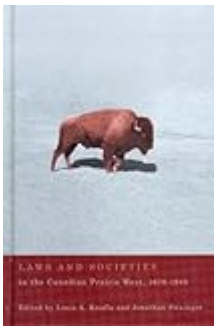
H-Net Reviews
in the Humanities & Social Sciences



Louis A. Knafla, Jonathan Swainger, eds. *Laws and Societies in the Canadian Prairie West, 1670-1840.* Vancouver: University of British Columbia Press, 2005. vi + 344 pp. $85.00 (cloth), ISBN 978-0-7748-1167-5.

Reviewed by Jonathan Anuik (Department of History, University of Saskatchewan)

Published on H-Canada (July, 2006)

The Case for the Legal Thrust: Suggestions from Western Canada

Canadian historians investigate the experiences of individuals and groups within government and its institutions, but few use the law and its arms as a springboard to launch their research. Historians consider legal restrictions and punitive measures imposed by the policymakers when presenting tales of oppression and resistance. The few historians who study the law use the case file as the tool to reconstruct the experiences of their characters and use central Canada and especially Toronto as the location for analysis.[1]

The contributors to the anthology *Laws and Societies in the Canadian Prairie West, 1670-1940*, under the leadership of co-editors Louis A. Knafla and Jonathan Swainger, offer legal minds with a history of the evolution and bureaucratization of the law in western Canada. In the introduction to the collection, Knafla criticizes the paucity of studies on Canada's legal history and its tendency to be rooted in urban and central Canadian contexts. Knafla believes historians think of the law as static and not as a useful resource for doing history. Therefore, the editors and contributors present the law as a fluid part of a pluralistic and ever-changing western Canada (p. 3). Not only were the characters who experienced tribal, discretionary, and later positive law a diverse lot, but the representatives of the law and the contexts where they operated varied drastically in terms of time and region. The contributors to the anthology, whose papers are the outcome of the April 1997 conference "Law for the Buffalo, Law for the Musk Ox" at the University of Calgary in Alberta, Canada, choose not to dwell on the sparseness of the secondary literature, but instead discuss how law and legal matters affected public and private and business and personal relations among individuals in the British, and later, Canadian prairie west. The writers, who represent academic and public interests, interrogated over 250 years of prairie history through the multiple lens of gender, class, and race.

The editors organize the collection into two parts. Confederation divides the chapters, but underlying Confederation is the shift from English law to Canadian law, and questions of governance and jurisdictional responsibility. Every contributor, in both parts of the collection, recognizes the struggle to incorporate a comprehensible yet flexible system of governance applicable to

all persons. Aboriginals, fur traders, immigrant groups, and private corporations enter the presentation as participants who could be collegial with the public sphere at best, but uncooperative at worst.

Sidney L. Harring sets the tone for the first section. In addition to offering definitions of the law and legal history in terms of the impact of the North West Mounted Police (NWMP) upon the First Nations, Harring implicitly identifies a debate amongst legal experts of the seventeenth to nineteenth centuries: should and can English law apply to Aboriginals? Furthermore, how can Aboriginals effectively participate in a system designed in English and guided by principles foreign to almost all First Peoples? Harring notes bureaucrats and politicians, represented by the NWMP, denied Aboriginals control over declining resources like the buffalo simply through administration of the law. Documents and proceedings were in a foreign language and styled in an incomprehensible manner and one less relevant to traditional practice. The consequence for Canadianists is that the pre-existing history tells more about Canadian law and its impact than about Aboriginal societies in the years immediately following Confederation.

Russell C. Smandych illustrates the omnipresent question of the application of English law through the study of the trial of Capinesseweet at Red River. To Smandych, the elites of nineteenth-century Britain and its colonies knew the Aboriginals did not understand the legal system. To ease the miscommunication and potential conflict, intellectuals through the Aborigines Protection Society advocated for a gradual process of re-education for indigenous persons that would culminate in effective interactions with Aboriginals in the public sphere. The "gradual" shift allowed the Maoris of New Zealand to continue to settle crimes committed within communities and checked the power of colonial judges; the defendants then faced judiciaries reluctant to convict or even apply the law. Smandych's study is an example of the evolution from Aboriginal, or what Knafla would term "laws of discretion," to a colonial justice system whose workers gained increased authority to award punishment or temper mercy.

Paul C. Nigol uses the journals of the eighteenth-century Hudson's Bay Company (HBC) posts to study the application of English law by the bayside governors. For Nigol, responsibility for the administration of law rested in the hands of the governor but isolation, distance, and, in some cases, lack of suitable replacement labor underscored the actions taken against those who drank, sodomized, or deserted. Certain challenges affected the application of law at the posts and in the West for almost two hundred years.

Every contributor to part 1 of the volume considers English law to be less than relevant to a vast territory whose residents faced isolation and extreme weather conditions, and where survival eclipsed business and settlement ventures. All of the authors demonstrate the transition initiated by the Commonwealth from Aboriginal or discretion-based justice to a systematic English legal system. However, the historians implicitly and explicitly note that the circumstances of the pre- and immediately post-Confederation period kept the rule of law trapped between the perceived "old" and "new" systems. Modernity and control eluded the British in the West from 1670 to 1870.

The essayists of part 2 of the collection view Confederation as the means to implant English law in Canada. Greg Marquis, Lin Zhiqiu and Augustine Brannigan, Tristan M. Goodman, Janice Erion, and John McLaren examine police forces, court systems, policy, and state institutions to prove how their structures and policies brought westerners into what is now the Canadian system of governance. Marquis believes the National Policy was the framework that allowed Ottawa to develop the West, categorize and regulate those who opposed either deliberately or accidentally its development, and regulate its resources. The Canadian Pacific Railway was the tangible outcome of the policy and trains transported the NWMP through the West and allowed these agents of the state to better watch and handle disputes. Goodman notes the conflict between common or discretionary law and the shift toward systematic regulation of resources through the study of prairie water laws. Zhiqiu and Brannigan, Goodman, Erion, and McLaren show how provincial governments used police forces, water laws, and state regulation of commodities and public conduct to bolster the agenda of development, and increasingly followed trends in central Canada and away from local contexts. Part 2 satisfies Knafla's contention of "dynamic law in a pluralistic society" (p. 3). Each contributor identifies the process governing the creation and direction of legislation and the proponents who advocated policy. Political and economic development governed the establishment of legislation and legal practice in the period following Confederation, and its consequences affected larger numbers of people as the sphere of authority grew.

Law and Societies is a useful contribution to the sparse history of law and governance in Canada. However,

statements from the introduction minimize the contributions of central Canadianists. Knafla dislikes the centrist bias of legal history and seeks, in collaboration with his contributors, to address the evolution of law in the West. However, the product is a presentation that neglects the methodological insights gained through the new social history. The editors and contributors to *On the Case*, as mentioned earlier, note that the use of a case file often reveals more of the perceptions of those who maintain the file than of the subjects of the file. Proposed laws and legislation reflect the biases and power of proponents and of those who enforce the laws; a point implicitly present in the essays of part 2 of *Laws and Societies*. Furthermore, the centrist studies present histories of several groups once neglected by historians: women, immigrants, the working classes, and lesbians and gays. However, the representation of these groups is lacking or completely not present, particularly in part 2 of the volume. Academics who study central Canada provide agency and voice to these groups in a framework similar to that of "Adaptations to Modernity," in part 2. Karen Dubinsky's *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* (1993), Carolyn Strange's *Toronto's Girl Problem: The Perils and Pleasures of the City, 1880-1930* (1995), Donald Avery's *Reluctant Host: Canada's Response to Immigrant Workers* (1995), and Tom Warner's *Never Going Back: A History of Queer Activism in Canada* (2002), are a few examples of the gendered, racialized, and sexualized contours present in central Canadian legal history and almost nonexistent in the legal histories of western Canada.

It should be noted that there are few studies founded on the approach of gender and sexuality in the history of western Canada. Recent work by Valerie Korinek provides historians with a lively gay past in western Canada and evidence of lesbians and gays caught up in post-secondary and provincial institutions governed by individuals intolerant of sexual diversity.[2] If the new western legal history is to be taken seriously and presented accurately, then historians must not only read predecessor studies from central Canada, but also consider the methodologies, along with works generated in the West, when developing anthologies similar to *Law and Societies*.

Finally, Douglas Victor Janoff, in his recently published book *Pink Blood: Homophobic Violence in Canada* (2005), collapses the east-west division developed by Knafla. Janoff uses case files from the period 1990-2005 to identify homophobic violence and the treatment of the victims and perpetrators by the justice and health care systems. Janoff seeks to identify commonalities across regions, age groups, class, and gender. He finds for gay men that many do not know their assailants and that the privilege of an upper-middle-class background will not minimize the chances of a violent encounter. Janoff's work challenges the need for a western legal history as his arguments de-emphasize regional variation.

Despite the caveats, the presentation is an inclusive history of several well-studied topics in western Canadian history. The editors challenge historians of western Canada to muse about the use of the law and legal documents in their projects. Hopefully, the collection will inspire future conferences, discussions, and monographs on the law and its application in western Canada and in Canada.

Notes

[1]. For example, see Franca Iacovetta and Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto: University of Toronto Press, 1998).

[2]. Valerie Korinek, " 'The Most Openly Gay Person for at Least a Thousand Miles': Doug Wilson and the Politicization of a Province," *Canadian Historical Review*, 84, no. 4 (2003): pp. 517-550; and "Activism = Public Education: The History of Public Discourses of Homosexuality in Saskatchewan, 1971-93," in *"I Could Not Speak My Heart": Education and Social Justice for Gay and Lesbian Youth*, ed. James McNinch and Mary Cronin (Regina: Canadian Plains Research Center, 2004), pp. 109-137.