

## Judicial Auxiliaries Across Legal Regimes: From New France to Lower Canada

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#### Introduction

The British conquest of New France in 1759/1760 brought fundamental changes to the formal judicial regime of the new colony of Quebec. After a brief interregnum of military rule (1759-1764), the constitutional and public law of France was replaced by that of England, including the criminal law and the anti-Catholic penal laws. The courts were dramatically remodelled, and new British institutions and offices were introduced, such as the jury and the coroner. And the civil law was upended: the pre-Conquest French law, based in large part on the *Coutume de Paris*, was maintained during the military régime, then in 1764, in theory replaced by English common law, and then restored in 1775 by the Quebec Act, which also removed the Catholic disabilities and confirmed the reception of English criminal law. The whole was confirmed by the Constitutional Act of 1791, which created the colony of Lower Canada out of part of the old province of Quebec, but left the legal system largely intact.

These rapid changes in formal legal regimes and structures make eighteenth-century Quebec a particularly interesting setting for studying the concrete effects of profound legal change on justice systems. As in other conquered colonies with European populations, such as New York or South Africa, what emerged in Quebec was a hybrid of English and continental law and legal practices. In addressing this hybrid system, Quebec legal historiography has mainly emphasized the dramatic break represented by the Conquest and the legal confusion that followed through to the end of the eighteenth century. The consensus is that the law was either an alien system imposed on an unwilling population (in the case of the criminal law) or an unwieldy and largely unworkable amalgam of French law and English legal structures (in the case of the civil law). The social and political results were dramatic: alienation of the *Canadien* (francophone) population, with a general boycott of the legal system, especially immediately following the Conquest; exclusion of *Canadien* elites from judicial appointments, with a bench dominated by largely incompetent British judges; manipulation of the legal process for partisan political ends, exemplified by arbitrary imprisonments and state trials; and so on. The whole fits into a more general thesis about the effects of the Conquest on Quebec society, whereby the conquerors excluded the majority *Canadien* population from power and denied its political rights and traditional institutions, with the goal of anglicizing the colony and assimilating its population.<sup>1</sup>

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<sup>1</sup> Classic studies include Edmond Lareau, *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours* (Montréal: A. Periard, 1888-1889) and Hilda Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis: Minnesota University Press, 1933); more recent scholarly work is well-represented by André Morel, "La réaction des Canadiens devant l'administration de la justice de 1764 à 1774: Une forme de résistance passive", *Revue du Barreau* 20(2)(1960): 55-6 and "La réception du droit criminel anglais au Québec (1760-1892)", *Revue juridique Thémis* 13(2-3)(1978): 449-541; Jean-Marie Fecteau, *Un nouvel ordre des choses: la pauvreté, le crime, l'Etat au Québec, de la fin du XVIII<sup>e</sup> siècle à 1840* (Montréal: VLB, 1989); Evelyn Kolish, *Nationalismes et conflits de droits: le débat du droit privé au Québec, 1760-1840* (LaSalle: Hurtubise HMH, 1994); F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: University of Toronto Press, 1993), *From Higher Morality to Autonomous Will: The Transformation of Quebec's Civil Law, 1774-1866* (Winnipeg: University of Manitoba, Faculty of Law, 1992) and with Barry Wright (eds), *Canadian State Trials. Volume I: Law, Politics, and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996). See also Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774", in Louis A. Knafla (ed.) *Crime and Criminal Justice in Europe and Canada* (Waterloo, Wilfrid Laurier University Press, 1981): 77-110; Louis A. Knafla and Terry L. Chapman, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812", *Osgoode Hall Law Journal* 21(2)(1983): 245-274; Michel Morin, "La perception de l'ancien droit et du nouveau droit français au Bas-Canada, 1774-1866", in *Droit québécois*

While there are elements of truth in much of this, the discussion of this hybrid legal system has often been based more on an examination of the law in theory than in practice and, when the practice has been studied, on exceptional cases and the upper reaches of the legal system. Thus, much attention has been focussed on the political debates surrounding the laws, and on the actions and ideas of the British administrators, the higher court judges and the principal law officers. Until recently, far less attention has been paid to how the changes and admixtures in legal regimes affected the everyday routines of ordinary justice. Recent studies, such as my own work on local criminal justice or Jean-Pilippe Garneau's study of family law, have suggested that at this level, changes across the Conquest, though quite real, were less dramatic than formal transformations might suggest; that the *Canadien* population, both elite and popular, was less alienated from the law than has generally been postulated; and that the system was far less incoherent than its contemporary and modern critics would have us believe.<sup>2</sup>

One part of this reconsideration has focussed on "judicial auxiliaries" - a term I use here in the sense of the French term *auxiliaires de justice* to mean judicial officers other than judges, such as lawyers or bailiffs. At the level of everyday justice, they were as or even more important than the judges; for most of the colony's inhabitants, the human face of the legal system was not so much the judge as the notary, the bailiff or the court clerk. As in all legal systems, auxiliaries played a fundamental role both in reproducing legal routines and cultures and in mediating between state law and the population. And yet, their role in post-Conquest Quebec has been relatively little studied. This is in contrast with the French régime, which we know better from the work of scholars such as André Lachance and John Dickinson.<sup>3</sup>

My intent in this brief paper is evidently not to undertake a detailed history of these legal actors from New France to Lower Canada. Instead, I want to sketch out briefly what we know about them across the changes in legal regimes from the end of New France to the beginning of Lower Canada, with a particular concern for the issues of continuity and change in personnel and in practices. To address these issues, this paper examines four main types of judicial auxiliaries: notaries; lawyers; court clerks; and bailiffs.<sup>4</sup>

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*et droit français: communauté, autonomie, concordance* (Montréal, Yvon Blais, 1993): 1-41 and "Les changements de régimes juridiques consécutifs à la Conquête de 1760", *Revue du Barreau* 57(3)(1997): 689-700.

<sup>2</sup>Fyson, *Criminal Justice, Civil Society, and the Local State: The Justices of the Peace in the District of Montreal, 1764-1830* (Ph.D., Université de Montréal, 1995); Garneau, *Droit, famille et pratique successorale: les usages du droit d'une communauté rurale au XVIII<sup>e</sup> siècle canadien* (Ph.D., UQAM, 2003) and "Droit et «affaires de famille» sur la Côte-de-Beaupré. Histoire d'une rencontre en amont et en aval de la Conquête", *Revue juridique Thémis* 34(2)(2000): 515-561.

<sup>3</sup>For example, the last general history of the notarial profession was André Vachon, *Histoire du notariat canadien, 1621-1960* (Québec: Presses de l'Université Laval, 1962), with one thin chapter on the eighteenth century. A few descriptive studies provide useful information, notably Christine Veilleux, *Les gens de justice à Québec, 1760-1867* (Ph.D., Université Laval, 1990); Seaman Morley Scott, *Chapters in the History of the Law of Quebec 1764-1775* (Ph.D., University of Michigan, 1933); and J.-Edmond Roy's classic *Histoire du notariat au Canada* (Lévis: Revue du notariat, 1899-1902). There are also discussions in more focussed studies, such as those of myself and Garneau. Some of the more significant characters have biographies, notably in the *Dictionary of Canadian Biography*, <<http://www.biographi.ca>>. On New France, see Lachance, *La justice criminelle du roi au Canada au XVIII<sup>e</sup> siècle: tribunaux et officiers* (Sainte-Foy: Presses de l'Université Laval, 1978), and Dickinson, *Justice et justiciables: la procédure civile à la Prévôté de Québec, 1667-1759* (Sainte-Foy: Presses de l'Université Laval, 1982), *Law in New France*, (Winnipeg: University of Manitoba, Faculty of Law, 1992), "Réflexions sur la police en Nouvelle-France", *McGill Law Journal* 32(3)(1987): 497-512 and "La justice seigneuriale en Nouvelle-France: le cas de Notre-Dame-des-Anges", *Revue d'histoire de l'Amérique française* 28(3)(1974): 323-346; also Garneau, *Justice et règlement des conflits dans le gouvernement de Montréal à la fin du Régime français* (M.A., UQAM, 1995).

<sup>4</sup> Aside from the historiography cited in the notes, what follows is based in large part on the following sources: the *PRDH* database of all Quebec vital statistics records up to 1800 <<http://www.genealogie.umontreal.ca>>; the *Parchemin*, *Chronica 2* and *Thémis 3* databases by Archiv-Histo (summary descriptions, respectively, of all Quebec notarial records up to 1784; of various series of the *Conseil supérieur*, the *Prévôté* and the Quebec *Conseil militaire* through 1764; and of the Montreal Common Pleas case-files through 1794); the inventories of the *jugements et délibérations* of the *Conseil supérieur* (ANQQ TP1 S28) and the *ordonnances* of the Intendant (ANQQ E1 S1) as presented in the PISTARD catalogue of the Archives nationales du Québec

## The legal system across the Conquest

Prior to the Conquest, the legal system in Canada (the main settled part of New France, in the Saint Lawrence valley) was essentially a simplified version of that of France. The colony was divided into three administrative districts, and royal courts established in the three main towns -- the *Prévôté* in Quebec City and the *juridictions royales* in Montreal and Trois-Rivières. Appeals went to the colony's *Conseil supérieur*; an *Amirauté* and an *Officialité* decided maritime and spiritual matters. A half-dozen seigneurial courts sat in the countryside, though most seigneuries had none and only about a quarter of the colony's rural population had access to them. The whole system was under the ultimate jurisdiction of the colony's Intendant, who also heard cases himself, in person or through his *subdélégués*.

Judicial auxiliaries played vital roles in this system. Commissioned notaries in both town and country drew up contracts, settled estates and the like; public cases were generally prosecuted by *procureurs du roi* attached to the royal courts, with *procureurs fiscaux* playing an analogous role in the seigneurial courts; process was served by commissioned bailiffs (*huissiers*); policing was undertaken by a small *maréchaussée* (a *prévôt* and a handful of *archers* based at Quebec), by urban bailiffs and, in the countryside, by officers of the seigneurial courts and by the militia officers (principally captains and sergeants) named in each parish; and there was the usual complement of court clerks, gaolers and executioners. Unsurprisingly, the nature and roles of these auxiliaries were very similar to those of their French equivalents. The most notable contrast was the absence of licensed lawyers, prohibited from pleading in the colony; they were nonetheless partially replaced by officially tolerated but unlicensed *praticiens* or *procureurs*, often notaries or bailiffs, who assisted parties in their preparations and court appearances.<sup>5</sup>

The Conquest dramatically changed not only the colony's law, but also its courts. During the military regime, British governors in each of the three districts replaced the existing courts with interim and largely novel systems of rural and urban courts, with most cases heard in courts composed of *Canadien* militia officers or judges, appeals and important cases heard by councils made up of British military officers, further appeals to the governors themselves, and courts martial for serious crimes. British civil administration in 1764 brought another radical break. The interim courts were replaced by a simplified and centralized version of the English judicial system: justices of the peace with lesser criminal and (at first) civil jurisdictions; a Common Pleas for more important civil cases (and all civil cases from 1773); a King's Bench for more serious criminal matters and (at first) civil matters; appeals to the governor and his council; and Prerogative, Chancery and Vice-Admiralty courts.<sup>6</sup> The Trois-Rivières jurisdiction was

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(ANQ) <<http://www.anq.gouv.qc.ca/>>; forays into the principal surviving records of the post-Conquest courts, especially the Quebec and Montreal military régime courts (ANQQ TL9 and ANQM TL12), the Quebec and Montreal Common Pleas through 1775 (ANQQ TL15 and ANQM TL16, TL275 and TP5), the King's Bench (criminal side) through 1794 (ANQQ TL18), the Montreal Quarter Sessions through 1800 (ANQM TL32) and miscellaneous documents in ANQQ TL999; the principal official series of the post-Conquest colonial administration, in the National Archives of Canada, notably RG4 A1 (incoming correspondence), RG1 E15A (public accounts), RG68 (provincial registrar, and commissions and letters patent) and C.O. 42 (State Papers, Quebec); and the biographical and other information on auxiliaries in the *Dictionary of Canadian Biography*, the *Bulletin des recherches historiques* (notably 1905, 1925, 1926, 1931 and 1933), Roy, *Histoire du notariat au Canada*, Pierre-Georges Roy, *Les avocats de la région de Québec* (Lévis: Le Quotidien, 1936) and Normand Robert *et al*, *Parchemin s'explique* (Montreal: Archiv-Histo, 1989). For reasons of space I have had to eschew a full reference apparatus.

<sup>5</sup>Aside from the work of Lachance, Dickinson and Garneau, see also André Vachon, "The Administration of New France", *Dictionary of Canadian Biography* II: xv-xxv.

<sup>6</sup>For a more complete discussion, see Marcel Trudel, *Histoire de la Nouvelle-France X: Le régime militaire* (Montréal: Fides, 1999): 155-184; Douglas Hay, "Civilians Tried in Military Courts: Quebec, 1759-64", in Greenwood and Wright (eds.), *Canadian State Trials I*: 114-128; and Donald Fyson, *The Court Structure of Quebec and Lower Canada, 1764-1860* (Montreal: Montreal History Group, 1994/1997) <<http://www.hst.ulaval.ca/profs/dfyson/courtstr/>>.

abolished and the colony divided into two large judicial districts centered on Quebec City and Montreal; when coupled with the disappearance of the seigneurial courts in 1760 and the abandonment of the rural courts of the military regime, this meant that the judiciary was even more centralized than before the Conquest, apart from a few justices of the peace in the countryside and, from 1770, bi-annual circuits of the Common Pleas. And there was also an almost complete change in the magistracy: many of the pre-Conquest judges, mainly French-born, returned to France following the Conquest; Catholics were essentially excluded from the bench between 1764 and 1775 by the Test Acts; and even after 1775, *Canadiens* were a minority on the bench of the higher courts, though more present among the justices of the peace.

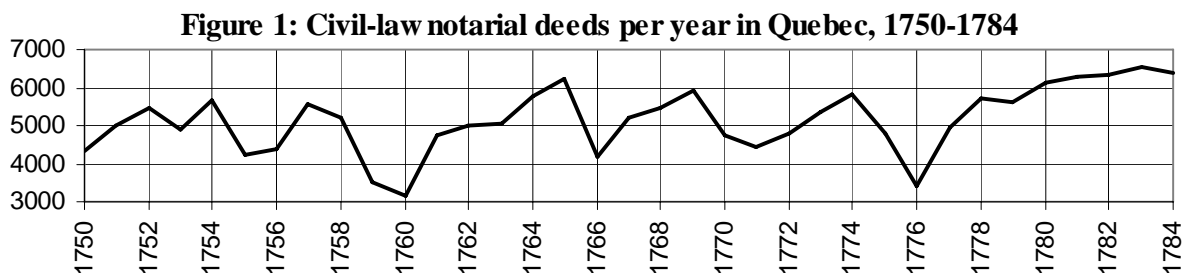
But the change was far less dramatic at the level of judicial auxiliaries. As a general indicator, consider the people who filled the various roles of notaries, bailiffs, clerks, and so on. Based on a very preliminary and partial prosopographical analysis, about 2/3 of judicial auxiliaries active at the moment of the Conquest continued to be active afterwards. And during the period 1764-1774, when Catholics were in theory excluded from posts of public trust by the penal laws, of about 250 judicial auxiliaries that I have been able to identify, about 2/3 were Catholic francophones. Evidently, there was no wholesale replacement of francophone judicial personnel; instead, the human face of the law remained predominately French, though with a significant British element. In part, this was because for reasons of administrative necessity, British administrators put the most liberal interpretation possible on the Test Acts, in essence requiring the anti-Catholic oaths only from judges and magistrates. However, francophones evidently also had a continuing desire to fill these roles, even in a justice system that was no longer French. Still, the degree of continuity in personnel and practices varied considerably among the different types of auxiliaries, which had a significant impact on the position that judicial auxiliaries occupied between state law and the population.

### **Notaries**

The notarial profession has long been taken as the classic example of continuity across the change in regimes. The Conquest itself had little impact on the colony's notaries, beyond the immediate disruptions caused by the war. Of the 42 notaries who had been practising at the time of the final capitulation in 1760, of whom two thirds had been born in France, only four subsequently left the colony; the remainder stayed and continued to practise as before. The British military governors who ruled the colony between 1760 and 1764 explicitly recognized the profession, not only re-commissioning many of those notaries who remained, but also commissioning new notaries. The theoretical change in laws in 1763/1764 should have substituted English practice for French and might also have disqualified Catholics from any positions of trust, through the application of the Test Acts; and some historians have seen the period 1764-1774 as one of dire peril for the profession. But this formal change also had virtually no practical impact. After an initial period of uncertainty, there were no objections to notaries continuing to practice, and British administrators recognized the profession by issuing new commissions to Catholic notaries and by treating notarial archives as public documents.

Most importantly, the *Canadien* population, irregardless of the law in theory, continued to contract and inherit according to French law, in which notaries played a central role. A few English notaries did set up shop in the 1760s, making deeds according to common-law forms and registering them with the provincial registrar according to English practice; and the colony's small British population seems to have used them, as did *Canadiens* on occasion. But despite the proclaimed willingness of several English notaries to write in either English or French, the bulk of the practice remained in the hands of francophone notaries, with even British merchants using

their services, particularly in property matters. As a result, as Figure 1 shows, recourse to civil-law notaries recovered quickly after the invasion-induced drop of 1759-1760, and there was no drop at the theoretical disappearance of French law in 1764; conversely, the formal restoration of French civil law in 1775 did not lead to any sudden upsurge in notarial deeds, with instead a temporary drop resulting from the American invasion in 1775-1776.



Source: *Parchemin* database by Archiv-Histo. Due to indexing limitations, the numbers are approximate.

Beyond numbers, the notaries who made these deeds continued to follow the same civil-law forms as before, a practice implicitly confirmed by the courts (which accepted their deeds as valid proofs) and by the provincial registrar (who registered deeds of theirs in the 1760s and 1770s, though sometimes in translation); even though this was not formalized in colonial law until 1785. And notaries' relationship to the state remained essentially the same: royally commissioned and regulated under the French régime, they remained so under the British; up to 1780, even their fees continued to be set (in theory) by pre-Conquest regulations.

The legitimacy of the profession derived from more than just the state, however, and francophone notaries displayed considerable "passive resistance" towards changes in the law and in administrative practices that threatened their status and customs. Thus, in the early years, several began practising before being commissioned, with one, Dominique Mondelet, continuing as such for over twenty years. As well, though commissions under the British régime could be read to imply that notaries were to follow English practices and use English forms, French notaries continued to act as before, not only using French forms but also keeping the originals of deeds passed before them, a practice unknown under the English system. And though a 1765 ordinance required that all existing and future property deeds be registered, notaries and their clients largely (though not entirely) ignored this obligation, especially outside the towns.

Continuity was also ensured by recruitment into the profession. Most new notaries were francophones: 44 of the 54 notaries who began practising between 1760 and 1774, and all but two of the 39 between 1775 and 1791. With the virtual end of immigration from France, an increasing proportion had been born and educated in the colony itself -- a little under half of the francophones who began in 1760-1774 and three quarters of those for 1775-1791. Even the transmission of notarial *études* (practices) followed pre-Conquest traditions, with transfers often by purchase or from father to son. All ensured the continuity of the profession's legal culture.

This continuity was particularly striking in the countryside, where 90% of the population lived. With the disappearance of the seigneurial courts, rural notaries undisputedly became the most significant local representatives of the law in the countryside; and since with one exception, English notaries practised only in the main towns, the continuity in personnel and practices ensured that the encounter with the formal law that these auxiliaries represented changed very little. Thus, through to the 1780s, there was considerable stability in the sorts of matters for which rural inhabitants came before notaries; and the modalities and rituals of recourse to the

notary remained largely unchanged in the years following the Conquest, with notaries if anything taking on an even more central role following the disappearance of the seigneurial courts.<sup>7</sup>

The Conquest, the military regime, the "abolition" of French civil law in 1764 and its "restoration" in 1775 thus had relatively little concrete impact on what notaries and their clients did in their *études* and homes. In the 1780s, there were a few changes in the state's regulation of the profession, most notably a more detailed fees ordinance in 1780, a reorganization of their territories in 1781 and a 1785 ordinance regulating the profession which imposed, among other things, a mandatory clerkship on aspiring notaries. But with one important exception, none of these were more than tweaks on what was essentially the same system as before the Conquest.

The exception was the relationship that notaries had to the courts. For one thing, some notaries had played important roles in the pre-Conquest courts, acting as *assesseurs* (assistant judges) or substitute *procureurs du roi* in the royal courts, or judges, clerks or *procureurs fiscaux* in the seigneurial courts; indeed, about a third of rural notaries had some position in a seigneurial court, including three judges. All of this essentially ceased under the British regime. But even more important in transforming notaries' relationship to the courts was the beginnings of the bar under the British regime, with the formal admission of lawyers to practice from 1765.

### Lawyers

Despite the formal prohibition of lawyers under the French régime, the colony was not devoid of professional counsel. Judicial auxiliaries made up a large proportion of the *procureurs* who replaced lawyers, with notaries and *praticiens* accounting for over three quarters of *procureurs* in Quebec City's *Prévôté* by the 1750s. The military régime had continued this practice. For example, in the early 1760s, Jean-Baptiste Lebrun was describing himself as a *praticien* and a *procureur en la cour de Québec*. And notaries continued to plead even in the most English of the tribunals, the courts martial. In Montreal, for example, Pierre-Méru Panet, a notary and *praticien* under the French régime, and also the clerk of the town's militia court, appeared on occasion as an attorney before the courts martial, while Jean-Antoine Saillant, a Quebec City notary, was asked by the court to act as defence counsel in the legendary murder trial of Marie-Josephte Corriveau. However, under British civil government, governors began following the English system of commissioning or licensing lawyers, with prior examination by the Attorney General and formal admission to practice by the courts. The right to plead was not exclusive, and other legal professionals acted as well on occasion; thus, in 1771, two rural notaries, Antoine Robin and Ignace Gamelin dit Gaucher, acted as counsel before the Montreal Common Pleas, while in the 1760s and early 1770s, Charles LePailleur, later to become one of the court's clerks, was essentially a permanent *procureur* for what may have been a wealthy widow. Still, commissioned attorneys rapidly dominated proceedings in the courts, so that by 1771, in the Montreal Common Pleas, they accounted for about 90% of known counsel.<sup>8</sup>

At first, this represented little actual change for some notaries, since among francophones at least, the two professions were intimately intertwined. All but three of the eighteen francophone attorneys admitted to the bar between 1765 and 1774 were also notaries, and had generally been so before becoming attorneys. For notaries like Saillant and practitioners like Lebrun, both admitted as attorneys in 1765, the "creation" of the bar thus simply allowed them to continue what they had already been doing. However, it was almost always urban practitioners who held both commissions, thus marginalizing rural notaries, who only rarely appeared before the courts

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<sup>7</sup> Michel Guénette, *Les notaires de Laprairie, 1760-1850: étude socio-économique* (M.A., Université de Montréal, 1992); Garneau, *Droit, famille et pratique successorale*.

<sup>8</sup> The data on which this analysis is based was kindly provided by Jean-Philippe Garneau.

as counsel. When we add the disappearance of the seigneurial courts, where rural notaries were probably most likely to appear as *procureurs*, the effects of regime change are evident. Still, the extent to which this simply formalized a situation already existing under the French regime, the relationship of rural notaries to the Common Pleas circuits, and the role of the licensing process itself in discouraging them from obtaining commissions, all remain to be examined.

Dual practice was also far less common among English attorneys, with only a quarter of those admitted before 1775 also being commissioned as notaries. This reflected the differing constellations of practices, venues and clienteles of lawyers from the two main ethnic groups in this early period. Though the situation was probably more nuanced than many historians have supposed, most francophone practitioners appear to have worked largely in the civil-law Common Pleas (indeed, up to 1766, they were technically barred from pleading elsewhere); and to use Attorney General Francis Maseres' expression, they gave this court the "face and language of the French law". As these courts generally used French law and French procedures and attracted a largely francophone clientele, there was a natural fit with civil-law notarial practice. In the King's Bench, however, law and procedures were English, giving far less prominence to notarial deeds; the English attorneys that apparently predominated in that court thus probably had less reason to be formally commissioned as notaries. Francophone and anglophone lawyers thus adapted differently to the hybrid legal system and the overlap between the two key groups of judicial auxiliaries, notaries and attorneys, reflected these different strategies

The overlap did not last long, however, especially after the formal restoration of French civil law in 1775. In some respects, this should have strengthened the integration of the two professions, since the Common Pleas was now the only important civil court; and indeed, English attorneys began more regularly asking to be named notaries. However, from the late 1770s, British administrators began limiting the issuing of double commissions, in part because of potential conflicts of interest between the two professions (the fear being that notary-lawyers might be tempted to falsify deeds), though commissions still created a half-dozen notary-lawyers between 1779 and 1785. The policy was formalized in 1785, when a regulatory ordinance prohibited notaries from pleading in the courts and forced notary-lawyers to choose one or the other of the professions; the ordinance also forced forbade notaries from acting as court clerks. Paradoxically, just as notaries strengthened their role as justice intermediaries in the countryside, they also lost their role as mediators between the urban-based courts and the population, to the benefit of an increasingly corporatist bar (the first formal law society, the *Communauté des avocats*, had been set up in Quebec City by 1779). Notary-lawyers initially protested against the change, but henceforth the two professions were separate, though some individuals did move back and forth between them during their careers.

I don't want to go much further into an examination of the eighteenth-century bar, as this is covered by another paper in this volume. But one important point is that in contrast with notaries, there was a great deal less continuity, not only in practices but also in personnel. Of 41 attorneys active between 1764 and 1775, only 18 were francophone, including two Europeans who had arrived in Quebec after the Conquest; and of those commissioned between 1777 and 1791, only a third were francophone. Many of the anglophone lawyers had already practised elsewhere, and thus brought a quite different legal baggage with them, though it was not necessarily English: in the pre-1775 period, many had been trained in the Irish and American bars, and some of the most important anglophone lawyers who began practising in the 1770s and 1780s were Loyalists fleeing the American Revolution. Still, at least for the earlier period, part of this anglophone domination is illusory, since many of the anglophone lawyers stayed in the colony for only a few

years. Nathaniel Minor, for example, was commissioned in 1765 but probably back in his native Connecticut by 1767; and Richard McCarty, commissioned in 1768 (and one of the few English lawyer-notaries) left for Michilimackinac in the West in 1770. Without a more detailed examination of who represented whom, where, and how, it is hard to determine how English lawyers adapted to and adapted the colony's legal cultures. Still, if a *Canadien* client wanted to find a French-speaking lawyer to argue French law in the civil courts, there was no shortage, just as an English merchant could easily find an English-speaking lawyer to represent him in the Common Pleas. And there was certainly a considerable admixture of legal cultures among lawyers, with francophone clients engaging English lawyers and vice-versa, and lawyers of each legal culture arguing the law of the other. Even in the criminal courts, francophone lawyers were not necessarily disadvantaged by language or training: thus, in a Montreal Quarter Sessions case in 1771, which opposed two francophones over a master/servant issue, Pierre-Méru Panet successfully convinced the court that under the terms of an Elizabethan statute, it could not hear the case; and this over the equally technical arguments of Edward Antill, the American-trained opposing counsel. In sum, lawyers, like notaries, were well equipped to mitigate the potential shock of the transformation of legal cultures and judicial structures.

### **Court clerks and other court personnel**

In the courts themselves, the continuity in personnel and routines also reflected the hybrid legal system. Despite the radical break in structures, the military regime was marked by stability in court personnel. In the towns, the clerks of all but the courts martial were francophones well-versed in French civil law: in Quebec City, the notary and *praticien* Jean-Claude Panet; in Montreal, Pierre-Méru Panet, who had previously been a *greffier substitut* in the town's *juridiction royale*; and in Trois-Rivières, Louis Pillard, a notary and the former clerk of the *juridiction royale* there. And in Quebec City at least, the crier of the court was Martial Vallet, who had occupied similar positions before the Conquest, notably as *huissier audiencier* of the *Prévôté* in the late 1740s. In the rural courts, the few identifiable clerks were mainly pre-Conquest notaries, such as Charles-François Coron at Saint-Sulpice, who had also been clerk of the seigneurial court of Ile-Jésus. These pre-Conquest officials ensured continuity in proceedings, even before English officers: French procedure was followed, with *comparutions*, *assignations*, *insinuations* and so on; court proceedings were generally in French; and the records were kept in French, just as in the pre-Conquest courts, and in some cases in the very same registers. Only in the courts martial and before the governors was the change in regime more evident, with English procedure and English clerks (probably the governors' secretaries), though pleading seems sometimes to have been in French. But for most *Canadiens* who came before the courts, the bureaucratic face of the law was very much as it had been before the Conquest.

After 1764, the situation varied considerably according to the court and the type of law. In the Common Pleas, the continuity from New France through the military regime was evident. In both Montreal and Quebec City, the Common Pleas initially had two clerks, one English and one French, who divided the business between them; and the French clerks were none other than Pierre-Méru and Jean-Claude Panet, the former military regime clerks. Further, from 1766, the Quebec City clerkship passed to Nicolas-Gaspard Boisseau, the former clerk of the Quebec *Prévôté*, who thus essentially recovered his pre-Conquest position. There were other significant continuities as well: in Quebec, Martial Vallet continued as crier of the Common Pleas through to the late 1770s, when he was replaced by Mathieu Hianvieu dit Lafrance, another pre-Conquest auxiliary; and in Montreal, the clerks even continued to use the pre-Conquest *maison du greffe*, owned by the city's Sulpician seigneurs. The continuity was not complete, though. From the



1760s, the English-language clerks kept their own set of registers and issued English process. And in Montreal, from 1767 to 1777, there was no French-language clerk at all. But even then, the English clerk, John Burke, had a series of assistant clerks generally versed in French law and procedure -- for example, in 1768, Valentine Jautard, who was soon became one of Montreal's leading lawyers, and in 1769, Louis Aumasson de Courville, a pre-Conquest notary and former clerk of the seigneurial court at Notre-Dame-des-Anges -- and from 1777, Burke had to share his duties once again with a French clerk, Charles LePailleur, appointed by the Sulpicians.

French clerks played an important part in maintaining the bilingual character of the court. For example, not only were summons generally issued in the language of the party concerned, but also most other procedural documents, which followed French more than English forms; though the respective roles of French clerks and French lawyers in this respect remains to be thoroughly explored. At any rate, as contemporary observers noted, English parties probably felt no less alienated by the personnel, procedures and proceedings of the Common Pleas than *Canadiens*.

In some respects, it was quite different in the other courts. In the 1760s, the King's Bench, which heard many civil cases, including appeals and *certioraris* from the Common Pleas, was entirely staffed by anglophones, from the chief clerk to the tipstaff. These officials of course used English procedures and forms, and proceedings were apparently entirely in English. The utter alienation of the *Canadien* population from this court is likely overstated, since they were quite able to recognize a potential source of power when they saw it and did appeal to it on occasion. But what awaited them was without doubt a much different experience from the Common Pleas. Going before the King's Bench probably necessitated recourse to an attorney, and probably an English one, to mediate between them and the formal law; whereas in the Common Pleas, many parties continued to represent themselves, especially in lesser cases. As for the civil jurisdictions of the justices of the peace up to 1770, while almost no records have survived, the Clerks of the Peace in both Montreal and Quebec City were anglophones, so it seems unlikely that French predominated in the justices' courts. Still, French practices probably did not disappear entirely from these courts: several of the most active justices were French-speaking Huguenots, who apparently had their own clerks; and French attorneys pleaded before the justices. At any rate, the justices' civil jurisdiction disappeared from 1770, and that of the King's Bench from 1773, leaving only the Common Pleas clerks and their bilingual practices.

Both the King's Bench and the justices' courts, though, continued as criminal courts; and there, the change in personnel and in formal proceedings was more striking. Through to the 1790s, the clerks of these courts were almost always English; and even when, in 1777, the French Common Pleas clerks were also appointed as joint clerks of the peace in both Montreal and Quebec City, they seem to have been rapidly marginalized by the existing English clerks, who were also the English Common Pleas clerks. On a practical level, this is not surprising, since certain formal documents such as precepts and indictments had to be in English; but at this early period of British rule, it probably also reflected a desire to maintain an English face on the criminal law. Indeed, up until 1775, there was an almost complete change in the judicial auxiliaries associated with Crown prerogatives, such as coroners, gaolers, sheriffs, and the personnel of Admiralty and Chancery courts. As for procedures, the change in criminal laws also brought fundamental changes for the clerks. Most notably, in most cases, there was no record taken of oral testimony during trials, making perfectly bilingual clerks less of a necessity and also reducing their role in the interplay between judges and parties.

However, in the penal law at least, this did not necessarily result in an alienating environment for *Canadien* parties. The records and proceedings in the King's Bench were almost entirely in

English, apart from oral testimony. However, the Quarter and Weekly Sessions, the justices' courts which dealt with the vast majority of penal cases, were essentially bilingual, despite the main clerks being anglophone. Thus, in Montreal, a strong francophone presence on the bench from the early 1770s onwards (initially Huguenot justices and then, from 1776, *Canadien* ones) meant that judgements and orders were often given in French, and sometimes recorded as such in the registers, even when only Burke was clerk; both anglophone and francophone attorneys pleaded before the justices; grand and petty juries were mixed, with the former making their presentments in either language; and perhaps most importantly for parties, from the 1780s at least, and probably before, preliminary documents such as depositions, warrants and recognizances were in the language of the party concerned. It thus seems clear that Burke was either fluently bilingual or (more likely) had French assistants, perhaps those who helped him in the Common Pleas. But whatever the case, the net result was that bureaucratic practices in the justices' courts, embodied by the clerks, were in large part adapted to the *Canadien* population, thus helping explain why they more readily resorted to these courts than to the King's Bench.<sup>9</sup>

### **Bailiffs**

This combination of formal change accompanied by more practical continuity was also the case for bailiffs. In both the English and French systems, they played similar roles, serving both civil and criminal process and also acting as police; they were thus the judicial auxiliaries who, for the population, concretely represented the conflictual face of the law and the state. But in theory at least, there was a profound transformation across the Conquest. In New France, the *Conseil supérieur*, the three main royal courts and the seigneurial courts each had their complement of bailiffs, responsible directly to the courts but generally commissioned by the Intendant, just like notaries. Indeed, several rural notaries were also commissioned as bailiffs, meaning they could serve process when necessary, though most likely this was mainly as an adjunct to their notarial activities (since bailiffs in New France also signified notarial deeds). Commissioned bailiffs essentially had a monopoly on process-serving, which they guarded jealously. Finally, bailiffs, like notaries and *praticiens*, often acted as *procureurs*, especially in minor cases, thus filling a crucial role as mediators between the courts and the population.

Much of this changed after the Conquest. Under the military regime, bailiffs' functions were mostly taken on by militia officers, especially sergeants, though the Quebec City courts appear to have maintained a system of bailiffs. Then, from 1764/1765, the system took a decidedly English turn. To replace the militia officers, whose positions had been abolished, and in an attempt to reproduce the English system of parish constables, British administrators organized a system of annually elected bailiffs in the colony's parishes. Like their English counterparts, in rural areas these parish bailiffs were meant to be the state's main representatives, and in theory had both administrative and judicial roles, including serving civil process and arresting offenders. However, as in England, a much different system developed in practice. In the civil courts, the responsibility for serving most civil process was given to a new commissioned official in each district, the deputy provost marshal, the functional equivalent of the sheriff (which was the formal title from 1775). He then employed process-servers of his own choosing, mostly a small group of urban bailiffs who worked in both town and country. During the brief time of their civil jurisdiction, the justices of the peace also appointed their own resident bailiffs in the countryside, in parallel to the parish bailiffs. Likewise, in criminal matters, justices were free to direct arrest

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<sup>9</sup>On this, see Donald Fyson, "The Biases of Ancien Régime Justice: The People and the Justices of the Peace in the District of Montreal, 1785-1830", in Tamara Myers *et al.* (ed.), *Power, Place and Identity: Historical Studies of Social and Legal Regulation in Quebec* (Montreal: Montreal History Group, 1998): 11-35 <<http://www.hst.ulaval.ca/profs/dfyson/Biases.htm>>.

warrants and the like to whomever they chose, and relied mainly on their own bailiffs or those of the deputy provost marshal, rather than rural parish bailiffs. Only in the brief period between 1770 and 1775 do rural parish bailiffs seem to have been more active in process-serving, mainly for the inferior sessions and circuits of the Common Pleas.

Indeed, the sheriffs' and justices' bailiffs of the 1760s and 1770s resembled nothing more than the bailiffs of the pre-Conquest royal courts. In civil matters, they had many of the same duties, such as serving summons and seizing and selling property. And in policing matters, they were if anything more active than their French-regime predecessors, since they combined the roles of bailiffs and of *archers de la maréchaussée* (the latter having disappeared at the Conquest). They made most criminal arrests; they were furnished with staves as symbols of authority, just like English constables; they were expected to attend corporal punishments and executions; and in post-Conquest Montreal at least, they were even assigned city wards to police. Thus, instead of a system that co-opted local populations into self-policing, the force of the law was represented by urban lawmen reaching into rural communities; and this perhaps even more so than in New France, considering the disappearance of seigneurial court bailiffs.

This disjuncture between theory and practice continued after 1775. The parish bailiffs were abolished and their civil and judicial functions reassumed in theory by militia officers, but in practice, most criminal and policing matters remained the purview of bailiffs appointed by the justices or the sheriff, up until town constabularies were created in 1787. And the sheriffs' bailiffs also continued to serve most process in the civil courts, though in rural parishes, there were an increasing number of individuals who identified themselves as bailiffs and occasionally served summons and made arrests for the criminal courts; their exact role and status on the civil side, however, remains to be explored.

The changes in structures following the Conquest were accompanied by a decline in status and official recognition for bailiffs. Most importantly, as they were no longer commissioned by the colonial administration or even the courts, they lost both their formal corporate status and their job security, since a justice or a sheriff could simply stop using them. Still, despite their precarious status, the courts at least apparently continued to regard them as their officers, for example disciplining them through fines and suspensions. Thus, in 1766, the Quebec Common Pleas ruled that François Dumergue (who had been a bailiff both of the *Conseil supérieur* and the military regime courts) "formerly a huissier or constable of this court ... be degraded of said employ". With the coming of commissioned lawyers, bailiffs also lost their role as *procureurs*, which they seem to have maintained to some extent under the military regime. Bailiffs very occasionally represented parties before the Common Pleas; and there are hints that on occasion they acted as informal mediators between parties; but none of this represented anything like their role before the Conquest. Although the decline of bailiff *procureurs* had already begun under the French regime, the Conquest marked the definitive transition from a role of both constraint and mediation to one of constraint alone.

Despite the decline in status, though, there was remarkable continuity among the people who worked as bailiffs. This was particularly striking in Quebec City, where five of the eight French-regime bailiffs were still active in the mid-1760s, forming the core of the deputy provost marshal's bailiffs; several had also served as bailiffs under the military regime. In Montreal, there was more turnover, partly because the position of bailiff disappeared under the military regime; but two of the city's six pre-Conquest bailiffs, Jean-Baptiste Decoste and his son, Jean-Christophe, continued under the civil government. Overall, more than half of pre-Conquest bailiffs continued into the new regime, though sometimes in different roles: for example, perhaps

because of the decline in status, all of the notary-bailiffs who continued to practice after the Conquest did so as notaries alone. And Decoste père well illustrates the change in bailiffs' roles: an important *praticien* before the Conquest, he became a simple process-server thereafter, though also acting on occasion as crier of the courts.

Post-Conquest bailiffs were also mainly francophones. This was the case for about 70% of bailiffs between 1764 and 1774, and for most of those used by Montreal's sheriff, Edward William Gray, in the late 1770s and early 1780s; and among 30 rural bailiffs identified for the district of Montreal in the 1780s and 1790s, all but two were francophones. There was even continuity in the sorts of people who became bailiffs. At least half of the 20-odd bailiffs active at the end of the French regime (excluding notary-bailiffs) had been former soldiers; and three quarters were immigrants from France, rather than born into colonial society, though many had married *canadiennes*. This same profile continued after the Conquest. In the District of Montreal, at least half of the bailiffs who began acting between 1764 and 1774 were former French soldiers; and even among rural bailiffs in the 1780s and 1790s, at least half were immigrants, and a quarter former soldiers, including several German mercenaries who married *canadiennes*. In sum, like notaries, bailiffs put much the same face on the law as before the Conquest.

Even bailiffs' uneasy relationship with the population remained a constant. Just as in New France, attacks on bailiffs were common, and two bailiffs in the late 1760s were murdered while serving process; while at the same time, bailiffs were fairly frequently accused of extortion and corruption. Indeed, in 1770, Governor Guy Carleton himself not only disparaged the justices' bailiffs as former French soldiers "either disbanded, or deserters" (evidently unaware that this was the norm for all bailiffs, including in New France) but also accused them of fomenting litigation in order to increase their fees. It was perhaps this sort of antagonism, both popular and official, which led one anglophone bailiff to declare, in the 1767 *Quebec Gazette*, "This is to acquaint the Public, that Peter Sinnott, late Bailiff to the D.P. Marshall, has declined, and utterly given up that d\_\_\_\_\_l and unbeneficial office." But his francophone colleagues continued.

## Conclusion

This paper has argued for significant but variable continuity across the transition between the French and English regimes. Rather than being swept away in the tide of constitutional and legal change that followed the Conquest, Quebec's auxiliaries were quite able to adapt to the new legal and political realities. Among francophones, roughly two thirds of pre-Conquest auxiliaries successfully negotiated the perilous transition to the new regime, in spite of formal obstacles such as the anti-Catholic penal laws or changes in both language and law. As well, many of the newly-arrived British seem to have adapted fairly well to this mixed and in large part French legal culture. This capacity for adaptation is key to understanding the difference between justice auxiliaries and judges; the judges, more directly connected to the state, were less able to make the transition between regimes, in Quebec as elsewhere.

Justice auxiliaries were, indeed, the most concrete manifestations of the legal function of the state. The French colonial state, inspired by absolutist principles, took care not only to name or approve virtually all auxiliaries, from notaries to bailiffs, but also to ensure that they conformed to the official religion, Catholicism. But the British colonial state had to proceed differently. Despite official will to anglicize the new colony, despite a confessional and anti-Catholic English state, British administrators in Quebec had to make do with the human resources and systems of governance at their disposal. Hence the *de facto* maintenance of Catholic auxiliaries, despite the penal laws; hence the acceptance of fundamentally non-Common-law elements such as the notarial system; hence the opening of new British-inspired institutions, like the bar, to Catholics.

Beyond these utilitarian considerations, though, the actions of the administrators also reflected a common philosophy of local governance that emphasized decentralization and the cooption of local populations in their own management. This philosophy contributed to the decision to integrate rather than to replace the auxiliaries and their systems; it also allows us to interpret the gap between theory and practice not as weakness but as flexibility. It also led to decreased central control over auxiliaries: for example, the fact that bailiffs were no longer commissioned by the central administration; the greater power of judges and courts to name and discipline their own officers; or the relative deregulation of notaries during the early years. Even the formal recognition of the bar represented a lessening of control compared to a French regime which in theory prohibited all lawyers. Changes in states thus certainly had effects on the context in which auxiliaries operated, but not necessarily the negative effects that are too often postulated.

Francophone auxiliaries were quite able to adapt to these new systems of governance. The legal uncertainty in which notaries operated before 1775 does not seem to have affected existing notaries or the recruitment of new ones, as was also the case for bailiffs, despite their loss of status. Consequently, even with the usual turnover, the nature of the individuals who filled these positions changed far less than the laws and the structures of governance which surrounded them. Through to the end of the 18th century and beyond, auxiliaries remained in large part of the same language and religion as the majority of the Quebec population, especially in rural areas. And this allowed notaries, lawyers, court clerks and bailiffs to continue to fill, with varying success, the role of mediators between state law and *Canadien* society. Even in the cities, with the bar and the criminal courts, where the anglophone presence was strongest, *Canadiens* could easily find legal professionals who spoke and wrote their language and could thus serve as mediators between the state, the law and the population. This continuity in the human face of justice helps explain why the basic relationship of the *Canadien* population to justice was little changed by the Conquest, whether on the criminal side, resolutely British, or the civil, more French. When the *Canadien* population rejected justice, it was more for questions of class, gender, or urban/rural conflict, than for considerations of language or national culture.

This adaptation to the change in legal cultures also raises the issue of the auxiliaries' skills. Historians have often stressed auxiliaries' more formal legal knowledge and training, rather than their more technical and practical capacities; one of the persistent criticisms of the post-Conquest justice system as a whole, indeed, is the poverty of formal legal culture. But the talents of a Nicolas-Gaspard Boisseau, for example, clerk under the French and British regimes, lay as much in his organizational capacities as in his knowledge of the law. The same holds for bailiffs, for whom serving court order was as much a physical action as a judicial deed, and who depended as much on their skill with the sword as with the pen. Even lawyers relied as much on their rhetorical talents as on their legal knowledge. These capacities were readily transposable between legal regimes, thus also ensuring significant continuity in the operation of justice as the population saw it. Whether it be the confrontation with the bailiff or the ritual of meeting the notary, it was not only faces but also practices which endured.

These patterns continued across the constitutional divide that separated the old Province of Quebec from Lower Canada. Through the 1790s and early 1800s, notaries continued to be virtually all French; the bar was mixed, though with an increasingly English presence; if anything, the role and presence of *Canadien* court officers increased; and though there were a few more anglophone bailiffs and constables, *Canadiens* remained by far the largest contingent of process servers. All of this laid the groundwork for an autonomous legal profession in Quebec that throughout the nineteenth century, despite Rebellion, Union and Confederation, was drawn

largely from local society, and reflected its internal divisions and dissensions. And more generally, the Quebec example suggests how a close attention to the lower levels of a justice system can nuance conclusions based on judges, politicians and exceptional cases alone. To paraphrase Trotsky, though legal regimes may change, the judicial auxiliaries remain.