PORTRAIT OF A LEGAL HARMONIZER

It is a beautiful language for those who would defend it
It offers treasures of infinite richness
The words we could not find to understand one another
And the strength we need to live in harmony

Yves Duteil, “La langue de chez nous”

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Almost two weeks after my interview for a job with the Civil Code Section, I received the phone call that would change our lives, Viviane’s and mine. It was from one of the lawyers in the section offering me a one-year term as counsel. I will long remember the end of that afternoon. From my window, I could see how the trees on the Plateau Mont-Royal were losing their leaves with every gust of wind. It was the end of summer but, most of all, it was the beginning of a promising professional adventure.

In a short time, I had to move to the National Capital. I had to find an apartment fast, get settled in a new neighbourhood, in a different universe, in a foreign environment and learn how to live on my own again. Viviane and I would live two hundred kilometres apart for several weeks so that she could sell the house and find an associate to take over her dental clinic.

Looking ahead in the long term, we saw only happiness. Viviane would come join me in Ottawa, we would buy a lovely home and she could open another dental clinic. We had found our capacity to dream again, to project ourselves into the future. Once, we had had rosy visions of our future but, driven by our professional agendas, that bright prospect had somewhat dimmed.

That night, we let our eyes do the talking, and my beating heart danced like a candle flame. Our sense of complicity was as exquisite as a well-aged Château Latour.

The next day I took the 417 for the first time in my young career. Driving along that asphalt ribbon bordered with hardwoods. Discovering the glow of light spreading over the horizon in the middle of the night. And, finally, following the meandering road leading to the capital.

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If there was one overwhelming frustration that I experienced in my years of private practice, it was that I never could get into the legal issues that occurred to me as I read federal statutes. Things had to be done in a hurry: the client was waiting, the other side, too, the meter was ticking and the cell phone ringing, the pleadings had to be filed fast, the injunction obtained and, before I knew it, I had been practising for five years.

I was still young, I was still healthy and Viviane, who had been through hell and high water herself, was still my faithful companion. But Claude, an old friend from law school, had just fallen into a severe depression. And Bob, another friend, had just had a bed set up in his office. Did I have to go that far before I woke up? The time had come to give my career a kick in the pants.

Of course, this was easier to think about it than do! I wasn't even thirty yet and, already, I was questioning myself. Lost in the meanders of my existential crisis, I could suddenly see all the problems in my young professional's life closing in. Of course, I would have liked to see the light at the end of the tunnel. But, in the mood I was in, I was afraid they were the lights of a train heading right for me.

Once I was in the office, however, I remember that a light went on in my mind. It happened when one of our articling students told me about the harmonization program at the federal Department of Justice. Apparently, the Department was looking for lawyers interested in research to conduct an in-depth revision of the federal legislative corpus. To make a long story short, what was involved was updating the statutes to reflect the changes that had been made to the Civil Code in the 1994 reform by the Quebec legislature.

From a quality of life perspective, the option was definitely alluring. I would leave a basically precarious job for another where I might get a permanent position. I would leave a work schedule consisting of seven big Mondays for another where there would be time for a weekend. I would leave the whirlwind of a career based on stress and sink into the tranquillity of legal research. So what if I listened to my heart for once?

That is when I thought about hanging up my shingle. I had never rediscovered the pleasure I had experienced when writing my master's thesis on the rights of the unpaid vendor in Quebec civil law. I had explored terrifically interesting legal issues and been involved in fascinating research. Since then, I had been unable to truly devote myself to pure legal analysis. And now this opportunity had arisen. And I had no intention of letting it pass me by.

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Once before, I had had a chance to deal with the issue of harmonizing federal statutes with the civil law. It was in the spring of '94 when I was still an articling student. As I was leaving a seminar on the new *Civil Code of Quebec*, I fell in with my mentor, Mr. Winner. He was indeed a winner and a very effective litigation lawyer. He had a scintillating presence, a very characteristic way of talking while blinking his eyes and a subtle intelligence. We strode through the crowd lining the halls of the Alexis Nihon Plaza. Mr. Winner turned towards me, his eyes half closed.

– We have the time to go eat something before the three o'clock session, don't we?

– Oh, I'm with you, I said ingenuously.

– That's the stuff, my boy, said Mr. Winner with a mocking grin.

After crossing St. Catherine, I caught sight of the façade of a small bistro that seemed to be our destination. On the red awning above the entrance was written "À la soupe" in gold letters. Mr. Winner gestured to the waiter with a snap of his fingers. He invited us to sit at a small round table near the window in the smoking section and then took our orders. Basquaise chicken, trout filet, one bill.

While we waited for our food, Mr. Winner lit up a Gauloise and then, frowning, edified me with a few comments on the morning's information session.

– It's quite a change, especially for the municipalities.

– You mean because of the introduction of “prior claims”, I asked.

– I am not sure how the judges are going to interpret that, Mr. Winner said with a grimace, two columns of bluish smoke issuing from his nostrils. I’m thinking about what could happen in case of the bankruptcy of a debtor, he added.

My mentor’s finely honed legal mind had already identified a problem that left me a little stunned at the time. I maintained a wise silence while my mentor reflected and pulled more deeply on his little carcinogenic stick. I was discretely eyeing our neighbours’ orders when Mr. Winner’s voice suddenly rang out.

– In my opinion, there could be a problem at some point in bringing the law into alignment as between Parliament and the Quebec legislator.

– Yes, but the *Civil Code of Quebec* is the fundamental law of the province, right?, said I, rather artlessly.

– I fully agree! Mr. Winner replied. Except that if the two legislators starting using separate terminologies and concepts, we could find ourselves in a funny situation that would not be at all amusing.

In my *naïveté*, I let myself imagine all the litigation that this “funny situation” might lead to. And I didn’t understand why that could be a problem. After all, the more litigation, the more potential clients, the better things go at the office, I told myself. But my mentor did not share my opinion. For him, the rights of his clients might be at stake and that was a torment to him.

It must be said that Gold, Brick and Associates was a firm that was rolling in money. It also had a legal treasure trove of wisdom in the person of Mr. Wise. He was the patriarch of the firm, with a large white moustache and a light pair of rectangular glasses handing at the end of his nose and had been in practice for twenty-five years. He was a specialist in civil law, and no one, especially not the senior partners, hesitated to consult him. His advice was invariably followed.

Back in the office, Mr. Winner returned to his earlier line of thought. This time, he found a more battle-hardened ear than mine when he talked with Mr. Wise. The latter listened to his colleague’s fears about the transformations that the law of security on property had just undergone.

– The Quebec legislator is abandoning the privileges given to the municipalities in respect of their property tax liabilities, Mr. Winner began. That could pose a problem.

– It gives them a prior claim, replied Mr. Wise. In sum, the legislator is simplifying things for them. They don’t even have to register their claim!

– In bankruptcy and insolvency, added Mr. Winner, that might not be so simple.

– There’s no doubt that they are going to run into some trouble because a prior claim probably does not constitute a real security. The trustees in bankruptcy will no longer recognize them as secured creditors. Now that could be a problem.

– Because when they changed the *Code*, they should have changed the *Bankruptcy and Insolvency Act.*

– And the other federal statutes, explained Mr. Wise. But, it's up to the other Parliament to do that.

Mr. Wise just smiled and returned to his office. I went my way and filed away this very enlightening conversation on the interaction between federal and provincial legislation. I didn't know then that it would be of great help a few years later.

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"What we're doing is unique!," said the director of the section at my interview. And there was, in fact, almost no precedent for a legislator's undertaking the task of harmonizing the whole of the legislative corpus in a context that was federal, bilingual and bijural all at once. However, since there was no precedent, a methodology had had to be cobbled together. The methodology had already been agreed upon by the time I arrived in the section. It was recorded in a document that the manager handed to me at the end of my interview.

I became acquainted with the work method on my way home. It had a whole vocabulary that I would have to assimilate. I would spend the coming weeks ferreting out "unijuralisms", "semi-bijuralisms", "approximate bijuralisms", not to mention examples of "terminological obsolescence", "simple doublets" and "doublets by paragraph", "neutral terms" and "conceptual incompatibilities". I felt I was discovering a new language. And, paradoxically, the purpose of this method was to make the law comprehensible to Canadians from every region.

I placed the document on my knees and began day-dreaming. So, I would no longer have to meet with Mr. Tartampion but instead I would be reviewing legal dictionaries. I would no longer have to do searches for bad debtors but identify harmonization problems. I would no longer have to prepare out-of-court settlement proposals but instead I would be making proposals for legislative amendments. I was, to put it bluntly, changing profession!

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I was assigned to the commercial law team and had to review the whole *Bankruptcy and Insolvency Act.* Still, this was a curious trip down memory lane. Remembering the learned exchanges between Messrs. Winner and Wise, I found myself in familiar territory when I read the draft amendments for the first bill on harmonization. This obviously marked the introduction of the concept of "prior claim" into the definition of "secured creditor". It would finally cut short the legal debates raging at the time on this subject, particularly in the famous "*Château d'Amos*" case. And, in my first hours on the job, I was struck by the undeniable utility of the work of the Civil Code section.

With a bit of historical research, I was able to place the *Bankruptcy and Insolvency Act* in context and understand the issues it posed for harmonization. By and large inspired by British law, its main legal basis came from the common law. Furthermore, the reform of the Civil Code in 1994 had given it an old-fashioned look. Hence the need to bring the Act into line with Quebec's civil law. There was no doubt that an enormous task lay ahead. I had to screen every provision of the Act to identify the terminological and conceptual problems raised by each. Each and every one! And this was in reference to every area of the civil law. All of them! From family law to security law, from successions to private international law, from legal persons' law to the publication of rights. Not to mention procedure. A painstaking task. In fact, the work of someone who is an expert in bankruptcy law and Quebec civil law!

Carried away by my enthusiasm, I threw myself heart and soul into my research to discover the legislative intent behind each of these provisions. For this I had to read the relevant authorities, search in terminological dictionaries, in English language, French language, civil law, common law, Canadian, English, American and French dictionaries, consult Government of Canada computer databases, query *Quicklaw*, query the *Code civil du Québec annoté interactif* [the interactive annotated Civil Code of Quebec], consult other publications annotating the *Civil Code of Quebec* as well as those annotating the *Civil Code of Lower Canada*, check in the *Canadian Abridgment*, the *Annuaire de jurisprudence du Québec,* leaf through general dictionaries as required, read the *Commentaires du ministre de la justice du Québec* on the Civil Code reform carried out by the Quebec legislator in 1994, verify the solutions applied by that legislator in the context of its program for harmonizing public statutes with the Civil Code of Quebec, consult *Hansard*, read the research carried out by the section's lawyers, consult as required the working documents of the department responsible for administering the Act, check other federal statutes, consult the Internet as required, consult with my colleagues in the section and in the department responsible for administering the Act, consult members of the legal community, the *Barreau du Québec*, the *Chambre des notaires*, university professors and on and on.

The problems that first jumped out at me raised issues of a terminological nature. Of course, the civilian vocabulary used in the Act belonged, to a great extent, to times gone by. Thus, the word "*nantissement*" [pledge] had ceased to corresponded to any security mechanism in Quebec civil law since 1994. But there was also an impressive quantum of barbarisms, coloquialisms, double meanings, grammatical errors and anglicisms. These problems seemed, however, to reflect fairly widespread usages that were nonetheless wrong, legally speaking. For example, the word "charge" was mistakenly used as a synonym for "security". I then had to find solutions that took into account the audience of francophone common law lawyers and the audience of anglophone civil law lawyers.

Sometimes I would have exhausted all the resources available to me and still not have managed to get even the slightest bit of information about an obscure provision of the Act. Obscure, no doubt, but still capable of presenting harmonization problems. This was because, basically, I was dealing with a complete abstraction. When I was in practice in a private law firm, the questions we asked ourselves arose from the clients' very concrete problems. As a harmonizer, however, I had to review provisions that, more often than not, had never been litigated. I had, in sum, to anticipate possible litigation! Above all, I had to ensure that it would not arise. For the needs of my research, I had to be both judge and a party! A dreadful dilemma.

I also had to deal with provisions of far greater litigious potential. Any amendment to those provisions threatened to have serious financial and legal consequences. Thus, before I went ahead, it was a good idea to consult the various stakeholders whose comments could be very enlightening—which was a good thing, incidentally, but also had the effect of removing the most concrete, interesting and spectacular harmonization problems from my purview.

When I finally presented the results of my work, I had the terrible feeling that the few legislative amendments that I was proposing did not do justice to the thousands of hours, dozens of days and several weeks' work that I had devoted to the meticulous analysis of tens of legislative provisions concerning a number of areas in civil law. I had undertaken the harmonizing process with vigour and determination, like Guillaumet crossing the Andes, and there I was at my destination and all I had to show for it was a few amendments making mere terminological changes or dealing with obscure provisions. While the frostbite, wounds and scars on Guillaumet spoke of his struggles to reach his goal, most of my efforts were invisible.

But this didn't mean the end of my labours! Once our first bill drafted by our brave legislative services team was tabled in the House of Commons, it still had to be passed. Subjected to the vicissitudes of politics, our bill was at the mercy of our Members of Parliament and Senators. And, what had to happen finally happened: ineluctable destiny, the axe of the parliamentary agenda, the dissolution of Parliament. Like poor grieving parents, we gathered in silence for a moment before the remains of our bill, dead on the Order Paper. We had to mourn the product of our labours before it could even reach the courts. Above all, we had to get back to work and stay at work and maintain our course without faltering.

It was demanding work, sometimes exhausting, sometimes discouraging, but I gained something, despite everything. I gained because every day I was becoming a better jurist. I was lucky enough to take part in solving various complex problems, some of which were litigated. Moreover, I had at my disposal every technical resource a researcher could dream of. And what is more, I had the signal privilege of working in the heart of the parliamentary process, at the source of the nation's laws.

It was exhilarating, sometimes troubling and often frustrating work. At the end of the day, I was the gainer. I was gaining because I had the opportunity to defend the distinctiveness of the Quebec legal system that is based on determining the legal rule by a process of abstraction. I also had the opportunity to familiarize myself with the distinctiveness of the common law system that is based on determining the legal rule through an empirical approach. In so doing, I acquired solid work experience in the world's two most prominent legal systems.

In connection with this aspect of my work, incidentally, the more I held discussions with renowned practitioners, eminent researchers or professors emeritus, generally at conferences, the more I realized the importance of my work in terms of the globalization of markets. Pioneering in this effort, working to implement a program that was both desirable and novel, in the context of a federal government that was bilingual and bijural, I myself became a resource person. Imperceptibly, I was forging a reputation for myself.

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In the months that followed, consultations with the legal community on the most complex problems in the *Bankruptcy and Insolvency Act* came to an end. Sketchy solutions began to appear on the horizon. My harmonization efforts were now linked to those of the department responsible for administering the Act in order to introduce new legislative policies. This meant that once amendments had been developed to harmonize the whole Act, they would appear in a bill sponsored, this time, by the department in question.

With a certain tug at my heart strings, I learned that the second bill on which I had collaborated had just been placed in the hands of our Members of Parliament and Senators. It had been created in partnership with a good portion of the legal community, including the responsible department. I had already gone through the grieving process, it was true, but one cannot become accustomed to the pain of losing one's bill. The weeks passed. The bill went to first reading, second reading, committee study, third reading. The House of Commons file was transferred to the Senate. A similar procedure was followed. As each stage was passed, I increasingly felt that the bill would succeed, although I was full of trepidation! The suspense was as interminable as it was gruelling.

One day, my co-ordinator burst into my office to tell me that the bill had become law. With tears in my eyes, I realized that the harmonization amendments we had developed now had legal force. By dint of my work, my collaboration with the responsible department, by our consultations with the legal community, I had just transformed the Canadian bankruptcy and insolvency legal landscape. What did it matter if I burned with the enthusiasm of a thirty-year-old child? I had still managed to meet my professional goals and the goals of my section. I was walking on air!

I now had to direct my energies to a new goal: to explain the legislative amendments to the *Bankruptcy and Insolvency Act* to the entire Canadian legal community. In the following months, I had to give dozens of lectures, answer hundreds of questions and explain the harmonization program to thousands of other lawyers. With practised gestures, an agile tongue and flowery eloquence, I took an ever more obvious pleasure in talking about harmonization.

One day, at the end of one of those training sessions at Montreal's Intercontinental Hotel, I had the pleasure of chatting for a few minutes with my former mentor, Mr. Winner. He was still full of sparkle and he still had that characteristic way of talking while blinking his eyes, and his subtle intelligence. Obviously, we talked about the amendments to the definition of "*créancier garanti*" [secured creditor]. We recalled our conversation on that subject, over seven years ago. As we prepared to say our goodbyes, Mr. Winner waxed somewhat nostalgic.

– When I think that not so long ago you were just beginning at the firm wearing a suit too big for you and now, look at you on the podium, teaching our colleagues like a professor about the harmonization of the *Bankruptcy and Insolvency Act.*

– Oh, Mr. Winner, if you knew how hard the way seemed sometimes.

– But you arrived, François, you arrived. And, indeed, just to highlight your accomplishment, I have a little gift for you.

Mr. Winner held out to me a rectangular package soberly wrapped in a purple-coloured gift wrap with fine golden lines. While I tore off the wrapping, Mr. Winner told me he had recently started making his own wine. At the moment, I didn't understand why my former mentor was talking about his new hobby. I grasped the allusion when I opened the gift. It was a bottle of red wine. I burst into laughter when I read the label that Mr. Winner had placed on the bottle. Endowed with an ironic sense of humour, he had baptized his wine "Cuvée Château D'Amos".

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Once again it was spring. Viviane had moved in with me several months ago. She had finally managed to open her second dental clinic in downtown Ottawa. As for me, I had obtained permanent status. We managed very well in my little apartment. At least, that's what I thought. Until, one evening in May, we were finishing an excellent *fettuccine,* and Viviane made a remark that would change our lives.

– Perhaps we should think about buying a house, François, she said looking at the walls and the ceiling. Your apartment's nice, but it's small.

– Why do you say that? We're not comfortable together?

– Of course. But what I'm telling you is that we might get in each other's way now that we're going to be three.

– That we’re going to be... You mean...

– That’s exactly what I want to tell you! I went to see my gynaecologist this afternoon. It’s due in December!

I jumped up and went to kiss the woman who would be the mother of my first child. With tears in my eyes, I realized that our love had created a separate human being who would soon be forcefully expressing himself in the garden of our house, the one we would be buying in the coming weeks. The future had indeed found its glamour again and now glittered on the horizon, shining and inviting.