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BOOK REVIEW

Essays in the History of Canadian Law, Volume VIII: In Honour of R.C.B. Risk

EDITED BY G. BLAINE BAKER AND JIM PHILLIPS
(Toronto: University of Toronto Press, 1999) 585 pages.¹

Dick Risk is one of the pioneers in the study of English Canadian legal history and this book represents a well-deserved tribute. In the 1970's, Risk, along with a few others, invigorated what had been a dormant field of legal scholarship. The "few others" include Graham Parker and Murray Greenwood, both of whom died late last year. They were important mentors of mine and will be missed by many Canadian legal historians. Together with Risk, they have been generous with their encouragement, nurturing a younger generation of scholars.

The scholarly importance of legal history was not always recognized. Indeed, it was marginalized for much of the twentieth century for reasons Parker perhaps best expressed in 1974. The existing legal historical scholarship, consisting largely of medievalist work on the origins of common law and whiggish, or nineteenth century style constitutional history, had little appeal in the modern legal academy concerned about professional training or for the more critically-oriented legal realists. Although the field might be more effectively pursued in the humanities than in a law school, Parker noted that historians seemed to have little interest in law.² Risk wrote rather less pessimistically about the field at about the same time, charting a prospectus for its study and identifying issues that would interest the wider scholarly community.³

¹ [hereinafter *Essays in Honour of Risk*].

² G. Parker, "The Masochism of the Legal Historian" (1974) 24 U.T.L.J. 279.

³ R.C.B. Risk, "A Prospectus for Canadian Legal History" (1973) 1 Dal. L.J. 227.

In the longer term, Risk's optimism about the prospects of Canadian legal history proved to be more prescient. By the mid 1980's, the field was flourishing with a younger generation of scholars embracing it and moving it forward in new interdisciplinary directions.⁴ These developments delighted Parker and inspired Greenwood to produce a body of work of enduring importance to historians, legal scholars, and anyone concerned about civil liberties in Canada. Risk has become one of the most active of the early Canadian legal historians and his influence is such that he has been honoured in the most flattering way by this book.

While it is difficult in such circumstances to be critical, the field has developed sufficiently to warrant something more than echoing praise, especially where one of the book's editors has himself set high standards in his review of the field in a recent article in the *Canadian Historical Review*.⁵ Without detracting in any way from Risk's accomplishments, from the work of the editors, or suggesting that such a tribute is inappropriate, it must be said that a book of this nature does inadvertently strike a slightly whiggish tone. Individuals contribute to intellectual movements, and some, including Risk, are significant contributors, but they do not create such movements. The positive developments in the study of Canadian legal history would have been unlikely had it not been for broader challenges facing the discipline of law.

A combination of forces, some of them outside the world of legal scholarship and originating in the United States and Britain, supported a new critical and interdisciplinary orientation to legal scholarship that in turn created fertile ground for Canadian legal history. The emphasis on cases, doctrine, and expositional legal reasoning in common law legal education was challenged at the same time scholars from other disciplines became interested in the study of law. These included British historians who had a growing interest in crime and its management through the

⁴ This tone is reflected in D.G. Bell, "The Birth of Canadian Legal History" (1984) 33 U.N.B.L.J. 312; B. Wright, "Towards a New Canadian Legal History" (1984) 22 Osgoode Hall L.J. 349; B. Young, "Law in the Round" (1986) 16.1 *Acadiensis* 155. See also D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *Essays in the History of Canadian Law: Volume One* (Toronto: Osgoode Society/University of Toronto Press, 1981) 3; and A. Morel, "Canadian Legal History—Retrospect and Prospect" (1983) 21 Osgoode Hall L.J. 159. With the growth of legal history since the mid-eighties, comprehensive surveys are more difficult but have been attempted. See for example, M.H. Ogilvie, "Recent Developments in Canadian Law: Legal History" (1987) 19 *Ottawa L. Rev.* 225; J. Benidickson, "Survey of Canadian Legal History in the 90's" (1996-97) 28 *Ottawa L. Rev.* 433; J. Phillips, "Recent Publications in Canadian Legal History" (1997) 78 *Canadian Historical Review* 236.

⁵ Phillips, *ibid.*

administration of criminal law, and social theorists, who found new interest in law and its relationship to power and moral regulation. Within legal scholarship, the critical legal studies movement moved the projects of the American legal realists in interesting new directions. In such an environment, American legal historians such as Morton Horwitz and Robert Gordon were able to build upon the work of Willard Hurst who toiled largely in isolation in the previous decades. David Sugarman and others opened up the field in new ways in Britain. In Canada, fresh reflections about law's scholarly projects were marked by studies such as Harry Arthurs' "Law and Learning"⁶ and in the particular context of legal history, by the formation of the Osgoode Society and the publication of its inaugural collections of essays edited by David Flaherty.⁷

The collection opens with two assessments of Risk's contributions to the field, including one by the above-mentioned Gordon and Sugarman. Their essay places Risk's work in some international and disciplinary context, revisiting points made long ago by Parker about the whiggishness of traditional legal history and the marginalization of the field in the disciplines of history and law. They allude to some of the broader movements, mentioned above, which enabled Risk's work to flourish. We discover that the early influence of Willard Hurst during a sojourn in Wisconsin directly resulted in Risk's prospectus and a quartet of articles on law and the economy in mid-19th century Ontario, marking the first phase of his scholarship.⁸ This international acknowledgement and measure of Canadian legal history, and of Risk's role in it, is flawed only by a facile reference to postmodernist concerns about the relevance of history in the conclusion and by repeated use of the vacuous terms *mentalite* (four times) and *mindset* (three times).

⁶ *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Ottawa: Information Division, The Council, 1983).

⁷ D.H. Flaherty, ed., *Essays in the History of Canadian Law: Volume One* (Toronto: Osgoode Society/University of Toronto Press, 1981); D.H. Flaherty, ed., *Essays in the History of Canadian Law: Volume Two* (Toronto: Osgoode Society/University of Toronto Press, 1983).

⁸ R.W. Gordon & D. Sugarman, "Richard C.B. Risk: A Tribute" in *Essays in Honour of Risk* (Toronto: Osgoode Society/University of Toronto Press, 1999) 3. See R.C.B. Risk, "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23 U.T.L.J. 270; R.C.B. Risk, "The Golden Age: The Law About the Market in Nineteenth-Century Ontario" (1976) 26 U.T.L.J. 307; R.C.B. Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U.T.L.J. 199; and R.C.B. Risk, "The Law and Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 U.T.L.J. 403.

Blaine Baker's essay provides a more comprehensive assessment and places Risk's contributions in a national context. He acknowledges that assessing the reception and impact of Risk's work is difficult (especially since most of it was published in article form and so few reviews of his work exist). After a quiet period, Risk's five early articles were followed by fifteen others that reflected a common thread of curiosity about legal culture and public policy. They examined interrelated matters such as the post-confederation regulatory state, the constitutional divisions of powers, the emergence of distinctively Canadian "rights talk," and biographical-type studies of judges and legal scholars (William Meredith, John Ewart, A.H.F. Lefroy, W.P.M. Kennedy, and others). Important incidental insights range from the late 19th century break from colonial judicial styles to legal realism in Canada in the 1930s. Baker takes advantage of this review to weave in references to related work by Canadian legal historians, and in so doing provides what is perhaps the best existing overview of the current state of Canadian legal history.⁹

Borrowing from the clever title of Parker's 1974 survey, I was tempted to entitle this review "The Masochism of Reviewers of Collected Essays in Canadian Legal History." Collected essays are difficult to review at the best of times. The problems are compounded in this case because, as the editors readily admit in the preface, apart from paying tribute to Risk, there are no organizing themes for the remaining fourteen essays in the collection. After two introductory essays evaluating Risk's contributions to the field, the others are organized alphabetically by author. Of these, only two (Kyer, Vipond and Feldberg) could be characterized as explicitly engaging with Risk's scholarship. While many of the other essays contain at least some acknowledgment of his influence or support in an introductory section or note, several make no reference to him at all. This seems odd in a book of this nature, especially given the dearth of organizing themes.

Although the editors have not made their selection criteria explicit, it appears that contributors include former students of Risk and a selection of some of the country's more prominent legal historians. An important source of essays was the 1998 Festschrift conference in Risk's honour. Roughly half of the papers presented there appear in this collection along with a few others solicited from elsewhere. Although I am not in an unbiased position to comment on omissions,¹⁰ I find it distinctly odd in a

⁹ See *supra* note 3.

¹⁰ I was a presenter at the Festschrift.

collection of Canadian legal history that there is not a single piece from a francophone legal historian (one *Festschrift* participant was recently awarded the Jean-Charles Falardeau prize, the francophone equivalent of the Harold Adams Innis prize, for his book on Quebec legal history), nor indeed, any essay directly about Quebec (at least one *Festschrift* presentation concerned Quebec). On the other hand, two eccentric choices for inclusion are rather strained decipherings of commonalities with the United States.

Although taken as a whole, the essays reflect very well on the current state of Canadian legal history, the comparative United States and Canada essays proved to be the most problematic ones. R.W. Kostal's "Conservative Insurrection: Great Strikes and Deep Law in Cleveland, Ohio and London, Ontario, 1898-1899" examines simultaneous strikes in the same industry and involving the same employer, railway magnate Henry Everett. While acknowledging differences in social and cultural attitudes between London and Cleveland (there is reference to popular rhetoric around the defence of British liberties against unbridled American capitalism), Kostal sets out to challenge the prevailing view in labour history that suggests legal responses also differed (for example, the greater willingness of the American courts to issue labour injunctions and the wider success of prosecutions for criminal conspiracy). In this instance, Kostal notes a similar legal pattern, notably the failure of legal responses which led in both cases to military intervention.

The problem lies in Kostal's search for similarities based on this superficial pattern. The stark dichotomy between legal and military responses is an especially questionable assumption when the use of military force against civilians is regulated by law. We do not know whether the legal regimes governing military aid to civil power were similar in Canada and the United States. Certainly such responses were common in Canada; between Confederation and the Depression there were at least 133 military interventions to deal with labour and sectarian conflicts.¹¹ Whether or not such interventions were equally common in the United States would seem an important background point to his thesis. On the regulatory side of labour law in this period, Oliver Mowat's Ontario Government had introduced legislation to promote collective bargaining and to facilitate the submission of labour disputes to arbitration, a significant context to what Kostal examines. He sheds little light on whether similar legislation existed

¹¹ See D. MacGillivray, "Military Aid to the Civil Power: The Cape Breton Experience in the 1920s" (1974) 3.2 *Acadiensis* 45.

in American jurisdictions.¹² Eric Tucker's work on the co-existence of repressive and regulatory legal controls over labour, and the relationship of these laws to what he describes as the "social zone of toleration" would have been a good starting point for a more rigorous analysis.¹³

Bernard J. Hibbitts' "Our Arctic Brethren: Canadian Law and Lawyers as Portrayed in American Legal Periodicals, 1829-1911" tells us what we already know: Americans generally have a profound lack of interest in and knowledge of Canadian affairs, legal or otherwise. The unfortunate impression left by the essay is of the sort of insight one might expect to encounter at an after-dinner talk over port in the Barristers' Common Room. In fairness, Hibbitts' study is anything but anecdotal—instead it is based on a systematic study of American legal periodicals in the period—but perhaps something more interesting would be gleaned if the study stepped beyond the bar and bench, and engaged with popular views about the law. This could readily be done by examining the rich newspaper reports dealing with hot cross-border legal incidents and cases: matters such as escaped slaves, the Hunters Lodge patriots, the Fenians, and civil war raiders.¹⁴ Canada appears on the legal periodical radar screen during the periodic fits of American annexationism and as elite segments of the American bar became increasingly anglophilic, expressing occasional curiosity about examples of the gentlemanly ways of the English bar close to home. While one must be cautious of "lessons of history," one might be inclined to speculate—as select Canadian law schools eagerly embrace continentalism and seek to place their top graduates on Wall Street rather than Bay Street—that some hesitation is in order before embracing the absurd American conceit of styling the first professional degree in law a doctorate. The Americans will not pay attention anyway and obsession with profession-training in accordance with perceived elite American standards only threatens to marginalize "non-essential" fields to practice such as legal history and legal theory.

Two outstanding essays in the collection concern property law and provide a glimpse of the range and historical richness of issues in this area,

¹² Indeed, the more apt comparison of legal regimes in this respect would appear to be between Canadian and Australian jurisdictions where similar legislative initiatives were taken: see M.E. MacCallum, "Labour and Arbitration in the Mowat Era" (1991) 6 *Can. J. L. and Society* 65.

¹³ See E. Tucker, "That Indefinite Area of Toleration: Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991) 27 *Labour/Le Travail* 15.

¹⁴ See, for example, A.L. Johnson, "The New York State Press and the Canadian Rebellions, 1837-1838" (1984) 14.3 *American Review of Canadian Studies* 279.

from tenant farmers and absentee owners to native title. Margaret MacCallum's "The Sacred Rights of Property: Title, Entitlement, and the Land Question in Nineteenth Century Prince Edward Island" begins with a conception of property as a relationship within which law structures power. Similar to struggles in Scotland and Ireland, the official reluctance to return land to the Crown where absentee owners failed to meet the conditions of their grants meant that escheat became a rallying point for agrarian protest in Prince Edward Island. By 1875, the lack of broader social legitimacy of the law and the effective advocacy by the tenant league and local interests overcame clear and established legal rights, securing through legislation the transfer of rights to farmers who had long occupied and improved land. This suggests the potential for contestation around the law. Certainly the effects of these struggles persist in the province to this day in attitudes toward absentee and large tract property owners.

Hamar Foster's "Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" draws a direct line between issues of title and what Brian Slattery has called the "hidden constitution of Canada"—relations between native peoples and the Crown. Native communities did not recognize the sovereignty of colonial, provincial, or dominion governments, despite the practical assumption of powers by these governments over land granting and native affairs. Their established and accepted relationship was with the Crown, manifested in the *Royal Proclamation, 1763*,¹⁵ which set out the basis for agreement for subsequent treaties affecting native rights and title. In the late nineteenth and early twentieth centuries, governments and courts continued to ignore these obligations and the Crown's responsibilities as trustee of native rights, and were increasingly anxious to suppress native understandings. In 1909, Ottawa asked MacInnes to submit a legal opinion in the context of negotiations between the British Columbia and Dominion governments over reserve lands. He clearly articulated the legal and constitutional foundations for native claims, noting the continued controlling authority of the imperial Crown, the need for native consent to all land surrenders, and the illegal and dishonest actions of provincial governments, particularly in British Columbia where treaties remained to be concluded. He also attacked William Blake's submission to the Judicial Committee of the Privy Council in 1888, suggesting that "Indian title" was less than ownership and that treaties reflected the expedient policies of the time rather than legally-binding undertakings. MacInnes noted that if a

¹⁵ (U.K.), R.S.C. 1985, Appendix II, No. 1.

similar approach were taken with the *Quebec Act, 1774*,¹⁶ confederation would be imperilled. MacInnes' opinion was suppressed, but as Foster notes, it has proved remarkably resilient, and the concepts have emerged eighty years later as the basis for recent legal advances for native Canadians.

Philip Girard's "Taking Litigation Seriously: The Market Wharf Controversy at Halifax, 1785-1820" focuses on the extended legal battles between the prominent Beamish and Cochran families. While appearing to be of purely local interest, Girard carefully considers the limits of case studies, the broader significance of civil litigation in terms of social attitudes and the exercise of power, and the light this case sheds on important early Nova Scotian legal thinkers (notably Beamish Murdoch), the legal profession, the courts, and appeals.

Ian Kyer's "Gooderham and Worts: A Case Study in Business Organization in Nineteenth Century Ontario" explicitly engages with Dick Risk's scholarship on the law of partnerships and corporations in nineteenth-century Ontario. Kyer echoes Risk's arguments about the advantages and disadvantages of both forms of business, confirming the limited embrace given to incorporation in the province, especially in the retail and manufacturing sectors. Kyer adds that incorporation, with its greater disclosure requirements and limits on activity, was unattractive for closely controlled family enterprises. Incorporation took place in this case, not because of the advantages of limited liability, enhanced investment, and administrative utility, but because two key partners died within a month of one another.

Offerings in the area of criminal law include Connie Backhouse's study of discrimination against native Canadians as reflected in the early twentieth-century Ontario murder of Gus Ninham. The essay, though interesting and suggestive, does not engage with the limits of case studies (as Girard's does), nor with other research in the area, notably Tina Loo's work, so it is difficult to gauge the broader significance of this incident. In contrast, John McLaren's systematic study of approaches to crime in British Columbia's Chinese communities in a similar period engages explicitly with other scholarship, notably the work of geographers on space and regulation of urban populations.

Jim Phillips provides a valuable descriptive study of the criminal trial in Nova Scotia from 1749-1815 and compares it to the English criminal trial, which was then in the throws of significant change as the

¹⁶ (U.K.), R.S.C. 1985, Appendix II, No. 2.

result of the “colonization” of trial proceedings by lawyers representing victims in private prosecutions and, increasingly, the accused. In contrast, law officers of the Crown are prominent in colonial criminal trials while defence counsel are seldom seen. Despite this unfavourable balance, roughly one third of the accused were acquitted. Phillips discounts the significance of capital punishment (the automatic sentence for most felony convictions) while conceding that even higher acquittal rates were observed where the automatic sentence was death. This appears to be in contrast to the situation in Upper Canada, where such penal inflexibility around felonies prompted the repeal of most capital offences in 1833 and the construction of the Kingston Penitentiary, and in England itself, where figures such as Henry Fielding complained of the “spineless tenderness” of private prosecutors and jurors, adding fuel to utilitarian and humanitarian proposals for reform.

Essays in other areas of public law include Jamie Benidickson’s study of law and water quality, Paul Craven’s study of labour law initiatives and constitutional conflicts, and a look by Robert Vipond and Georgina Feldberg at legal reactions to the ideas of Charles Darwin. Benidickson’s essay, focusing on Ontario law from 1880–1930, reminds us that concerns over water quality have long been with us (a Select Committee in 1882 found that three quarters of eighty municipalities struggled with polluted water) and that struggles for effective environmental regulation and enforcement is not simply a late twentieth-century phenomena.

Craven examines the federal *Breaches of Contract Act, 1877*,¹⁷ which has been understood by labour historians as the measure that eliminated the criminal consequences of the provincial master and servant laws, and by constitutional historians as an example of jurisdictional confusion between federal criminal law powers and provincial jurisdiction over property and civil rights. Craven demonstrates that the measure was about something else entirely. Placed in the immediate context of the Grand Trunk Railway strike, the act reveals the fragmentation of jurisdiction over labour law. This enabled federal and provincial politicians to manipulate the division of powers in order to deflect criticism and better regulate labour relations. While Edward Blake and Oliver Mowat are central figures in Craven’s study, yet another figure in late nineteenth-century constitutional and legal thought, and prominent in Risk’s own scholarship, is David Mills. As Vipond and Feldberg show, Mills saw Darwinian concepts as threatening to the ideals of public service, British-Canadian

¹⁷ (Can.) 40 Vict., c. 35.

liberalism, and to his own highly-ordered conception of federalism, one consisting of exclusive spheres within which each level of government was sovereign. Chaotic “survival of the fittest” smacked very much of Sir John A. Macdonald, a selfish subverting of established categories within the order of things.

Last but not least, there are good studies of aspects of the Canadian bar and bench in this collection. Peter Oliver provides a useful overview of recent research which sheds direct and indirect light on the judiciary in Upper Canada. He moves matters from hagiography to a scholarly historiography. Questions of partisanship and judicial independence are raised directly in cases with obvious political overtones, although to a much lesser extent, Oliver argues, in routine criminal and civil cases (although he concedes that further empirical work remains to be done). Formal protections of independence then prevailing in the mother country (security of tenure and separation of powers) were contested matters in the colonial context, where leading judges were executive and legislative councillors, where extra-judicial opinions were routinely given (not only in government policy deliberations but also Crown prosecutions), and where maverick judges associated with opposition to government were summarily removed (Robert Thorpe, John Willis). Despite these examples, Oliver concludes that little in the way of conscious manipulation of the bench took place and on occasion governments lacked confidence in the courts. Nonetheless, one would have to say that oppositionists had good grounds to expect something less than impartial justice. Oliver’s most valuable insight concerns colonial legal culture; the ongoing conflicts over the constitutional and institutional role of judges took place within a context where, increasingly, distinctions between statecraft and partisanship were difficult to maintain—a colonial confusion that was decisively overcome after the union of the two Canadian provinces and responsible government.

Wesley Pue’s “The Disquisitions of Learned Judges: Making Manitoba Lawyers, 1885-1931” examines how the development of an appropriately educated, socialized, and regulated legal profession was part of the project to implant British law and justice on the frontier. The perceived urgency of this project in western Canada meant that the Law Society of Manitoba and the University of Manitoba developed the most advanced programme of modern “scientific” legal education in the Dominion, although it quickly declined, and was embraced elsewhere in the 1930s and 1940s.

As this overview of the range of essays in the book suggests, there are a number of well-conceived and well-executed studies which should be of great interest to specialists in most areas of law. We are reminded of the interdisciplinary reach and continuing relevance of the best legal history.

Despite gaps (notably Québec) and somewhat questionable continentalism, the collection as a whole reflects the pluralism and the maturity of Canadian scholarship in the field. It stands as a splendid tribute to Risk and to the important role that he has played in the emergence of the “new” Canadian legal history.

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