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Canada's Legal Pasts: Looking Forward, Looking Back

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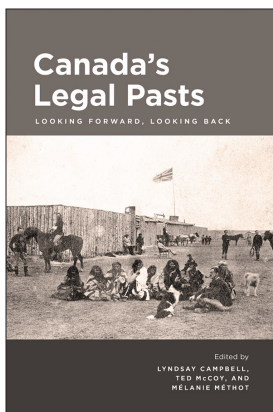
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**CANADA'S LEGAL PASTS:
Looking Forward, Looking Back**
Edited by Lyndsay Campbell, Ted McCoy, and
Mélanie Méthot

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Canada's Legal Pasts: Looking Forward, Looking Back

Ted McCoy, Lyndsay Campbell, and Mélanie Méthot

In 1977 a group of historians met at Laval University to consider the emergence of Canadian legal history as a distinct and worthy field of study. Although legal history in Britain and the United States enjoyed a longer and more established tradition, in Canada it was in its formative stages in the 1970s. It emerged alongside a growing interest in fields of Canadian studies, gender studies, and social history—all fields that the study of law would eventually touch upon and incorporate into its own development. Over forty years have passed since that first conference, eventful decades in which the field has matured and absorbed theoretical and methodological developments in scholarship, while profiting from the tremendous improvement in the availability of sources that has come with digitization projects now widely accessible on the internet. In this introduction to *Canada's Legal Pasts: Looking Forward, Looking Back*, we outline some key moments. By foregrounding Canadian legal history's rich array of sources, methodologies, and questions, this book not only marks the maturity of the field but also aims to welcome new scholars and new contributions.¹

The 1977 Laval conference led to a collection of essays edited by Louis A. Knafla. Each chapter in the Laval proceedings was loosely oriented around topics relating to crime in Canadian society. This in itself was methodologically different, providing evidence that the proceedings at Laval sought to reorient views of Canadian history into new areas of

research involving the law. In his preface, Knafla described how the papers illustrated the potential for seeing our society through an appreciation of legal problems in their social, cultural, and economic settings.² What these first papers indicate is the intertwining of legal and social history as a route forward for understanding not just crime, but all areas of Canadian society.

Shortly after the meeting at Laval, the field's momentum increased with the founding of the Osgoode Society for Canadian Legal History. Two years later, the Osgoode Society published the first volume of its *Essays in the History of Canadian Law* series, edited by David H. Flaherty. Flaherty proposed a model for legal history in Canada that would explore the relationship between law and society in terms roughly connected to those of the "Wisconsin School," employing the method of Willard Hurst.³ Knafla noted in a subsequent review that this approach, with its focus on the state's intervention in the industrializing economy, was simultaneously rather too Ontarian and too American to serve as a model for the young field. Furthermore, its instrumentalism largely sidelined important methodologies that might incorporate histories of crime, among other topics, in an understanding of the law,⁴ methodologies that were actually anticipated in R.C.B. Risk's prospectus for Canadian legal history, which Flaherty commended as "Hurstian in the best sense of the term." For Risk, legal history could be considered "the study of the history of legal processes in three overlapping elements: the influences of societal values on the law, the effect of law itself on the minds and events of the society, and the structures, procedures, and functions of such institutions as the legislature, the courts, and the legal profession."⁵ Risk's agenda included the analysis of French and American, as well as English influences on Canadian law and explorations of crime, the family, and law's role in contributing to a sense of Canadian identity. Subsequent scholarship has wrestled to come to grips with the ways in which Hurst's approach, as well as approaches advanced by Risk, E.P. Thompson, Douglas Hay, and others, have by turns opened and limited lines of analysis in Canadian legal-historical scholarship.⁶ Indeed, Knafla's own scholarship on Western Canada has contributed greatly to one vital element of Canadian legal history that escaped Flaherty and Risk: the colonial violence imposed through law, among other forces, on Indigenous people.

The field of Canadian legal history got another push in 1985 with the creation of a multidisciplinary scholarly association devoted to the study of law and society. Law professor John McLaren was elected the first president of the *Association canadienne droit et société / Canadian Law and Society Association*. A year later, the Association published the first volume of the *Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, edited by Rainer Knopff.⁷ Knafla, McLaren, Knopff, and others applied their western Canadian energies to the field.

A decade after the first meeting at Laval, Canadian legal history could claim that the project initiated there was firmly underway. In 1987 Canadian legal historians met again, this time at Carleton University, where nearly fifty papers were presented. The social history of law was the predominant theme. This was social history broadly conceived, addressing—among many other topics—histories of sex crime, “common sense” in railway regulation, political and legal culture, debt, obscenity, and morality. The multitude of research interests was evidence of an expanding rigour in the field. It represented not only the growing number of researchers using legal history to understand Canadian society, but a widening conception of what the contours of that society included. Perhaps the biggest development signaled by the 1987 conference was the theoretical and political enrichment of Canadian legal history through the addition of the broader theoretical perspectives added by Marxism and feminism. The influence of E.P. Thompson’s and Douglas Hay’s work on the ideological basis of law was apparent in essays that considered Marxist theorizations of punishment, and Greg Marquis addressed the place of “British justice” in Canadian history. Marquis’s work, in particular, added insight into the possibilities of cultural history in our understanding of the Canadian legal culture and disrupted, as Thompson did in England, older notions of how the nineteenth-century working-class understood, responded to, and used the law to their own purposes.⁸

The introduction of feminist perspectives to Canadian legal history was a welcome consequence of the changing gender balance of Canadian academe and the growing influence of gendered analysis in all areas of social history. Eight different papers illustrated the possibilities of feminist analysis in Canadian legal history, among them considerations of patriarchy and the state by Jane Ursel, who theorized about production and

reproduction in the sexual division of labour in Canadian society. Ursel sought to theorize the place of law in the organization of power and authority in nineteenth-century Canadian society in a paper that joined together the possibilities of Marxist and feminist analysis. As David Flaherty had anticipated in 1981, “major interpreters of the Canadian past” had ceased to assume the legal system to be “secondary and passive rather than an instrumental and dynamic aspect of historical development.”⁹

Other papers at the Carleton conference hinted at the changing landscape of Canadian scholarship about the law. Among them were two essays that began to consider Indigenous rights in Canada. D.R. Williams discussed land claims litigation in a piece that presciently asked questions about the rule of law, legal history, and reconciliation, though not in the language that defines our contemporary debate on these issues.¹⁰ A second essay, by Tom Flanagan, questioned the meaning of Indigenous rights—a relatively new topic in 1987—by considering the long history of international law on these questions.¹¹ Although post-colonial scholarship swiftly moved past both of these interpretations, they represent early attempts to grapple with the legal implications of Canadian colonial history. In the larger sense, these essays hinted, too, at the influence of social history in our field, revealing the dawn of anti-colonial scholarship and race theory that would come to influence all areas of scholarship about Indigenous people in Canada.

Post-colonial scholarship and legal history in Canada were significantly strengthened by the founding of UBC Press’s Law and Society book series, edited by W. Wesley Pue, which published its first title in 2002.¹² Processes of colonization, expropriation, and other uses and abuses of power have been central preoccupations of that series. Legal history now shows its merits both as a topic of study and as a historical methodology in unpacking these processes. The essays in this volume reflect both long-standing concerns and newer ones, well-known kind of sources and some that have only really become available with digitization and the internet. In addition to the UBC Law and Society book series and Osgoode Society for Canadian Legal History, legal historians have presented their research at the annual ACDS/CLSA conferences and published their work in the scholarly journal of the association. Perhaps because scholars found so many venues for their research, it took another thirty years before a third

Canadian legal history conference was held. In July 2017, the University of Calgary, under the leadership of Lyndsay Campbell and Ted McCoy, hosted sixty-five scholars identifying as legal historians. The papers reflected both continuities and discontinuities with past scholarship. The effects of colonization on Indigenous peoples in northern North America was a major thread, with papers by Jean-François Lozier, Nicole O’Byrne, Jacqueline Briggs, Robert Hamilton, David G. Bell, Genevieve Painter, Sarah P. Pike, and Shaunnagh Dorsett (providing a point of Māori comparison) all contributing to the conversation. Still, the absence of Indigenous historians themselves from this debate is in itself evidence of a field that must expand its efforts to incorporate voices from beyond the traditional power structures of the academy. Just as legal history expanded to include class and gender in its understanding of the law, the challenge ahead will be to move beyond Indigenous people as a topic of study and welcome Indigenous perspectives.

At the 2017 conference, the legal history of Quebec was well represented, especially by a number of scholars exploring the ways in which women navigated family issues in civil courts in the nineteenth century.¹³ Other papers explored aspects of Canadian constitutionalism, the law’s relation to ethnicity and race, judicial biography and histories of lawyering, legal ideologies and geographies, dimensions of the history of tort, property, municipal, administrative and human rights law, gender and sexuality, transboundary legal problems, the institutions of colonialism, and the challenges of writing about crime and punishment.¹⁴

The papers presented in Calgary provide evidence of a field that has outgrown its traditional definitions. Legal history is not only a topic of study, but the basis of an expansive historical methodology that enriches multiple areas of historical analysis. Just as social history explores more than merely society, as though it could be separated from everything it encompasses, legal history in Canada has become a method of inquiry and research that incorporates the law into understandings of historical processes and change of every kind. This moment did not arrive overnight. The methodological maturity of legal history in Canada is the product of four decades of historical research and writing on every aspect of the law and how it affects Canadian society. It also speaks to the deepening political commitment of scholars who seek to challenge the structures of

inequality in Canadian society by investigating legal history as one avenue toward change.

The essays in this volume explore a variety of topics with a particular eye to methodology, on the one hand because we wish to emphasize the possibilities inherent in thinking about legal history as a methodology and, on the other, because we hope to welcome to the field scholars who may be unfamiliar with legal sources and arguments. The book has three parts: the first focuses on writing about specific cases; the second interrogates the workings of legal systems and their participants; and the third offers historiographical scope, looking forward and back. We include five short pieces about particular kinds of sources and how they can be used in legal history research: Mélanie Méthot's chapter on finding bigamy cases using archival and non-archival sources; Ted McCoy's essay on the rich offerings of prison records; Catharine MacMillan's chapter on the largely unexplored treasure-trove of the records of the Judicial Committee of the Privy Council; Angela Fernandez's chapter on the history of a particular, low-cost law book used in the *Gerring* case, which Christopher Shorey discusses in his chapter; and Lyndsay Campbell's essay on finding and interpreting the accounts of trials contained in pamphlets and newspapers.

The chapter by Christopher Shorey is a case study of the interplay of legal and political pressures on the fate of an American fishing schooner whose crew were caught packing up fish on the wrong side of the international boundary off Nova Scotia. In writing about a "hard case"—the kind that lawyers know make "bad law"—Shorey offers a novel contribution to Canadian legal history by venturing into admiralty law, a much-neglected area for a country with so much coastline. Consistent with Risk's and Flaherty's calls for research on the profession itself,¹⁵ we include Alexandra Havrylyshyn's chapter on lawyering in New France, where the professional hierarchy and social status of those who represented others in court were markedly different from those of France. Also exploring aspects of legal systems is Shelley Gavigan's chapter on the strangely hybrid disciplinary and criminal proceedings brought against mostly young North-West Mounted Police officers before Alberta and Saskatchewan became provinces. Gavigan shows the vulnerability of these young men who went West in the name of a colonial vision of social order, but whose

troubling encounters with the justice system demonstrated its highly personal, fluid lines of authority.

Canadian legal historians have long been interested in the relationship between gender and law. Jean-Philippe Garneau's chapter on how married women navigated civil law before the Court of King's Bench in Quebec between 1795 and 1830 takes up this historiographical thread. To describe the history of women's activism in Canada and its contribution to the dramatic changes in equality law, Dominique Clément, in his essay, pulls together a vast amount of secondary scholarship amassed by historians of women's history and connects it with his own research on legal reform.

We begin the book with Eric Reiter's "Family Defamation in the Quebec Civil Courts: The View from the Archives," an essay that puts methodology at its centre and masterfully demonstrates how the actual physicality of the archive can inform us about how real people used law. We conclude with a forward-looking historiography of the prairies presented by Lou Knafla, the editor of the 1977 conference proceedings, now Professor Emeritus of History at the University of Calgary. Knafla's essay underlines both what we know and what we have yet to learn, as scholars—perhaps including some of the newcomers we hope to welcome to our field through this volume—bring new insights into the histories of Indigenous peoples and settlers in Canada. Lou has for decades been a driving force in Canadian legal history; his career was once described as "charted by a restless mind driven forward by a genuine curiosity about the world in which he lives."¹⁶ Lou remains an inspiring, gently towering figure in our field, and it is to him that we dedicate this book.

NOTES

- 1 We are grateful to the Social Sciences and Humanities Research Council of Canada for its support of this project.
- 2 Louis A. Knafla, "Preface," in *Canadian Society for Legal History. Proceedings 1977*, ed. Louis A. Knafla (Toronto: Canadian Society for Legal History by the York University Law Library, 1977), ii.
- 3 David H. Flaherty, "Writing Canadian Legal History: An Introduction," in *Essays in the History of Canadian Law*, vol. 1, ed. David H. Flaherty (Toronto: University of Toronto Press for the Osgoode Society, 1981), 7–8.
- 4 Knafla, Review of *Essays in the History of Canadian Law*, vol. I, ed. David H. Flaherty, *American Journal of Legal History* 27, no. 4 (1983): 389–90.

- 5 Flaherty, "Writing Canadian Legal History," 7–8.
- 6 See particularly W. Wesley Pue, "Locating Hurst," *Law & History Review* 18, no. 1 (2000): 187–95; David Sugarman, "Reassessing Hurst: A Transatlantic Perspective," *Law & History Review* 18, no. 1 (2000): 215–21; and the other essays in volume 18, number 1 of the *Law & History Review*.
- 7 <http://www.acds-clsa.org/?q=en/content/short-history-canadian-law-and-society-association>.
- 8 Greg Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography," in *Papers Presented at the 1987 Canadian Law in History Conference Held at Carleton University, Ottawa, June 8–10, 1987*, vol. 1 (Ottawa: Carleton University, 1987), also published as Greg Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography," in *Canadian Perspectives on Law and Society: Issues in Legal History*, ed. W. Wesley Pue and Barry Wright (Ottawa: Carleton University Press, 1988).
- 9 Jane Ursel "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada," in *Gender and Society: Creating a Canadian Women's Sociology*, ed. Arlene Tigar McLaren (Toronto: Copp Clark Pitman, 1988), reprinted in *Papers Presented at the 1987 Canadian Law in History Conference*, vol. 1.
- 10 David R. Williams, "Native Land Claims – Rule of History or Rule of Law?" in *Papers Presented at the 1987 Canadian Law in History Conference*, vol. 2.
- 11 Thomas Flanagan, "Francisco de Vitoria and the Meaning of Aboriginal Rights," in *Papers Presented at the 1987 Canadian Law in History Conference*, vol. 2.
- 12 A full list of the Osgoode Society's publications is available on its website, at www.osgoodesociety.ca/books/. The catalogue of UBC Press's Law and Society series is available at www.ubcpress.ca/law-and-society.
- 13 Serge Dauchy, Donald Fyson, Jean-Philippe Garneau, Peter Gossage, Marie-Neige Laperrière, Michel Morin, Thierry Nootens, Darren Pacione, Eric Reiter and Brian Young all presented papers on the legal history of Quebec.
- 14 These contributors were Constance Backhouse, David G. Bell, Blake Brown, Michael Boudreau, Andrew Buck, Lyndsay Campbell, Erika Chamberlain, Lori Chambers, Dominique Clément, Angela Fernandez, Shelley Gavigan, Philip Girard, Claire Gjertsen, Sarah Hamill, Douglas C. Harris, Ian Holloway, Lou Knafla, Rande Kostal, Catharine MacMillan, Greg Marquis, Ted McCoy, John McLaren (presenting a paper authored by himself and Pooja Parmar), Jeffrey L. McNairn, Mélanie Méthot, Bradley Miller, James Muir, Nicole O'Byrne, Stefan Parker, Karen Pearlston, Jim Phillips, Graham Price, Christopher Shorey, Mary Stokes, Carolyn Strange, Jonathan Swainger, and Barrington Walker.
- 15 Flaherty, "Writing Canadian Legal History," 16.
- 16 Jonathan Swainger, "Prologue: Louis Knafla and Canadian Legal History," in *People and Place: Historical Influences on Legal Culture*, ed. Jonathan Swainger and Constance Backhouse (Vancouver: UBC Press, 2003), vii.