty between “unificationists” and “polyjuralists.” See also J. E. C. Brierley, *Developments in Legal Education at McGill, 1970–1980*, 7 *Dalhousie L.J.* 364 (1982).
12. The part-time, civilian, “judge and practitioner” professors were resentful of Smith's and Mackay's [two full-time faculty members recruited by Lee] ambition to make law a full-time programme, to require professors to become full-time scholars, and to broaden the intellectual orientations of the curriculum. The elite anglophone Bar of Montreal was hostile to any development which, by facilitating the dispersal of McGill graduates across the country, might lead to the weakening of its representation in the Quebec legal profession. Other law societies, and especially the Law Society of Upper Canada, strenuously resisted university based legal education, and even as McGill's common law degree was achieving recognition in the U.S. it was scorned in Ontario.

Macdonald, *supra* note 11, at 259–60.

13. Faculty of Law Announcement, 1920, *quoted in id.* at 258.

programs is obvious.¹⁴ What is less obvious is that the National Program itself, as I think will have become apparent from the foregoing observations, had deep intellectual roots in the history of the Faculty. One might argue that, in Canada at any rate, only McGill, because of its particular situation and ethos, could adopt the approach to legal education that its curriculum evinced between 1920 and 1924, and subsequently after 1968.

Finally, more recent and perhaps more transient factors also contributed to the adoption of the McGill Program. Obviously, the context of the late 1980s and early 1990s mattered: the advent of NAFTA and of the WTO, globalization and further economic integration (in Europe as elsewhere), all favored in a more or less diffuse way the growth of a bijural or transsystemic legal education. Already in the 1980s the number of courses taught at McGill from a partly transsystemic perspective was steadily growing. Practical considerations weighed in favor of maintaining and enriching these course offerings. More and more McGill students were being solicited by foreign law firms (American, notably). As mobility increased within the legal profession, not simply in Canada or in North America but also between North America, Europe, and Asia, employment abroad became an attractive career opportunity for McGill students. Whether a student was looking at a job with the International Civil Aviation Organization in Montreal, with Unidroit in Rome, or with an international law firm in Brussels or New York, a working knowledge of the two main Western legal traditions, a capacity to operate with perceived ease in different legal systems rooted in these traditions, and bilingualism were advantages in the hiring process. McGill's diaspora expanded spatially, and the horizon of the National Program thus began to shift.

One last factor at play was the political situation in Canada, a situation which a sizable portion of McGill's student body and alumni did not perceive as neutral. There were at least two facets to this question. Although no attempt has ever been made to measure and compare their respective spread, there is little doubt that, among those of Canadian law schools, the McGill alumni population has long been one of the most broadly distributed, both across the country and abroad. For years, and possibly since the very early days of the Faculty of Law, a fluctuating proportion of students originally from Quebec chose to leave the province upon graduation. After the mid-1970s the risk that Quebec might secede from Canada became a genuine concern for some graduates and an added reason to look for work outside the province. The National Program opened the possibility of finding employment in a common law jurisdiction. But conversely, and this is the other facet of the question, unless McGill's law program was made especially attractive to out-of-province students, persuading them to come to the Faculty for their legal education would become more difficult in light of political events.

The National Program had already addressed these concerns to some extent, but after its twenty-five years of existence one could begin to detect in

14. To date, the most in-depth study of this articulation and of the aims of the McGill Program is Julie Bédard's *Transsystemic Teaching of Law at McGill: Radical Changes, Old and New Hats* 27 *Queen's L.J.* 237 (2001). Bédard, a graduate of the National Program, wrote the article while she was an associate in law at Columbia University.

the Faculty what I would call a case of National Program fatigue. The need to seriously rethink the structure of the curriculum, and to make it more attractive (or even exciting) all round, was being broadly felt in the Faculty. With accelerating globalization, and in the wake of a second referendum on Quebec's secession, the time seemed ripe to examine the possibility of a three-year fully integrated civil and common law program.

Structure and Objectives of the McGill Program

It is useful at this stage to describe in general terms the National Program and the McGill Program as they were offered respectively at McGill from 1968 to 1999, and after 1999.¹⁵ Both of these programs qualify as *bijural*, but the first tended to favor a sequential and comparative approach, while the second introduced in a number of key areas a transsystemic and integrated approach. Subject to two important qualifications discussed below, the two programs differ in degree rather than in kind, and the McGill Program can be seen as an extension and an intensification of a method already used in the National Program. In fact, the history of McGill's law curriculum after 1968 is one of progressive and ever increasing integration of the civil and the common law traditions, from juxtaposition to partial amalgamation where subjects permit it. But two qualifications are in order, one about the content of the curriculum and the other about its structure. The first concerns transsystemic courses, that is, courses where an area of law, usually a standard law school course such as Contracts or Secured Transactions, is treated as a unified field across the divide between the different legal traditions and where course materials, despite known differences between these traditions, are drawn simultaneously from standard civil law and common law sources to form an amalgamated whole. These courses, which at present are offered only in private law, represent the principal curricular change introduced by the McGill Program.¹⁶ They may actually amount to a difference in kind between this program and the earlier one. The second qualification is that, since 1999, students are no longer admitted to the civil law or to the common law stream but are admitted into a single civil and common law program, the McGill Program. In other words, the two admission pools of the National Program have been collapsed into the single pool of the McGill Program.

In its inception back in 1968, the National Program offered three possibilities to students entering law school: (1) completing a B.C.L. (the civil law degree) over three years and in 95 credits, or (2) completing an LL.B. (the

15. The cut, of course, first affected Law I; the National Program continued for a short transitional period, alongside the McGill Program, as it was being phased out. For a detailed description of both programs, see *id.* at 248–50; Jutras, *supra* note 3, at 80–82.

16. It would be inaccurate to say, however, that no attempt to integrate the two traditions in this fashion had ever been made before 1999. Several courses adapted to the demands of a Canadian law school curriculum did integrate civil and common law sources to the extent desirable in particular areas of law: for example, Labor Law—the law of organized labor relations, where some attention must be paid to contracts of employment at civil law and at common law, and to parallel delicts and economic torts—or National Civil Procedure—a course which for a number of years before the advent of the McGill Program dealt concurrently with procedural laws in common law Canada (typically Ontario) and in Quebec (where several key features of procedure originate from the civil law tradition).

common law degree) over three years and in 95 credits, or (3) completing seriatim the B.C.L and the L.L.B degrees, over four years and in 125 credits. At first, and for several years, a large proportion of the student population chose to graduate with a single degree.¹⁷ This tendency eventually waned, and in the last five or six years of the National Program's existence, most students typically received both degrees at the same time. Between 1968 and 1972 simultaneous graduation was not a possibility, and all students intending to take both degrees were required to do in separate academic years, taking their first degree in their third year and their second degree in their fourth year. After 1972 it became possible to take both degrees jointly. But the process was still compartmentalized and involved a side-by-side or sequential treatment, in other words a juxtaposition of civil and common law, rather than a truly integrated approach. Students completed basic private law courses in one or the other tradition in the first year, and not as a matter of choice but as was determined by their entry stream. Subsequently, in the second year or later, they had to complete the corresponding basic private law courses in the other tradition. They did so in the same classrooms as first-year students who had entered the Faculty in the other stream. Over time it became apparent that this approach generated certain undesirable side effects.¹⁸ In 1985, in order to resolve these problems, the Faculty introduced what would be the most important curricular reform implemented during the life of the National Program: "crossover" courses, restricted to upper-year students and having a lighter credit load than courses on the same subjects offered to first-year students who had entered the Faculty in the other stream.¹⁹

17. Macdonald gives some early figures; they must have been disappointing for the proponents of the 1968 reform. Macdonald, *supra* note 12, at 314–15, nn.241, 242.

18. If one wanted to be truly provocative, one could argue that the mark of a successful traditional legal education is that it instills in students a secure and sometimes also a rigid sense of the rightness of concepts and solutions validated by their legal system. One problem with the National Program as it was structured until 1985 was that civil law classes attracted from among upper-year common law students a small cohort of aspiring common law supremacists who professed a vague contempt for the "pontification" and "dogmatism" of the civil law, while the parallel common law classes attracted from among upper-year civil law students a small cohort of aspiring civil law supremacists who professed equal contempt for the "casuistry" and "shiftness" of the common law. The reform of 1985 was meant to alleviate this problem by introducing "crossover" courses specially designed for students who had already had at least one year of exposure to basic subjects in the other private law tradition.

19.

From 1985 to 1999 a different pedagogical approach was developed. Students would take either basic civil or common law instruction in their first year. In the second year each student would take again the basic topics (Contracts, Torts, Property) in the other tradition, but those second-year courses were taught on an explicitly comparative basis, drawing insight from the student's prior exposure to the same ideas in the first year. In the third and fourth year of the program, students would have various options to take courses in the civil law or common law tradition, in order to graduate with both degrees.

Jutras, *supra* note 3, at 80. Bédard says that in her own experience the comparative law content was weak, which may well have been true of many crossover courses, but it cannot be doubted that these courses all banked on the students' prior exposure to similar problems in another tradition. Bédard, *supra* note 14, at 241 n.10, 274 n.134.

¹ The National Program was a major advance for the Faculty, which owes to it a good part of its present reputation. Learning from this experience, but reacting also to the pressures outlined in the previous part of this article, the Faculty embarked in 1995 on a thorough reexamination of its entire curriculum. Members of the Faculty had debated sporadically for several years the idea of a single fully integrated three-year program, leading to both the B.C.L. and L.L.B. degrees, but the proposal had never received the full consideration of the Curriculum Committee. The process began in 1995, lasted four years, and produced several lengthy reports to Faculty Council. It is not a betrayal of confidences, nor is it an overstatement, to say that these efforts severely taxed the patience of many in the teaching faculty, the student body, and the administration. But that may be unavoidable when an institution undertakes a curricular reform on this scale.

As I indicated in the first few lines of this article, the result is a bijural program of 105 credits which called for the design of several new transsystemic courses in fundamental as well as upper-year private law subjects formerly taught in sequence, or comparatively, in tradition-specific courses. Before dealing with some of the difficulties typical of this kind of exercise, a few further observations may be appropriate on the general structure of this program and on its stated objectives.

Since in Canada a standard course load consists of 30 credits per year, it is only by taking six complementary credits in each of their first two summers²⁰ and by carrying a load of 33 credits in at least one of their three years that students will complete the McGill Program in three consecutive academic years. Finishing the program in three years may thus require a high degree of dedication.²¹ The 105-credit formula was one of several compromises achieved in Faculty Council after much soul searching. Students favored a 95-credit program but faculty, by a majority, took the view that 105 credits represented an incompressible minimum; anything less would damage the program's credibility, even taking into account the gains made with the introduction of transsystemic courses. In the end, however, the course structure on which the Faculty agreed is fairly conservative. Among basic private law courses, which in many faculties are taught in first year, Property retained its systemic specificity, it being considered unsuitable for transsystemic treatment. The courses that currently qualify for transsystemic teaching are the following. (A single asterisk marks first-year courses; the course with two asterisks may be taken as an elective in the first year.)

- Contractual Obligations (6 credits) *
- Extra-Contractual Obligations/Torts (5) *
- Introductory Legal Research (3) *
- Business Associations (4)
- Comparative Federalism (3)

20. After the implementation of the McGill Program, the Faculty of Law substantially relaxed its rules on summer credits taken at McGill or other universities; it is expected that, in the near future, law courses taught by members of faculty will be offered in the summer.

21. The latest available figures indicate that 58 of the 155 students who registered in the McGill Program in September 1999 will have completed the program and graduated by the end of June 2002.

Evidence (Civil Matters) (3)
Family Law (3)**
Legal Methodology (4)
Private International Law (3)
Sale (4)
Secured Transactions (4)

A progressive but cautious expansion of this list is to be expected.

Civil Law Property (1st year, 5 credits), Common Law Property (2d year, 4 credits), Advanced Civil Law Obligations (2d year, 2 credits), and Advanced Common Law Obligations (2d year, 2 credits) bolster with tradition-specific topics the transsystemic offerings; they are *compulsory* courses. Students are of course free to take a number of additional tradition-specific courses, such as the civil law of Lease, Enterprise, and Suretyship (3 credits) or the Law of Persons (3), or, on the other side of the traditional divide, Equity and Trusts (3) and Restitution (3). At a strict minimum—and not as a recommended course of action, nor as a particularly practical proposition—a student intent on satisfying all the dual-degree requirements while completing the smallest possible number of private law courses would still have to take 38 credits of civil and common private law, or about thirteen three-credit courses. But on a normal application of degree requirements, which were always fairly constraining at McGill, the exposure to private law subjects will easily exceed this minimum load.

The reform of 1999 was also the occasion for a more introspective debate on the skills imparted by the program and on the particular form of jurisprudential awareness it can cultivate in students. One of the objectives of the reform was to provide students with new learning opportunities that would help them overcome the National Program fatigue I mentioned above. To this end, the Faculty also approved and deployed along with the McGill Program an ambitious program of human rights internships, minors in other disciplines, majors in particular fields of legal specialization, and an honors thesis add-on. Although there is nothing characteristically bijural about these other features of the program, they show that a reform of this magnitude invites a reconsideration of other systemic issues in curriculum management.

McGill is much like many other North American law schools: feminism, history and sociological jurisprudence, law and economics, social *progressisme* through human rights, and other perspectives on law, including analytical jurisprudence in the English mode and more conventional forms of doctrinal positivism, are all represented among its teaching staff. None of these perspectives is dominant. But above all else, perhaps, there is in the school a lengthy tradition of comparative law, or polyjural scholarship. The perception that the Faculty has of its own mission is therefore inevitably influenced by the weight of this tradition. It may be an overstatement to call it a shared theory of law (and I do not wish to imply that comparative law even qualifies as a *theory* of law), but most faculty members do have a marked penchant for comparative work as a methodology and have a keen research interest in polyjural inquiries. Nicholas Kasirer explores in this journal a view of comparative law which is

shared by several McGill colleagues. Daniel Jutras has offered a different vision, also common in the Faculty.²² It bears repetition that McGill's Faculty of Law, from its earliest days, perhaps because of the proximity of a vastly influential *other* legal tradition, has always been habited by the conviction that a great deal can be gained in legal scholarship from a sustained and humble dialog with *otherness*. Indeed, the Faculty may now have reached a stage in its history where it feels the need to expand the scope of comparative law well beyond the boundaries of civil and common law.²³

Some Problems of Implementation

This third aspect brings to mind, first and foremost, practical issues, such as the process and the details of curricular design, the content of teaching materials, the choice of teaching methods, the reallocation of faculty resources, the impact on adjunct teaching staff, and the like. The curricular reform of 1995–99 affected most aspects of Faculty life, from admissions to hiring, student evaluations, faculty research and scholarship, prizes and distinctions, even alumni relations.

Inevitably, the intellectual legitimacy of the project is also a potential source of concern. A fully integrated bijural program requires faculty to redefine, or at the very least to consider critically, the boundaries and content of core subjects such as obligations, contract, and torts. Are these colleagues then still teaching what at other institutions is understood to be obligations, contract, or torts? To what extent is it realistic to attempt to develop a new comprehensive terminology encompassing, for example, fault, negligence, and trespass? While it is too early to speak of a theory of bijurality, we see emerging at McGill a common approach to analytical problems of this kind, and there already appears to be a degree of consensus on how these problems should be tackled. Annual retreats on the McGill Program are one of the ways in which faculty grapple with these concerns, as is a just-begun quarterly in-house newsletter on transsystemic research.²⁴

I cannot address here all the issues that we discovered during this process. But in order to convey a sense of what is involved, I offer a list of the main problems that arose while the reform was underway. I will then turn to difficulties pertaining more specifically to the design and the teaching of a transsystemic course.

The impact that the reform would have on faculty was confronted early on. Age, experience, relative workloads, ability and willingness to retrain, affinities with other systems, and language skills are all relevant. To what extent are faculty prepared to collaborate in the design of new courses, to teach together, to participate extensively in team teaching, to share course evaluations, research results? What research assistance should the Faculty provide

22. Jutras, *supra* note 3.

23. Two different but forceful arguments along these lines can be found in current publications by McGill colleagues. See H. Patrick Glenn, *Legal Traditions of the World* (Oxford, Eng., 2000); Jean-Guy Belley, *L'envers et l'endroit du contrat: pour une doctrine transsystémique*, Sir William C. Macdonald Inaugural Lecture (forthcoming 2002).

24. The first issue of the *Transsystemic Bulletin Transsytémique* appeared in September 2001.

for the design of new courses? Will all students actually have the linguistic skills needed to absorb the new materials? Is the student workload realistic? What transitional rules should apply to students graduating under the old program? What impact will these changes in the undergraduate curriculum have on graduate studies? Is the law library ready to service an increasingly transsystemic program? What do new information technologies have to offer here? Are there already in existence published teaching materials that could be of use, or will we require all faculty engaged in transsystemic teaching to design new in-house casebooks, problems, and selected materials? How will students be evaluated? Can there be such a thing, for purposes of a law school exam, as a transsystemic fact pattern? Where is Transsystemia? How will all this affect prizes and scholarships? What will be the likely effect of these changes on our bar accreditations? Will a transsystemic legal education have any impact on the placement of our graduates? What will the local legal profession think? What will the legal profession of other jurisdictions think? Will our alumni support us? What effect will this reform have on transfer students, on exchange programs, and more generally on the compatibility of what we do with what sister institutions do? What should be the preferred profile in future faculty recruitment? Since transsystemic courses, at least initially, are likely to be the preserve of those who designed them, what will happen when these colleagues go on sabbatical, retire, or simply leave the Faculty? What will all this mean for sessional and faculty lecturers, most of whom cannot invest the very substantial startup effort needed to teach a transsystemic course? What will be the effect of this reform on faculty productivity in research? Is it realistic to expect sustained transsystemic scholarship to develop out of this new program? Who will read such scholarship outside of a small circle of comparativists? These are some, but by no means all, of the questions raised by the reform, and not surprisingly every Faculty standing committee had to consider and report on the repercussions of the reform within its purview.

Once the reform had received university approval, the next major step was the design of transsystemic courses. For several of the faculty, the task involved weeks or even months of work, spread over two academic years. Most felt that working out the intellectual implications of the new program was both enjoyable and challenging. I will limit myself here to describing the experience I had with one transsystemic course, *Evidence (Civil Matters)*.

This course, more so perhaps than several other transsystemic courses, is resolutely focused on the Quebec and Canadian reality. Nevertheless, structuring it and choosing appropriate course materials required extensive reading not only on local law, but also on French, English, and American law. The issues that presented themselves along the way were resolved in a manner characteristic, I believe, of the approach developed at McGill.

Before summarizing them, I must stress the importance of language in transsystemic teaching. The Faculty of Law at McGill is, *de facto* rather than *de jure*, a thoroughly bilingual institution. While students are free to choose the language in which they answer exam questions or write essays, passive fluency in French and in English, at a minimum, is an entrance requirement, and by the time students enter the Faculty, most will have already achieved a much

higher level of fluency. These language skills matter enormously because of McGill's context, one in which the French/English, Civil Law/Common Law correspondence is easily discernible. Transsystemic teaching as it is practiced at McGill would not be possible if it could not be assumed that entering students have these language skills. I suspect that, with very few exceptions, such perhaps as Louisiana, transsystemic teaching, wherever it is tried, will necessitate language skills that are not needed for a traditional or monojural legal education. English, of course, remains preeminently the language of the common law, but the civil law tends to express itself in French, German, Spanish, Dutch, et cetera, and wanting to study it only in English is a bit like wanting to study German literature only in French. It can be done, of course, but it clearly is not the optimal solution. Legal traditions, as well as their many systemic iterations, are rooted in one or several natural languages, and comparative law as a discipline has something in common with translation, understood in the broadest sense of the word.²⁵ This is why law teachers developing transsystemic courses can learn a few things from translation theory: they will discover, for example, that the most intriguing and difficult aspect of this work is the elaboration, where possible and appropriate, of analytical common denominators resembling what is known in multilingual translation as archconcepts.²⁶

Faculty members who were engaged in the design of transsystemic courses frequently compared notes, and they soon realized that they all faced similar problems. Developing Evidence (Civil Matters) was not different. The course was eventually taught in a format that is standard at McGill: 28 lectures, 90 minutes each, with a casebook prepared for the course and a supporting Web page with additional materials. Schematically, six issues had to be addressed.

1. Formulating a working definition of the subject matter for the course. The first task is to formulate a working definition or a theory (though this word may be a little too pompous for what is involved) of the subject matter, and this definition must accommodate the particular civil law and common law traditions relevant to Canada and Quebec. Many of those who grappled with the design of a transsystemic course felt that starting with a factual common denominator could help, and that as a general proposition, for example, one should therefore speak not of torts and delicts but of mishaps, not of wills and estates or successions, but of legal consequences of death, not of contract and obligations but of deals and promises. I do not know if this idea can be

25. In fact, it does not have to be comparative: legal analysis as such is inherently interpretive, and it evokes Ricoeur's aphorism "Comprendre, c'est traduire." See Paul Ricoeur, *Le paradigme de la traduction*, in *Le Juste* 2, 125, 139 (Paris, 2001).

26. See Philippe Thoiron et al., *Notion d'«archi-concept» et dénomination*, 41 *Meta* 512, 521-52 ("[O]n voit émerger des faits que l'analyse poussée d'une seule langue laisserait autrement cachées."). It is interesting, for example, to construct an archconcept of the trace as evidence, using the "acte sous signatures privées" in French law (art. 1341 CN), "proof in writing" in Quebec law (art. 2862 CCQ), the "memorandum or note [...] in writing" of many common law jurisdictions (for example, section 4 of the Statute of Frauds of Ontario), and more recent transsystemic legislation such as the UNCITRAL Model Law on Electronic Signatures, 2001.

elevated to the level of a general principle, but what is interesting about evidence as a subject is that it lends itself rather easily to this approach. In evidence, preeminently, the relationship between raw facts, accounts of facts, and legal descriptives is forever at the centre of the debate.

I began the course with a central idea once powerfully expressed by Pascal: "We have an incapacity of proof insurmountable by all dogmatism; we have an idea of truth invincible to all skepticism." Perhaps because this central idea is rather abstract, I underscored it with a raw factual illustration and used press reports of the Egypt Air catastrophe of October 1999 off the American East Coast. We all know that something happened there. We do not know what exactly happened. There are various forms of dogmatism in the way of any inquiry into this tragedy—dogmatism about international terrorism, dogmatism about worldwide airline deregulation, dogmatism about covert American naval defense activities, dogmatism about the safety practices observed by second-world air carriers and by the American aircraft industry. But we have an invincible idea that there is a truth out there. In due course these and many other questions will have to be resolved by litigation. Settling this complex dispute in a manner that meets the basic requirements of a correspondence theory of truth, and that is procedurally acceptable, is what evidence is about, and this is so no matter where you live in the West (though not necessarily in Rwanda, Kazakhstan, or Myanmar).

2. *Harmonizing the course with other offerings in the program.* Every new course is part of a greater whole, the curriculum, and so it is necessary to consult, sometimes extensively, with instructors who teach germane topics. In this case, Evidence (Civil Matters) had to be coordinated with Evidence (Criminal Matters) since both courses were coming into existence at the same time. Some coordination was also needed with other courses, since what qualifies as Evidence in one tradition does not fit exactly what qualifies as Evidence in the other tradition. Consultation was therefore necessary on topics such as the Statute of Frauds, contracts under seal, counterletters, *res ipsa loquitur*, and evidentiary burdens in medical liability cases. The object at this stage is twofold: to determine how much of a given topic should be covered in the new course, and to determine what prior knowledge is taken for granted in other courses.

3. *Determining the corpus or composite of sources.* This is quite time-consuming but not significantly different from what is done in other courses, transsystemic or not. It is simply more exotic. One casts the net as far as one can, selects materials, edits them, and constantly reworks the course outline in the process. In the case of Evidence (Civil Matters), the following considerations, which reflect McGill's context, determined the result.

- As a general proposition, and for obvious linguistic reasons, civil law materials that were in neither French nor English were excluded. Some general articles on German and Italian civil law were included, however, mostly because they presented interesting variations on civil law themes.

- French civil law was given much more space than had been the case in the (Quebec) civil law course in evidence formerly offered by the Faculty. The principal reason for this choice was that the Quebec law of evidence is really a mixed system and that several civil law constructs (for example, *expertise*, *procès-verbal*, or *clause exécutoire* in notarial deeds) are not as developed in Quebec as they are in French law.
- The common law component also became more inclusive; materials were brought in from English, American, and Australian sources that might not have been used in a casebook for the former, nontranssystemic course called Evidence. Choices were dictated by practical considerations. If, for example, a particularly effective account of the collateral fact rule was found in a decision of the High Court of Australia, or the most complete and compact codification/consolidation of the hearsay rule was found in the United States Federal Rules of Evidence, both of these sources were included.
- Materials on international commercial arbitration, international criminal proceedings, and other extrajurisdictional types of proceedings were added to illustrate the convergence of civil and common law approaches to evidence and the slow emergence of an asystemic normativity reconciling adversarial and inquisitorial systems of procedure.
- Preference was often given to doctrinal sources, perhaps because comparative law is primarily a doctrinal activity and articles that adopt a comparative approach often contain crisp accounts of “the civil law” or “the common law” on a particular issue.
- During the course students were strongly encouraged to consult standard and unpretentious Canadian or foreign sources, such as the *Canadian Encyclopedic Digest* or the *Juris-classeur Civil*, if they wished to improve their technical understanding of a particular matter. There is not enough time in a three-credit course to really delve into questions such as the legal professional privilege or issue estoppel, but students were frequently reminded of the standard sources available on these questions.

4. *Dealing with systemic differences.* Some significant differences between traditions or systems, which bear heavily on a particular area of the law such as evidence in civil matters, may not be apparent in that branch of the law itself. Not much time is spent on these differences in a systemic course, but they have to be addressed at some length in a transsystemic course. Different approaches to particular problems within the law of evidence (for example, derivative or secondhand evidence, or expert evidence, or the examination of witnesses, or the role of notaries) are much less easily understood if it is not known from the beginning that the civil law is still basically inquisitorial and favors delegating issues of fact to trusted officials, whereas the common law is still basically adversarial and prefers to let the parties sort out their differ-

ences, including differences over facts, at their own pace and with their own devices. In short, more space must be allocated to these explanations in a transsystemic course.

5. *Dealing with commonality and singularity.* Some of the principal themes in the law of evidence have developed in a similar vein in the two basic traditions at hand. This is so, for example, and in varying degrees, with burdens and standards of proof, judicial notice, *res judicata*, formal or judicial admissions, or, subject to certain important qualifications, relevance. Other themes, and there are quite a few, are substantially or radically different, or may even be altogether absent from the other tradition. For example, in civil law traditions, there is no such thing as a similar fact doctrine, the distinction between evidence and proof is largely unarticulated, there are typically no “objections” to admissibility, and there is no hearsay rule; in common law traditions, there is no such thing as a decisory²⁷ oath, there are no *juges des mises en état*, and the idea of a “commencement of proof,” let alone “commencement of proof in writing,” is incomprehensible. The course outline must reflect these differences, which range in intensity from identity to contradiction or nonexistence. There are three ways of arranging the information.

Integrated treatment. Dealing concurrently, and in a fully integrated exposition, with similar or substantially similar legal concepts or devices seems a sensible solution where such a thing is possible. On the other hand, there is no doubt that a measure of accuracy is lost in the process: a student may not fully appreciate, or even remember that, for example, *Assistance Publique—Hôpitaux de Paris*²⁸ does not stand for exactly the same proposition as *Hollis v. Dow Corning*.²⁹ But it is not clear that full accuracy can ever be achieved even in courses taught within one system.

Seriatim treatment. It is also possible to look for common denominators, that is, factual problems of a certain kind that are resolved in a similar or substantially similar manner in each tradition, but by means of rather different legal concepts. Thus, a commencement of proof in writing is basically the same sort of thing as circumstantial evidence in writing emanating from the party against whom it is proffered. It plays a crucial function in civil law in that it opens the door to testimonial evidence that could not otherwise be used but is of a kind that would normally be admissible in a common law jurisdiction. Other examples are the case of extrajudicial admissions, characterized as binding *acte juridique* in civil law but as mere exceptions to the hearsay rule admissible as testimonies in common law jurisdictions, or instrumental writings at civil law and “writings or memoranda” in the Statute of Frauds. It is not desirable to deal with these situations

27. OED: «Decisoire, decisorie, deciding; fit, used, or able, to decide controversies. 1755 in JOHNSON.»

28. C.E. 5. 1. 1999.

29. [1994] 2 S.C.R. 9.

concurrently, for the degree of dissimilarity between traditions requires that students be alerted to the differences. The course outline, however, locates the discussion of these questions in the same place (or segment of the course structure), and it introduces them seriatim.

Separate treatment. Evidently, no pun intended, designing a transsystemic course requires more than looking for common denominators. Such common denominators will not be found everywhere—in fact, in Evidence, they probably account for less than half of the subject matter. Their existence here rather than there is largely accidental or contingent, and limiting the course materials to that which happens to be similar, or similar enough, in two or several traditions, would produce an incomplete, skewed, and, in the end, irrational view of the subject matter. There comes a point where differences so outweigh similarities on a particular issue that it is necessary to bite the bullet and to deal with singularities as singularities. For example, to illustrate some of the deep differences between civil and common law approaches to intrinsic policy, the contrast between notarial deeds and documentary hearsay is useful.

6. *Maintaining an appropriate coverage-to-depth ratio.* Given the bulk of most law school subjects, this ratio is a frequent concern in law teaching. The amount of relevant material in a transsystemic course is typically bulkier, and it is especially important to find the right balance between structure and content or coverage and depth. A transsystemic course in evidence presents as one entity two approaches to evidence which share some characteristics but which also each have many singularities. This format of presentation can obscure the overall structure of each approach, and there is a danger that students will see only the trees, will never develop a sense of the forest. The greater loser in this regard is probably the civil law tradition, for it favors codes, and the relationship of each part to the whole is endowed with more significance than is the case at common law. Various pedagogical strategies, such as the frequent use of visual aids and charts, can serve to reinforce in students a sense of the structure of the law of evidence. But the coverage-to-depth ratio is also about depth. There is a risk in a transsystemic course that students will never engage the materials as thoroughly as they would in a systemic course, that they will forever remain tourists, or amateurs, in both of the legal traditions on which the course is based. To avoid this undesirable result, it is essential that adequate depth be given to the discussion of some issues truly representative of one or the other tradition. Students can grapple with those issues from within that tradition and see what kinds of argument appeal to civil or common law lawyers. It is advisable to include in the course materials some problems, and preferably difficult problems, focused on the singularities of each tradition: for example, as was mentioned earlier, hearsay for the common law and notarial deeds for the civil law.