

# Introduction

## Peter Oliver and the Osgoode Society for Canadian Legal History

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This volume is a tribute to the late Peter Nesbitt Oliver, professor of history at York University for more than forty years and, for twenty-seven years, from 1979 to 2006, editor-in-chief of the Osgoode Society for Canadian Legal History. The contributors are mostly authors or editors of Osgoode Society books, plus others who were colleagues or students of Professor Oliver at York University. All would also count themselves as his good friends, for friendship with those he worked with came naturally to Peter Oliver. Although Peter Oliver contributed in many ways to the Canadian academic world – as a teacher and colleague and through his association with the Ontario Historical Society – his work as editor-in-chief of the Osgoode Society represents his most substantial professional achievement. During his tenure, the Society published sixty-six books on Canadian legal history, a remarkable attainment, and the lion's share of the credit for that record must go to the editor-in-chief.<sup>1</sup>

This introductory essay is principally a history of the Society's publishing program and an analysis of that program's contribution to the field of Canadian legal history. But there was more to Peter Oliver than the Osgoode Society, and a little more to the Osgoode Society than Peter Oliver. Hence we begin with sections on the man, and on the founding and history of the Society. The final section of this chapter introduces the rest of the essays in this collection.

### Peter Nesbitt Oliver, 1939–2006

A crowd of more than 250 people filling the room at a memorial for Peter Oliver at old Osgoode Hall in Toronto on 8 June 2006 testified to the numerous friendships that he developed during his rich life and to the great admiration of colleagues for his many achievements. He was born in Kitchener, Ontario, in November 1939, and died in May 2006 in Toronto, less than a year after his retirement from York University. He entered the University of Toronto in 1957, and soon developed a reputation among faculty and fellow students as a conscientious and determined student of history. In 1960 he enrolled in John Saywell's honours research seminar on Canadian political parties, and at Saywell's suggestion went to work on the papers of premier George Howard Ferguson. The paper Peter Oliver wrote for that course eventually grew into his doctoral thesis and a book.

After earning his BA in history from Toronto, Peter went to Harvard for an MA and then returned to Toronto for his PhD, again studying under Saywell, and continued his work on Ferguson. When Saywell left Toronto to join the still-fledgling York University (founded in 1959) as Dean of Arts, Ramsay Cook became Peter's supervisor. Just a few weeks into his new job, Saywell hired Peter as a part-time instructor – the first of many of Saywell's graduate students to join him at York. From 1965 Peter was a full-time lecturer at York, while working on his doctorate. Once the dissertation was completed he became a professor and was given tenure, spending the rest of his university career at York.<sup>2</sup>

Peter Oliver's own primary area of historical interest and research, in his doctorate and through most of his subsequent career even after he joined the Osgoode Society, was the history of Ontario, particularly its political history. In 1967 Saywell asked him to write the annual survey of Ontario for the *Canadian Annual Review*, and he did that for the next decade. During the same period he published his first two books on Ontario political history: a biography of Howard Ferguson, which received a special mention in the Canadian Historical Association's Sir John A. MacDonald Prize competition, and an examination of the province's pre-war political history and culture through a series of sketches of leading politicians and important political issues.<sup>3</sup> Another biography – of conservative politician Alan Grossman – came a few years later.<sup>4</sup> His most recent project, *The Dynasty*, uncompleted but immensely thoroughly researched, would have profiled the provincial Tories in their heyday of the 1960s and 1970s under John Robarts and

Bill Davis.<sup>5</sup> Perhaps not surprisingly the two books he produced for the Osgoode Society were also about Ontario – an account of the province’s nineteenth-century prison system and an edited edition of Chief Justice Robert Harrison’s nineteenth-century diaries that provides remarkable detail about the social and professional life of Harrison and his contemporaries.<sup>6</sup> His work on the Ontario prison system also produced four contributions to the *Dictionary of Canadian Biography*, on prison officials John Langmuir, Michael Lavell, Thomas McCrosson, and James Moylan.<sup>7</sup>

Given his area of expertise, Peter Oliver was a natural choice for the Ontario Historical Studies Series Trustees to turn to when in 1971 a substantial government grant was allocated to the production of a ‘comprehensive history of Ontario.’ Professor Goldwin French served as editor-in-chief, and Peter was appointed associate editor. Between 1971 and 1993 that series grew to thirty-one volumes.<sup>8</sup> One of those books, John Saywell’s biography of Mitch Hepburn,<sup>9</sup> provided Peter with a chance to get a measure of scholarly revenge on his mentor. Peter’s first drafts of articles for the *Canadian Annual Review* were invariably said by Saywell to be too long, and amicable disputes about how to cut them down followed. Peter delighted in telling the story that when Saywell’s book on Hepburn came before the board of the Ontario Historical Studies Series he had the pleasure of relaying the message that it needed to be cut. This kind of genteel battle was repeated many times over during Peter’s years at the Osgoode Society, with Peter frequently asking authors for cuts (including asking that Saywell’s Osgoode Society volume *The Lawmakers* be reduced)<sup>10</sup> and yet getting the same message from reviewers with both of his own books for the Society!

Through his own writing and his work on the Ontario Historical Studies Series Peter Oliver became, in the words of York colleague Marc Egnal, ‘one of the pre-eminent historians of this great province.’<sup>11</sup> He won the Cruikshank Medal of the Ontario Historical Society in 1971, for his contributions to ‘professional historical writing.’ His history of prisons and punishment in nineteenth-century Ontario won the J.J. Talman Award of the Ontario Historical Society in 1998, and his biography of Howard Ferguson was short-listed for the Canadian Historical Association’s MacDonald Prize. For his commitment to Ontario history and to Canadian legal history, discussed below, he won the Guthrie Award in 1997, given by the Ontario Law Foundation for ‘outstanding public service’ and ‘excellence in the legal profession,’ and the Queen’s Jubilee Medal in 2002. In 2001 he was made a member of the Order of Ontario.

In his teaching Peter stressed research in primary sources, and many in his graduate seminar caught the research bug. As a member of the history department he did not relish the ideological and methodological battles that invariably seem to afflict academic departments at some time, and largely stayed away from them. But he was on more than one occasion asked to take on difficult and divisive tasks because he was widely trusted. He made no enemies in the department, evidenced by the presence at his memorial of colleagues from all fields and all approaches to history.

While we are principally concerned here to chart and celebrate Peter Oliver's professional achievements, we cannot resist an additional, more personal paragraph. As Marc Egnal eloquently put it at the memorial for Peter, he not only wrote about the Ontario past but also, in charming and admirable ways, seemed at times to embody its major achievements while embracing to some extent the world of the past. A true 'red Tory,' his Ontario was a society that valued its roots but had become more open, tolerant, and compassionate through the twentieth century, and he passionately believed in the social improvement he chronicled and through which he lived. That appreciation for advancement did not, however, carry over into technology. He used neither computers nor email; his manuscripts were written by hand or on a trusty manual typewriter.<sup>12</sup> Clinging to the past, in more senses than one, while embracing the future, Peter Oliver could not have been anything but a historian, and was perhaps most suited to a social institution, the law, that is both rooted in history and self-consciously aware of its past.

### **The Origins of the Osgoode Society for Canadian Legal History**

The Osgoode Society (the phrase 'for Canadian legal history' was added in 1993) was founded in 1979 at the initiative of Roy McMurtry, then Attorney General for Ontario in the government of Premier Bill Davis.<sup>13</sup> Peter Oliver's entry into the world of Canadian legal history was serendipitous, the result of McMurtry's desire for reading material during a convalescence in 1977. He was given *G. Howard Ferguson* and *Public and Private Persons* and, shortly afterwards, concerned about the dearth of legal history writing in Canada and convinced that he could and should do something about it, asked Oliver, whom he had never met, to provide the necessary professional historian's expertise to guide the society he was forming to encourage and promote the writing of Canadian legal

history. Surely not knowing where it would all lead, Peter Oliver agreed with alacrity to do so. The rest, as they say, is history. As a recent article introducing Canadian legal history to an Australian audience states, the 1980s were 'a decade of take off in research and interest' in Canadian legal history; and the founding of the Osgoode Society was 'a highly significant event in providing momentum' for that take off.<sup>14</sup>

There are a number of parallels between the Osgoode Society and the Ontario Historical Studies Series discussed earlier in this essay. The latter was created to fill a void in scholarly writing devoted specifically to Ontario history, especially for the post-Confederation period.<sup>15</sup> McMurtry and others believed that there was an even greater problem with Canadian legal history. There was a Canadian Society for Legal History, founded in 1974, but lack of institutional support meant that it did not survive.<sup>16</sup> The Ontario Historical Studies Series had a substantial oral history component, with Peter Oliver as the director of the Oral History Programme, which carried out almost one hundred interviews.<sup>17</sup> This feature was also carried into the work of the Osgoode Society. Indeed, Peter Oliver was one of the earliest Canadian proponents of the use of oral history by historians of the modern period, writing and lecturing on the topic in a variety of forums well before the formation of the Osgoode Society.<sup>18</sup>

The Osgoode Society has always been a membership organization, modelled after a combination of two similar historical membership societies, the Champlain Society and the Selden Society.<sup>19</sup> It still derives its strength and a good deal of its income from its 900 plus members. In its early years it was also funded by the Ontario Ministry of the Attorney General and the Law Foundation of Ontario. The Law Society of Upper Canada has always provided support in kind. Since the mid-1980s the Society's principal source of revenue, apart from memberships, book sales, and donations, has been the Law Foundation. Although the recession of the early 1990s meant lean years for the Foundation and consequently for the Society,<sup>20</sup> the latter has been increasingly generous in the last decade or so and now provides stable funding with substantial three-year grants. Overseen by a board of directors,<sup>21</sup> and administered from the beginning by the indefatigable Marilyn MacFarlane, it has had just two presidents – the late Brendan O'Brien from its founding to 1989, and Roy McMurtry from 1990 to the present. Both have been actively engaged in the Society and its publications program rather than merely ornamental executives.

The Society has employed a variety of techniques over the years to

promote Canadian legal history. In its early years it sponsored a lecture at Ontario law schools. For much of the 1980s it had the funds to provide fellowships to academics which bought out some of their teaching time, but that program was cut in the recessionary early 1990s.<sup>22</sup> The two constant and principal activities during Peter Oliver's tenure were the collection of oral histories of the legal profession and a publishing programme. By the time he died, the oral histories encompassed interviews with over 450 individuals, and had yielded approximately 65,000 pages of transcript. Although some of that collection is closed to researchers on the insistence of the interviewees, most of it is available at the Archives of Ontario and many of the oral histories have been used by authors, including a good number of the Osgoode Society's own contributors.<sup>23</sup> The publishing program, the most visible of the Society's activities to the wider world, merits a more extended treatment.

### **The Osgoode Society and the Writing of Canadian Legal History: A Review and An Appreciation**

The Society's initial major ventures into scholarly publishing were the first two volumes in the series *Essays in the History of Canadian Law*.<sup>24</sup> The existing but limited work in the area, almost all of it in article rather than book form,<sup>25</sup> made producing a comprehensive general history impossible, yet Peter Oliver wanted to make a statement about the field, to provide a resource on which others could build. The solution to that dilemma was an essay collection, one that drew together people working independently in a variety of areas, some of whom may not have realized that they were doing 'legal' history. A closed conference in 1980 sponsored by the Osgoode Society and organized by Professor David Flaherty of the University of Western Ontario helped to take stock of existing scholarship and to lay out the basic shape of the project. The original intention was to publish one volume, but the response of potential contributors was sufficient that the plan changed very quickly to include two books – although some essays submitted for volume two were not ultimately published there.<sup>26</sup>

If the *Essays* project was indeed the 'birth of Canadian legal history,' one that 'propell[ed] the writing of Canadian legal history into the modern world,' in the words of one enthusiastic reviewer,<sup>27</sup> then the mid-wife was Flaherty, a historian of colonial America with appointments in both law and history at the University of Western Ontario who had pub-

lished extensively on the legal history of the American colonial period. His edited collection of *Essays in the History of Early American Law* remains a classic,<sup>28</sup> and of course also provided a title template for the Society's first volume. Flaherty thus brought to the Osgoode Society's project a breadth of experience and an expertise in legal history, as well as formidable organizational and editorial skills. He saw the project as 'a chance to illustrate the possibilities of research and writing in Canadian legal history,' not as an attempt to provide a 'coherent history' of all of it – a judgment that remains as correct in hindsight as it was at the time. He and Peter Oliver also insisted on a rigorous review process. In contrast to the current practice of having volumes assessed as a whole, each of the essays was individually reviewed by more than one reader, and many went through substantial revisions.<sup>29</sup>

The result was two volumes of essays collections that demonstrate the range of subjects which this field of history can encompass. The law and economic development, master and servant law, the origins of the criminal code, and nineteenth-century custody law were among the topics treated in the first volume, while the second contained studies of the origins of workers' compensation in Ontario and histories of subjects as diverse as Ontario legal education, rape law, and riparian rights. The authors included two pioneers who had worked in the field before 1981 (Richard Risk, with an essay in each volume, and Graham Parker) and a number of then junior scholars who were just starting their careers and who have since become mainstays of the Canadian legal history community: Constance Backhouse and Paul Craven had an essay in each volume, while Blaine Baker, Jamie Benidickson, Hamar Foster, and Paul Romney were contributors to one of the collections. The volumes were very favourably received, with a common theme of reviews being that the field had come of age with their publication.<sup>30</sup>

Those first two volumes of *Essays in the History of Canadian Law* launched the Society on its way to becoming a serious participant in the writing and publishing of scholarly legal history – indeed, almost the only serious Canadian participant. They also provided the general title for a series that has now reached (with this book) ten volumes. In addition, sixty-three more books were published over the twenty-three years in which Peter Oliver was editor-in-chief. In the 1980s and early 1990s the Society published one or two books a year, which was in line with its initial ambitions and belief in what could be achieved; as is stated in the first volume of *Essays in the History of Canadian Law*, the Society intended to publish books 'at the rate of about one a year.'<sup>31</sup> One

testament to its success in engendering interest in the field is that a substantial expansion occurred from the mid-1990s. Three books were published for the first time in 1994, and the following year the total went to four. Since then, with one exception, each year saw no fewer than three, and usually four, books produced.

How considerable an achievement this is can be made apparent by comparing the Osgoode Society to similar organizations elsewhere. The best-known legal history association in the Anglo-American world is the British Selden Society, founded in 1887. Like the Osgoode Society it is a membership organization. Its publishing program runs to some 130 volumes, or roughly a volume a year. Its focus is very different from the Osgoode Society – the vast majority of its books are edited documentary collections, and most of them deal with the medieval or early modern period, reflecting the much greater interest among English legal historians in the more distant than the recent past, and in ‘internal’ legal history.<sup>32</sup> Across the Atlantic, the Studies in Legal History Series published by the University of North Carolina Press in association with the American Society for Legal History, is not dissimilar to the Osgoode Society in its concentration on scholarly monographs. The first volume in that series was published in 1981, the same year as our first volume of *Essays*, and the list now has almost fifty titles in both American and British history.<sup>33</sup> It highlights the Osgoode Society’s success to observe that a similar series in the much more populous and resource-rich United States produces slightly fewer books than it does, and that the Selden Society brings out far fewer volumes. In a country of more similar size to Canada, the Australian Francis Forbes Society was founded in 2002 with similar objectives to the Osgoode Society. To date it has produced just five books.<sup>34</sup> In short, this brief review of cognate organizations shows that they vary in their objectives and organizational structures; but it also demonstrates that Peter Oliver left the Osgoode Society among the premier, if not the most successful, legal historical organization in the common law world.<sup>35</sup>

Five principal points can be made about the Society’s publication program under Peter Oliver’s leadership. First, in tune with his historian’s sensitivity to context, and following the invocation of Flaherty in his ‘Introduction’ to the first volume of *Essays*, the Society’s publications have, with a few exceptions, eschewed what has been termed narrowly ‘internal legal history,’ the history of law and legal institutions written without a sense of the relationship between law and the wider society.<sup>36</sup> The emphasis has been on the converse, ‘external legal his-

tory,' history that charts the relationships between legal and broader societal developments. This is not to say that a good deal of what the Osgoode Society has produced, and continues to produce, has not been about what one author has called 'the box of distinctive-appearing legal things.'<sup>37</sup> That, presumably, is the purpose of writing legal as opposed to some other form of history. Hence the history of courts, judges, lawyers, and legal doctrine has been a very notable presence. There are five volumes of court history, fifteen judicial biographies or memoirs, nine books devoted to the legal profession (biographies of lawyers, books on the history of the profession and law firms and legal education), six books about the development of the substantive law, and one other which we would put in this category, Paul Romney's *The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899*.<sup>38</sup> That makes for a total of thirty-six books, more than half of the Society's list as of 2006. In addition, the various national and regionally based essay collections contain a substantial amount of material on these kinds of topics. The first volume of *Essays in the History of Canadian Law*, for example, contains two articles on private law doctrine and the economy, and other chapters on labour law, chancery and law reform in mid-nineteenth-century Ontario, and the Criminal Code. Similarly, volume six of the series, devoted to British Columbia and the Yukon, looks at, among other subjects, ecclesiastical law, family courts, and the legal profession.

Such work has been extremely valuable in establishing a basic knowledge of the history of our legal system, institutions and personnel, an area largely ignored by mainstream Canadian historians during the twentieth century. But importantly, and testament to Peter Oliver's guidance, that *oeuvre* is not 'internal legal history' written in a vacuum. It typically links changes in law and legal institutions to social, economic, and political developments. Two examples should suffice to make the point. Brian Young's examination of the origins of the Lower Canadian Civil Code of 1866 intimately links the revision of private law to large changes in Quebec society. Codification, he demonstrates, was 'a political act,' and 'part of a larger process ... marking the transition in Lower Canada from a pre-industrial condition in the late eighteenth century to one dominated by capitalist relations a century later.'<sup>39</sup> Similarly, Philip Girard's biography of that giant of twentieth-century Canadian law, Bora Laskin, is not only an account of a judge and his decisions but also of an extraordinarily rich pre- and extra-judicial career, of Jewish life in twentieth-century Ontario, of struggles to

reform university governance, of the effects of the depression on Canadian intellectual culture, and much more.<sup>40</sup>

A second aspect of the publications program worth noting has been the Osgoode Society's desire to make it a pan-Canadian enterprise. Attention to regional variation is a long-standing feature of Canadian historical writing – indeed of Canadian life and politics – and Peter Oliver recognized the importance of that variety in understanding Canada's legal past. Despite the naming of the Society after Ontario's (then Upper Canada's) first Chief Justice (and a man who later become Chief Justice of Lower Canada), and despite his own scholarship being Ontario-based, Peter Oliver sought to make the publication program national in scope. That ambition was difficult to realise initially, as revealed by the contents of the first two volumes of *Essays in the History of Canadian Law*. Fully eleven of the eighteen essays in the two volumes (excluding the introduction to volume one) are about Ontario, while four of them have national or comparative themes and only three concentrate on places outside Ontario.<sup>41</sup> Ontario-based monographs are also prevalent in the books published in the first decade or so: 72 per cent (eight of the eleven, excluding the two volumes of *Essays*) published before 1990 are about Ontario.

The explanation for this early trend has mostly to do with the fact that little non-Ontario legal history was being written in the 1980s.<sup>42</sup> As Flaherty noted in the first volume of the *Essays in the History of Canadian Law*, the focus on Ontario was the 'result of happenstance rather than editorial design,' with invitations having been 'extended from the Atlantic Provinces to British Columbia.'<sup>43</sup> There was a marked shift from 1990 onwards, a year that saw the Society's two books being a collection of essays on law firms from across the country and another one about Nova Scotia.<sup>44</sup> This geographical diversification resulted from more manuscripts becoming available from outside Ontario, and the period from 1990 onwards shows a distinctly different profile. Rather than 72 per cent of the books being substantially about Ontario, only 33 per cent of the post-1990 books can be so categorised (eighteen of fifty-three). Monographs and essay collections that are national in scope became much more prevalent than before and outnumbered Ontario books – there have been twenty-two of them, or 42 per cent of the total. A significant minority of the post-1990 books have been about other provinces or regions (thirteen, or 25 per cent of the total).<sup>45</sup> *Nova Scotia Essays* was the first non-Ontario and non-national volume published by the Osgoode Society, but the list now includes five books on Quebec,

two on Newfoundland, three on Nova Scotia, and three on the west and the north. Probably more a result than a cause of this shift in the geographical scope of the publications, 1993 saw the addition of the words 'for Canadian legal history' to the name of the Osgoode Society.

While the last two decades have still seen more Osgoode Society books about Ontario than about the other provinces and regions combined, it must be recalled that the various collections of essays organized around specific subjects embody substantial geographical diversity and tend to have more to say about places outside Ontario than about Canada's most populous province. *Crime and Criminal Justice*, for example, the fifth volume in the *Essays in the History of Canadian Law* series, has eight essays that are on regions outside Ontario, six on Ontario, and one that is national in scope.<sup>46</sup> Perhaps ironically, there is neither a general legal history of Ontario nor an essay collection devoted to the province. It goes without saying that the current editor-in-chief of the series would welcome such an addition, as well as anthologies treating other regions of the country that have not yet been highlighted by the Society.

In short, from its beginnings as a somewhat Ontario-centric enterprise, the Osgoode Society's publishing program has diversified substantially in the last decade and a half, testament to the encouragement and interest of its editor-in-chief in unearthing the richness and variety of the Canadian legal past. Certainly Peter Oliver was extremely receptive to the proposal from Philip Girard and Jim Phillips for the volume on Nova Scotia, a book that turned out to be the first of three volumes devoted to particular provinces.<sup>47</sup> There was no suggestion that a book about one of Canada's smaller provinces did not fit the Society's mandate, even though Peter was dealing with an out-of-the-blue inquiry from two tyros in the field of whom he had surely never heard. And throughout the pre-publication process, which inevitably involved a few bumps in the road, he remained steadfast in his commitment. As the acknowledgments to that volume state, Peter Oliver was 'an enthusiastic supporter of this enterprise from the outset' and 'provided much encouragement, useful criticism, and practical support.'<sup>48</sup> He was equally keen about publishing a volume on the history of the same province's Supreme Court on the occasion of its 250th anniversary.<sup>49</sup> A similar enthusiasm was manifested for Jerry Bannister's book on the legal history of early Newfoundland, published by the Society in 2002. According to Bannister, Peter Oliver 'treated my research on Newfoundland as if it were as important to Canadian legal history as a study

of any other jurisdiction ... I always had the sense from him that he was sincerely committed to a truly national legal history.<sup>50</sup>

A third feature of the Osgoode Society's publications list is that it replicates the diversity of approaches to doing good history that marks the contemporary historical profession at large. At the risk of drawing too simplistic a set of distinctions among genres, and acknowledging that many of the books fall into more than one of the categories delineated here, it is nonetheless useful to observe that, under Peter Oliver's guidance, the Society's publications came to include quite different forms of historical writing. Standard monographs detailing large developments over time abound, such as Peter Oliver's own magisterial account of the development of penal policy in nineteenth-century Ontario or Sid Haring's analysis of the various ways in which Euro-Canadian law interacted with Aboriginal law and societies in the same period.<sup>51</sup> They are joined by judicial memoirs, such as Quebec Court of Appeal judge Fred Kaufman's compelling story of his life and involvement in a number of highly significant events.<sup>52</sup> In between we find, in addition to the essay collections already discussed, biographies of judges and lawyers, case studies, two documentary collections, and even two 'picture' books!

Peter Oliver was also always keen to publish different kinds of work, giving the Osgoode Society's list a much more diverse appearance than that of, for example, the Selden Society. He was similarly willing to be persuaded of the value of work that did not immediately appeal to him. When Bruce Ziff pitched the idea of a monograph on the Leonard Foundation case, Peter was sceptical that it could support a book. But he was willing to read a draft manuscript, and once he did he appreciated how well that case study linked a legal document to its broader context. He became 'exceedingly positive, and went full steam ahead for me.'<sup>53</sup> While there are no doubt some observers who would decry what at times seems an eclectic approach to legal history, the fact is that the Osgoode Society has done no more than reproduce in microcosm the very considerable variety of ways of usefully doing history that have for decades marked the historical profession generally. Adhering to high standards of scholarship – an issue discussed below – is what counts, not the choice of genre. Understanding the past requires both a sense of the broad sweep of historical change and examinations of the minutiae of lives and events. Indeed in publishing case-in-context studies relatively early in its history, the Society somewhat presaged what has now become quite a popular genre of historical writing.<sup>54</sup>

A fourth point about the Osgoode Society's publication program,

which in some ways relates to our earlier discussions of internal and external legal history and diversity of approaches, is that it has not been without a critical edge. Some twenty-four of the Society's volumes focus on what can be termed socio-legal history, and a good many of those are far from positive about the role played by law, legal institutions, and legal actors in our past. Those twenty-four books include volumes on the social history of crime and punishment (nine books), women's history (three), the history of the relationships among racial and ethnic groups and classifications and the legal system (four), the use of law to control and punish political dissent (four), and other topics (four) in which the theme is often the way the law has been used by one social group to marginalize and repress another. Those subjects, and the adoption of a critical stance, are also consistently represented in the essay collections. Peter Oliver's personal politics and historical interests were very different from those of some of his authors, but he believed in publishing good and provocative historical work whether or not he agreed with the authors' interpretations. As one of his former doctoral students and a contributor to this volume stated, while Peter did not agree with his leftist approach to penal and asylum history, he was a 'tolerant and fair' supervisor.<sup>55</sup> Hence the Osgoode Society has put out class analyses of the establishment of penitentiaries in the nineteenth century, feminist critiques of law, and denunciations of Tory disdain for political dissent.<sup>56</sup> Peter Oliver, it might be said, operated in the best tradition of academic tolerance for the views of others. He believed in and supported scholarly diversity – even if he did not always like the particular form it took!

Finally, and this is a related point, that the Osgoode Society under Peter Oliver's leadership produced different kinds of books is in part a reflection of the fact that its authors have been drawn from the profession and the academy, and within the latter from both legally trained academics and those whose formation has been in other disciplines – mostly, but not exclusively, in history. Peter Oliver did not play favourites in this regard; he wanted good work, be it from lawyers with academic interests, from historians who took law seriously, or from other legal academics who understood the importance of history. The list of Osgoode Society authors during his tenure includes seventeen people with appointments at Canadian law schools, twenty-four academics from some other discipline, sixteen lawyers and judges, and two 'others.'<sup>57</sup> That total of fifty-nine individuals is fewer than the sixty-five books they have collectively produced, because a good number of them have written and/or edited more than one volume.<sup>58</sup>

In some ways what is surprising about this summary is the relatively small role played by academics based in law schools. The reasons for their absence are complicated and perhaps controversial: the low priority given by law school administrators to history, especially in the last decade or so, and the fact that legal history is a relatively time-consuming discipline compared to others are possible causes. And it must be acknowledged that not all Canadian law schools have failed to accord an appropriate weighting to legal history, even if the largest (by faculty size) seems mostly uninterested in the Canadian legal past. But whatever the reasons, the fact remains that in a law school world in which legal historians play a limited role, especially compared to the one they occupy at the elite law schools in the United States, the Osgoode Society during Peter Oliver's editorship filled the gap. Indeed we would venture to say that the Society has been a much more important institution for the development of Canadian legal history than the law schools collectively. Deferring to a non-university-based organisation has not characterised any other aspect of Canadian legal scholarship in the modern era.

Peter Oliver's legacy is as much in the quality of the publishing program as its quantity and diversity. From the beginning he insisted on the usual scholarly procedures of blind review by outside assessors, and he himself read and commented in detail on all the manuscripts that eventually made it into print (and many that did not). The many favourable reviews in scholarly journals, too numerous to cite here, are testament to the excellence of the scholarship. In some ways an even more sterling measure is the winning of prizes, and in that respect the Osgoode Society has done remarkably well. Five of its books won four different Ontario Historical Society awards. One prize winner was Peter Oliver himself, who in 1999 was awarded the J.J. Talman Award of the Society for the best book on any aspect of Ontario history in the previous three years.<sup>59</sup> Others have been the Fred Landon Award, given to the best book on regional history in Ontario published in the previous three years,<sup>60</sup> the Joseph Brant Award, for the best book on the province's multicultural history,<sup>61</sup> and (twice) the Alison Prentice Award for the best book in women's history in the preceding three years.<sup>62</sup> The Society has also twice garnered another Ontario-based prize, the Floyd Chalmers Award, given annually by the Champlain Society for writing on Ontario history.<sup>63</sup>

Outside of Ontario the John Wesley Dafoe Book Prize for distinguished writing on Canada and/or Canada's place in the world has

been given to two Osgoode Society books.<sup>64</sup> Brian McKillop's *The Spinster & The Prophet: Florence Deeks, H.G. Wells, and the Mystery of the Purloined Past* won the City of Toronto Book Prize and the Arthur Ellis Award for the best non-fiction book, both for 2000, and it was a finalist for the Governor General's Non-Fiction Award. Don Fyson's *Magistrates, Police and People* won the Canadian Law and Society Association Book Prize for 2006 and the Priz Lionel Groulx of the Institut d'histoire de l'Amérique française, awarded for the best book on the history of French America. Perhaps the two most notable achievements have been awards from leading scholarly associations in Canada and internationally, and Osgoode Society books have garnered two of them. Constance Backhouse's study of *Women and the Law in Nineteenth-Century Canada* won the J. Willard Hurst Prize of the Law and Society Association in 1992, given for the best book in English on socio-legal history for any country. The John A. MacDonald Prize, awarded annually by the Canadian Historical Association for the best book in any field of Canadian history, went in 2003 to Jerry Bannister for *Rule of the Admirals*. Other Osgoode Society books have been given honourable mentions by juries for both of these prizes.<sup>65</sup>

### **The Peter Oliver Festschrift**

The essays in this volume have been contributed mostly by the authors of Osgoode Society books, and also by a colleague (Paul Craven) and two former students (Rainer Baehre and Joseph Berkovits) of Peter Oliver at York University. Our solicitation of contributors did not limit them beyond one, very broad theme – Canadian legal history. Although there might have been some value in restricting authors to a subtheme or themes within that, we believed that such a limitation would not do justice to the ways in which Peter Oliver himself valued and encouraged work in all areas of legal history from all regions of the country. As it happens seven of the contributors gave us essays about subjects that Peter Oliver himself wrote extensively about – criminal justice and the judiciary. The essays are nonetheless an eclectic collection, but we see eclecticism as a mark of his own intellectual curiosity and tolerance for a broad approach to the subject. The essays in this volume look at the legal history of Ontario, Alberta, Quebec, Nova Scotia, and Newfoundland, as well as at 'federal' subjects. They examine judges and lawyers, theorists and practitioners, politicians, litigants, defendants, and convicts; they focus on areas as diverse as labour, criminal, family, land,

and international law. They are about what legal historians have in recent years come to call 'high' and 'low' law. The former refers to law at the elite level – judges, reported cases, legal doctrine and theory and the like; the latter to law on an everyday level, as it was administered in myriad small contexts and affected the lives of ordinary people.<sup>66</sup> We believe Peter Oliver would have appreciated the eclecticism represented here, and that he would have enjoyed the fact that there were so many interesting ways to write about the law, its practitioners, and its subjects.

The first section comprises four essays dealing in diverse ways with the history of crime and punishment, long a central interest of Peter Oliver.<sup>67</sup> Constance Backhouse, a pioneer and the best-known exponent of writing about the history of women and the law in Canada,<sup>68</sup> provides a fascinating case study of a 1929 rape trial in which the defendant was a member of Parliament. Although relatively few rape victims have historically seen their cases effectively prosecuted, this case resulted in five trials (three for rape, one for seduction, and one for perjury) and two appellate judgments. Backhouse weaves together a variety of legal issues, especially the rules on corroboration, with sociopolitical ones, including the francophone defendant's ethno-cultural and religious background. She argues convincingly that extra-legal considerations played a determinative role in securing a conviction for seduction, if not for the more serious rape charge.

Joseph Berkovits, a former student of Peter Oliver's, gives us an innovative essay on aspects of prison culture in late-nineteenth- and early-twentieth-century Ontario. Canadian historians know a good deal about the broad parameters of policy shifts and institutional developments in corrections, much of it, of course, from the work of Peter Oliver himself. Berkovits' work supplements this by looking at the internal workings of prisons, at the culture of these unique institutions, in particular in this essay at the role of prison wardens and their relationships with inmates. Some of his findings are not surprising – wardens needed to be disciplinarians, to be fearless, strict, and uncompromising. But their authority depended not just on their ability to use coercive physical force and other punishments, it also relied on their moral authority. Such moral authority had to be earned; prisoners came to respect, not just to fear, their wardens. Berkovits also shows us that wardens had other ways of managing their captive populations, sometimes binding men to them by displays of mercy, at other times assuming the role of what he calls 'social worker,' solicitous of prisoners' welfare. Finally, in

an intriguing section towards the end of his essay, he shows us wardens as advocates, interceding with the outside world on inmates' behalf for remission of sentences or post-release employment. The world of the prison, even the 'maternal' women's prison, was never a pleasant one, but it did at times involve the better human feelings and actions motivated by kindness and sympathy.

Just as the application of the criminal law has at times been subject to a variety of social factors, so too can the making of the law reflect particular political and social contexts. Windsor, Ontario, lawyer Patrick Brode's essay on why Parliament added sexual psychopath provisions to the Criminal Code in 1948 illustrates this point very effectively. The legislation created a new kind of 'status offender,' the 'criminal sexual psychopath,' who could be given an indefinite sentence and be required to undergo medical treatment. Brode's principal question is why this legislation was brought in when it was. He demonstrates that it was not the result of any increase in sexual assaults or other sex-related crimes, but rather reflected both post-war Canadian society's broader concerns about social and sexual order and the newly enhanced status of the psychiatric profession, which was then claiming to be able to 'cure' homosexuality. The new legislation was also a response to a small number of highly publicised incidents, a classic example of a 'moral panic' in which elevated concern about a pre-existing social phenomena results first in a belief that the problem (in this case, of attacks by and on homosexuals) was much larger than it was, and then in draconian new laws to combat the perceived problem.

Paul Craven of York University is well known for his extensive writing about labour and the law in Canadian history, and we are delighted to be able to include in this volume his essay on liability for injuries caused on the railways of mid-nineteenth-century Ontario. Craven weaves together a complex story, one that involved two distinct, but overlapping, bodies of law, and shows, among many other things, the limited reach of the criminal law. On the one hand the law of negligence determined when a worker and/or the railway company could be held liable for injuries. Craven shows that juries invariably held railway companies civilly liable. Yet criminal prosecutions of workers for manslaughter or criminal negligence were generally unsuccessful, juries frequently evincing sympathy for the worker and ignoring judicial directions that strongly encouraged them to indict and/or convict. At the same time, railway workers were subject to employment law, both generally and specifically. Railway companies' rule books were effec-

tively enforced in court, and statute law deemed breach of a company rule a sufficient basis for a conviction for manslaughter when a worker's disobedience resulted in death. These two systems of law overlapped in some respects; as noted, the companies' own demarcated obligations became those used to establish whether there had been a breach of duty. Yet the two systems also competed, in the broad sense that which law governed was representative of whether the railways were effectively regulated by the state or given managerial autonomy. For Craven the answer is clear: companies were insulated from judicial review of their managerial practices and given a free hand in matters of labour discipline, because in turn that meant that they could make the economics-based operating decisions they needed to make. Damages in civil suits were the trade-off, what Craven calls a 'license fee for managerial autonomy.' Craven's essay very effectively reminds us that 'law' operates at many levels, including in the everyday relations between employers and employees, and that the line between the abstract legal categories of public and private action has often been blurred. Railway companies were private corporations imbued with 'public' power to regulate and able to invoke state institutions like courts to enforce their dictates.

The judiciary is another topic that will always be associated with Peter Oliver,<sup>69</sup> and three essays here examine aspects of the Canadian judicial experience. Dalhousie University law and history professor Philip Girard's essay on Sir Wilfrid Laurier's judicial appointments takes on an enduring topic of debate within the Canadian legal system, the influence of patronage on judicial appointments. This is, regrettably, not a subject about which we have a systematic historical understanding; individual judicial biographies sometimes discuss it in microcosm, but Girard's is one of only a small handful of large-scale accounts of patronage and appointments. Laurier made 151 appointments to superior courts during his tenure as prime minister, and while patronage certainly had a role to play in his selections, it was by no means the only factor. Particularly with regard to places on the higher courts, professional assessments of suitability and independence, and the need for strong leadership in the often newly formed provincial courts of appeal, were key considerations. Laurier's approach was the more remarkable in that it followed a long period of Conservative near-monopoly on power, and the temptation to reward political supporters must have been considerable. Girard demonstrates the enduring value of looking at almost any subject historically – unthinking assumptions about what the past must have been like, often based on current prac-

tices, are shown to be incorrect, the world a more complicated place than many think it to be.

Jon Swainger also looks at judicial appointments, but in a rather more indirect way, concentrating on the effects of the overwhelming use of patronage by Sir John A. Macdonald and his successors. The result was that many men were appointed to superior courts in the early years of Confederation who turned out unsuitable, and Swainger's essay examines many of the controversies that ensued. The disputes are drawn from Nova Scotia, Quebec, and Ontario. Some were internal battles within parties over who should get the political plums, some were allegations of gross incompetence and/or unsuitability for the bench, and some were about personal and professional rivalries. All were debilitating to the nation's benches, especially the long-running set of allegations and counterallegations that Quebec's judges were variously too old and infirm for their jobs, immoral, or ignorant of the law. Collectively, Swainger argues, the various judicial scandals undermined the administration of justice in the crucial early years of the new Dominion and produced courts unable to put their stamp on the nation by enunciating a distinctive Canadian jurisprudence.

Jim Phillips takes on a rather different aspect of judicial history, examining aspects of the court structure and the use of the judges in support of political authority in early Nova Scotia. One of the challenges facing all Canadian colonies in their early decades was delivering the machinery of justice across long distances to thinly dispersed populations. Phillips' essay shows that in the early years of settlement the Halifax-based Nova Scotia Supreme Court used a variety of techniques to bring criminal justice to the hinterland, but that civil litigation was all conducted in the capital. Demands for more accessible justice led to the establishment of circuits some twenty years after the founding of the court. But circuits were more than an administrative response to the need to deliver justice to far-flung communities. With the winds of revolution blowing across British North America in the mid-1770s, sending the Supreme Court judges out from the capital was seen as a way to enforce the authority of the King's law, and hence of the King himself, to potentially disloyal citizens. Drawing on Douglas Hay's famous thesis about the way the law operated as ideology in the eighteenth century, Phillips argues that certain officials saw the 'majesty' of the law, represented by the judges, as an important bulwark of royal authority.

The third section contains two essays that consider aspects of legal thought and the history of the legal profession in the nineteenth-century Canadas. John McLaren of the University of Victoria examines early

Ontario legal culture through the life and ideas of William Warren Baldwin, doctor, lawyer, judge, treasurer of the Law Society of Upper Canada, and politician. He was also, although he did not live to see it attained, one of the leaders of Upper Canada's movement for responsible government. McLaren shows that Baldwin's commitment to the rule of law and a responsible executive were derived both from his Irish whig background and his education and practice as a lawyer. Certainly no republican, indeed a believer in the virtues of aristocracy, Baldwin nonetheless deprecated the corruption of the Family Compact and its hold on administrative power, especially its abuse of that power and of the justice system in silencing political opponents.

William Baldwin was one of the province of Ontario's best known early lawyers. Less well known, though he clearly deserves better, is William Badgley. Blaine Baker of McGill University has written a good deal about the history of Canadian legal ideas and the legal profession, and here he combines these two topics in a study that charts the relationships among criminal law codification, state building, and the desire of the elite bar of mid-nineteenth-century Canada to enhance its professional status and to play a leading role in the political and social life of the colony. At the centre of Baker's essay is Badgley, lawyer, judge and assemblyman, and his efforts to legislate codes of criminal law and procedure in the 1850s. But his explanations of this phenomenon take us well beyond Badgley himself, and well beyond criminal law codification. Badgley's codes, he argues, were an expression of many things, among them a desire to unify the law of the United Canadas and a commitment to Benthamite principles of coherence, simplicity, and clarity. Most of all he argues that Badgley's codes were symptomatic both of the turn to and faith in legislation that characterised the Province of Canada, and of the elite legal profession's understanding of the leadership role that it could play in politics and society. He identifies the mid-nineteenth century as a unique period in the way elite lawyers in the Canadas thought about their role. Before the rebellions they served an executive not yet responsible to the assembly, and from the later nineteenth century the courts and judge-made law became their focus. In this interim period their gaze was most firmly fixed on what legislation could do to transform society and consolidate the local state.

We have entitled the final section 'New Directions in Legal History,' because the four essays here are all about topics that have received very little attention within Canadian legal history, and all deserve to be more fully integrated into our understanding of what constitutes that history.

This is, indeed, a fitting way to conclude a volume devoted to celebrating a scholar who did a great deal to put the field 'on the map.' International law is the subject of Rainer Baehre's essay on the law and politics of treaties, a welcome addition to a sparse literature. Baehre is a professor at Sir Wilfred Grenfell College of Memorial University and completed his doctorate in history under Peter Oliver's supervision at York University. He examines the provisions of the post-Napoleonic Wars settlement of 1815 and of the Anglo-American Convention of 1818, which involved French and American fishing rights off the coasts of Newfoundland. While debates about the meaning and content of international law contributed to the treaty-making process in both cases, broader strategic and political concerns played a larger role and determined the extent of 'foreign' rights that were recognised. The concessions made to France and the United States harmed Newfoundland's economy, which was in effect sacrificed to Britain's desire to ensure good relations with other powers. Newfoundlanders complained and protested, but could do little to alter the terms – treaty-making was a forum available only to nation states, and dependent territories were excluded from any real influence.

Lori Chambers looks at the operation of 'everyday law,' or 'low law,' in twentieth-century Ontario. Chambers, a historian principally of women and law and a professor at Lakehead University, analyses the operation of the province's *Children of Unmarried Parents Act* of 1921, which provided machinery by which unwed mothers could invoke the aid of the state, through its proxy the Children's Aid Society (CAS), in suing the fathers of their children for support. However, the CAS also had the discretion to decide which cases it would advance in court, and Chambers' chapter is thus principally an examination of how that body, effectively an arm of the bureaucracy by virtue of the power delegated to it, exercised discretion. She demonstrates that CAS workers' decisions were fundamentally shaped by their moral disapproval of unwed motherhood, so that only a small proportion of women who applied to the CAS received that organisation's backing in taking the father to court. The women were often disbelieved, and invariably pressed either to marry the father or to release their child for adoption. Thus what appeared on paper to be a valuable legal right granted to a powerless and often despised group was, in practice, substantially reduced by the work of administrators. Chambers also notes the inherent conflict of interest in the system; the CAS was also responsible for arranging adoptions, and fulfilling this mandate was made easier by persuading

unmarried mothers not to seek support to bring their children up themselves, but to give up their babies.

Ian Kyer, a Toronto historian turned lawyer who has written about legal education as well as law firm and corporate law history, provides us with a detailed and revealing study of one of the province's most famous and wealthy twentieth-century lawyers, David Fasken. Although Kyer has a lot to tell us about how Fasken made his money and about his contacts with other leading lights of the profession in the early twentieth century, such as appeal court judges William R. Riddell and Cornelius Masten, the article is principally concerned with two other aspects of Fasken's life. In part it is a compelling if at times bitter-sweet social history, a tale of a family life far from the idyllic. In part – and in this sense it is a near-unique contribution to Canadian legal history – it is an examination of the techniques of early estate planning. Kyer shows how Fasken used a variety of measures, especially *inter vivos* and testamentary trusts, to minimize the payment of succession duties.

The final essay in this volume by Bruce Ziff and Sean Ward of the University of Alberta takes on a central aspect of Canadian legal history, the law of the land, but looks at it from the perspective not of official land-granting but of the informal or customary law of squatters' rights. One of the ways in which European settlement in Canada was different from many other British colonies in the nineteenth century was in the relative absence of squatting and the consequent conversion of informal rights to officially legal ones. For the most part the Canadian West was divided up after 1870 by land sales from the Crown, not by individuals simply establishing themselves on the soil. Yet there were exceptions, even if unsuccessful and short lived, and Ziff and Ward recount one of these, the staking of claims around Edmonton by those whose claimed 'right' rested on nothing more than physical possession. Perhaps not surprisingly, squatting led to more of the same, or claim jumping, and in turn to vigilante acts to defend apparent rights. And, also not surprisingly, the squatters' claims ran up against official land-granting policies. In the end many of the squatters had their titles confirmed, a familiar enough nineteenth-century tale. This essay demonstrates the complexity of our legal history and, in the process, demolishes widely and perhaps too easily held assumptions, in this case about the fact that Western settlement always took place in accordance with established government policy.

## NOTES

- \* We thank a number of people who provided us with information about, and observations on, Peter Oliver. Marilyn MacFarlane, administrator of the Osgoode Society for the bulk of Peter Oliver's tenure as editor-in-chief, was unfailingly helpful. Ramsay Cook, Martin Friedland, Roy McMurtry, and, especially, Marc Egnal offered remarks at the memorial service for Peter Oliver that we have drawn on here in discussing his professional life. Anne Hodgson and Kevin, Michael, and Tony Oliver also spoke about their father and brother on that occasion, and their comments helped us to understand the man better. We also thank those colleagues in the Canadian legal history community who responded to a request for anecdotes about Peter; we have used only some of them, but appreciate all the responses we received. Blaine Baker offered very useful comments on an earlier draft of this introduction, as did two anonymous reviewers for the Osgoode Society. Readers may have noticed the third-person reference to Roy McMurtry in this note. When referring to ourselves we have done so in the third person, to avoid the awkwardness of phrases such as 'one of the authors of this essay.'
- 1 The total of sixty-six books includes the three published in 2006 after Peter Oliver's death, that bear the name of Jim Phillips as interim editor-in-chief. Each of those books was chosen by Peter Oliver, and he worked with the authors to bring the volumes almost to completion. We therefore consider the 2006 books to be part of Peter Oliver's legacy as editor-in-chief. For a list of the Osgoode Society's publications, see the last few pages of this volume.
  - 2 See 'The Making of a Provincial Premier: Howard Ferguson and Ontario Politics, 1870–1923' (PhD diss., University of Toronto 1969).
  - 3 *G. Howard Ferguson: Ontario Tory* (Toronto: University of Toronto Press 1977); *Public and Private Persons: The Ontario Political Culture 1914–1934* (Toronto: Clarke, Irwin 1975). For the special mention see the note from Audrey Livernois of the University of Toronto Press to Peter Oliver, 19 June 1978, on file with Jim Phillips.
  - 4 *Unlikely Tory: The Life and Politics of Allan Grossman* (Toronto: Denny's 1985).
  - 5 Peter Oliver's papers contained a very large amount of material for *The Dynasty*.
  - 6 *'Terror to Evil-Doers': Prisons and Punishments in Nineteenth Century Ontario* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press 1998); *The Conventional Man: The Diaries of Ontario Chief Justice Robert A. Harrison, 1856–1878* (Toronto: Osgoode Society for Canadian

- Legal History and University of Toronto Press 2003). In subsequent notes all books published by the Osgoode Society and the University of Toronto Press will be referenced only by date of publication; those brought out by other publishers will be footnoted with their full citation.
- 7 See *Dictionary of Canadian Biography*, online at [www.biographi.ca](http://www.biographi.ca).
  - 8 For details, see [www.ontariohistoricalsociety.ca](http://www.ontariohistoricalsociety.ca) and an unpublished 1987 paper by Peter James, 'The Making of History: The Ontario Historical Studies Series,' located in Peter Oliver's papers and on file with Jim Phillips.
  - 9 *Just Call Me Mitch: The Life of Mitchell F. Hepburn* (Toronto: University of Toronto Press 1991).
  - 10 *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (2002).
  - 11 Remarks of Professor Marc Egnal, Peter Oliver Memorial, 8 June 2006, on file with the authors.
  - 12 Taken from *ibid.*
  - 13 This section on the history of the Society is derived from, in addition to the specific sources noted, the files preserved in the Society's office in Osgoode Hall (hereafter Society Files). For the origins of the Society see also 'The Osgoode Society,' *Law Society of Upper Canada Gazette* 13 (1979), 156-7, and 'Osgoode Society Gathers Legal History,' *CBA National*, April 1981, 11.
  - 14 J. McLaren, 'In the Northern Archives Something Stirred: The Discovery of Canadian Legal History,' *Australian Journal of Legal History* 7 (2003), 75. Similar encomiums for the leading role played by the Society appear in a number of review articles: see, for example, J. Phillips, 'Recent Publications in Canadian Legal History,' *Canadian Historical Review* 78 (1997), 236-57.
  - 15 See *Ontario Historical Studies Series: A Progress Report* (1984), 2-3.
  - 16 For that society see L. Knafla, ed., *Proceedings of the Canadian Society for Legal History 1977* (Calgary, 1977), with accompanying newsletters. See also G. Parker, *Now and Then*, a circular for Canadian legal historians published irregularly during the later 1970s and early 1980s.
  - 17 James, 'The Making of History,' 11. This collection is housed at the Ontario Archives.
  - 18 See P. Oliver, 'Oral History: One Historian's View,' *Journal of the Canadian Oral History Association* 1 (1975), 13-19; 'Oral History,' lecture delivered to Ottawa Local History Workshop, 1975, in Oliver papers, on file with Jim Phillips; 'Book Review Article of Four Books on Oral History,' *Archivaria* 7 (1978), 164-8.
  - 19 'The Osgoode Society,' 156.
  - 20 See the article in *Law Times*, 28 March-3 April 1994.

- 21 Three of the original directors remained on the board throughout Peter Oliver's tenure as editor-in-chief – Roy McMurtry, the late Brendan O'Brien, and the late Mr Justice Archie Campbell. For a full listing of current directors see the Society's website at [www.osgoodesociety.ca](http://www.osgoodesociety.ca).
- 22 See generally Society Files. See also P. Oliver, 'The Osgoode Society: A Progress Report,' *Law Society of Upper Canada Gazette* 18 (1984), 77, and *Law Times*, 28 March–3 April 1994. Fellowship recipients included many of the best-known practitioners of Canadian legal history, such as Desmond Brown, Constance Backhouse, Hamar Foster, Richard Risk, Paul Romney, and Carolyn Strange.
- 23 See, for example, P. Girard, *Bora Laskin: Bringing Law to Life* (2005); R. Sharpe and K. Roach, *Brian Dickson: A Judge's Journey* (2003); E. Anderson, *Judging Bertha Wilson: Law as Large as Life* (2001); and I. Bushnell, *The Federal Court of Canada, 1875–1992* (1997). Scholars other than Osgoode Society authors have also used the collection: see, for example, C. Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797–1997* (Toronto: University of Toronto Press 1997).
- 24 D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (1981) and D. H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2. These were not the first two volumes the Society produced. Volume I was the first, but in 1982 there appeared M. MacRae and A. Adamson, *Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784–1914* (1982).
- 25 For English Canada the principal, almost the only, scholar working seriously in the field was R.C.B. Risk: see G.B. Baker, 'R.C.B. Risk's Canadian Legal History,' in G.B. Baker and J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 8, *In Honour of R.C.B. Risk* (1999). See also R.C.B. Risk, 'A Prospectus for Canadian Legal History,' *Dalhousie Law Journal* 1 (1973), 27–45. Otherwise the bulk of the legal history that was written – by people like W.R. Riddell for Ontario; E. Lareau, G. Doutre, and B.A.T. de Montigny for Quebec; C.J. Townshend for Nova Scotia; and W.F. Bowker and R. Stubbs for Western Canada – tended to be anecdotal and largely concerned with judges and lawyers as individuals. An exception is D. and L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670–1970* (Winnipeg: Peguis 1972). A review of the field written in the early 1970s for the *University of Toronto Law Journal* had nothing to say about Canada; the approaches discussed were all British or American: see G. Parker, 'The Masochism of the Legal Historian,' *University of Toronto Law Journal* 24 (1974), 279–317. Quebec was somewhat better served: see A. Morel, 'Canadian Legal History – Retrospect and Prospect,' *Osgoode Hall Law Journal* 21 (1983), 159–192, and

- V. Masciotra, 'Quebec Legal Historiography,' *McGill Law Journal* 32 (1987), 712–32. For an account of an abortive early attempt to write the history of Canadian law, see P. Girard, 'Who's Afraid of Canadian Legal History,' *University of Toronto Law Journal* 57 (2007), 727–53.
- 26 See Society file on Flaherty Essays.
- 27 D.G. Bell, 'The Birth of Canadian Legal History,' *University of New Brunswick Law Journal* 33 (1984), 317.
- 28 (Chapel Hill: University of North Carolina Press, 1969).
- 29 See Society file on Flaherty Essays.
- 30 See Bell, 'The Birth of Canadian Legal History,' and the reviews by B. Wright, J. McLaren, D. Hay, A.W.B Simpson, L. Kealey, and D. Kettler in, respectively, *Osgoode Hall Law Journal* 22 (1984); *Canadian Bar Review* 62 (1984); *Canadian Historical Review* 44 (1983); *University of Western Ontario Law Review* 19 (1983); *Social History* 17 (1984); and *Journal of Canadian Studies* 3 (1984).
- 31 'Foreword,' in Flaherty, ed., *Essays*, vol. 1, ix. Ironically this phrase continued to appear in the preface to Osgoode Society books until 1996, a year in which three books were published and a year after four had been produced. It disappears from 1997 onwards.
- 32 The meaning of 'internal legal history' is discussed below. For more details on the Selden Society, see [www.selden-society.qmw.ac.uk](http://www.selden-society.qmw.ac.uk). Interestingly, most of the Selden Society's membership is resident in North America.
- 33 Information on the Series can be accessed at [www.h-net.msu.edu/~law/ASLH](http://www.h-net.msu.edu/~law/ASLH).
- 34 See [www.forbessociety.org.au](http://www.forbessociety.org.au).
- 35 See Christopher Moore's similar assessment, reviewing Sharpe and Roach, *Brian Dickson*. He states: 'The Osgoode Society may be the most successful legal history society around.' *Law Times*, December 2003.
- 36 For the distinction between 'internal' and 'external' legal histories, see R.W. Gordon, 'J. Willard Hurst and the Common Law Tradition in American Legal Historiography,' *Law and Society Review* 10 (1975), 325–33, and D. Flaherty, 'Introduction,' in Flaherty, ed., *Essays*, vol. 1, 12–19. A recent article uses the terms 'lawyers history' and 'historians law' to make the same distinction, and also charts the emergence of the divide between the English academic and legal worlds as occurring at the end of the nineteenth century: see R. A. Cosgrove, 'The Culture of Academic Legal History: Lawyers' History and Historians' Law, 1870–1930,' *Cambrian Law Review* 33 (2002), 23–34.
- 37 Gordon, 'J. Willard Hurst,' 11.

- 38 (1986). While we are confident that almost all of our categorisations are unexceptionable, we acknowledge that some readers might quibble with a few of our decisions. For example, we included R. Fraser, ed., *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography* (1992) in the judicial biography list because it contains a good many of them, but whether it belongs there or under the legal profession heading is debatable – and irrelevant as it certainly should be among the total of thirty six volumes about ‘distinctive appearing legal things.’ In the ‘legal doctrine’ category we include, in addition to the obvious books, both B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (2000) and P. Brode, *Courted and Abandoned: Seduction in Canadian Law* (2002).
- 39 *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Toronto: Osgoode Society for Canadian Legal History and Montreal: McGill-Queen’s University Press 1995), xiii.
- 40 See *Bora Laskin*.
- 41 A point made by a reviewer in 1984: see Bell, ‘Birth of Canadian Legal History,’ 317.
- 42 There were exceptions, most notably L.A. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto and Calgary, 1981); T.G. Barnes et al., eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto 1983); L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfrid Laurier University Press 1981); vol. 21 of the *Osgoode Hall Law Journal*; and vol. 32 of the *McGill Law Journal*, on Quebec legal history.
- 43 ‘Preface,’ in *Essays*, vol. 1, xiii.
- 44 C. Wilton, ed., *Essays in the History of Canadian Law*, vol. 4, *Lawyers and Business in Canada 1830–1930* (1990), and P. Girard and J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3, *Nova Scotia* (1990).
- 45 As with the discussion of internal and external legal history above, not all of the Society’s publications are easily categorized and some might question our decisions on what to include where. Biographies of Supreme Court judges pose a particular problem. We have included Girard, *Bora Laskin*, as an Ontario book, but Anderson, *Judging Bertha Wilson*, as a national one. The former is substantially based in Ontario and Laskin’s time on the Supreme Court of Canada is only part of the life detailed by Girard. Conversely, although Wilson was an Ontario appointment to the Supreme Court of Canada, Anderson’s account of her life deals more with her years at the Court, a national institution. We have for similar reasons counted Sharpe and Roach, *Brian Dickson*, as a national book, not a Manitoba one. In a few other cases we have categorized books in ways that do not reflect

- their title. For example, Brode, *Courted and Abandoned*, is largely about Ontario law and cases.
- 46 J. Phillips, T. Loo, and S. Lewthwaite, eds., *Essays in the History of Canadian Law*, vol. 5, *Crime and Criminal Justice* (1994).
  - 47 H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law*, vol. 6, *British Columbia and the Yukon* (1995); C. English, ed., *Essays in the History of Canadian Law*, vol. 9, *Two Islands, Newfoundland and Prince Edward Island* (2005).
  - 48 Girard and Phillips, *Essays*, vol. 3, *Nova Scotia*, ix.
  - 49 P. Girard, J. Phillips, and J. B. Cahill, eds., *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (2004).
  - 50 J. Bannister to J. Phillips, email correspondence, 27 December 2006. This is in reference to Bannister's *Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699–1832* (2003).
  - 51 *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (1998).
  - 52 *Searching for Justice: An Autobiography* (2005).
  - 53 B. Ziff to J. Phillips, email correspondence, 28 December 2006, on file with the authors. The book is Ziff, *Unforeseen Legacies*.
  - 54 See M. Friedland, *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (1986); R. Sharpe, *The Last Day, the Last Hour: The Currie Libel Trial* (1988); B. O'Brien, *Speedy Justice: The Tragic Last Voyage of His Majesty's Vessel Speedy* (1992); and P. Brode, *The Odyssey of John Anderson* (1989).
  - 55 R. Baehre to J. Phillips, email correspondence, 12 June 2007.
  - 56 The references are to R. Baehre, 'Prison as Factory, Convict as Worker: A Study of the mid-Victorian Saint John Penitentiary, 1841–1880,' in Phillips, Loo, and Lewthwaite, eds., *Crime and Criminal Justice*; C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Osgoode Society for Canadian Legal History and Women's Press 1991); and F.M. Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (1993). Compare the first article to Oliver's account of the origins of the Kingston Penitentiary in 'Terror to Evil-doers,' chap. 2, and the Backhouse book to his chapter on the Mercer Reformatory in Phillips, Loo, and Lewthwaite, eds., *Crime and Criminal Justice*.
  - 57 This count is only of those who were either authors or editors of monographs, and does not include writers of individual chapters in essay volumes. It also excludes McRae and Adamson, *Cornerstones of Order*. The 'others' are Barry Cahill, an archivist, *The Thousandth Man': A Biography of James McGregor Stewart* (2000); Girard, Phillips, and Cahill, *The Supreme Court of Nova Scotia*; and Beverley Boissery, an independent writer, *A Deep*

- Sense of Wrong: The Treason, Trials and Transportation to New South Wales of Lower Canadian Rebels After the 1838 Rebellion* (1995), and, with Murray Greenwood, *Uncertain Justice: Canadian Women and Capital Punishment 1754–1953* (2000) – both Osgoode Society for Canadian Legal History and Dundurn Press. We have included Robert Sharpe twice because he wrote one book (*The Currie Libel Trial*) while an academic and another as a judge (*Brian Dickson*, with K. Roach). William Kaplan is on the law school academics list because, at the time he wrote *Bad Judgment: The Case of Mr. Justice Leo Landreville* (1996), he taught at the University of Ottawa law school. The ‘other academics’ category includes some individuals – Robert Fraser, Susan Lewthwaite, Paul Romney, and Carol Wilton – who hold PhDs in history but who work outside university history departments.
- 58 Those authors who have written more than one monograph and/or edited more than one collection include Peter Oliver himself, with two. The others are Constance Backhouse (3), Blaine Baker (2), Beverly Boissery (2), Patrick Brode (4), Barry Cahill (2), David Flaherty (2), Philip Girard (3), Murray Greenwood (4), Jim Phillips (5), Robert Sharpe (2), Fred Vaughan (2), David Williams (2), Carol Wilton (2), and Barry Wright (2).
- 59 That prize was for ‘*Terror to Evil-Doers*.’
- 60 J. Honsberger, *Osgoode Hall: An Illustrated History* (2004), won the award in 2006.
- 61 C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (1999), won in 2002.
- 62 L. Chambers, *Married Women and Property Law in Victorian Ontario* (1997), won the award in 2001, and Anderson, *Judging Bertha Wilson*, won in 2004.
- 63 L.S. McDowell, *Renegade Lawyer: The Life of J.L. Cohen* (2001), won for 2001, and Girard, *Bora Laskin*, won for 2005.
- 64 Saywell, *The Lawmakers*, won in 2002, and Sharpe and Roach, *Brian Dickson*, won in 2003.
- 65 D. Fyson, *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764–1837* (2006) was an honourable mention for the Hurst Award in 2007, and both Fyson and Philip Girard’s *Bora Laskin* were honourable mentions for the MacDonald Prize in 2006 and 2007, respectively.
- 66 For an excellent recent discussion of this distinction, see D. Hay, ‘Legislation, Magistrates and Judges: High Law and Low Law in England and the Empire,’ in D. Lemmings, ed., *The British and their Laws in the Eighteenth Century* (Woodbridge, UK: Boydell Press 2005).
- 67 In addition to his seminal ‘*Terror to Evil-Doers*,’ see also four other articles by him on punishment: ‘A Terror to Evil-Doers: The Central Prison and the

Criminal Class in Late Nineteenth-Century Ontario,' in R. Hall et al., eds., *Patterns of the Past: Re-interpreting Ontario's History* (Toronto: Dundurn Press 1988); 'From Jails to Penitentiary: The Demise of Community Corrections in Early Ontario,' *Correctional Options* (1984), 1–10; 'To Govern By Kindness: The First Two Decades of the Mercer Reformatory for Women,' in Phillips, Loo, and Lewthwaite, eds., *Crime and Criminal Justice*; and, with M. Whittingham, 'Elitism, Localism, and the Emergence of Adult Probation Services in Ontario, 1893–1972,' *Canadian Historical Review* 68 (1987), 225–58. Peter Oliver also taught a history of crime and punishment course at York University for many years, which had large enrolments.

- 68 Her fourth Osgoode Society book, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1950*, is being published at the same time as this volume.
- 69 See Oliver, *The Conventional Man*, and 'Power, Politics, and the Law: The Place of the Judiciary in the Historiography of Upper Canada,' in Baker and Phillips, ed., *Essays*, vol. 8, *In Honour of R.C.B. Risk*.