



University of Calgary

PRISM: University of Calgary's Digital Repository

University of Calgary Press

University of Calgary Press Open Access Books

2020-05

Canada's Legal Pasts: Looking Forward, Looking Back

University of Calgary Press

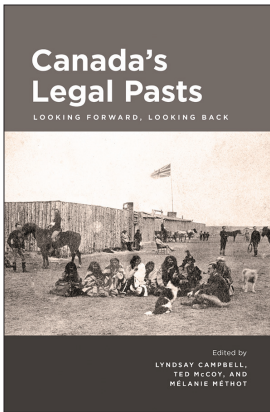
Campbell, L., McCoy, T., & Méthot, M. (2020). Canada's Legal Pasts: Looking Forward, Looking Back. University of Calgary Press, University of Calgary, Calgary, AB.

<http://hdl.handle.net/1880/112105>

book

<https://creativecommons.org/licenses/by-nc-nd/4.0>

Downloaded from PRISM: <https://prism.ucalgary.ca>



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

ISBN 978-1-77385-117-4

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

COPYRIGHT NOTICE: This open-access work is published under a Creative Commons licence. This means that you are free to copy, distribute, display or perform the work as long as you clearly attribute the work to its authors and publisher, that you do not use this work for any commercial gain in any form, and that you in no way alter, transform, or build on the work outside of its use in normal academic scholarship without our express permission. If you want to reuse or distribute the work, you must inform its new audience of the licence terms of this work. For more information, see details of the Creative Commons licence at: <http://creativecommons.org/licenses/by-nc-nd/4.0/>

UNDER THE CREATIVE COMMONS LICENCE YOU MAY:

- read and store this document free of charge;
- distribute it for personal use free of charge;
- print sections of the work for personal use;
- read or perform parts of the work in a context where no financial transactions take place.

UNDER THE CREATIVE COMMONS LICENCE YOU MAY NOT:

- gain financially from the work in any way;
- sell the work or seek monies in relation to the distribution of the work;
- use the work in any commercial activity of any kind;
- profit a third party indirectly via use or distribution of the work;
- distribute in or through a commercial body (with the exception of academic usage within educational institutions such as schools and universities);
- reproduce, distribute, or store the cover image outside of its function as a cover of this work;
- alter or build on the work outside of normal academic scholarship.



Acknowledgement: *We acknowledge the wording around open access used by Australian publisher, re.press, and thank them for giving us permission to adapt their wording to our policy <http://www.re-press.org>*

Legal-Historical Writing for the Canadian Prairies: Past, Present, Future

Louis A. Knafla

The legal history of the Canadian prairies is a relatively new area of modern historical studies compared to the richer origins in British, American, and central Canadian legal history. Indeed, the writing of Canadian legal history has lagged significantly behind that of Britain and the behemoth to the south. The initial impetus for legal-historical writing in Canada was provided by the Osgoode Society, but its early volumes were almost exclusively on Ontario and Quebec. Well-researched and written with a comparative focus, the subject matter caused one critic to see it masquerading as “Canadian” legal history, referring to it as “Losollah”: the London Ontario School Of Lumber Law And History.¹ Legal-historical writing on the prairies coincided with a very early period in most of Canadian history where the sources were cases, statutes, and newspapers, and the account was chronological with little or no interpretative framework.² This coincided, perhaps, with Canada’s alleged first legal historian, Ontario’s prolific Justice William Renwick Riddell (1852–1945).³ He was followed on the prairies by other law career writers such as Wilbur Bowker on lawyers, Roy St. George Stubbs on Rupert’s Land, Lewis Thomas on constitutional history, and D. Colwyn Williams on the North-West Territories.⁴ It was largely in the late 1960s that legal-historical writing for the prairie Canada

region began, and from the late 1970s it has taken off; today, specialist studies abound. A problem is that there are few overarching themes, or stimulating interpretations, as one often finds in central/eastern Canadian, British, and American legal history.⁵ The purpose of this chapter is to identify those areas and encourage the writers of the present future to go forth, flourish, and multiply.

Three groups comprised the Canadian prairies in the late nineteenth century: First Nations, the Dominion government and its institutions, and settlers. The major outside influences were the remnants of the Hudson's Bay Company's private law regime, the interface of British colonial and Canadian domestic influences, the challenge of Indigenous peoples who inhabited the plains on the south side of the border, and that country's westward movement of "manifest destiny." Entering the twentieth century, the region became influenced significantly by the advent of British and eastern Canadian financial interests which sought to exploit its natural resources—namely agriculture, mining, and forestry for Britain's colonial project.⁶ Later, the discovery of rich oil and gas fields brought the region into the vortex of the world economy, which impacted the relations among First Nations, settlers, and new immigrants as much as the landscape on which they resided.

This chapter will explore the ways in which these external developments and influences have been interpreted by the academic community in terms of the major legal-historical issues in the law and society area. The somewhat "closed" economy of the late nineteenth century faced continuous outside social, commercial, and industrial influences related to empire and state-building that affected the social institutions of family, marriage, working conditions, and welfare in later generations. In addition, those socio-economic developments caused by the influences of global markets have led recently to an "anti-colonial" interpretation that challenges the "post-colonial" world which has formed the framework of most legal-historical studies of the region.⁷ Given the multi-faceted nature of current research interests, the chapter will close with a comment on where we stand today compared to where we were at the turn of the past century.⁸

Much of the past historical writing on prairie Canada has been "internal" history, that is, studies of individual institutions, events, problems, and peoples within their individual settings with slight regard to

external factors or influences. Many of such works began with MA theses or PhD dissertations, and worked their way into articles, book chapters, and monographs which retained this internal focus. This writing, and the research on which it was based, usually has been exemplary and badly needed for an area of the country which has often been in the backwaters of Canadian historiography. Since the early years of the twenty-first century, however, writers for this area have been turning increasingly to the wider world in order to gain a more informative perspective and comparative understanding of their subject matter. Such an understanding leads us beyond mere factual studies of individual persons, institutions, and events in the imperial context towards viewing and understanding settler and Indigenous peoples in a global environment, and the latter as participants in settler society and not merely antagonists. Indeed, if the legal-historical record of Indigenous peoples is to be fully revealed, we need to have more of their own studies.

With regards to prairie Canada, two books that appeared in 2005 reflected an impact upon an outward turn in its historiography—and, if not these two works in particular, others in which similar thinking took place in adjacent years.⁹ Frederick Cooper’s *Colonialism in Question*¹⁰ and Chris Bayly’s *Birth of the Modern World, 1780–1914*¹¹ highlighted the role of critical, interdisciplinary scholarship in post-colonial studies that did not see a flat version of European “modernity,” but a version that had competing ideologies. Their work featured a historiographical change in purpose—to become familiar with the broader transnational and global connections which may have affected or influenced fundamentally the local or regional story. Bayly, in particular, argued that global uniformities developed in the course of the nineteenth century in the state, religion, politics, economies, and domestic domains which became manifest in post-colonial societies.

These views were enlarged by James Belich in his 2009 book *Replenishing the Earth*.¹² Reshuffling the map of the Anglo world, he saw a non-contiguous “British West” where the transfer of “things, thoughts, and people” flowed more easily within such regions than without. Explosive colonization was followed by overlapping periods of recolonization in the midst of Indigenous resistance. Hence, as in prairie Canada, a settler

revolution took place against the resistance of Indigenous peoples which is best understood within this broader transcolonial context.

The perplexing role of liberalism in the subjugation of Indigenous peoples was raised to the forefront by P.G. McHugh in his magisterial work *Aboriginal Societies and the Common Law* in 2004, and his chapter “The Politics of Historiography and the Taxonomies of the Colonial Past” (2013).¹³ Examining the uniform manner in which much English common law was applied to Indigenous peoples in Anglo settler societies, he highlights the role of Euro-American liberal ideology – recognizing that the humanitarian liberalism of the mid-nineteenth century Colonial Office and legal officials, such as the under-studied Saxe Bannister and the famous James Stephen—who has been recently examined as the archetype of nineteenth-century thinking on the rule of law—was short-lived.¹⁴ Their view of bestowing rights to English law on Indigenous peoples was overwhelmed by officials on the ground who refused to recognize them as citizens of a British colony. This led to uneven development across such colonial societies.¹⁵

McHugh’s insights highlight the “Anglo divergence” of settler colonialism by supporting both subjugation and its amelioration. This quasi-sovereignty led to fragmented geographical spaces in many British colonies which included the Anglo-Canadian prairies. It brought difficulties to colonial administrators as well as judges. With regards to recent historiography in the law and society area, John McLaren’s significant 2011 book on colonial judges, *Dewigged, Bothered, and Bewildered*,¹⁶ with its flow of judges and their controversies across the empire, makes for fascinating reading. What must be added for such external influences in prairie Canada, however, is the US borderlands which formed an equally close context. Also in 2011, Blanca Tovias published her study *Colonialism on the Prairies: Blackfoot Settlement and the Cultural Transformation*,¹⁷ which details the threads of cross-country continuity that much future research and writing should follow.

These conflicting views led to a conundrum— the struggle between Liberty and Authority, in which liberty was a birthright of British settlers and authority gave them a contested absolute dominion over Indigenous people. Recently, a work that attempts to find a balance between these two forces within the multi-layered context of state sovereignty is Shelley

Gavigan's *Hunger, Horses and Government Men* (2012), which is examined more fully below.¹⁸ Taken with my own recent coauthored work *Fragile Settlements: Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada* in the long nineteenth century, the two books reveal through legal examples how that conundrum worked out in practice on the Canadian prairies.¹⁹ They pit local Royal Canadian Mounted Police and civilian magistrates, who regarded Indigenous peoples as subjects of the British crown, against the Department of Indian Affairs and other government officials, who tried to implement a Dominion policy of control that bordered on extermination.

Also exploring relations between settlers and Indigenous peoples, Lauren Benton, in *A Search for Sovereignty* (2010), emphasizes the creation of spaces of uneven sovereignty throughout European colonial empires which led to concepts of "quasi-sovereignty."²⁰ Such concepts involve the influence of places, spaces, and ideas on where and how colonizers and Indigenous peoples had to carve out customary and legal positions to handle their particular problems in sharing the ground they inhabited. This is a rich theoretical approach for the study of places in prairie Canada, both geographical and spatial. The customary and legal complexities at issue led to pluralistic legal practices. Recognizing how such practices were developed in other Anglo settler societies would provide useful insights for prairie Canada, as well as showing how widespread was the very imperfect territorial sovereignty which most writers fear to acknowledge. Such questions of sovereignty impinge upon the livelihood of people who live on adjacent ground and concern the fabric of their existence. For example, a major element concerning human habitation on the desert-like conditions of prairie Canada was water. A study of the conflicts between Indigenous peoples and settlers over water rights on the Canadian prairies would enlighten us on their relationships as well as providing a useful context for such practices across the border.²¹

Sovereignty and jurisdiction are intimately related. Mark Finnane has done extensive work on the limits of jurisdiction in the Australian colonies which can be applied to prairie Canada. His 2010 chapter "Law, Governance and Indigenous Peoples in Colonized Australia" explores the ways in which settlers, striving for jurisdictional uniformity, have tried unsuccessfully to assert sovereignty and jurisdiction over Indigenous

peoples.²² Too often, writers on prairie Canada have preferred to skate over such legal lumpiness. The goal here would be to study the problem of jurisdiction not only with respect to Indigenous peoples, but also to the non-Anglo immigrant settlers who have formed such a large part of prairie Canadian society. There have been individual studies for Icelanders and Ukrainians, for example, but a larger comparative canvas might reveal norms and an actual taxonomy that would better explain where individual non-Anglo groups fit—noting the distinctions between the “law ways” of the various legal authorities.²³

Thus what is a settler colonial state? According to Lorenzo Veracini, who has written numerous articles since 2006 and a major book in 2010 on this issue (*Settler Colonialism: A Theoretical Overview*), it is one where the settlers never went home.²⁴ He argues that such settlers were “inherently trans-national and transcultural.” They faced a dialectic tension between the metropole and the settler colony, and their experience comprises a structure and not an event—as too many historians unfortunately define it. As Patrick Wolfe has emphasized in his study of settlers in the US, settler colonialism is different from colonialism as it foreshadows the marginalization and elimination of Indigenous peoples.²⁵ Considerable writing has been undertaken on Indigenous peoples and their interactions in individual settler colonial states, and how this has been interpreted by the courts. Drawing upon recent work, the time is appropriate for comparative studies of this matter for former British colonies.²⁶

Comparative studies may do well to be informed by the analysis of Edward Cavanagh, who argues that the Hudson’s Bay Company exercised a particular kind of sovereignty in Rupert’s Land. Using local alliances to cement its home ground, passing orders and regulations to shape intra-company operations, and eschewing both wars against rivals and the christianization of First Nations people, the local governors and chief factors aimed to stay out of the geo-political limelight. The HBC extended its governance over indentured labour and First Nations families closely connected to the forts for security and support, creating a welfare system that went against the preferences of the HBC’s governing London Committee and endowed the HBC with a “formidable authority.”²⁷ George Colpitts, in his exploration of the history of the bison hunts, *Pemmican Empire*, elaborates on this system, describing Indigenous people investing in these

relationships in the interest of food security and the care of the elderly and infirm over long winters.²⁸ The HBC thus used the relations it forged with Indigenous peoples and outside organizations to devise a welfare regime that enhanced its unique form of sovereignty until, by the mid-nineteenth century, circumstances launched by settlers overtook these efforts.

For the law and society writer who sees law as the lens through which settler-colonial states can be studied, law must be de-centered from a doctrinal approach to include the study of other means by which settlers attempted to eliminate Indigenous peoples over the course of time through government agencies, policing, courts, the church, and local societies. In the end, we find that the evolving structure did not accomplish what it had originally set out to do (assimilation), because of conflicting interactions within and between those institutions and Indigenous resistance. Over time, the isopolitical relationship between the metropole and settler locales gave way to settler self-government and an accelerated subjugation of Indigenous peoples and non-British migrants. However, alongside this Anglo-Canadian legal system were the customary laws and practices of non-Anglo immigrant settlers and Indigenous peoples that formed a legal pluralist structure within which the factors of resistance and accommodation provided a moving platform of human interaction. It is the study of such factors that will bring the historiography of prairie Canada to a more robust stage and parallel the study of other Anglo-settler societies, while providing the means for more comparative legal-historical writing. Given the large body of specialized studies of an “internal” nature in prairie Canada, the doors are open for a wider and more meaningful interpretive canvas. But above all, this canvas must include Indigenous scholars exploring their customary laws and legal institutions within this pluralist paradigm,²⁹ lest we become bound to “white-settler scholarship.”³⁰

As the first part of this chapter has focussed on colonial settler society and relations with Indigenous peoples, the second part will address the historiography of a few other law and society subjects in prairie Canada with a relevant comparative eye. The region, from its settler period to the end of the twentieth century, has been in many instances a thorn in the side of imperial and dominion governments. Prairie Canada was seldom seen as integral to Confederation from its very beginning with the Riel Resistance of 1869, when Ontario militiamen tried to impose their will on

the diverse peoples who occupied what became the province of Manitoba, until perhaps the National Energy Program of the 1980s which targeted revenues from the oil and gas industries centred in the West, a development that led to an ill-fated secession movement. While space necessarily is limited, I will touch on some of the major areas in which the historiography of law and society in prairie Canada could continue to flourish—including agriculture, civil society, business and labour, towns and cities, crime, policing, and the courts.

For the fur trade era itself, there is still work to be done on governance and the law leading up to the surrender of the Hudson's Bay Company Charter in 1870. Dale Gibson has contributed yet another detailed examination of the legal history of the Red River colony.³¹ This follows Jack Bumsted's *Trials and Tribulations* and a number of articles and book chapters cited in Gibson's book.³² What remains for the HBC era is the further study of legal relations and disputes among settler, Indigenous, and Métis peoples in the hinterlands of the region. The fur trade era was steeped in imperial and economic issues, and a recent article by David Smith delves into the parliamentary inquiry of 1749 that launched an attack on the HBC's trade monopoly and whether it operated for private corporate or public interest and good.³³ The issue is timeless and stretches into our current era. So too is the relationship between business and science. As Ted Binnema has explored in a fascinating work, the HBC assisted the royal navy with cartographic knowledge and used its monopoly to become a patron of science by convincing the Royal Society and government authorities to support its studies of geomagnetism, plant and animal biodistribution, geology, hydrography, ethnography, and craniometry, along with the collection of specimens and meteorological data.³⁴

The social and economic life of the prairies after the fur trade era was founded on agriculture, both arable and husbandry. This essentially rural society depended on small towns for forms of social engagement until Winnipeg, and then Regina, Calgary, and Edmonton rose to urban status. Thus, forms of municipal government and the rise and privatization of public utilities and of oligarchic and monopolistic forms of business organization were crucial to the region's development. We know that some small towns, such as Vulcan, were stopovers in the great westward movement, the average length of residence being perhaps five years.³⁵ As to how

much mobility there was across the prairies, we still do not know, nor have we examined its ramifications for a settler society. Understanding mobility is an essential task for legal historiography because people carry their laws and customs with them from place to place.

As for local communities, what were the legal relations within and between town councils, municipal organizations, and public utilities when residency was of short duration? Was the tenure of councillors, magistrates, and legal officials similar, and did that situation affect governance in its wider sense? For example, it has been demonstrated that many towns and their local courts were keen to prosecute and convict persons of vagrancy who were targeted as “idle” and of “ill repute.” When such cases were appealed to provincial superior courts, often the convictions were overturned.³⁶ We have a plethora of local histories, but to my knowledge no one has used them to garner the information that would provide answers and insight into these questions, and few of those histories delve into socio-legal matters. Some of the issues have been studied in states across the border, and it would be interesting to find the extent of commonalty. Since internal and external migration was the norm, did, or how did this factor affect the growth of monopolistic forms of transportation, power, and water which were so essential to an agrarian economy? Since there was conflict with each of those enterprises, how did government regulation and case law play out?

Twenty years ago, John Phillip Reid, writing about law on the Overland Trail, said that we can best understand a society from its civil behavioural patterns, and thus the role of the legal historian is to research property law, debtor-creditor relations, and common civil transactions.³⁷ While Reid’s advice has been followed to some extent in the western United States, it has remained fallow in prairie Canada. Indeed, I wonder if it will ever happen. There appears to be an insufficient number of socio-legal historians today to mount such intensive studies. One of the most contentious areas of civil transaction, for example, concerns the law of dower. As we know, the province of Manitoba abolished it in 1885, the Northwest Territories in 1886, and the new provinces of Alberta and Saskatchewan in 1905. Since we have Margaret McCallum’s study of the women’s movement to restore dower and the origins of that legislation in 1917–1920,³⁸ it would be fascinating to examine the case law that developed in the three

provinces over the course of the twentieth century and how dower has affected the development of family law since then.

Two other subjects common to civil transactions concern the business of business (bankruptcy law), and the business of labour (unions). For the former, we have the unique work of Thomas Telfer in his 2014 book *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867–1919*.³⁹ Using the rural and urban court records of Ontario, Telfer provides a thorough understanding of the legal structures involved in the regulation of debt and obligation while exploring the legal forms and changing public attitudes which were frequently contested. While we have a virtually complete run of civil files in Alberta and Manitoba with process books that identify the subject matter of the actions, such a study for the twentieth century would provide a kaleidoscope on the twists and turns of business history over challenging decades of economic rise and fall on the prairies.⁴⁰ This would include the emergence of the strange economics of Social Credit in the late 1930s, followed by the impact of the federal Natural Energy Program in 1980 that decreased the western provinces' share of oil and gas revenues and brought them into a nation-wide conflict that flirted with separation.

The study of the business of labour on the prairies has been somewhat moribund since the turn of this century. Apart from events of industrial strife, lockouts, and strikes, the non-union aspect of human labour has also been missing. An entry to the subject is that of the other side of labour, namely unemployment. Erik Strikwerda's fine study, *The Wages of Relief: Cities and the Unemployed in Prairie Canada, 1929–39*,⁴¹ published in 2013, examines the crisis of unemployment in the three prairie cities of Edmonton, Saskatoon, and Winnipeg and brings us an interesting comparative study. Given the importance of the local perspective to regional history, such comparative studies for the second half of the century would rest on a vast array of sources and comprise a wonderful undertaking.

The writing of contemporary socio-legal history also applies to the fields of forestry and mining, which were major industries in prairie Canada throughout the course of the twentieth century. For south of the border, Gordon Bakken has written a study of the interaction of mining companies and local communities at the county and state court levels in the western states. Many of the cases involved the law of nuisance as

ranchers and families took issue with the practices of mining companies.⁴² A study of such cases in prairie Canada would provide an interesting introduction to settler and community acceptance of industrial practices. As we know, there was major litigation between citizens and the railway companies, as well as grain elevator and electric power conglomerates, as investors from Great Britain and Eastern Canada sought to install monopolistic and oligarchical structures upon the natural resources of the West.⁴³ On another level, such a study would also test the popular thesis of Jared Diamond on the entitlement values of the mining industry.⁴⁴ It would also be interesting to examine the differences between environmental practices by Indigenous and non-Indigenous peoples.⁴⁵

The history of crime and criminal justice has been at the forefront of legal-historical writing on the prairies for decades, from the scholarly to the popular levels, and most often it has focussed on “violence” (interpersonal killing) and not necessarily the full panoply of criminality as reflected in the *Criminal Code* of Canada. The subject has been a major industry in the western United States, one which enables western Canadians to have a comparable focus. Taking homicide itself, Robert Dykstra has reset the terms of reference for its quantitative study. The conclusion is that any sampled population of less than 100,000 people, or at least 80,000, is too small for the analysis of its homicide rate to be meaningful.⁴⁶ Regarding “high violence,” Dykstra suggests that a figure of about forty homicides per 100,000 people would provide a useful cut-off point for defining a society with a high level of violence. The general problem is that most studies of violence in the West are based on population levels of much less than 80,000, and modern figures reveal statistically that the smaller the population base the higher the rate of violence—which renders such figures meaningless. Why does this happen, and does it not then become impossible to study places (such as judicial districts) with populations below 80,000? What is useful, however, is the ratio of violence per capita based on socio-economic structures. Thus ranching communities in the western US, adjusted for population, had five times the killings of farming-urban ones, and two and a half times the rate in mining areas.⁴⁷ These distinctions are critical for a meaningful understanding of violent crime in its socio-economic context.

Compiling such data for the pre-modern era in the West is problematic due to factors such as reporting and randomness. The “academic” figures are also different from contemporary perceptions due to the press in the early period,⁴⁸ and the press and movies since the 1920s. It was, in fact, the “dime novel” which initiated the modern view that violent crime is rampant in our modern society. The statistical evidence for prairie Canada, however, is available thanks to the fact that policing and legal institutions were established at the outset. By Dykstra’s methodology, the figures of forty-seven murders per year per 100,000 people for Manitoba, fifty-four for Saskatchewan, and thirty-nine for Alberta from 1870 to 1919 suggest that the rate of violent crime was high (over forty being the threshold).⁴⁹ With regard to the rural/urban areas, the figures are not far from the evidence of western states in the US where, for all criminal prosecutions, the rural area rate was four times that of the towns and cities. Moreover, for all indictable offences, the rate quadrupled from 1891 to 1931, confirming the public view.⁵⁰ Thus there are similarities in the western borderlands of both countries, but considerable research is needed to flesh out the evidence and its meaning on a topic of wide public interest.⁵¹

The history of crime relating to the convergence of settlers and Indigenous peoples on the prairies begins in the 1870s. Jeffrey Monaghan has dived into the correspondence of North-West Mounted Police (NWMP) officers who planned their patrol routes to gain knowledge of Indigenous peoples.⁵² The Mounties focussed on distinguishing between good and bad individuals, and in doing so they contributed unknowingly to the anxiety of settlers whose calls for “law and order” established the colonial settler imagination and mentality. Settler leaders also used the “troubles” of the 1885 Rebellion, a Métis uprising in which most Indigenous people were not involved, in order to accelerate control over Indigenous communities and mobility.⁵³ Nonetheless, the records show that the Mounties went out of their way not to apprehend and remove individual Indigenous people who went beyond their reserves, or to arrest those who were cited by Department of Indian Affairs (DIA) officials. Instead, the Mounties, exercising their discretion to handle local conditions while maintaining a semblance of control over the Dominion policy for reserves, tended to allow individual chiefs to control and discipline their own men.⁵⁴ The role

of the NWMP would diminish, however, with the rise of civilian governments and the establishment of reserves.

It was, in fact, the Conservative government of John A. Macdonald that established the first “industrial schools” for the Indigenous children of prairie Canada in 1883, even though such schools had failed in central Canada. Bypassing the protections of the Royal Proclamation of 1763, and the treaties of the 1880s, the expansion of these residential schools in the late nineteenth century brought the deaths of thousands of Indigenous children, and the injury and traumatization of thousands more as Ottawa’s “cultural genocide” took root.⁵⁵ These schools appeared to fit the paradigm of Michel Foucault’s art of “distribution” and his theory of “circulation”: dividing or partitioning good and bad people so that the latter could be located, controlled, and disciplined.⁵⁶ For Foucault, schools were a place to control children through a regimented regime with surveillance, discipline, and punishment—a fitting description of Canada’s residential schools’ attempts to break Indigenous children away from their heritage.

When applied to prairie Canada in its formative years, the frontier with its settlers, buildings, and infrastructure could be seen as a geographical milieu where Indigenous peoples were seen as “subjectivities” which were thought to justify the imposition of settler colonial rule under “myths of liberal benevolence.”⁵⁷ This was, out of interest, a hallmark of policing in European industrial cities.⁵⁸ Yet the police, whether the NWMP or the later RCMP, declined to use violence against Indigenous peoples in their general policing activities.⁵⁹ Since most of the complaints of Indigenous malevolence were unfounded or unsubstantiated, many patrols sent out to address complaints found no suspects, which probably gave rise to this seeming benevolence.⁶⁰ Instead, the Mounties, and later local police, turned most of their attention to European immigrants, who swelled the calendars of the criminal courts,⁶¹ and Chinese immigrants in prairie towns⁶²—subjects that await a full legal-historical study such as that of South-Asian immigrants in the US northwest.⁶³

Shelley Gavigan’s *Hunger, Horses and Government Men* addresses one of the most important public policy issues in Canada today: “What went wrong in Canadian Indian policy that led to the dismal poverty and high crime rates of most of today’s reserves?”⁶⁴ Gavigan’s book takes on the issue in a well-structured and clearly written analysis of the relationship

between Plains First Nations and Canadian criminal law, in what is now Saskatchewan and Alberta. It is surprising that this is the first book-length legal history of the imposition of criminal law in the settlement era on the Indigenous peoples of the prairies. While we now have both histories and revisionist histories of the NWMP in the same period,⁶⁵ one hopes that this work marks the beginning of a rich discussion of the introduction of criminal law and the criminalization of First Nations people.

Moving from reserves to the settler countryside, recent writing by Warren Elofson and others has highlighted the early history of ranching on the prairies and the difficulties ranchers faced in eeking out a subsistence on a landscape they had never encountered before.⁶⁶ Several law and society issues have surfaced from such ranching history. These include the widespread theft of cattle by Anglo-Canadian thieves, who ranged back and forth across the border, and the inability of the NWMP or RCMP to investigate and bring them to justice. In the end, we have instances of rough justice and the NWMP's hiring of the Pinkerton Agency in Seattle, whose officials appeared much more adept in pursuing such criminal activity.⁶⁷ Indeed, the Canadian Pacific Railway also hired Pinkerton agents to investigate criminal activity on the rails. Thus a study of the Pinkertons on the Canadian prairies would not only be useful, but also make a very attractive study for a widely read book.

Rural farmers have fared worse in historical accounts of their socio-legal problems which ended up in the courts. It was the institutional practice of fencing that brought them into conflict with ranchers who, by contrast, had a wider view of an unencumbered landscape on the prairies and a strong preference for a cheap open range. Those issues, starting with fence law on the trans-Mississippi west,⁶⁸ and the land law under which they were litigated, have been examined in the prairies south of the border but not to the north. Although Canadian historian Allan Greer has set the framework for such a study, it has been developed only on the US northern frontier.⁶⁹

Moving to the towns and urban life, it is also surprising that we have no solid history of crime in any of the prairie cities. The records are fully extant, both in terms of the official record and literary evidence. Historians across the common-law world, especially in England and the United States, have turned to criminal justice records in a quest for the

history of crime in the growth of urban populations. In Canada, one could point to no finer example than Michael Boudreau's 2012 book on the early twentieth-century history of crime in Halifax, *City of Order*.⁷⁰ Boudreau, drawing upon that rich legacy, meshes the social and legal aspects and interrogates what we will call *law and crime*. Not only is it time for such studies to be undertaken for prairie cities,⁷¹ but again there is a readership out there which would welcome such writing.

An important subject of crime and criminality concerns women. Here we have Lesley Erickson's superb 2011 book, *Westward Bound*.⁷² Assessing the legal and literary evidence from 1886–1940, Erickson sets the framework for future studies into the second half of the twentieth century in which women's issues—and gender and family issues in general—become mainstream. There is still much, however, to be examined regarding women and the law in the earlier period, for which Robert J. Sharpe and Patricia L. McMahon's *Persons Case* is a hallmark of western Canadian historiography.⁷³ Other areas of research interest include temperance, eugenics, and vice.

Crime, of course, is only part of the law and society agenda. Equally important are the activities of the courts themselves. Thanks to the significant work of Dale Brawn, we have a thorough history of the Manitoba Court of Queen's Bench, as well as his historical study of the process of judicial appointment in Manitoba, *Paths to the Bench*, published in 2014.⁷⁴ Brawn's latter book is perhaps the most detailed analysis of court appointments in Canada. He has conducted an immense amount of research into the backgrounds of the judges, and he uses that data to shed significant light on trends in judicial appointments. A similar work on Alberta is in progress with a biographical history of its federally-appointed judges from 1886 to 2005.⁷⁵ Brawn's judicial history of a provincial high court has its equals in David Mittelstadt's in-depth history of the Alberta Court of Appeal, published the same year, as well as Jonathan Swainger's edited collection on the history of the Supreme Court of Alberta.⁷⁶ All three contributions follow in the footsteps of Philip Girard, Jim Phillips, and Barry Cahill's admirably edited book on the Nova Scotia Supreme Court.⁷⁷ In addition, we will soon have an equivalent work on Saskatchewan with Mittelstadt's current history of its Court of Appeal, which is nearing completion. We lack, however, that major tradition of lower-court historiography which

has been developed so well in England and the US, as lower, provincially-appointed courts in Canada continue to receive less attention than they deserve.⁷⁸ A Canadian exception is Paul Craven's superb 2014 study of the sessions system in nineteenth-century New Brunswick, *Petty Justice*, which can serve as a model of researching the local courts in any prairie community.⁷⁹ An important older work for the prairies is Graham Price's massive thesis on the courts of the stipendiary magistrates of the Northwest Territories.⁸⁰

While we have major studies of the courts, we have no studies of the juries before whom major cases were heard. In addition to juries themselves, we also need a study of the mixed anglophone-francophone juries (*de medietate*, that is, half and half) of the early period, and the role of women on later ones for which we have an admirable example south of the border.⁸¹ Grand and petty (trial) juries, along with coroners' inquests—which formed the backbone of the criminal justice system—remain subjects in which we have a dearth of knowledge. Most of these legal records exist in major runs in the prairie provinces, and their archives wait for the researcher eager to explore them.⁸²

An important “external” thesis has been explored recently by a young Canadian historian, Susan Dianne Brophy, of St Jerome's University in Waterloo. A graduate of York University's Department of Social and Political Thought, Brophy's 2013 article on “Freedom, Law and the Colonial Project” in *Law and Critique* uses Marxist-informed works on economic development that adopt an international scope to show that countries thrive “in an interconnected, evolving global landscape.”⁸³ Her theory of UCD (Uneven and Combined Development) is taken from Trotsky's theory of gaps and disparities interrupting development to cause a new amalgam called “combined development”—a result of Eurocentric dialectic forces which, being “uneven,” comprise a theory of law that challenges the legal pluralist approach.⁸⁴

The UDC of capitalism and the law provides a way to analyze the connection between the local and the global, as well as between law and the economy. As the remnants of previous modes of production carry over and clash with new productive means, the laws of the past combine with new ones. Brophy's idea is that law and the state are not synonymous, but comprise a “state of exception.”⁸⁵ Law has its own dialectic facets and is

intrinsic, not tangential, to capitalism; its flexibility assists capitalism in negotiating its barriers. The effects of the rise of capitalism in post-colonial and post-industrial societies on their Indigenous peoples is an allied subject that deserves greater attention as we move into a more globalized digital world.⁸⁶

Brophy, having written on Ukrainians and the colonial project,⁸⁷ UCD, and how the dialectical materialist logic is intrinsic to historical development itself, is currently in the process of completing a thematic history of the Hudson's Bay Company from the Proclamation of 1763 to the merger of 1821.⁸⁸ Her interest is to examine critically the fur traders and incoming settlers and their relations with Indigenous peoples over time. Brophy's recent and stimulating article "Reciprocity as Dispossession" suggests a framework for understanding the origins of Indigenous-settler relations in the nineteenth century.⁸⁹ The HBC and other trading companies exploited the labour of Indigenous peoples in various ways that have been "barely perceptible" to historians—an uneven and combined legal and economic transformation that became a major legacy of British-North American settler colonialism. Brophy argues that the distortion of customary labour by factors such as credit, debt, and the "truck" economy led to their fragmented and inconspicuous dispossession, which later facilitated the displacement of Indigenous populations on the prairies. With reference to Manitoba, the Dominion's purpose was to advance economically with the settlement of Ukrainians and the seclusion of Indigenous peoples on settled reserves in western Manitoba and elsewhere. Brophy's anti-colonial thesis will bring an interesting counter-argument to the received history of the HBC and the settlement of prairie Canada, all of which will be grist to the historian's mill.

Twelve years ago I wrote, in the concluding section of the introduction to *Laws and Societies in the Canadian Prairie West, 1670–1940*, that work on such various subjects as the law of intestacy, dower and divorce, family law in general, the end of riparian water rights, the privatization of public utilities, natural resources law, and consumer rights in the growth of a market economy—which were being researched and written about in the western United States—provided a rich background and context for the study of such subjects in prairie Canada.⁹⁰ To date, apart from family and natural resources law, most of these subjects critical to the study of

law and society in the Canadian prairie provinces have not been undertaken in that comparative context, either within or without the region. It is, perhaps, the historian's conundrum that legal-historical writing often proceeds sloth-like—slow to adapt to the larger and ever-changing historiographical landscape. As witnesses in the common-law world have often said, after giving little satisfactory testimony to the interrogatories posed in court depositions, "I can say no more."⁹¹

NOTES

- 1 The leader was David H. Flaherty, who edited the Society's first two volumes, *Essays in the History of Canadian Law*, published by the University of Toronto Press in 1981 and 1982, whose contributors formed part of the initial cadre of professional legal historians. The critic was none other than myself, and the moniker appeared in Louis A. Knafla, Review of *Essays in the History of Canadian Law*, vol. 1, ed. David H. Flaherty, *American Journal of Legal History* 27, no. 4 (1983): 389–90.
- 2 See, for example, André Morel, "Canadian Legal History—Retrospect and Prospect," *Osgoode Hall Law Journal* 21, no. 2 (1983): 159–64.
- 3 Hilary Bates Neary, "William Renwick Riddell: Judge, Ontario Publicist and Man of Letters," *Law Society of Upper Canada Gazette* 11 (1977): 144–74.
- 4 For these and others, see the thorough bibliography on the early writing by Janice Dickin McGinnis, "Bibliography of the Legal History of Western Canada," in *Law & Justice in a New Land: Essays in Western Canadian Legal History*, ed. Louis A. Knafla (Toronto: Carswell, 1986). A later, select bibliography focussing on crime and criminal justice was Jim Phillips's "Crime and Punishment in the Dominion of the North," in *Crime History and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice in Modern History*, ed. Clive Emsley and Louis A. Knafla (Westport: Greenwood Press, 1996).
- 5 The first overarching study for prairie Canada was Louis A. Knafla's, "From Oral to Written Memory: The Common Law Tradition in Western Canada," in Knafla, *Law & Justice in a New Land*, in which several conceptual themes were advanced.
- 6 For the legal intrigue of this early period, see Louis A. Knafla, "Richard 'Bonfire' Bennett: The Legal Practice of a Prairie Corporate Lawyer, 1898–1913," in *Essays in the History of Canadian Law*, vol. 4, *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930*, ed. Carol Wilton (Toronto: Butterworths for the Osgoode Society, 1990).
- 7 The word "colonial" here refers to the French and British empires; "post-colonial" refers to a Canadian nation that grew out of those European controls and influences and became subject to global influences for which it was unprepared and struggled to accommodate. The term "anti-colonial" refers to the problems which arose out of those global influences.
- 8 For a larger historiographical landscape for the "West," see Benjamin H. Johnson and Andrew Graybill, *Bridging National Borders in North America: Transnational and*

- Comparative Histories* (Durham: North Carolina University Press, 2010); and for the colonial experience, Amanda Nettelbeck, Russell Smandych, Louis A. Knafla, and Robert Foster, *Fragile Settlements: Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada* (Vancouver: UBC Press, 2016), 3–42.
- 9 It should be noted that advances in general historiography are not always reflected in writing at the local level, which often takes time for that work to “trickle down” and inform such writers.
 - 10 Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley: University of California Press, 2005).
 - 11 C. A. Bayly, *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (Oxford: Blackwell, 2004).
 - 12 James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford: Oxford University Press, 2009).
 - 13 P. G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) and “The Politics of Historiography and the Taxonomies of the Colonial Past: Law, History, and the Tribes,” in *Making Legal History: Approaches and Methodology*, ed. Anthony Musson and Carolyn Stebbins (Cambridge: Cambridge University Press, 2013).
 - 14 Keally McBride, *Mr Mothercountry: The Man Who Made the Rule of Law* (Oxford: Oxford University Press, 2016). See for Stephen and the colonies Russell Smandych, “Contemplating the Testimony of ‘Others’: James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, circa 1839–1849,” *Australian Journal of Legal History* 10, no. 1–2 (2006): 97–143, and “Mapping Imperial Legal Connections: Toward a Comparative Historical Sociology of Colonial Law,” *Adelaide Law Journal* 31, no. 2 (2010): 187–228.
 - 15 The large and complex literature on this subject has been reviewed effectively by Russell Smandych in “Colonialism, Settler Colonialism, and Law: Settler Revolutions and the Dispossession of Indigenous Peoples through Law in the Long Nineteenth Century,” *Settler Colonial Studies* 3, no. 1 (2013): 82–101.
 - 16 John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Toronto: University of Toronto Press for the Osgoode Society, 2011).
 - 17 Blanca Tovias, *Colonialism on the Prairies: Blackfoot Settlement and Cultural Transformation, 1870–1920* (Brighton: Sussex Academic Press, 2011).
 - 18 Shelley A.M. Gavigan, *Hunger, Horses and Government Men: Criminal Law on the Aboriginal Plains, 1870–1905* (Vancouver: UBC Press for the Osgoode Society, 2012).
 - 19 Nettelbeck et al., *Fragile Settlements*.
 - 20 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empire, 1400–1900* (Cambridge: Cambridge University Press, 2010).
 - 21 See Bonnie G. Colby, John E. Thorson, and Sarah Britton, eds., *Tribal Water Rights: Essays in Contemporary Law, Policy and Economics* (Tucson: University of Arizona Press, 2006). For a case study of the intersection of law and politics on this subject, see the major work of Norris Hundley, *Water and the West: The Colorado River*

- Compact and the Politics of Water in the American West*, 2nd ed. (Berkeley: University of California Press, 2009). See also Adele Perry, *Colonial Relations: The Douglas-Connolly Family and the Nineteenth-Century Imperial World* (New York: Cambridge University Press, 2015).
- 22 Mark Finnane, "The Limits of Jurisdiction: Law, Governance and Indigenous Peoples in Colonized Australia," in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. Shaunnagh Dorsett and Ian Hunter (New York: Palgrave, 2010).
 - 23 For the typology of this concept, see Louis A. Knafla, "Law-ways, 'Law-jobs,' and the Documentary Heritage of the State," in *Law, Society, and the State: Essays in Modern Legal History*, ed. Louis A. Knafla and Susan W. S. Binnie (Toronto: University of Toronto Press, 1995).
 - 24 See especially Lorenzo Veracini, "Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation," *Journal of Intercultural Studies* 29, no. 4 (2008): 363–79; "Introducing: Settler Colonial Studies," *Settler Colonial Studies* 1, no. 1 (2011): 1–12; "Isopolitics, Deep Colonizing, Settler Colonialism," *Interventions: International Journal of Postcolonial Studies* 13, no. 2 (2011): 171–89; and *Settler Colonialism: A Theoretical Overview* (London: Palgrave, 2010).
 - 25 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387–409.
 - 26 See, for example, Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011) and Randi Dawn Gardner Hardin, "Knight v Thompson: The Eleventh Circuit's Perpetuation of Historical Practices of Colonization," *American Indian Law Review* 28, no. 2 (2013–2014): 579–98.
 - 27 Edward Cavanagh, "A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670–1763," *Canadian Journal of Law and Society/Revue canadienne droit et société* 26, no.1 (winter 2011): 37.
 - 28 George Colpitts, *Pemmican Empire: Food, Trade, and the Last Bison Hunts in the North American Plains, 1780–1882* (New York: Cambridge University Press, 2015).
 - 29 For example, the pioneering and stimulating work of John Borrows, from his *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) to *Drawing out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010), *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), and *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).
 - 30 Susan Dianne Brophy, "Reciprocity as Dispossession: A Dialectical Materialist Analysis of the Fur Trade," *Settler Colonial Studies* (1 March 2018): 2, <https://doi.org/10.1080/2201473X.2018.1432011>.
 - 31 Dale Gibson, *Law, Life and Government at Red River*, vol. I: *Settlement and Governance, 1812–1872* (Montreal: McGill-Queen's University Press, 2015).
 - 32 J. M. Bumsted, *Trials and Tribulations: The Red River Settlement and the Emergence of Manitoba 1821–1870* (Winnipeg: Great Plains Publishers, 2003).

- 33 David Chan Smith, "The Hudson's Bay Company, Social Legitimacy, and the Political Economy of Eighteenth-Century Empire," *William and Mary Quarterly*, 3rd ser., 75, no. 1 (January 2018): 71–108.
- 34 Ted Binnema, *"Enlightened Zeal": The Hudson's Bay Company and Scientific Networks, 1670–1870* (Toronto: University of Toronto Press, 2014).
- 35 This is a theme of Paul Leonard Voisey's *Vulcan, The Making of a Prairie Community* (Toronto: University of Toronto Press, 1988).
- 36 These findings result from many research papers by students in my course on "Crime in Western Canada" at the University of Calgary over the 1990s.
- 37 John Philip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, CA: Huntington Library Press, 1996).
- 38 Margaret McCallum, "Prairie Women and the Struggle for a Dower Law, 1905–1920," *Prairie Forum* 18 (spring 1993): 19–34.
- 39 Thomas G. W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867–1919* (Toronto: University of Toronto Press for the Osgoode Society, 2014).
- 40 See, for example, the extensive run of civil action files in Alberta, copies of which are available in the Provincial Archives of Alberta. See also Graham Parker, "The Alberta Legal History Project," *Now and Then* 1, no. 1 (1979): 7.
- 41 Erik Strikwerda, *The Wages of Relief: Cities and the Unemployed in Prairie Canada, 1929–39* (Edmonton: Athabasca University Press, 2013).
- 42 Gordon Morris Bakken, "Mining and Pollution in the West: The Limits of Law Protecting the Environment," *Western Legal History* 21, no. 2 (summer 2008): 209–36.
- 43 Knafla, "Richard 'Bonfire' Bennett."
- 44 Jared Diamond, *Collapse: How Societies Choose to Fail or Collapse* (New York: Viking, 2004).
- 45 Daren Ranco and Deane Suagee, "Tribal Sovereignty and the Problem of Difference in Environmental Regulation: Observations on 'Measured Separatism' in Indian Country," *Antipode* 39, no. 4 (September 2007): 691–707.
- 46 Robert R. Dykstra, "Quantifying the Wild West: The Problematic Statistics of Frontier Violence," *Western Historical Quarterly* 40, no. 3 (autumn 2009): 342–43. For example, the statistic for Detroit (central) in 2006 was 47.3, but for the county 11.3. What often occurs is that writers "cherry-pick" their area to match their thesis: Dykstra, 336.
- 47 See Randolph Roth, "Guns, Murder, and Probability: How Can We Decide Which Figures to Trust?" *Review in American History* 35, no. 2 (June 2007): 165–75. Dykstra has critiqued Roth's statistical models as exaggerated, but the referential comparisons are unaffected.
- 48 For example, the press in the Idaho Territory (1860–1890) reported an increasing rate of violent killings without any recorded evidence, thus contributing to the violent frontier thesis: Robert G. Waite, "Violent Crime on the Western Frontier: The Experience of the Idaho Territory, 1863–90," in *Violent Crimes in North America*, ed. Louis A. Knafla (Westport, CT: Praeger, 2003).

- 49 Louis A. Knafla, "Violence on the Western Frontier. A Historical Perspective," in *Violence in Canada. Sociopolitical Perspectives*, ed. Jeffrey Ian Ross (New Brunswick, NJ: Transaction Publishers, 200), 426–27. Using Dykstra's test, the population figures were too low in the later nineteenth century for a meaningful interpretation, but sufficiently high to be acceptable in the early twentieth.
- 50 Louis A. Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada," in *Laws and Societies in the Canadian Prairie West, 1670–1940*, ed. Louis A. Knafla and Jonathan Swainger (Vancouver: UBC Press, 2005), 59–60. In the 1930s, however, crime rates in Calgary were almost doubled that of some rural prairie areas: Louis A. Knafla, "Introduction: Laws and Societies in the Anglo-Canadian North-West Frontier and Prairie Provinces, 1670–1940," in Knafla and Swainger, *Laws and Societies in the Canadian Prairie West, 1670–1940*, 27.
- 51 For a preliminary case study, see Harl L. Dalstrom, "Homicide on the Canada-U.S. Border," *Manitoba History* 73 (fall 2013): 9–18.
- 52 Jeffrey Monaghan, "Mounties in the Frontier: Circulations, Anxieties, and Myths of Settler Colonial Policing in Canada," *Journal of Canadian Studies/ Revue d'études canadiennes* 47, no. 1 (winter 2013): 122–48.
- 53 For the major trials of 1885, see the comprehensive study of Bill Waiser, "The White Man Governs: The 1885 Indian Trials," in *Canadian State Trials*, vol. 3, *Political Trials and Security Measures, 1840–1914*, ed. Barry Wright and Susan Binnie (Toronto: University of Toronto Press for the Osgoode Society, 2009).
- 54 The evidence is summarized in Nettelbeck et al., *Fragile Settlements*, 67–69, 113–20.
- 55 See Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada, vol. 1. Canada's Residential Schools. The History, Part 1: Origins to 1939*, a 962-page goldmine of evidence and sources for further research.
- 56 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, ed. Arnold Davidson, Michel Senellart, Francois Ewald, and Alessandro Fontana, transl. Graham Burchell (New York: Picador, 2007). For a critical commentary see David Garland, "Foucault's Discipline and Punish: An Exposition and Critique," *American Bar Association* 11, no. 4 (October 1986): 847–80.
- 57 Monaghan, "Mounties in the Frontier," 125. Monaghan further argues that Commissioner L.W. Herchmer's patrols were organized along the lines conceptualized by Foucault to secure ever-widening space between Indigenous and settler peoples (p. 133). Patrick Wolfe asserts that this phenomenon led to settler calls for the elimination of Indigenous peoples: "Settler Colonialism and the Elimination of the Native."
- 58 For the European and colonial context, see Mark Neocleous, *Critique of Security* (Montreal: McGill-Queen's University Press, 2008). For the role of police in establishing liberal capitalism, see Randall Williams, "A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism," *Interventions* 5, no. 3 (2003): 322–44.
- 59 Nettelbeck et al., *Fragile Settlements*, 62–75. This includes especially the troubled enforcement of the "pass" system: Nettelbeck et al., *Fragile Settlements*, 74–75, 117–18.

- 60 Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2009). For the continuing concept of benevolence afterwards, see Renisa Mawani, "Legalities of Nature: Law, Empire, and Wilderness Landscapes in Canada," *Social Identities* 13, no. 6 (2007): 715–34.
- 61 Nettelbeck et al., *Fragile Settlements*, 140–42. For comparative purposes, see Carolyn Moehling and Anne Morrison Pielh, "Immigration, Crime and Incarceration in Early Twentieth-Century America," *Demography* 46, no. 4 (November 2009): 739–63.
- 62 Ken Leyton-Brown of the University of Regina is currently working on a history of Chinese immigrants and the law in early Saskatchewan history.
- 63 Nayan Shah, *Stranger Intimacy: Contesting Race, Sexuality and the Law in the North American West* (Berkeley: University of California Press, 2011).
- 64 Gavigan, *Hunger, Horses and Government Men*.
- 65 For a recent survey of this literature, see Nettelbeck et al., *Fragile Settlements*, 53–59.
- 66 Warren M. Elofson, *Cowboys, Gentlemen, and Cattle Thieves: Ranching on the Western Frontier* (Montreal: McGill-Queen's University Press, 2000) and *Frontier Cattle Ranching in the Land and Times of Charlie Russell* (Montreal: McGill-Queen's University Press, 2000).
- 67 Knafla, "From Oral to Written Memory," 65. This subject is still ripe for research and analysis.
- 68 Yasuhide Kawashima, "Farmers, Ranchers, and the Railroad: The Evolution of Fence Law in the Great Plains, 1865–1900," *Great Plains Quarterly* 30 (winter 2010): 21–36.
- 69 Allan Greer, "Commons and Enclosure in the Colonization of North America," *American Historical Review* 117, no. 2 (April 2012): 365–86; Lee J. Alston, Edwyna Harris, and Bernardo Mueller, "The Development of Property Rights on Frontiers: Endowments, Norms, and Politics," *Journal of Economic History* 72, no. 3 (September 2012): 741–70.
- 70 Michael Boudreau, *City of Order: Crime and Society in Halifax, 1918–35* (Vancouver: UBC Press, 2013).
- 71 An early attempt to write such a history for Calgary from local records is Thomas Thorne and Neil B. Watson, "Patterns of Prairie Crime: Calgary, 1870–1939," in *Crime and Criminal Justice in Europe and Canada*, 2nd ed., ed. Louis A. Knafla (Waterloo: Wilfred Laurier University Press, 1985).
- 72 Lesley Erickson, *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society* (Vancouver: UBC Press, 2011).
- 73 Robert J. Sharpe and Patricia L. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press for the Osgoode Society, 2007).
- 74 Dale Brawn, *The Court of Queen's Bench of Manitoba, 1870–1950: A Biographical History* (Toronto: University of Toronto Press for the Osgoode Society, 2006) and *Paths to the Bench: The Judicial Appointment Process in Manitoba, 1870–1950* (Vancouver: UBC Press, 2014).

- 75 Louis A. Knafla's *Lords and Ladies of a Western Bench, 1876–2005: A Biographical History of the Supreme and District Courts of Alberta, 1876–2005*, a two-volume work that will flesh out the judges' political, social, and cultural backgrounds in addition to their legal and judicial careers.
- 76 David Mittelstadt, *People Principles Progress: The Alberta Court of Appeal's First Century 1914 to 2014* (Calgary: Legal Archives Society of Alberta, 2014); Jonathan Swainger, ed., *The Alberta Supreme Court at 100: History and Authority* (Edmonton: University of Alberta Press for the Osgoode Society, 2007).
- 77 Philip Girard, Jim Phillips, and Barry Cahill, eds., *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for the Osgoode Society, 2004).
- 78 See, for example, the books on the lower courts of the Midwest that have been authored by John R. Wunder: *Law and the Great Plains and Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853–1889* (Westport, CT: Greenwood Press, 1979, reprint, New York: Garland, 1999).
- 79 Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785–1867* (Toronto: University of Toronto Press for the Osgoode Society, 2014).
- 80 Graham Price, "Remote Justice: The Stipendiary Magistrate's Court of the Northwest Territories (1905–1955)," LL.M. thesis, University of Manitoba, 1986.
- 81 Janolyn Lo Vecchio, "Western Women's Struggle to Serve on Juries, 1870–1954," *Western Legal History* 21, no. 1 (spring 2008): 25–54.
- 82 Thomas Thorner, "Sources for Legal History in the Archives of Saskatchewan and Alberta," 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); Louis A. Knafla, "Be It Remembered: Court Records and Research in the Canadian Provinces," *Archivaria* 18 (summer 1984): 105–23; and John P.S. McLaren, "Meeting the Challenges of Canadian Legal History: The Albertan Contribution," *Alberta Law Review* 32, no. 3 (1994): 423–35.
- 83 Susan Dianne Brophy, "Freedom, Law, and the Colonial Project," *Law and Critique* 24, no. 1 (2013): 39–61.
- 84 Susan Diane Brophy, "Legal Pluralism and its Explanatory Limits in Legal History," presentation at the Canadian Law and Society Association's Midwinter Conference, Waterloo, ON, 16 January 2016.
- 85 Susan Dianne Brophy, "Lawless Sovereignty: Challenging the State of Exception," *Journal of Social and Legal Studies* 18, no. 2 (2009): 199–220.
- 86 Caitlain Devereaux Lewis, "Policies of Inequity—A World Apart: A Comparison of the Policies Toward Indigenous Peoples of a Post-Colonial Developing Nation to those of a Post-Industrial Developed Nation," *American Indian Law Review* 37, no. 2 (2012/2013): 423–65.
- 87 Susan Dianne Brophy, "The Emancipatory Praxis of Ukrainian Canadians (1891–1919) and the Necessity of a Situated Critique," *Labour/Le Travail* 77 (May 2016): 151–79.

- 88 The provisional title is *Troublesome: The British North American Fur Trade and the Legacy of Dispossession, 1763–1821*. I wish to thank Dr. Brophy for sharing with me her table of contents and draft Preface.
- 89 Brophy, “Reciprocity as Dispossession.”
- 90 Knafla, “Introduction: Laws and Societies in the Anglo-Canadian North-West Frontier and Prairie Provinces,” 32–37.
- 91 For the origins of this response in the early modern era and an exploration of justices of the peace and witnesses, see Louis A. Knafla, “The Magistrate—and Humorous Magistrates—in Early Seventeenth-Century England,” *Early Theatre* 14, no. 2 (2011): 183–207.

