

Notes and Communications

The Osgoode Society: A Progress Report

by **PETER N. OLIVER**

The complex issues of contemporary law in Canada have evolved over three centuries, from roots in the British and French systems through historical developments peculiar to Canada. But the history of that evolution has remained largely unexplored. To help rectify this situation, Ontario Attorney General, R. Roy McMurtry, and the Law Society of Upper Canada in May of 1979 established The Osgoode Society. Its purpose is to study and promote public interest in the history of the law, the legal profession, and the judiciary in Ontario and across Canada, and to stimulate research and publications on these and related subjects.

There are complex reasons for the failure of legal history in Canada, in contrast with the situation in Britain and the United States, to develop as a mature and exciting field of studies. Foremost among these undoubtedly is the general underdevelopment of Canadian historical writing, including social, economic, and political history. With so much to be done even in these areas, it is understandable, perhaps, that few university-based historians have turned their attention to legal history. The other side of the equation has been the long-standing lack of interest in legal-historical scholarship in Canadian law schools. Not only has history not been a priority either in law school curricula or in the research interests of individual professors, but there is considerable evidence to suggest that research and scholarship generally have not fared well in the law schools. The 1983 publication, *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, was extremely critical of the state of legal scholarship, and justifiably so. [The Osgoode Society, however, was gratified that *Law and Learning* pointed to its efforts as a hopeful indication of new scholarly activity. (p. 147)]

From the beginning, then, The Osgoode Society's Directors have recognized that to achieve their objectives will require them to move beyond their intention to publish a volume a year in Canadian legal history to develop a multi-faceted programme to stimulate an underdeveloped field of studies. The Directors have undertaken precisely such a programme. The Directors currently are: Laura Legge, Q.C., Treasurer, The Law Society of Upper Canada; Archie Campbell, Q.C., Deputy Attorney General of Ontario; Professor Jane Banfield Haynes, Division of Social Sciences, York University; John D. Honsberger, Q.C., Editor, The Law Society of Upper Canada *Gazette*; Kenneth Jarvis, Q.C., Secretary, The Law Society of Upper Canada; The Honourable Mr. Justice Allen M. Linden, President,

The Law Reform Commission of Canada; The Honourable R. Roy McMurtry, Q.C., Attorney General of Ontario; Brendan O'Brien, Q.C., Bencher and Ex-Treasurer, The Law Society of Upper Canada; Dr. Peter N. Oliver, Department of History, York University.

The Directors' most important early decision was to endeavour to create a market for Canadian legal history by embarking on a national membership campaign. This venture was marked by substantial success when some eight hundred individuals and institutions across Canada joined the fledgling organization. In return for a membership fee of twenty-five dollars, the Society promises its members, in addition to other rights of membership, an annual volume dealing with some aspect of Canadian legal history. This method, in effect a book-club approach, offers some advantages and poses a few problems. Since about 80 per cent of our members are practicing lawyers, we must produce books that are attractive to them. Since most of our authors of necessity are academics, they are not always interested in (or capable of) writing books with wide popular appeal.

We have decided, therefore, on what we believe to be a flexible and balanced approach, always recognizing that we must be careful not to "fall between two stools." Some of our books will be primarily scholarly, others will be more popular, and most, we hope, will combine attributes of both approaches. In addition, because one of our objectives is to place good legal-historical scholarship in print so it can be used for teaching and other purposes, we have decided from time to time to offer to our members "optional extras." The first such volume, which will appear in 1984, is a biography of Sir Lyman Poore Duff by David Williams, writer-in-residence at the University of Victoria, British Columbia. This book is being published by the University of British Columbia Press which has agreed to prepare a special edition for Osgoode Society members.

The Society's 1981 and 1983 publications (*Essays in the History of Canadian Law*, David H. Flaherty, editor, Volumes I and II) were planned so as to involve as many individuals as possible in the writing of Canadian legal history. The nineteen essays in these two volumes deal with a wide range of subjects and interests. One purpose was to illustrate the extensive possibilities for research and writing in Canadian legal history, and the reviews to date encourage us to believe that the two volumes of *Essays* have had a generally stimulative effect.

These books were published for us by the University of Toronto Press. In addition to the members' edition, a trade edition was produced for sale in bookstores, at a somewhat higher price. The fine work done by our publisher has assisted greatly in our efforts to achieve high standards of scholarship and readability.

The flexibility of the Society's approach was demonstrated by its cooperation with another publisher, Clarke, Irwin, in the production of our 1982 volume, Marian MacRae and Anthony Adamson's beautiful book, *Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784-1914*. This book was not commissioned by the Society, but when it came to our attention that Professors MacRae and Adamson were at work on the subject, we negotiated an arrangement by which the publisher would produce an edition for our members. Our Directors also made a grant to the publisher to make possible the inclusion of a number of coloured prints. Normally, The Osgoode Society intends to sponsor and initiate new work, rather than cooperate with work already under way, but in this case our contribution

enhanced a manuscript then in progress and our members as a result received a beautifully illustrated volume which not only made a contribution to scholarship, but was a change in pace from the two volumes edited by David Flaherty.

We believe that our forthcoming books will also combine readability and scholarship, but we hope as well that our members will recognize that in any given year our volume may appeal more to one type of reader than to another. Books forthcoming are:

- 1984 *Sir John Beverley Robinson: A Biography* by Patrick Brode
 Sir Lyman Poore Duff: A Biography by David Williams
- 1985 *A History of the Supreme Court of Canada* by James Snell and Frederick Vaughan
- Post-
1985 *The Papers of William Dummer Powell, Chief Justice of Upper Canada*
 by Graham Parker
- Crime and Capital Punishment in Upper Canada* by Robert Fraser
- The Minutes of Convocation of the Law Society of Upper Canada* by
 John Honsberger, Q.C.

The Society will include in its publications studies of the courts, the judiciary, the legal profession, biographies, collections of documents, studies in criminology and penology, great trials, and work in the social and economic history of the law. We are now most actively considering publication of collections of documents and great trials. We welcome suggestions for future publications and comments on the books in print.

Most students of Canadian history will recognize at once that, apart from constitutional history, little work has been done by historians in any of these areas, but perhaps fewer will be aware of the potential value to Canadian historiography of work in the above fields. Legal documents, despite some serious problems which will be discussed below, in many respects remain a rich and relatively untapped resource. In Ontario, for example, about 22 per cent of the holdings of the provincial archives are court records and these records can be used to analyze many aspects of social and economic history. The records of the criminal courts, for example, inform us not only about the criminal justice system *per se*, but are vital to understanding issues relating to power, authority, and social and political values generally. The records of the Courts of Quarter Sessions inform us about local elites and the development of local government in pioneer societies. The records of the Court of Chancery, of which there is a particularly good collection in the Ontario Archives, are vital for all those numerous family, personal, and business issues of the nineteenth century dealt with by that Court.

Even the study of a particular "famous trial," as has often been demonstrated, may be used to help to comprehend broad questions of ideology and social and political values which are of interest far beyond the field of legal history narrowly defined. Those who read at least some of the essays offered in Professor Flaherty's two volumes will be struck at once by how wide a door can be opened through legal

history on more general historical concerns. This is not to denigrate legal history more narrowly defined, but merely to emphasize how valuable these relatively untapped sources are for all students of Canadian history.

Lectureship in Canadian Legal History One recent initiative has been The Osgoode Society Lectureship in Canadian Legal History. An annual lecture, funded by the Society, is given in two Canadian universities. The first such lecture, delivered in 1982 by Dr. Robert Fraser of the Dictionary of Canadian Biography, at the Queen's University and University of Windsor Law Schools, was on the subject, "Law, Politics, and Society in Upper Canada: the Execution of Michael Vincent." The 1983 lecture by Professor Constance Backhouse of the University of Western Ontario Law School was entitled "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society." The lecture was delivered at the law schools of the University of Ottawa and the University of Toronto. The lecture's purpose is to interest more university students and professors in Canadian legal history.

Fellowship in Canadian Legal History Another programme which is designed to build for the future is The Osgoode Society Fellowship in Canadian Legal History. The Society has offered, in alternate years, two or three fellowships of a maximum value of ten thousand dollars to allow qualified individuals who have a clearly stated objective in the legal history field and a well-defined plan for reaching that objective to take partial leave from employment. To date six Fellowships have been awarded and, if funds are available, the Society will be announcing a competition in 1984 for fellowships to be held in 1985.

Oral History The Society has made a major commitment to oral history. In 1982 it appointed Christine J.N. Kates, B.A., LL.B., as Director of Oral History and, under Mrs. Kates's energetic leadership, numerous interviews have been carried out with individuals who have made a contribution to our legal heritage. The interviews are taped and transcribed and placed for safekeeping in The Osgoode Society Collection in the Ontario Archives. For full information on the Oral History Programme, please contact Mrs. Kates at the Society's office. Our efforts in this field are restricted to Ontario.

Research Support Programme In addition to research support for authors preparing volumes for publication by the Society, we offer research support in the form of minor research grants to scholars who are not necessarily preparing works for our Publications Series. The small sum set aside for the Research Support Programme has proved to be a flexible tool which has enabled the Society to respond with some speed to meet the expenses of several legal scholars. This is a minor research grant programme and major funding requests should be directed elsewhere.

The Osgoode Society and the Archives The Osgoode Society has a working relationship with the Ontario Archives. The Ontario Archives accepts documents of historical importance on behalf of the Society for preservation, restoration, and research purposes and has agreed to place these documents in a special Osgoode Society collection within the Archives. Our work in oral history has provided us with an opportunity to explain to legal practitioners the historical importance of their papers and several donations of significance have resulted.

It is in the area of archival work that the Society faces perhaps its greatest challenge. We recognize fully that first-rate published studies in all our above areas of interest can be prepared only if adequate documentation exists on which to base them. The oral record discussed above will, we hope, provide one indispensable source for future historians. But most historians will agree that the oral interview, however valuable it may be, is only second best and possesses many built-in limitations, not least of which is the frailty of human memory. Original documents which date from the actual occurrence of the events being described alone allow the historian to reconstruct with some semblance of accuracy the full texture of past events. Unless documents are preserved and made available, there can be no history. It is as simple as that. Indeed, the failure in Canada of the legal profession to give adequate consideration to proper records management and archival preservation accounts very largely for the sorry state of existing legal history and poses the greatest barrier to future work.

We in The Osgoode Society have given a good deal of thought to this matter, and we have discussed possible remedies with members of the staff of the Ontario Archives and with other interested parties. Writing in June 1980 in the *Law Society of Upper Canada Gazette*, Catherine Shepard of the Ontario Archives and Peter Oliver of The Osgoode Society canvassed the problem rather fully and offered suggestions for a solution. Unfortunately, since that date, The Osgoode Society has been preoccupied with other matters, and has taken no initiatives along the line suggested by the Shepard/Oliver article. In 1984, however, it expects to be in a position to act.

There are at least three major problems relating to Archives. The first is most readily addressed. Many, perhaps most, lawyers seem to have little interest in records management, at least from an historical perspective. They are in private practice, they tend to be pragmatic in their outlook, and when their records seem to be of no further use, often they destroy them. Generally, they are unaware of the kinds of questions being asked by the current generation of historians and seldom seem to reflect on how their records made available to scholars fifty or a hundred years from now, could be used to reconstruct many dimensions of the Canadian past. The Osgoode Society, in cooperation with other groups, may find it possible to assist lawyers in the development of professional records management procedures, which will be of great value both to lawyers and to historians. The Society in fact has now commenced a project, one purpose of which will be to access and determine the value to scholars of documents which now remain in the hands of private law firms. At present it is not at all clear how many private legal records survive from earlier periods. No systematic records survey has ever been undertaken, few extensive collections of such records have found their way into archival repositories, and few lawyers have given any thought to the potential value of their records for social and economic historians. It is probably accurate to say that most lawyers think of history as a chronicle of great individuals and spectacular events, and they have had relatively little contact with the historiographical revolution of the past twenty years which has placed new forms of social history in the foreground of historical interest. Lawyers cannot be expected to be familiar with these developments and it is a pressing responsibility of archivists and historians alike to assist them in understanding, from the perspective of scholarship, the purpose and potential of records management procedures. A committee established by The Osgoode Society and

including in its membership two professional archivists is now engaged in a preliminary survey of some private legal records in Ontario as part of an effort to assess the potential of this resource.

Secondly, space in many Canadian archival repositories is at a premium. Although the Ontario Archives has agreed to accept certain materials gathered by The Osgoode Society, we recognize that there is an element of caution or hesitation on the part of the Archives in this commitment. The Ontario Archives, which has done some excellent work in the collection and preservation of early court records in Ontario (see the Shepard/Oliver article for an account of this), confronts a critical situation as current court records accumulate and, because of the problems posed by sheer volume, the Archives, the judiciary, and the Ministry of the Attorney General face some critical records management decisions over the course of the next year. If substantial quantities of private legal manuscripts are also to be collected, this will pose an additional burden on those responsible for managing archival institutions.

This point relates directly to the third problem. Archivists, understandably, are reluctant to give expensive space to housing collections which are seldom if ever used. In the field of private legal manuscripts, the problems posed by solicitor-client privilege and confidentiality at present do prevent many private legal records from ever being used. Confidentiality and privilege are at the heart of legal traditions and practices and must remain as a sacrosanct part of the work of the lawyer for reasons which are apparent to all. That having been said, however, it seems clear that the absolute right of solicitor-client privilege and confidentiality has been maintained at great cost to Canadian historical knowledge and even to lawyers themselves. An air of mystery continues to enshroud the legal profession and its work and this has led not only to a general lack of knowledge about most aspects of our legal past, but even to a degree of public anger against the profession, a resentment which often is quite unjustified. In their *Gazette* article, Shepard and Oliver pointed towards a solution of the problems posed by privilege and confidentiality. Among the aspects of this proposed solution were the establishment of a "Legal Records Commission," a time limit set on confidentiality and privilege in the absolute sense (perhaps a hundred years), and the use of signed data-use agreements through which responsible researchers might gain access to certain records if they guaranteed to respect the privacy of all individuals.

There are many other dimensions to this problem, but The Osgoode Society in 1984 expects to take some initiatives which may, ultimately, facilitate the collection and use of legal records which are not now available.

Conclusion The above represents a progress report on the work of the Society since its establishment. Undoubtedly there are areas we have neglected and matters which call for imaginative new approaches. One issue with which we are concerned has been whether we are a provincial or national organization. Here our answer to date has been somewhat ambiguous. Most of the funding which has permitted us to carry on our special projects (as opposed to our publishing programmes) has come through the generosity of The Law Foundation of Ontario. Also, a very high proportion of our members come from Ontario. The Society, however, welcomes applications for funding from across the country, and it is interested in publishing work which is national as well as regional in scope. Clearly some of our efforts, such as oral history, are best restricted to Ontario, if only because of cost and because

similar programmes are being carried out elsewhere. For these reasons, then, we consider ourselves to be an Ontario-based organization which has some national interests, but we do not pretend to be equipped to involve ourselves in matters that are best handled in other regions.

The Society welcomes suggestions, comments, and advice on all aspects of our work. Membership is open to all interested parties and our Annual Report is available on request: The Osgoode Society, Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N6.

The Law Society of Upper Canada Archives

by **ROY SHAEFFER**

In September 1983, the Law Society of Upper Canada formally established an archives programme at its offices in Osgoode Hall, Toronto. The programme, which includes a records management component, is dedicated to meeting certain of the information needs of the organization and preserving one significant element of the documentary heritage of the legal profession. It reflects a growing awareness in the profession of its history and traditions and the central role it has occupied in the social and economic development of Canada.

Founded in 1797, the Law Society is the governing body of the legal profession in Ontario and the oldest organization of its kind in North America. Among its duties remain the initial ones of education in the law, admissions to the bar, the establishment of rules, and the maintenance of high standards of professional conduct. However, the responsibilities of the Society have grown with the profession and now extend to insurance, active public information services, and the administration of the Ontario Legal Aid Plan.

The archives houses a relatively complete record of the programmes and activities of the Society from its first days at Niagara-on-the-Lake. The minutes and reports of Convocation (the board of directors elected by the members) and the Standing Committees provide a detailed account of the development of the Society and its response to changing conditions and demands. The extensive files of numerous special committees reflect the professional and public concerns of the members in fields such as education, legislation, and the administration of justice. There are also records tracing the growth of the Great Library of Osgoode Hall, established in 1832, and the system of county law libraries in Ontario. These documents, along with the rolls of solicitors, executive correspondence, ledgers, and financial statements, represent the core of the holdings and the most complete runs of material.

Significant, however, are the records relating to associated institutions and organizations involved in legal education. These include the early nineteenth-century journals of the Juvenile Advocates Society, the first club of students-at-law, and the twentieth-century files of the Osgoode Hall Legal and Literary Society. A wide range of material relating to the Osgoode Hall Law School, prior to its move to York University in 1968, is also maintained. These include student registers, exams, lecture notes, year books, and a short run of the files of *Obiter Dicta*, the student newspaper.