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Book Review: Essays in the History of Canadian Law: Volume III: Nova Scotia, edited by P. Girard and J. Phillips

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Essays in the History of Canadian Law. Volume III: Nova Scotia.

Edited by P. GIRARD and J. PHILLIPS.
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Essays in the History of Canadian Law, Volume III is a wonderful addition to the growing collection of essays on Canadian legal history published by the Osgoode Society.[1] Two earlier volumes edited by David H. Flaherty, which appeared in 1981[2] and 1983[3] respectively, included essays on a variety of topics focusing mainly but not exclusively on Upper Canada. The appearance of Volume III with its focus on the legal history of Nova Scotia represents an important new contribution, both because of its differing perspectives from eastern Canada and because the new volume aptly demonstrates the increasing scope of legal history which has occurred over the past decade in Canada.

The two earlier (and connected) volumes edited by David Flaherty contained some excellent essays on a great variety of topics. As a collection, they offered excellence of analysis and enthusiastic examination of "the interaction between law and society", two of the essential objectives identified by David Flaherty in his introductory essay in Volume I.[4] The introductory essay in Volume I and the corresponding preface in Volume II provided both a cogent analysis of the nature and role of legal history in Canada—and of the roles for both historians and lawyers in such an enterprise—and a research agenda which is as challenging as it is interesting. In David Flaherty's words "... no one can complain that the field of Canadian legal history lacks opportunities for significant research".[5]

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[1] The Osgoode Society, founded in 1979, was established to encourage research and writing in the history of Canadian law. Its efforts to stimulate legal history in Canada include a fellowship, an annual lectureship, research support programs, and an oral history project. The Society publishes annually volumes which contribute to legal-historical scholarship in Canada.

[2] David H. Flaherty (ed.), Essays in the History of Canadian Law, Volume I (1981).

[3] David H. Flaherty (ed.), Essays in the History of Canadian Law, Volume II (1983).

[4] *Op. cit.*, footnote 2, p. 3.

[5] *Op. cit.*, footnote 3, p. x.

Volume III, edited by lawyer-historians Philip Girard and Jim Phillips, responds to this challenge with vigour and insight. This volume is divided into four parts, each of which contains essays on similar themes: an overview of the legal system; the criminal law in society; women, the family and law; and law and economy. The arrangement is useful in bringing together thematically the work of different scholars and in providing a more complex and textured account of the interaction between law and society in these areas. There are interesting comparisons as well to essays in the earlier two volumes and opportunities for important connections and contrasts in the use of law and its impact.

In the overview section, Thomas Garden Barnes' essay on the Annapolis Royal Regime (1713-1749) offers a thought-provoking account of the efforts (and failures) of English imperialism in Acadian communities after the Treaty of Utrecht, efforts which demonstrated "no policy commitment to the role of law-making and law-doing in governing a conquered people".[6] In addition to the problems of oath-taking which have been generally recognized as critical to "les Grands Dérangements" of 1755, the author argues persuasively that it was the juridical failure to extend British law within the French communities which was a more fundamental shortcoming of the British imperial governance, and one which ultimately led to the political failure concerning the oath-taking. Such a perspective on the positive values of juridical imperialism raises many questions even two centuries later in Canada, of course, but the account of the Annapolis Royal Regime, the ways in which Acadian customary laws flourished after 1713, and the strong links between legal regimes and political actions clearly underline the significance of this work and the interaction between law and society. By contrast, Philip Girard's essay on three law reform efforts in the nineteenth century (married women's property, the abolition of the Chancery jurisdiction, and insolvency laws) shows Nova Scotia legislators at a different moment in history, sometimes creating indigenous legal solutions, sometimes reflecting or reacting to the British colonial government, and sometimes borrowing from the American states. His essay also aptly demonstrates the difficulty of labelling legal changes as progressive or otherwise, and the need to take careful account of the layers of meanings inherent in law reform initiatives:[7]

> ... Nova Scotia's legal history reveals a genuine clash of ideologies—broadly speaking, eighteenth-century paternalism versus nineteenth-century liberalism ... S.F. Wise's observation that the English-Canadian style arises out of a "contradictory heritage" best understood "in terms of muted conservatism and ambivalent liberalism, of contradiction, paradox and complexity" accurately captures my meaning.

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[6] Pp. 10-11.

[7] P. 116; quoting S.F. Wise, Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis, in Can. Hist. Assoc., Historical Papers 1974 1, at p. 13.

In the overview section, there is also an informative biographical essay by Clara Greco on judges of the Superior Court of Nova Scotia from 1754 to 1900, a collective portrait which shows both similarities over this period (for example, most appointees were Protestant, many were Anglican and many had been active politicians) as well as changes as the bar itself became more diverse in the nineteenth century. Even so, "Acadians and Irish are notable for their absence, to say nothing of blacks or natives. Women remained absent because they were formally excluded from the bar".[8] This study offers an excellent starting point for further research on possible relationships between the judges and their decisions.

The second section of this volume presents a striking portrait of the criminal justice system and the prisons—and the faces of those, mainly the poor, who experienced them. Jim Phillips' essay on poverty and the criminal law, in the context of vagrancy laws, provides an excellent account of the relationship between economic conditions and the legal system in the period 1864 to 1890, and even more significantly, the use of vagrancy laws as "an important tool in the control of the non-conformist and the unemployed".[9] A similar theme is evident in an essay by B. Jane Price on female petty criminals, most of whom were vagrants or prostitutes or both. During the period 1864 to 1890,[10]

> Victorian Halifax had its own female criminal class, a caste of women who were repeatedly convicted of petty offences. They were poor, and vagrancy laws criminalized their poverty; they 'chose' prostitution because few jobs were open to them and those that were paid desperately low wages ...

The end of the line in the criminal justice system, the prisons, is also very well documented in the essay by Rainer Baehre. As the author points out, the Halifax penitentiary was one of three in existence at the time of Canadian confederation and was replaced in 1881 by that now in Dorchester. Baehre's history of prisons in Halifax in the nineteenth century[11] raises important questions about administrative decision-making, legislative actions, and the use of law as a means of social control. In this way, all three essays provide rich material for further research about the history of criminal justice in Nova Scotia and its contrasting history in other parts of Canada.

The third section of this volume focuses on women and family life. Kimberley Smith Maynard's essay on divorce is an interesting account of divorce decrees granted in sixty petitions for judicial divorce before 1890.[12] As the author demonstrates, divorce law in Nova Scotia differed from that in England as early as 1750 in a number of respects: a more

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[8] Pp. 65-66.

[9] P. 153.

[10] P. 200.

[11] P. 163.

[12] P. 232.

lenient test for divorce *a vinculo matrimonii* and the absence of a requirement of a "crim. con." action at the same time.[13] On several occasions, moreover, legislative reforms in Nova Scotia were disapproved by the Colonial Office because of inconsistency with English law, although the Nova Scotia authorities firmly maintained their divorce law "in spite of imperial displeasure",[14] apparently with some success. Moreover, the Nova Scotia model (including its recognition of equality between the sexes in cases of adultery, for example) became an important model at the time of the reform of Canadian divorce law in the twentieth century.

Interestingly, this study of divorce law revealed that "the most obvious characteristic distinguishing successful from unsuccessful petitions [was] the absence of children: none of the successful petitioners had children and all of the unsuccessful petitioners had at least one".[15] This comment is a useful backdrop to a complementary study of child custody and divorce in the period 1866 to 1910. Rebecca Veinott[16] has provided a well documented account of the cases and added considerable insight to the questions about women's custodial rights in relation to their children raised by Constance Backhouse in an earlier volume published by the Osgoode Society.[17] Unlike England and other parts of Canada, Veinott has suggested that Nova Scotia custody law was gender neutral, both in theory and often in practice, although it did not adopt the American idea of "maternal presumption". Thus, Nova Scotia's contribution in the context of family laws generally provides rich comparative material for those interested in the roles of men and women in nineteenth century Canada.

The final section focusing on law and economy includes two essays, one, by Margaret McCallum, on the innovative Mines Arbitration Act of 1888,[18] and the other, by Jennifer Nedelsky, on the Water Act of 1919 which "expropriated basic riparian rights" in the province.[19] In these essays about late nineteenth/early twentieth century developments, there is interesting evidence of Nova Scotia's particular responses to rising industrialization and the post-Confederation economy. Margaret McCallum's examination of the history of coal mining and the strategic support for arbitration on the part of the union (the Provincial Workmen's Association) and its leader, Robert Drummond, in the 1880s is a remarkable testament to the perseverance and solidarity of coal miners to maintain their families

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[13] P. 234.

[14] P. 239.

[15] P. 254.

[16] P. 273.

[17] Constance Backhouse, Shifting Patterns in Nineteenth-Century Canadian Custody Law, in Flaherty, *op. cit.*, footnote 3, p. 212. See also Constance Backhouse, Petticoats and Prejudice (The Osgoode Society: 1991).

[18] P. 303.

[19] P. 326.

and communities in the face of dire economic changes. "In the face of the miners' commitment to their communities and way of life, the [mining] industry in the twentieth century looked to government subsidies [to permit competitive mining operations]."[20] Perhaps significantly, Jennifer Nedelsky's essay explains the decision-making which enabled another resource, water, to be transformed from private property to a public commodity, and the subsequent interplay between the legislature, the courts and the Power Commission in the determination of policies, rights and responsibilities. In such a context, there is ample opportunity for comparisons about the roles of the government and the market in the mediation of competing interests. As well, there are obvious comparisons between Nova Scotia and New England: "from an American perspective, the ease with which the Nova Scotia legislature accomplished the abolition of a whole class of private property rights is astonishing."[21]

Thus, while this volume of essays begins in the mid-eighteenth century with questions about "imperialist" laws in the context of the Annapolis Royal Regime, it ends with early twentieth century questions about resources and economic power, both questions which remain central to Nova Scotia's identity and well-being and questions which continue to be addressed, in constitution-making and in relation to economic decisions, throughout Canada in the 1990s. As a series of essays on the regional legal history of Nova Scotia, this volume is exceptional; as a microcosm of the issues which need to be researched and analyzed—questions about law "reform", about criminal laws and punishment, about families and family life, and about law and the economy—this volume is a contribution to a more textured understanding of Canadian legal history as a whole. This volume, which suggests that "Nova Scotia [is] a novel challenge",[22] is a model for further work exploring the special nuances of regional history as well as the ways in which regional variations have been blended to shape the broader picture of Canadian legal history as a whole.

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[20] P. 319.

[21] P. 344.

[22] Thomas Garden Barnes, p. 11, referring to the fact that Britain had little previous experience in governing "conquered territories" in 1713 when Nova Scotia was acquired.