

10-9-2019

## From La Beauce to Le Bayou: A Transsystemic Voyage

Rosalie Jukier

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>



Part of the [Civil Law Commons](#)

---

### Repository Citation

Rosalie Jukier, *From La Beauce to Le Bayou: A Transsystemic Voyage*, 12 J. Civ. L. Stud. (2019)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol12/iss1/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# FROM LA BEAUCE TO LE BAYOU: A TRANSSYSTEMIC VOYAGE

Rosalie Jukier\*

I. Introduction .....	2
II. Quebec and Louisiana: Law Sisters .....	4
III. The Transsystemic Voyage.....	8
A. The First Leg of the Journey: Packing Bags .....	9
B. The Second Leg of the Journey: Sightseeing .....	14
C. The Third Leg of the Journey: Reflections .....	20
1. Novel Problems.....	21
2. Novel Problem-Solving Methods .....	25
3. Novel Judicial Methodology.....	27
IV. Conclusion .....	30

## ABSTRACT

*This paper is an adaptation of the Tucker Lecture that I delivered in October of 2017. Its title depicts two iconic places, one in the Canadian province of Quebec, from where I hail, and the other in Louisiana, the locale of my audience. La Beauce, an enchanting part of Quebec, stretches along the Chaudière River and is located about thirty minutes south of Quebec City. Le Bayou refers to the low-lying wetlands found primarily in the southern part of Louisiana, a defining feature of this part of the United States.*

---

\* Professor and member of the Paul-André Crépeau Centre for Private and Comparative Law, Faculty of Law, McGill University. This article is based on the 40th John H. Tucker, jr. Lecture in Civil Law that was delivered on October 19, 2017 at the Louisiana State University, Paul M. Hebert Law Center. The style of an oral presentation has been intentionally preserved in some places. This lecture was adapted from the following paper: Rosalie Jukier, *The Untapped Potential of Transsystemic Thinking*, in *REPENSER LES PARADIGMES: APPROCHES TRANSSYSTÉMIQUES DU DROIT* 1 (Yaëll Emerich & Marie-Andrée Plante eds., 2018). The author wishes to thank McGill law student, Jenna Topan, generously funded by the Look-Chan and Law and You funds of the Faculty of Law, McGill University, for her invaluable assistance in helping me turn the lecture into a publishable format.

*In this paper, I attempt to guide an allegorical voyage from la Beauce to le Bayou, from Quebec to Louisiana, from Montreal to Baton Rouge, from McGill to LSU, using a transsystemic itinerary. This voyage will showcase the unique way of teaching and thinking about law that has defined the program of legal education, and the imaginations of legal scholars, at McGill's Faculty of Law for almost two decades. In addition to demystifying the elusive term "transsystemic," and outlining the pedagogical and intellectual benefits of teaching and thinking about law in this way, this paper will focus on the increasing relevance of the transsystemic approach as a way of preparing jurists, wherever they may be, for the complexity and novelty of contemporary legal practice. By instilling creative, critical and flexible thinking skills, it enables jurists to deal with novel legal problems, to be more adept at envisaging a multiplicity of creative ways to solve legal problems through alternative methods of dispute resolution, and to keep pace with novel comparative judicial methodology.*

*Just as la Beauce and le Bayou are different places with different geographical features, so too are Quebec and Louisiana different legal jurisdictions. However, they are, in many ways, sister jurisdictions, sharing a common mixity in their legal systems. This makes law schools in Louisiana a particularly fertile environment in which to showcase this unique itinerary in the hope that some of you will come along on this interesting voyage.*

Keywords: legal pedagogy; mixed jurisdictions; comparative law; Louisiana; transsystemic approach; Quebec

## I. INTRODUCTION

It was with great pleasure, and even more humility, that, on October 19, 2017, I delivered the 40th John H. Tucker, jr. Lecture in Civil Law. The list of my predecessors who have delivered this prestigious lecture was daunting indeed. If the reputation of the international scholars who appear on that list was not intimidating enough, the fact that I personally knew all of the Quebec scholars who have spoken as Tucker lecturers was even more overwhelming as I was

acutely aware of their singular accomplishments first-hand. I was privileged to know the late Paul-André Crépeau, who gave this lecture in 1974, as my teacher and my colleague at McGill and as someone who contributed so greatly to Civil Code reform in Quebec, presiding over the Civil Code Revision Office for twelve years. I am a great admirer of retired law professor and justice of the Quebec Court of Appeal, Jean-Louis Baudouin, the Tucker lecturer in the year 2000. Baudouin is, to us Quebecers, *le grand-père des obligations*, having written the definitive treatise on the Law of Obligations now in its seventh edition.<sup>1</sup> And as for my friend and former colleague, Nicholas Kasirer, who was Dean of McGill's Law Faculty (2003–2009), Justice of the Quebec Court of Appeal (2009–2019) and now a justice of the Supreme Court of Canada, after listening to his 2014 Tucker Lecture, I continue to marvel at his wit and creativity and, above all, his incredible insights into the law.<sup>2</sup> It was a great honour to join the company of these, and all the other, previous lecturers and to have been added to this roster of impressive jurists.

In preparation for the Tucker Lecture, I did some research on its namesake, Colonel John H. Tucker, jr. What I learned was inspiring indeed. Apart from his work as Chair of the Louisiana State Law Institute, I learned that he was an incredibly well-respected legal scholar, having been called, in an article by Saul Litvinoff, a “scholar in action” and a “renaissance” figure.<sup>3</sup> I believe that Professor Yiannopolous may have given him the ultimate compliment by referring to him, in the title of an article, as a “jurisconsult.”<sup>4</sup> Reading some of Tucker's own legal scholarship, one cannot help

---

1. JEAN LOUIS BAUDOUIN, et al., *LES OBLIGATIONS* (7th ed., Pierre-Gabriel Jobin; Nathalie Vézina eds., Yvon Blais 2013).

2. Nicholas Kasirer, That Montreal Sound: The Influence of French Legal Ideas and the French Language on the Civil Law, Presentation for the John H. Tucker, jr. Lecture in Civil Law (Apr. 10, 2014).

3. Saul Litvinoff, *Colonel Tucker, the Scholar*, 45 LA. L. REV. 1007, 1007 (1985).

4. A. N. Yiannopoulos, *John H. Tucker, the Jurisconsult*, 45 LA. L. REV. 1011 (1985).

but be impressed by his articulate defence of the civil law in Louisiana, the important role he saw for law reform, as well as his views on the centrality of the university and the legal scholar in the development of law.<sup>5</sup> After reading about his remarkable life and incredible contributions to the law, I could not think of a worthier namesake for this prestigious lecture.

## II. QUEBEC AND LOUISIANA: LAW SISTERS

My lecture began with an explanation of its title: “From La Beauce to Le Bayou: A Transsystemic Voyage.” A Louisianan audience was not likely to be fazed by the reference to le Bayou but would, understandably, be more perplexed about the reference to la Beauce.<sup>6</sup> La Beauce is a picturesque region of the province of Quebec that stretches along the Chaudière River, located about thirty minutes south of Quebec City. It is an enchanting part of Quebec and a popular tourist destination, both in winter and summer, for the variety of outdoor activities it offers. Le Bayou, of course, refers to a very different geographical region, and while water characterizes both, that is probably where the similarities end. A bayou is, as my audience knew better than I, a low-lying wetland found primarily in the southern part of Louisiana, home to alligators, crawfish, catfish and Cajun culture. Also, an attractive tourist destination, the bayou is a defining feature of this part of the United States.

Why did I suggest travelling from la Beauce to le Bayou? And what is a transsystemic voyage? Transsystemia does not reside anywhere, let alone in la Beauce, because it is not a place or a thing, not a noun but, rather, an adjective describing a unique way of teaching and thinking about law. I confess to using these two destinations merely as poetic (and alliterative) license to bring something that is happening in a law school, namely McGill, in Montreal, Quebec

---

5. See John H. Tucker, jr. *The Role of the Law School in Law Reform*, 17 LA. L. REV. 581 (1957). See also T. Haller Jr. Jackson, *John Tucker and the Law Institute*, 45 LA. L. REV. 999 (1985).

6. The reference is to la Beauce, Quebec, not la Beauce, France.

(home to la Beauce) to Louisiana State University in Baton Rouge, Louisiana (home to le Bayou). I thought that my Louisianan audience was particularly well-suited to accompany me on this voyage because while la Beauce and le Bayou are different places with different geographical features, Quebec and Louisiana share many similarities.

Quebec and Louisiana have been called “law sisters”<sup>7</sup> and Professor Vernon Palmer has convincingly argued that we belong to the same legal family.<sup>8</sup> As Palmer asserts, our histories are indeed “connected and parallel.”<sup>9</sup> After all, we both started out with the same *Coutume de Paris* as our law, extended by Louis XIV to Quebec in 1663 and to Louisiana in 1712.<sup>10</sup> France ceded Louisiana to Spain in the 1760s, at around the same time it ceded Quebec to Britain.<sup>11</sup> And much of Louisiana’s population are descendants of Acadian exiles from the Maritimes in Canada<sup>12</sup> (“*Acadien*” being the root of the term “Cajun”).<sup>13</sup>

Furthermore, we are both “mixed” jurisdictions in similar ways. Our private law is civilian in both substance and methodology and is codified—the Code and the civil law, as Olivier Moréteau has pointed out, are our “markers of identity.”<sup>14</sup> Both of our civil codes have historically been based on the *Code Napoléon* and our civil law influenced by French thinkers such

---

7. Alain A. Levasseur & Vicenç Feliú, *The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!*, 69 LA. L. REV. 715, 741 (2009).

8. Vernon Valentine Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L.J. 321 (2009).

9. *Id.* at 323.

10. Jerah Johnson, *La Coutume de Paris: Louisiana’s First Law*, 30 LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION 145, 150-51 (1989).

11. Alain A. Levasseur, *Bijuralism in Federal Systems and in Regions of Local Autonomy*, 38 AM. J. COMP. L. SUPP. 23, 31 (1990). France ceded Quebec to Britain in the Treaty of Paris, 1763.

12. Levasseur, *supra* note 7, at 718.

13. See, e.g., Luc V. Baronian, *Pre-Acadian Cajun French*, 31 ANNUAL MEETING OF THE BERKELEY LINGUISTICS SOCIETY 37, 39 (2014).

14. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 33 (2012).

as Pothier and Domat.<sup>15</sup> Yet, in both our cases, our civil law plays out in courts that function like common law courts, with judges who share many attributes of the common law judicial function including in how they are appointed (or in the case of state judges in Louisiana, elected) to the bench (there is no *École de la magistrature* in either Quebec or Louisiana) as well as in the fact that they write personalized and discursive judgments that can include dissents.<sup>16</sup>

Perhaps most importantly, we are both civilian based jurisdictions surrounded on all sides by the common law. Quebec is the only civilian presence among Canada's ten provinces and three territories and, of course, Louisiana the only civilian state in the United States. We, and our codes, are, to quote Moréteau, "a powerful symbol of the survival of the civil law tradition on a continent dominated by the common law."<sup>17</sup>

There are, of course, many distinctive features that separate us. Language is one. As Alain Levasseur points out, both Quebec and Louisiana make use of an English civilian legal vocabulary.<sup>18</sup> In this regard, we can recall Nicholas Kasirer's 2014 Tucker Lecture about the "Montreal sound" of the civil law and the dialogic relationship between the civil law in French and in English in Quebec.<sup>19</sup> But what distinguishes the two places is the fact that French has largely been lost as a legal language in Louisiana, while French thrives in Quebec.<sup>20</sup> With about 80% of Quebecers listing French as their mother tongue and 87% listing it as the language they speak at home, law, like life, in Quebec, happens in French.<sup>21</sup> The Quebec legal community is a very bilingual one, but the reality is that law is

---

15. Palmer, *supra* note 8, at 323.

16. Moréteau, *supra* note 14, at 46. See also Rosalie Jukier, *Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec*, 6 J. COMP. L. 54 (2011).

17. Moréteau, *supra* note 14, at 33.

18. Levasseur, *supra* note 7, at 726.

19. Kasirer, *supra* note 2.

20. Levasseur, *supra* note 11, at 36-38 (explaining the erosion of French in Louisiana).

21. Statistics Canada, *French and the Francophonie in Canada—Language, 2011 Census of Population*, 2 (2011) <https://perma.cc/4K55-7CVY>.

practiced largely in French and most judicial decisions are drafted in French as well. A further linguistic difference lies in the fact that there exists no official French version of the Louisiana Civil Code (although there is a marvellous unofficial translation edited by Moréteau<sup>22</sup>), while the Quebec Civil Code, and all other Quebec laws, exists in French and in English with both versions being official.<sup>23</sup>

As for civilian legal culture, Quebec saw what John Brierley has called an important “renewal of [its] distinct legal culture” in the 1991 recodification of the Civil Code of Quebec (which came into force in 1994).<sup>24</sup> Moreover, as Moréteau has pointed out, the centrality of the Civil Code of Quebec is reinforced by its Preliminary Provision asserting it as the *jus commune* and the foundation of all other laws.<sup>25</sup> The thriving civilian legal culture in Quebec is reinforced by the predominance of civilian legal education in the province. Unlike Louisiana, the civil law degree is the primary degree offered by Quebec law schools, not the common law JD.<sup>26</sup> It is also marked by a mandatory civilian presence on the country’s highest

---

22. See CODE CIVIL DE LOUSIANE ÉDITION BILINGUE (Olivier Moréteau ed., Société de législation comparée 2017).

23. See, e.g., *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862 (Can.).

24. John E. C. Brierley, *The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Québec*, 42 U. TORONTO L.J. 484 (1992).

25. Moréteau, *supra* note 14, at 59-60; Civil Code of Québec, S.Q. 1991, c. 64, Preliminary Provision (Can.):

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

See also Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9, 14 (2010), where he asserts that Quebec’s Preliminary Provision helps prevent common law contamination as it reminds us that, “the Civil Code is a central star in the private law galaxy.”

26. With the exception of McGill, where, pursuant to its integrated program, all students graduate with both B.C.L. (civil law) and LL.B. (common law) degrees, in all other Quebec law schools, the primary degree is the civil law degree. Some Quebec law schools do offer a separate program in the common law but it is not required, nor is it integrated with the rest of their legal education.

court because, again very unlike the United States, three out of the nine Canadian Supreme Court justices must be Quebec jurists.<sup>27</sup> Finally, the political perspective in Quebec, where legal nationalism complements political nationalism, is very different from that of Louisiana.<sup>28</sup>

And yet, as Vernon Palmer has written, “[o]ne might say our experience and our fortunes as mixed systems are different yet kindred, and our relationship as sister systems has been *comme un voyage ensemble dans tous ces aspects amicaux culturels et juridiques*.”<sup>29</sup> Hence, the rest of my title: a transsystemic voyage. I had toyed with continuing the alliteration and entitling my talk a Transsystemic Trip or Transsystemic Travels, but I settled on voyage because of its bilingual nature and therefore its applicability both to Quebec and to Louisiana, and to this passage by Vernon Palmer from which I drew inspiration.

### III. THE TRANSSYSTEMIC VOYAGE

In my Tucker Lecture, I wanted to take my audience on a voyage using a transsystemic itinerary, namely a voyage that would showcase a unique way of teaching and thinking about law. This journey had three legs. The first was meant to demystify the elusive term “transsystemic” and to explain what is meant by a uniquely comparative, bilingual, multi-systemic, pluralistic, cosmopolitan and dialogic way of teaching and thinking about law. How did this program come to be at McGill and how do we actually do it? The second leg of the journey presented the pedagogical and intellectual benefits of the transsystemic approach—what we and our students have gained

---

27. Supreme Court Act, R.S.C. 1985, c. S-26, §§ 3, 6 (Can.). *See also* Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21 (Can.).

28. There have been two referenda, 1980 and 1995, on whether Quebec should secede from Canada and although explicit recognition of the idea has been the source of much political controversy, Quebec is often referred to as a “distinct society” within Canada. *See, e.g.*, Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT’L L. 67, 68-70 (1996).

29. Palmer, *supra* note 8, at 324.

by integrating the study of law by transcending jurisdictional and tradition-specific boundaries, eschewing silos, and introducing hybridity into our classrooms and our research. And the final leg attempted to demonstrate what I believe to be the increasing relevance of the transsystemic approach as a way of preparing jurists, wherever they are, for the complexity and novelty of contemporary legal practice.

*A. The First Leg of the Journey: Packing Bags*

In order to embark on the first leg of the trip, we needed to pack our bags. In this case, our baggage represents McGill's institutional history and while I will not go as far back as the beginning of our law program at McGill, officially created in 1848, I will recall what we did between 1968–1999 where, for that period of three decades, we offered what we called a “National Programme” in which we taught both civil and common law but did so in a very siloed way. There were, at that time, two points of entry for students into the Faculty and they pursued either the Civil Law or the Common Law stream with the possibility of obtaining two law degrees (B.C.L., LL.B.) or only one. Our National Programme was essentially a traditional three-year monosystemic law program with the possibility of adding on one year in the other tradition.<sup>30</sup>

In 1999, we underwent what some described as a veritable programmatic and pedagogical revolution, what Harry Arthurs, renowned law professor at Osgoode Hall Law School in Toronto and former President of York University, called, “one of the most unusual curriculum experiments.”<sup>31</sup> What seemed so revolutionary was that we moved to one point

---

30. This was not the first time McGill's Law Faculty had offered two law degrees in both of Canada's legal traditions. In 1916, McGill began offering a three-year common law degree in addition to its three-year civil law degree program as well as the possibility of obtaining both degrees in four years, but this was abandoned in 1924. See Roderick A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects*, 13 DALHOUSIE L.J. 211, 250, 260 (1990).

31. Harry Arthurs, *Madly off in One Direction: McGill's New Integrated, Polyjurial, Transsystemic Law Programme*, 50 MCGILL L.J. 707, 709 (2005).

of entry for all law students (and a single admissions pool) whereby we would teach private law in an integrated manner and all graduates would obtain both civil law and common law degrees.<sup>32</sup> Courses would continue to be offered in English or French, and taken in either language at the option of the student. However, the materials would include sources from both legal traditions and thus would be bilingual, as our policy is to include sources in their original language. Consequently, all students would have to be what we call “passively bilingual,” namely, able to read and understand oral French and English but permitted to speak and write, for purposes of evaluation, whichever language they preferred.

Many ask why we embarked on this new program. Looking back two decades, it now seems, in retrospect, that our goals were quite modest but at the time, our aspirations were seen by some to be overly ambitious and even unattainable. To be truthful, we had many laudatory aspirations that I will outline shortly, but we also had some instrumental ones. For one, our distinct applicant pools to the civil and common law streams risked being uneven in terms of numbers and strength of applicants and we wanted to even them out. We also thought that creating a unique program of legal education would attract the strongest, most interesting and diverse applicants to our law faculty.

More importantly, we had serious pedagogical aspirations. An explicit goal was the improvement of our comparative teaching because although McGill had the reputation of being a comparative law school where we had some renowned comparativists, such as H. Patrick Glenn, on faculty, in reality, our program did not meaningfully allow for explicit comparative learning by students. From the students’ perspective, they took private law classes in monosystemic silos with no overt comparative law going on in them. Expecting students to make the comparisons themselves between different classes, in the different legal traditions, taken in different years, was

---

32. To obtain both law degrees, students must successfully complete 105 credits in 3-4 years of study.

slightly unrealistic. Moreover, right from the beginning, we had this idea that it could only be beneficial to learn from the other—what Yves Marie Morissette, former Dean of the Faculty and now a justice on Quebec’s Court of Appeal, called a “humble dialog with *otherness*.”<sup>33</sup>

Finally, we had an identity-related aspiration. We wanted to educate students without a particular juridical nationality who would become, in the words of one of my former students, “agnostic jurists.” As someone who, for years, taught civil law obligations to second-year common law students and common law contracts to second-year civil law students, I can attest to the fact that students become very attached to the system in which they started their legal studies and I used to do a lot of (almost religious) converting!<sup>34</sup>

The major pedagogical changes included moving from sequential courses to integrated ones—blending the civil and common law in, for example, the areas of contracts and extra-contractual obligations and, as we have just done, in Property, where the transsystemic approach blends indigenous legal traditions as well as those of the civil and common law. This necessitated changing our course outlines because they could no longer be organized around traditional doctrinal categories as the syntax and nomenclature do not match up. Although challenging, this actually had the fortunate consequence of moving to teaching by theme or pre-law question. And, once you started to teach in multiple legal traditions in the same course, it was only natural to start to teach legal rules and principles in

---

33. Yves-Marie Morissette, *McGill’s Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12, 22 (2002).

34. See Julie Bedard, *Transsystemic Teaching of Law at McGill: Radical Changes, Old and New Hats*, 27 QUEEN’S L.J. 237, 273 (2001) (who agrees that students identified with the first legal system they learned).

a way that linked them to their tradition-based methodology and mentality as well as unique historical development.<sup>35</sup>

Introducing hybridity of legal orders into the classroom was accomplished, in large part, by expanding curricular content to include a multiplicity of sources of law from a variety of jurisdictions and legal traditions. These sources are of varying kinds including traditional sources such as state law, judicial decisions and doctrinal writings, as well as less traditional sources such as soft-law instruments including UNIDROIT or the U.S. Restatement, and even non-traditional sources including stories and ceremonies. While language often inhibits law professors from including foreign materials in their courses, given that we use sources written in both French and English, regardless of the language of instruction of the particular course, we are able to access a wide variety of sources.

Although, admittedly, materials are still primarily from Quebec and common law Canada, the goals of curricular reform are enriched by studying a multitude of jurisdictions, including the United Kingdom, the United States (including, of course, Louisiana), Germany, France and Australia to name just a few. The idea, however, is not one of coverage. The intention is not to compare the various laws of as many jurisdictions as one can fit into a single class. Rather, the idea is to unleash law from any particular political geography or state normativity, to “de-couple[] the idea of law from the idea of the state,” and to teach without reference to one particular state as the central focus.<sup>36</sup> This, of course, as Harry Arthurs noted, “challenges the notion that law’s logic is bounded, its values fixed, its processes ascertainable, and its outcomes

---

35. Rosalie Jukier, *Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom*, 50 MCGILL L.J. 789 (2005) (specific performance is used as a case in point to demonstrate how transsystemic pedagogy teaches students to connect legal concepts to their socio-historical roots).

36. Harry W. Arthurs, *Law and Learning in an Era of Globalization*, 10 GERMAN L.J. 629, 635 (2009).

predictable.”<sup>37</sup> Consequently, sources are used merely as lenses, or hypotheses of solutions and approaches, thereby teaching students the crucial lesson that there is not one answer or one structure of reality to any given legal issue or human problem. We need to teach law students to tolerate ambiguity.

New words were used and even invented to describe our unique pedagogy. Some were prosaic—boring but accurate terms such as “integrated” or “blended.” Others were confusing such as “trans-systemic.”<sup>38</sup> Other descriptors were sexy like “cosmopolitan”<sup>39</sup> and “pluralist”<sup>40</sup> and still others were poetic and exotic such as the words used by Nicholas Kasirer—“nomadic,” “dialogic,” and engaged in “*métissage*.”<sup>41</sup> Soon, our legal curriculum was being described as uniquely comparative, “bilingual, multi-systemic, and pluralistic,”<sup>42</sup> characterized by “an epistemological and pedagogical practice at once pluralist, polycentric, non-positivist, and interactive.”<sup>43</sup> No wonder my wonderful late colleague and former Dean of our Faculty, Roderick A. Macdonald, said, “[i]f it’s not impossible, it’s not worth doing!”<sup>44</sup> But despite these fancy descriptors, what we call the transsystemic approach simply integrates the study of law by

---

37. *Id.* at 637.

38. See, e.g., Daniel Jutras, *Pour en finir avec la Transsystème (sic)*, in *RE-PENSER LES PARADIGMES : APPROCHES TRANSSYSTÉMIQUES DU DROIT* 73 (Yaëll Emerich & Marie-Andrée Plante eds., 2018).

39. Richard Janda, *Toward Cosmopolitan Law*, 50 MCGILL L.J. 967, 967 (2005).

40. Roderick A. Macdonald & Jason MacLean, *No Toilets in Park*, 50 MCGILL L.J. 721, 721 (2005).

41. Nicholas Kasirer, *Legal Education as Métissage*, 78 TUL. L. REV. 481, 490 (2003).

42. These are all descriptors that have been used in reference to the McGill program. See, e.g., McGill University Senate, *Appendix B: Academic Program Reviews 2004-2008: Final Program Review Summary Sheets – Faculty of Law: B.C.L./LL.B. Program*, in Report of the Academic Policy Committee D08-56 1, 1 (2009): <https://perma.cc/TBW3-JCN8>.

43. Macdonald, *supra* note 40, at 721. The French version of this description was used by the Université d’Auvergne in its conference program, *La trans-système : pour une approche rénovée de la conception et de l’enseignement du droit*, available at: <https://perma.cc/5Y9M-HCW2>.

44. Roderick A. Macdonald, *If It’s Not Impossible, It’s Not Worth Doing: The Challenges of Trans-systemic Legal Education*, Paper Delivered at Harvard University Law School (Nov. 22, 2004) (unpublished).

transcending jurisdictional and tradition-specific boundaries, eschewing silos, and introducing hybridity into our classrooms and our research.

*B. The Second Leg of the Journey: Sightseeing*

Once the bags were packed and my audience had arrived at our destination, the second leg of the journey could begin. This leg of any trip usually involves some sightseeing and for our purposes, this entailed exploring what freeing courses from jurisdictional boundaries has enabled us to do.

In my opinion, we have been able to surpass our original aspirations articulated just two decades ago. We have certainly accomplished the goal of eschewing silos and transcending jurisdictional and tradition-specific boundaries. We have also made comparative law a more explicit part of pedagogy and have taught students to approach comparative law in a holistic sense, as a way to imagine responses to underlying questions and larger thematic problems, rather than as a form of side-by-side doctrinal comparison. Undoubtedly, our approach has encouraged learning from the other which, in turn, has taught us the valuable lesson that learning from the other has truly enabled us to learn more about ourselves. After all, understanding the differences in another mode of thinking (such as another legal tradition) causes one to question the approach in one's own mode of thinking (or legal tradition), which ultimately invites opportunity for greater insight and more sophisticated contemplation of both.

The retreat from a focus on the law of a given jurisdiction has also forcibly moved our teaching away from its traditional expository function towards a more critical one. Moreover, transsystemic thinking has found a more natural home in an academic and intellectual view of the law (which has always been McGill's vocation),

rather than a professional one.<sup>45</sup> The pedagogical implications of teaching transsystemically freed professors from trying to teach “the law” (which is, of course, impossible) and encouraged them to teach students the tools they need to discover law for themselves.<sup>46</sup>

The reorganization of courses around broad themes and larger questions, rather than tradition-specific doctrinal titles, has moved teaching towards a more interactive model. Once the focus is no longer on teaching legal doctrines but on solving human problems through different lenses, there is a tendency to use more problem-based learning. This, in turn, creates a more active learning environment for students and more interaction in the classroom, all conducive to introducing some form of a “flipped classroom” for those who are keen to engage in this type of pedagogy.<sup>47</sup>

Transsystemic teaching and thinking invited a true paradigm shift on many levels, including the very questioning of law as the privileged response to human problems. Acknowledging that law is but one lens through which we can analyze and solve human problems has had the effect of encouraging the integration of more interdisciplinary perspectives, such as economic, historical,

---

45. See Nicholas Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. LEGAL EDUC. 29 (2002). Kasirer described this well using the metaphors of Law's cosmos versus Law's empire. To teach a given legal tradition in Law's empire aims to teach law as it is both spatially and temporally articulated and felt. To learn in Law's cosmos, however, infers concerns with the social and theoretical dimensions of law so as to more meaningfully grasp the nature of law itself.

46. A commonly held resistance to transsystemic pedagogy has been the ‘coverage’ issue, namely that professors already have too much material to teach without adding an entire other legal tradition to their course. McGill professors must accept that it is not realistic to teach every black letter detail of the law. Instead, the approach is to train students for life-long learning, to think independently and to uncover law themselves.

47. In a “flipped classroom,” students are expected to come to class “knowing” the material, sometimes by listening to pre-recorded video or audio lectures online, and then class time is an opportunity to apply and discuss material in dynamic in-class activities. See, e.g., LUTZ-CHRISTIAN WOLFF & JENNY CHAN, *FLIPPED CLASSROOMS FOR LEGAL EDUCATION* (Springer 2016). While most classes at McGill are not taught using the flipped classroom model, many professors have moved away from expository teaching and use problem-based learning as the focus of their pedagogy.

philosophical, sociological, and feminist approaches, into law classes.<sup>48</sup> It has also encouraged us to multiply the perspectives on how to solve problems and to teach students that the adjudication of disputes through the civil justice system is not the only, or indeed ideal, way to proceed. Students are encouraged to locate law and legal education all around them, not only in appellate decisions, thereby reinforcing the pluralistic conception of legal education.<sup>49</sup>

One of the most important pedagogical benefits of teaching transsystemically is that it operates as a vehicle for instilling creative, critical and flexible thinking skills in students, skills I believe they will really need as they lead their lives as jurists of the twenty-first century.<sup>50</sup> Critical thinking is characterized by analyzing, evaluating and creating knowledge, as well as by questioning underlying assumptions, discovering that which is hidden, and challenging orthodoxy.<sup>51</sup> This is precisely what the transsystemic classroom actively encourages. Learning other perspectives reduces the chance that students will accept legal responses as orthodox wisdom and increases the chance that they will be open to embracing, and creating, other solutions. A student who studies the civil and common law traditions simultaneously will be better equipped to question the very existence of certain doctrines, which may be treated as gospel in one legal tradition but find no voice in another. For example, the common law notions of consideration (seemingly the core of

---

48. RODERICK A. MACDONALD ET AL., *LESSONS OF EVERYDAY LAW* 7 (McGill-Queen's U. Press 2002).

49. See Roderick A. Macdonald, *Legal Education on the Threshold of the 1980's: Whatever Happened to the Great Ideas of the 60's*, 44 SASK. L. REV. 39, 48 (1979); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 6 (1999).

50. See Rosalie Jukier, *The Impact of 'Stateless Law' on Legal Pedagogy*, in *STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE* 201, 205-211 (Helge Dedek & Shauna Van Praagh eds., 2018).

51. See, e.g., Lisa Tsui, *Cultivating Critical Thinking: Insights from an Elite Liberal Arts College*, 56 THE JOURNAL OF GENERAL EDUCATION 200, 201 (2007); Nickolas James et al., *Conceptualising, Developing and Assessing Critical Thinking in Law*, 15 TEACHING IN HIGHER EDUCATION 285, 287 (2010); Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 321 (1999).

contract law) and duty of care (an ever-domineering gatekeeper to tort liability) have no place in the civilian tradition. Students who have studied both traditions, and easily envisage a legal order with or without their effect, may be more amenable to critically deconstructing the underlying reasons and justifications of such legal responses. Transsystemic pedagogy is thus instrumental in creating independent and innovative, rather than mechanistic, thinkers as the emphasis is placed on the process, not the result; on the question, not the answer; on the how and why, not the what.

The bilingual nature of the program has also yielded compelling benefits.<sup>52</sup> Reading legal documents in their original language ensures respecting the cultural and political role that law plays in society and is also, arguably, an important pedagogical aspect of transsystemic legal education. As my colleague, Shauna Van Praagh, has argued, there is a deep connection between McGill's bilingual learning environment and the creativity and empathy so characteristic of the transsystemic method because, as she says,

[E]very single student in the faculty . . . can understand at some level what it means to belong to the minority in a group . . . . The student, who in many law faculties across this country . . . would be characterized as being in the majority . . . who is Anglophone, is going to know what it feels like to be in a minority walking in the streets of Montréal . . . to know what vulnerability feels like . . . [creating] an ability to empathize and listen, and to imagine . . . . There is a shakiness about just existing in Quebec that actually makes teaching and learning law really exciting, because of that ability to empathize and cross identities.<sup>53</sup>

---

52. See, e.g., Daniel Jutras, *Enoncer l'indicible : le droit entre langues et traditions*, 4 REV. INT. DR. COMP. 781, 792 (2000) (arguing that in allowing for "un véritable dialogue bijuridique", bilingualism facilitates authentic bijuralism. However, bilingualism has also been cited as one of the challenges for many law faculties in adopting a similar teaching methodology, a "road block" to exportability). See Helena Whalen-Bridge, *A Common Law Fly on the Transsystemic Wall: Observing the Integrated Method at McGill Faculty of Law*, 51 THE LAW TEACHER 188, 201 (2017).

53. Andrea Bjorklund et al., *Teaching the Law: A Roundtable Discussion*, 5 CONTOURS 77, 81, 84 (2016).

The benefits of transsystemic pedagogy have by no means been restricted to students and, given the symbiosis between pedagogy and scholarship, professors have also been profoundly impacted by the program. That transsystemic pedagogy encourages transsystemic thinking amongst professors is evidenced in the research produced by legal scholars immersed in this mode of teaching and thinking. Initially, many members of McGill's Law Faculty, including myself, produced scholarship on transsystemic pedagogy.<sup>54</sup> Today, we are beginning to see an output of what may be called, more broadly, transsystemic scholarship. A notable example is Yaëll Emerich's recently published book, *Droit commun des biens : perspective transsystémique*, whose dialogue between various legal traditions unearths an intricate inspection of common perspectives on property law amongst civilian, common law and aboriginal law traditions.<sup>55</sup> For my own part, transsystemic teaching has helped me reconceive my research questions, a large part of which have come to focus on the impact of legal traditions on such topics as judicial methodology or civil procedure and, most recently, to explore the impact of legal traditions on each other.<sup>56</sup>

---

54. See, e.g., McGill Law Journal's special issue: *Navigating the Transsystemic*, 50 MCGILL L. J. 701 (2005) (including articles by McGill professors Roderick A. Macdonald, H. Patrick Glenn, Richard Janda, and Rosalie Jukier). See also Helge Dedek & Armand de Mestral, *Born to be Wild: The Trans-Systemic Programme at McGill and the De-Nationalization of Legal Education*, 10 GERMAN L.J. 889(2009); Kasirer, *supra* note 45; Morissette, *supra* note 33; and Daniel Jutras, *Two Arguments for Cross-Cultural Legal Education*, in UNTERSCHIEDLICHE RECHTSKULTUREN: KONVERGENZ DES RECHTSDENKENS / DIFFERENT LEGAL CULTURES: CONVERGENCE OF LEGAL REASONING 75 (Heinz-Dieter Assman, Gert Bruggemeier & Rolf Sethe eds. 2001).

55. YAËLL EMERICH, *DROIT COMMUN DES BIENS : PERSPECTIVE TRANSSYSTÉMIQUE* (Yvon Blais 2017). See also Shauna Van Praagh, *Palsgraf as 'Transsystemic' Tort Law*, 6 J. COMP. L. 243 (2011); Helge Dedek, *From Norms to Facts: The Realization of Rights in Common and Civil Private Law*, 56 MCGILL L.J. 77 (2010); Daniel Jutras, *Civil Law and Pure Economic Loss: What Are We Missing?*, 12 CAN. BUS. L.J. 295 (1987).

56. See, e.g., Jukier, *supra* note 16; Rosalie Jukier, *The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure*, 93 CAN. B. REV. 211 (2015); Rosalie Jukier, *Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec*, 1 THE J. OF COMMONWEALTH L. 1 (2019).

This leg of the voyage cannot end without some caveats. These include the admission that we at McGill have no monopoly on imparting critical thinking skills, integrating pluralism and inter-disciplinarity into the classroom or even making the learning of law more interactive. These all can, and do, happen in monosystemic law faculties. Moreover, McGill has no monopoly on how to be transsystemic. While the University of Luxembourg has emulated our program and adopted a version that might be called a close cousin, the University of Victoria in Western Canada has recently inaugurated a different sort of integrated program of legal education, namely a Joint Program in Canadian Common Law and Indigenous Legal Orders.<sup>57</sup> This is an extremely interesting example of a different way to integrate several legal orders into a unified program of law study. As the transsystemic approach itself has taught us, there is never just one way of doing anything, including transsystemic legal education.

Nonetheless, I think it can be persuasively argued that McGill's transsystemic classroom has led to many impressive results, and that the positive consequences of moving to this way of teaching and thinking flow somewhat naturally from a program of this kind. This is because once the emphasis on a single jurisdiction's state law and its doctrinal categorization is abandoned, students and professors are forced to think about legal problems holistically and in new ways that stretch beyond traditional boundaries. After all, the great gift of creativity is the ability to make connections and we can only teach our students, and ourselves, to do that if we break down silos.

---

57. See, e.g., University of Luxembourg's new "transnational" Bachelor's in Law (Bachelor en droit) (academic), online: <https://perma.cc/74U5-2576>; see Jamie Cassels, University of Victoria, *Contributing to Canada's Social and Economic Prosperity: A Proposal for an Innovative Common Law/Indigenous Law Program 1* (2016): <https://perma.cc/EL2J-ZL83>. The University of Victoria program accepted its first intake of students in September 2018.

*C. The Third Leg of the Journey: Reflections*

The final leg of any journey involves introspection. We all return home from our travels somewhat changed by what we saw and learned, and this influences us for the future. As a result, this final leg of our transsystemic journey entails us looking to the future and considering why this way of thinking about law is becoming more and more important for jurists who will make their mark on this twenty-first century.

It is an important question to ask because after all, this way of teaching law can be destabilizing and difficult for students, some would say confusing and even frustrating. And if graduates will, for the most part, practice in one jurisdiction, why do they need to learn about so many others? It certainly will not help them with their bar exams.<sup>58</sup> It can also be hard for professors because in addition to being required to handle legal materials bilingually, professors are expected to have expertise in multiple legal environments. Moreover, as there are no transsystemic teaching materials on the market, they must create their own from scratch. Perhaps more importantly, professors must continually guard against the risk of superficiality when they reference isolated legislative provisions or court decisions from a foreign legal system into their curriculum. After all, I may reference an Australian High Court decision in my contracts class, but I certainly do not pretend to be an expert in Australian law as a whole. William Bishop has appropriately warned against making “casual comparisons” stating that, “[i]t is not prudent to consider one difference in isolation from the others, for that difference may so easily be balanced by some other factor not considered.”<sup>59</sup>

---

58. See generally Aline Grenon, H. Patrick Glenn & Helge Dedek, *The Global Challenge in Common and Civil Law Contexts: A Canadian Perspective*, in *THE INTERNATIONALISATION OF LEGAL EDUCATION* 75, 83 (Christophe Jamin & William Van Caenegem eds. 2016).

59. William Bishop, *The Choice of Remedy for Breach of Contract*, 14 *J. LEGAL STUD.* 299, 318 (1985). After all, a professor may use an Australian decision to inspire a discussion of interesting legal questions and concerns in the class, but neither professor nor students understand Australian law in its totality.

We cannot, however, be dissuaded by these potential difficulties. The challenges are outweighed not only by the many pedagogical and intellectual benefits outlined above, but also by three additional reasons that justify the importance of this approach to legal thinking. These reasons are linked to our obligation to prepare jurists for the complexity and novelty of contemporary legal practice, regardless of its form or place. My three reasons include how jurists can face: I Novel Problems; II Novel Problem-Solving Methods; and III Novel Judicial Methodology.

### 1. *Novel Problems*

Article 9 of Quebec's Code of Civil Procedure (C.C.P.) might be seen as proclaiming an obvious proposition, namely that, "[i]t is the mission of the courts to adjudicate the disputes brought before them, in accordance with the applicable rules of law." At times, however, the dispute that comes before the court requires the judiciary to solve what may be termed a "novel problem," one in which there is no obvious answer or appropriate resolution using the ordinary legal tools at its disposal in its present arsenal. Traditionally, this is the way law often develops, particularly in common law systems, but true in civilian ones as well.<sup>60</sup>

Analyzing a novel problem through a transsystemic lens can be particularly useful in these situations. For the purposes of illustration, a contemporary example of what may be classified as a novel problem emanating from Quebec may be found in the case of *Churchill Falls (Labrador) Corp. Ltd. v. Hydro-Québec*, decided by the Quebec Court of Appeal in July 2016 and by the Supreme Court

---

60. Various important aspects of Quebec civil law were developed in this way. See, e.g., the jurisprudential development of unjust enrichment in *Cie Immobilière Viger v. L. Giguère Inc.* (1976), [1977] 2 S.C.R. 67 (Can.) and the creation of a doctrine of good faith in contract performance in *National Bank v. Soucisse et al.*, [1981] 2 S.C.R. 339 (Can.), 1981 CanLII 31; and *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 (Can.), 1990 CanLII 58.

of Canada in November 2018.<sup>61</sup> In brief, this case centered on a contractual dispute relating to a long-term contract signed in 1969 with a sixty-five year term. Pursuant to the contract, Hydro-Québec undertook to purchase almost all the energy generated by the Churchill Falls power plant in Newfoundland and Labrador at a fixed price. However, during the life of this contract, significant changes occurred in the global energy market resulting in an exponential rise in the value of electricity. Given the fixed contract price, Hydro-Québec was able to buy electricity at a very low price and realize large profits by reselling it at a substantially higher market price. In 2010, Churchill Falls instituted an action before the Superior Court of Quebec arguing that in the circumstances, Hydro-Québec should have a duty to renegotiate the contract on the basis of the obligation of good faith that is implied into the performance of every contract in Quebec law pursuant to articles 1375 and 1434 of the Civil Code of Quebec (C.C.Q.).<sup>62</sup> Churchill Falls contended that the radical changes in the energy market, and the consequential rise in the price of electricity, was unforeseeable at contract formation and was creating an unanticipated windfall profit for Hydro-Québec, one that countered the parties' profit-sharing intention at the time they entered into the contract.

At first blush, this looks like a straightforward situation of post-contract change of circumstances which, pursuant to Quebec law, only alters the contractual obligations of the parties in cases of *force majeure*, what the Louisiana Civil Code terms, in art. 1873, a fortuitous event.<sup>63</sup> In order to be classified as a *force majeure*, Quebec law requires “an unforeseeable and irresistible event” and, therefore, unforeseeable external events

---

61. Churchill Falls (Labrador) Corp. v. Hydro-Québec, 2016 QCCA 1229 (Can. Que), *aff'd* 2018 SCC 46 (Can.) [hereinafter Churchill Falls].

62. Art. 1375 Civil Code of Quebec [hereinafter C.C.Q.]: “The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.” Art. 1434 C.C.Q: “A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.”

63. LA. CIV. CODE ANN. art. 1873 (2005).

do not modify the obligatory force of contracts unless they render the performance of the contract impossible, not merely more difficult, more expensive or less lucrative.<sup>64</sup> In other words, the doctrine of *imprévision* (or hardship) is not applicable in Quebec law.<sup>65</sup>

As a result, there was no obvious solution to the *Churchill Falls* conundrum in Quebec law except to say that, as the situation did not meet the requirements of a *force majeure*, Churchill Falls had no case.<sup>66</sup> The legal representatives for Churchill Falls, therefore, had no choice but to think out of the box, to tackle the problem in a new way and reach out to other legal traditions and sources to craft their arguments. In other words, a transsystemic approach was crucial to thinking through the legal issues on behalf of Churchill Falls. Indeed, the arguments laid out in the appellant's factum (supporting Churchill Falls' position), were heavily based on transsystemic thinking.<sup>67</sup>

First, the appellant's arguments drew upon multiple sources and perspectives from foreign law to support the use of good faith in imposing an obligation of contract renegotiation. Most notably, the appellant's position found support in German law as well as in the soft-law instrument of UNIDROIT.<sup>68</sup> Secondly, the appellant

---

64. Art. 1470, para. 2 C.C.Q. (*force majeure*, translated as superior force, defined). See also art. 1439 C.C.Q. (binding force of contracts); art. 1693 C.C.Q. (restricts excuse for non-performance to situations of *force majeure*).

65. See, e.g., *Transport Rosemont Inc. c. Montreal (Ville de)*, 2008 QCCS 5507, para. 32 (Can. Que.). See also *Canada Starch Co. v. Gill & Dufus (Canada) Ltd.*, [1983] Q.J. No. 567, J.E. 84-88 (Can. Que. S.C.), *aff'd* 1990 CanLII 2754, [1990] J.E. 1617 (Can. Que. C.A.).

66. This was essentially the conclusion of the Superior Court decision rendered by Silcoff, J. in *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, 2014 QCCS 3590 (Can. Que.).

67. The appellant was represented by the law firm of IMK and Me Audrey Boctor, a graduate of McGill's transsystemic program, largely penned the factum (on file with author). For a summarized view of the appellant's position, see the appellant's application for leave to appeal (Applicant's Memorandum of Argument (Sept. 30, 2016): <https://perma.cc/L969-GY7H> [hereinafter Applicant's Memorandum]).

68. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], art. 242 (*Ger.*); International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* art 1.7 (UNIDROIT, 2010): <https://perma.cc/L6C6-C8KA>. See also Werner F. Ebke; Bettina M. Steinhauer, *The Doctrine*

buttressed its legal arguments with theoretical perspectives, notably those based on U.S. scholar Ian Macneil's theory of relational contracts.<sup>69</sup> Macneil posits that flexibility in contract law is required to deal with long-term contracts that involve symbiotic relationships between the parties. Finally, the appellant's arguments used a holistic approach in that its arguments were not restricted to the silo of the doctrinal category of *force majeure*. Instead, its arguments involved legal creativity and the use of lateral thinking skills in applying the doctrine of good faith (to renegotiate the contract) to a situation that appeared to be one of changed circumstances, characteristic of the transsystemic approach.<sup>70</sup>

Although in the end, Churchill Falls failed to convince all but one dissenting judge of the Canadian Supreme Court of the merits of its argument, this case, and its transsystemic approach, will, I believe, have an influence on future cases. At the Court of Appeal level, it was recognized that the lack of a doctrine of *imprévision* does not alone preclude the use of good faith as a mechanism to require the modification of a contract in appropriate circumstances of hardship.<sup>71</sup> And at the Supreme Court level, much turned on the finding by the majority judges that this particular contract could not

---

*of Good Faith in German Contract Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 171 (Jack Beatson & Daniel Friedman eds. 1997).

69. Macneil's conception of relational contracts, contrasted with discrete exchange, is summarized in the appellant's memorandum of argument as "long-term, interdependent, often called 'relational' contracts—that are not just a moment in time. Parties who engage for the long term form a relationship for their sustained mutual benefit and not simply a discreet economic exchange. Because parties who engage for such a long time cannot possibly foresee everything, the precise terms of the contract are subject to change over time." (Applicant's Memorandum, *supra* note 67, para. 44). See also Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

70. See generally EDWARD DE BONO, *SERIOUS CREATIVITY: USING THE POWER OF LATERAL THINKING TO CREATE NEW IDEAS* (Harper Business 1992).

71. See Churchill Falls, *supra* note 61, paras. 127, 152. The Court noted that, in this situation, the appellant was not suffering hardship. Although Churchill Falls did not share in the significant gains resulting from the higher market price of electricity, it continued to profit from the power contract.

be characterized as a relational one, which would benefit from a heightened duty of good faith.<sup>72</sup>

## 2. Novel Problem-Solving Methods

Admittedly, few legal problems will be of the *Churchill Falls* magnitude or novelty but, more generally, we are witnessing a move away from adjudication as the primary resolution mechanism in an attempt to solve legal problems of all sorts using a wide variety of alternative methods of dispute resolution, commonly referred to as ADR. There are, of course, various reasons for this, including the high cost and inordinate delays of litigation,<sup>73</sup> the confidentiality that ADR provides the parties,<sup>74</sup> and the autonomy and control over the outcome that a more collaborative process of dispute resolution offers. This potential for collaboration and control often results in a greater sense of satisfaction in any settlement outcome because the parties themselves have participated in the process rather than having justice imposed on them.<sup>75</sup>

At least in Canada, today, there is not only an increased recognition of the value of ADR, but indeed an increased obligation on

---

72. By contrast, dissenting Justice Rowe did characterize the contract as relational and, thus, found that it involved a heightened obligation of good faith and equity. Justice Rowe held that the parties had an implied obligation of cooperation which, in the circumstances, demanded that Hydro-Quebec establish a price adjustment formula to share the extraordinary profits.

73. See Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Oct. 2013), <https://perma.cc/22R9-XM9T>; Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996). These issues are not contained to the Canadian justice system. For discussions in the U.S., see, e.g., Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985).

74. See, e.g., *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (Can.).

75. See Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243, 257 (2008). See also LON L. FULLER, *THE MORALITY OF LAW* 150 (Yale U. Press Rev. ed. 1969) (importance of law being “achieved” rather than “imposed”).

the part of parties to use non-adjudicative modes of resolving conflict. For example, Quebec's new Code of Civil Procedure, which came into force in January 2016, states that "[p]arties *must* consider private prevention and resolution processes before referring their dispute to the courts."<sup>76</sup> While the parties need not actually solve their dispute using ADR, they are obliged to demonstrate their attempt to do so and may be strongly encouraged to engage in ADR by a judge acting in their case management capacity. The new code includes conciliation as one of the roles of the judiciary and Quebec even offers free judicial mediation services.<sup>77</sup> Quebec is not alone in moving towards a requirement that parties in dispute use ADR techniques before pursuing adjudication through the civil justice system. For example, Ontario's Rules of Procedure also require that litigating parties undergo mandatory mediation before continuing with any lawsuit they have launched.<sup>78</sup>

One of the key benefits of ADR, of course, is that it often enables parties to arrive at "solutions that no court has jurisdiction to provide."<sup>79</sup> It is more flexible and encourages the resolution of disputes through creative solutions. A transsystemic legal education is well suited to forming jurists who can conceive of creative and flexible solutions to legal problems, thereby making them better able to meet the needs of parties in conflict. Training future jurists to consider legal problems from a multitude of lenses arguably makes them more adept at imagining a multiplicity of creative ways to solve

---

76. Art. 1, para. 3 Code of Civil Procedure [hereinafter C.C.P.] (emphasis added). See also FULLER, *supra* note 75.

77. Art. 148 C.C.P. requires parties to indicate the consideration given to private dispute prevention and resolution processes. Art. 158 C.C.P. gives judges extensive case management powers including encouraging the parties to use mediation. Art. 9, para. 2 C.C.P. gives judges a conciliatory function in addition to their adjudicative one and art. 161 C.C.P. *et seq.* provide for judicial settlement conferencing.

78. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.1. Mandatory mediation applies in the counties of Toronto, Ottawa and Essex. In some contexts, mediation is also mandatory in the United States. See Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 373-383 (2001).

79. Reno, *supra* note 49, at 8.

parties' problems without resorting to litigation. As a result, I believe that this approach to legal thinking will help jurists solve legal problems through the alternative forms of dispute resolution they are increasingly being encouraged, or in some cases mandated, to use.

### 3. *Novel Judicial Methodology*

A final justification supporting the growing importance of the trans-systemic approach is that it dovetails with a novel form of judicial methodology developing in Canada and perhaps elsewhere in the world. In Canada, we are witnessing an increase in the use of comparative law in our courts and a resulting cross-fertilization of ideas moving between the civil and common law traditions. This, of course, resonates with an integrated approach to legal education and its focus on learning from the other.

Canada is, of course, a bijural country because of the presence of the French civil law tradition, which applies in private law matters in the province of Quebec, and the English common law tradition characteristic of the rest of Canada. The relationship between Quebec civil law and Canadian common law is a complicated one in which there have been large swings of the pendulum over Canada's 150-year history. As I explain in more detail in another article published in the *Journal of Civil Law Studies*, one can trace three major trends that define this complex inter-tradition relationship.<sup>80</sup>

The first discernable trend, apparent in the years immediately following the creation of the Supreme Court in 1875, was one of harmonization or unification. As a result, even though the Quebec Act of 1774 and the division of powers in the Constitution allowed Quebec to maintain its civilian tradition in private law, it was sometimes unclear whether this tradition would be preserved.<sup>81</sup> In particular, the Supreme Court's

---

80. Rosalie Jukier, *Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration?*, 11 J. CIV. L. STUD. 75 (2018).

81. See The Quebec Act, 1774, 14 Geo. 3, c. 83 (U.K.); Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 91-92 (U.K.), reprinted in R.S.C. 1985, app. II, No. 5 (Can.) divides authority to legislate between the federal and provincial governments. Per s. 92(13), the provinces have control over "Property and Civil Rights in the Province" which includes contracts and extra-contractual responsibility and

early jurisprudence speaks to standardizing and unifying Canadian law in a way that would bring the civil and common law in line with each other, but, in practice, this meant making the civil law conform to the common law, a process that would have left little autonomy for Quebec's civilian legal tradition.<sup>82</sup>

In the beginning of the twentieth century, a decidedly different trend emerged, that of diversity or autonomy. This was led primarily by Supreme Court Justice Pierre-Basile Mignault, who believed that the civil law, being part of Quebec's ancestral heritage, needed to be protected at all costs.<sup>83</sup> Worried about the survival of the civilian tradition in Canada, and even casting a worried eye to Louisiana, Justice Mignault stressed the distinctiveness of the civil law and argued that it needed to be developed autonomously from common law influences in order to preserve the tradition's identity, originality, and integrity.<sup>84</sup>

In Canada today, we find elements of both unification and diversification philosophies. On the one hand, we see our Supreme Court speaking, in some very recent cases, of the desirability of a convergence in outcome between civil and common law cases of the same sort. For example, in a recent case from Quebec dealing with the parties' request to rectify a contract on the basis that the written terms did not match their true intentions, the Court refused to do so, basing itself on Civil Code principles but also saying that the same result would occur in the common law and that that made sense.<sup>85</sup>

---

per s. 92(14), the provinces control the "Administration of Justice" which includes civil procedure.

82. Justice Taschereau, who served on the Supreme Court from 1878 to 1906, was a chief proponent of this harmonization philosophy. *See, e.g.*, *Canadian Pacific Ry. Co. v. Robinson* (1887), 14 S.C.R. 105 (Can.), at 125.

83. Justice Pierre-Basile Mignault served on the Supreme Court from 1918 to 1929. *See also* Sylvio Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec : La sauvegarde de l'intégrité du droit civil*, 32 MCGILL L.J. 559, 570 (1987).

84. *See* *The Mile End Milling Co. v. Peterborough Cereal Co.*, [1924] S.C.R. 120 (Can.); *Colonial Real Estate Co. v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585 (Can.); Pierre-Basile Mignault, *L'avenir de notre droit civil*, 1 REVUE DU DROIT 56 (1922).

85. *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, para. 5 (Can.).

On the other hand, we cannot deny that in Canada, we view the civil and common law traditions as autonomous and independent, the Supreme Court recently asserting that “the common law and the civil law [should] evolve side by side, while each maintain[s] its distinctive character.”<sup>86</sup> This idea came through loud and clear in a 2014 decision where the Supreme Court had to interpret the statute governing the appointment of Supreme Court justices. The Court’s interpretation actually resulted in different rules for the appointment of the three judges from Quebec that sit on the country’s highest court. The majority of the Supreme Court justified this difference by explaining that the wording of the statute was due to a historical compromise intended to “guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture,” and that the law must remain as such since, “the objective of ensuring representation from Quebec’s distinct juridical tradition remains no less compelling today.”<sup>87</sup>

Nonetheless, despite the strong survival of the civilian tradition in Canada, existing side by side with its common law counterpart, we are currently witnessing a greater willingness among judges to look to the other legal tradition in their judicial reasoning, leading to an interesting cross-fertilization of ideas. This increasing emphasis on comparative law at the judicial level is creating a new trend that can be described as one of inspiration. This trend is based on the premise that the Court can look across traditions, not to unify them but, rather, to use comparative law as inspiration for legal development. This maintains the distinctiveness and integrity of the two traditions, while at the same time acknowledging the mutual influence they can have on each other. This inspiration philosophy was summed up by Justice Stevenson in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* as follows,

[T]his Court has the benefit of being the final court of appeal in a country that has two legal traditions: the English

---

86. Reference re Supreme Court Act, *supra* note 27, para. 85.

87. *Id.* para. 93.

common law and the French civil law. Our two legal traditions are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law on this Court.<sup>88</sup>

What is very reassuring about this inspiration movement is that it is reciprocal. Not only, as we might expect, are judges in civil law cases looking to the common law for inspiration but increasingly, the dialogue is moving in the other direction as well with common law judges looking to the civil law for inspiration. A notable example is when, in November 2014, the Supreme Court rendered a decision using the well-established obligation of good faith that exists in Quebec civil law to influence the Court's creation of a good faith duty in contract performance in Canadian common law.<sup>89</sup>

#### IV. CONCLUSION

The dialectic theme of learning from the other, the very basis of the transsystemic approach, is evident in Colonel Tucker's own writings. His words from a 1957 article, published in the Louisiana Law Review entitled, "The Role of the Law School in Law Reform," were prescient indeed.<sup>90</sup> According to Tucker, "[t]he horizon of legal research today is international. Scholars of the world are constantly exchanging ideas and the experience and practices of other countries in solving legal problems are of great assistance in the solution of similar questions at home."<sup>91</sup> Of course, Tucker was speaking about the cross-fertilization of ideas as between scholars but it is not such a stretch to say it is equally positive when practiced by judges.

This trend of cross-fertilization and inspiration amongst legal traditions mirrors that endorsed by the transsystemic approach,

---

88. Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, 1174 (Can.).

89. Bhasin v. Hrynew, 2014 SCC 71 (Can.).

90. Tucker, *supra* note 5.

91. *Id.* at 589.

which emphasizes “the encounter between legal traditions,”<sup>92</sup> the “experience of exchange”<sup>93</sup> and “cross-cultural dialogue.”<sup>94</sup> Jurists educated in a transsystemic environment will be more at home in a legal environment that extols learning from, and being inspired by, the other.

It has now come time to end our voyage. I will do so by referring to others who have also used a travel metaphor. For one, Marcel Proust has famously said that, “[t]he real *voyage* of discovery consists not in seeking new landscapes, but in having new eyes.” I have always thought that that is what transsystemic thinking seeks to do, namely, view existing landscapes through new eyes, apply new lenses to legal problems and be enriched by new perspectives. But I was delighted to see that John Tucker himself employed this metaphor when he stated:

May we always *travel* the road of law reform and law revision together in complete mutual faith and understanding. The road ahead has no end and is not without its difficulties. But beyond each crest of achievement lies the glittering challenge of still another task, another problem arising out of the evolution and growth of the law to solve.<sup>95</sup>

He concludes, as will I, by saying, “[h]ow these problems are to be solved depends in large measure upon the leadership of the law schools.”<sup>96</sup> I believe that McGill has taken a leadership role in recasting legal education and, more importantly, legal thinking at large. The experiment, which had its risks, has been a success. Tradition-based silos have been replaced by a holistic, integrated approach. Our students are not prisoners of categories. They are indeed legally agnostic. But most importantly, they are open to a myriad of ideas and solutions and this approach dovetails closely with the kind of lives our graduates will live today as jurists.

---

92. Kasirer, *supra* note 41, at 482.

93. *Id.* at 483.

94. *Id.*

95. Tucker, *supra* note 5, at 592 (emphasis added).

96. *Id.*

Just as la Beauce and le Bayou are different places with different geographical features, so too are Quebec and Louisiana different legal jurisdictions. However, they are, as we saw earlier, in many ways, sister jurisdictions, sharing a common mixity in their legal systems. This makes law schools in Louisiana a particularly fertile environment in which to showcase this unique itinerary and I am so happy you came along with me on this voyage.