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Articles

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Introduction

The study of legal history can be a useful and scholarly undertaking. An understanding of the uses and limits of law is useful, if not necessary, for any civilized community, and a study of legal history is one way, although not the exclusive way, of achieving this understanding. More generally, our understanding of history cannot be complete without some understanding of its legal elements. Therefore, the study of Canadian legal history should be respectable and flourishing, but it is not. It has been greatly neglected, and most of the little work that has been done has reflected limited interests. Lawyers have usually restricted themselves to the development of doctrine and the stucture of courts. Historians have considered a wider range of law, because law has been a large and unavoidable element of Canadian history, but none has made it a distinct topic. The result is that we know almost nothing about our legal past. We have not even accumulated and organized most of the major facts, let alone thought about them.

The neglect and the need are obvious, but the reasons for the neglect are not. The study of legal history requires knowledge of legal doctrine, structures and procedures. Lawyers have had this knowledge, and I have a vested interest in believing that lawyers can be scholars, but perhaps their interest and opportunity have been limited by a traditional preoccupation with courts and conflict, and the late entry of lawyers and legal education into the universities. Perhaps historians have been interested, but frustrated by lack of knowledge, or perhaps they have not even been interested. Their interest, also, may have been restricted by the lack of lawyers in their universities. During the past couple of years I have perceived an increasing interest in legal history, although the wish may have been father to the perception.

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What Is Legal History?

Legal history has little inheritance of traditions or speculation about purposes and methods. Perhaps none are needed, because enthusiasm and technical knowledge alone might produce useful and distinctive results, but habit and default can limit effort to descriptions of conflict, courts and doctrine. Speculation is needed, not to establish one version of Truth, but to avoid this limitation, and to explore possibilities for less obvious questions and themes.

I conceive legal history to be a study of the history of the legal processes, and this conception can be elaborated in three overlapping elements: the influences that have shaped law; the effect of law; and the structure, procedures and functions of legal institutions.

A vast and complex array of influences have shaped law, from the fall of man to clerical mistakes, and choice and assessment of the significant influences must ultimately be an exercise of judgment. Values have been among the major influences, and, almost by inversion of the study of influences, the law can be studied as a record of values. Considered as a whole and over time, it is a massive and roughly accurate record. Some of the values are obvious and familiar, even though interpretations may differ, and some are not, especially the values expressed in procedures and the common law. But gaps exist. Not all values have been accurately expressed, or expressed at all, in law, and values that have been expressed in law may not have existed in the same intensity in society. Some values are not appropriate for expression in law, and expression, modification, or rejection of others may be stiffled or delayed by competing values or limitations of the legal processes. Historians sometimes seem to want to make legal history their hand-maiden, and find evidence about social values or structure in the legal record. The gaps make this undertaking either precarious or redundant: only a thorough knowledge of the society (and a shrewd reading of the legal record) can enable a judgment to be made about the accuracy of a small part of the legal record.

The second element is the effect of law on minds and events. It presents baffling difficulties of analysis and measurement. For example, common law and legislation about

discrimination and financing techniques have expressed values about human dignity and economic enterprise, but what has been their effect on feelings, conduct, and the production and distribution of goods? Which of the values that law has expressed have been shaped primarily in some other social processes, and which have shaped, or have been intended to shape, values of society? Questions of measurement of this kind challenge all social scientists.

The third element is the legal institutions: the legislature; the courts; the executive, government departments and other administrative agencies; and the legal profession. Their structures, procedures and functions must be described, and the traditional or expected allocation between lawyers and other social scientists is largely a reflection of chance and habit. The first two themes are entangled in this one, and present questions about legal change, especially the process through which changing values are expressed or are not expressed in law, and the effect of a failure or delay to express values that seek expression.

This conception is a grand challenge. It requires extensive technical knowledge about doctrine, structures, and procedures, but it also includes knowledge and topics that are not included in the traditional work and interests of lawyers, and topics that other social scientists have studied extensively. Legal history should not be the monopoly of lawyers and should not be limited by traditional patterns, but realism demands modesty. Useful contributions can be made without seeking to meet the entire challenge. Choice of limits emphasis must be personal preferences, although I fear that this admission may eventually be a resort to the enthusiasm and technical knowledge alone that I hoped to escape.

Themes For Canadian Legal History

Speculation about large themes in Canadian legal history is needed, like speculation about the nature and limits of legal history, to avoid thinking only about what is obvious or determined by traditions and habits. I shall limit my speculation to Canadian after the mid-nineteenth century, and I suggest eight themes. They are not proclamations of an exclusive domain for legal history. They are ways of ordering Canadian history that seem to me to be useful for legal history. The first

seven are elaborations of the first two elements and the last is the legal institutions.

The Nation: Unity and Diversity. What has been the function of law in the creation and expression of a distinctive Canadian identity? This theme is a common one in the study of Canadian history, and appears in different forms for different times and tastes. Much of the constitutional structure of Canada is expressed in law, for example, much of confederation, parliamentary government, geographic expansion, independence from Great Britain, and international stature. Beyond constitutional structure, the most useful form for this theme is the tension between unity and diversity, and it has three parts.

The first is the two cultures, which has been a dominant theme in Canadian history. Our law has usually respected individual preferences for religious worship, although this respect has not often been sharply tested. The record about preferences for education determined by religious differences is more complex. The conflict about separate schools and language resulted in compromises that have tended to respect diversity, but the legal processes performed only a minor function in achieving these compromises, and often expressed them in obsure and prosaic ways.

The existence of civil law and common law systems requires competence in comparative law as well as whatever other abilities legal history requires. Some of the issues are the differences between the systems, the effect of the differences on business transactions, the influences of the systems on each other, and the extent to which they have been symbols of differences of identity.

The continuing existence of other religious, national or ethnic groups is an element of diversity in Canadian life, but the legal record about this diversity is difficult to assess. They have been protected by general freedoms of association, worship, and ownership of property, but have occasionally been singled out for unpleasant discrimination. Whatever other assessments may be made, the law has probably not contributed much to the existence and nature of these groups.

The second part of unity and diversity is regionalism and metropolitanism; these two concepts are distinct, but overlap enough to be usefully considered together. Regionalism is diversity among areas, defined, for example, by geography, the

characters of peoples, or law. The largest effect of law on regionalism has been the division of powers between the federal government and the provinces, even though power to differ or to impose uniformity must not be assumed to have been effectively exercised. Whatever might have been the division intended, the decisions of the courts have tended to favour provincial power, but the effective process for dividing power has become executive negotiation. The results of this process have varied, but have usually tended to give larger powers to the federal government. Two other legal influences have tended more clearly towards uniformity. First, each province, apart from Quebec, has had a tendency to adopt statutes and common law from other provinces or from another common source, and second, law has facilitated the exercise of large private economic powers over great distances, for example through contact and the corporation.

Metropolitanism is the rise and competition of cities, and their relation to their hinterland. Cities are entangled in most of the other themes, but one thread that can be isolated is the use of law to define and control the hinterland, especially through the exercise of private economic power.

The third part of unity and diversity is classes and elites. This is a largely unexplored theme in Canadian history, and legal history is not likely to be able to make a significant contribution until more work is done in other social sciences. Assuming some useful and workable notion of class can be designed, issues for legal history are, the extent to which law has defined classes and has been the expression of the distinctive values of the classes, and the extent to which law has facilitated or restricted mobility between classes. The powers of elites take different forms, but the simple distinction between legal and non-legal power is derived from a limited conception of law and is too crude to be useful. The question about power should be the extent and the means through which law has enabled the accumulation and preservation of power, and the nature and limits of these means of exercising power compared to others.

The Influence of England, the United States, and France. This second theme might have been included in the first, but it is important enough to be isolated. Much of the form and content of Canadian law has been influenced by England and

the United States, and, to a much lesser extent, France. Some examples of the influences are obvious. For example, the structures of the legal institutions are largely derived from England, and reception statutes and the Privy Council formally imposed much English authority. The issues are the extent of the influences, why they existed, and whether models were adapted to Canadian needs. The answers will differ for different times, topics, areas, and legal institutions.

The Economy. Much of law has been and continues to be about economic affairs, and this concentration alone demonstrates much about our assumptions about the uses and limits of law. During the mid-nineteenth century the law gave extensive powers for private ordering of economic affairs. Three major aspects of this power were the market, especially the development of financing, security, and arrangements for transactions over large distances; business organizations; and the allocation of losses caused by economic activity. Our economic affairs are now vastly different. Two general changes are useful for legal history. The first is government regulation and participation: what techniques were used and what was the effect on the inheritance from the nineteenth century? The second is the growth of power, both public power and private power. How was law used to accumulate private power, what attempts have been made to impose control, and what have been the perceptions and the influence of the distinction between public and private interests?

Community. During the twentieth century much of the responsibility for individual economic and physical well-being has been shifted from the individual, the family, and private organizations to the government; and many of the risks of living in a crowded, complex society have been shifted to large groups. Many legal changes might be included in this theme; some of the more important ones are workmen's compensation, unemployment insurance, welfare, compulsory insurance schemes, medical care plans, and torts decisions that tend towards imposing losses on interests that can best spread them. Two more, which demonstrate the effect of technological change and more complex understandings of cause and effect, are public health, and food and drug legislation.

The Individual. This theme is the nature and extent of the opportunities given to individuals to make for themselves

purposeful lives, and to express and realize their capacities, hopes and beliefs. It is affected by some of the others, for example, regulation of economic affairs and the growth of economic power affect individual choice, and the arrangements made for economic and physical well-being may affect the dignity and responsibility of the individual. These apart, one major topic is the family. It includes changes of roles, powers and responsibilities of husbands and wives, and merges with attempts to achieve equality for women. Children present a shifting tension between efforts to protect and influence, and efforts to recognize and encourage maturity. Other topics in which law bears upon the quality of individual life are privacy, mobility among classes, discrimination, and the freedoms of association, speech and religion.

The Physical Environment. The physical environment dominates much of the past and present of Canada. Canadians have struggled against nature to make a living and a nation, and have enjoyed immense riches from nature. Even more than other themes, this is entangled with all the others. Three specific parts are natural resources, urban planning and control of use. The natural resources have been immense: animals, agricultural land, forests, rivers and minerals. During the nineteenth century, the topics for legal history are the arrangements for allocation to private use and the accommodation of competing uses. During the twentieth century, the topics are regulation and participation by government, conservation, and the accommodation of more complex and diffused policies.

Urban planning probably began in a substantial form during the early twentieth century. It need not be limited to the legislation usually referred to as planning legislation or to the geographic limits of cities; it can include all arrangements made to plan the patterns and contexts of living, including arrangements for planning uses of large regions and the design and location of transportation facilities. Control of use denotes controls imposed to make the environment a decent place to live, and perhaps only the recent designation of the environment as a topic for concern justify separating it from other topics. Some of its components are property rights, particularly rights to control nuisances; public health legislation; and urban planning.

The Control of Violence. One of the basic functions of law is to control anti-social conduct, especially violence. The content and use of the criminal law, including procedure, can suggest much about changing attitudes, and the uses and limits of law to control conduct. One aspect of this large topic that is useful and distinctive is the control of violence, particularly violence on the frontier and violence that was an expression of economic or political conflict. Legal history is not likely to be able to contribute much to the measurement of the extent of the potential and actual violence of this kind, but whatever the extent may have been, some other issues are the effectiveness of the legal controls and the purposes and values that determined assertion of the control. Canada may have experienced more violence of these kinds than the common belief in a comfortable and accommodating society might suggest, and the power of government seems to have been used, often violently and usually effectively, to control threats to the established order. If so, what were the extent and effect of a tension between the reality, and the believed and proclaimed ideals about the society and the uses of law?

The Legal Institutions. The third of the large elements I suggest for legal history is the structures, procedures and functions of the legal institutions. Existing knowledge and habits make it, or at least parts of it, the most comfortable one for lawyers.

The Constitution. The choice of the topics to be included under this title depends greatly upon definitions and purposes. The monarchy, the parliamentary system and legislative supremacy all should be included. Much work about them has already been done, but three appropriate possibilities for legal history are the use of law to express the values and traditions of our forms of government, the uneasy accommodation of the independent administrative agencies and the parliamentary system, and the influence of legislative supremacy, especially in the form articulated by Dicey, on the attitudes of courts and lawyers.

Federalism is the topic about which lawyers have done the most work that might be catalogued as legal history, and it certainly has been considered extensively by other social scientists, but the results make an unfortunate gulf. For example, the decisions of the courts have been thoroughly

analyzed, but the effect of these decisions on the exercise of power and their relation to political developments have not. Nor have the contrasts between the process of executive negotiations and the judicial process, and the effect of executive negotiation on the constitutional functions of the courts.

The Legislatures. The legislatures have been the dominant legal institution, if a comparison of this sweeping nature can be sensibly made. Not much work has been done about the structure, procedures, personnel and functions of the legislatures. All these topics can be included in legal history, but the contribution of lawyers is likely to be limited to the law-making function, and especially the relations of this function to the law-making functions of courts and administrative agencies.

The Courts. Most of the basic outlines of structures, procedures and personnel were settled by the mid-nineteenth century, and expressed a large degree of centralization and professionalization that has only recently been questioned. Some of the topics in the intervening century are the creation of the Supreme Court and the abolition of appeals to the Privy Council; the creation of specialized courts, for example family courts and the Federal court; the struggle, largely unsuccessful, to design efficient and fair procedures for large volumes of litigation; and the selection and lives of judges.

In the mid-nineteenth century the primary function of the courts was the supervision of private ordering, and elaboration and administration of the common law. The shift to ordering by governments and large concentrations of private power has substantially changed this function. Problems about the effect of statutes and the limits of government power have become dominant, and much of the common law has become a source of generalized attitudes for interpretation of statutes, and for governing emerging problems until they are settled by some other process.

The attitudes and values expressed by courts need to be assessed, but the job is complicated by the institutional needs of procedures and continuity. The most useful questions about attitudes in the twentieth century are likely to be about the limits of government power and about economic conflict, especially labour conflict; in the nineteenth century, a useful but more difficult inquiry would be about attitudes towards economic progress.

Our courts have tended to express attitudes and values within narrow limits and through results and technical reasoning, and they have not usually made decisions that have a major impact on society. For example, the cases about religious education in schools and the division of legislative powers during the depression did not settle the issues at stake. Instead, they often seem to have allocated the initiative of processing in some other process. Nor have we used courts much to declare values or to focus and make apparent problems, especially diffused problems that affect otherwise relatively powerless groups, although the litigation about Indian claims is one large and recent exception.

The Administrative Agencies. The vast range of administrative agencies makes the attempt to find general ideas difficult if not futile. The expansion of administrative agencies in Canada during the twentieth century was caused by a shift in our attitudes about the proper functions of government and the institutional limitations of legislatures and courts. For example, in the early twentieth century, legislatures and courts could not, without substantial changes in structures and procedures, have undertaken control of purity of food, regulation of railroad rates, or administration of workmen's compensation.

Four topics are useful. The first is the influences on the form of specific agencies or groups of agencies, for example, the influence of the United States in the development of the economic regulatory agencies; the second is the effect of massive government activity on the individual, particularly the right to participate in making decisions and the creation and protection of the new kinds of stakes in the community; the third is the procedures for making decisions; and the fourth is the techniques and effectiveness of the control of the agencies. All these topics, and particularly the last two, include the relation between the agencies and courts and legislatures.

The Legal Profession. The legal profession must be included among the legal institutions because of its role in the creation and administration of law, and it is composed of five topics. The first is functions; it includes the kinds of jobs lawyers have done, their knowledge, skills and products, their clients, and their effect, especially their effect on the structure and conduct of business and on the relations between

government and the individual. The second is organization; it includes the distribution of lawyers, both geographically, and among government, business, and private practice; the distribution of jobs and clients; and the organization of lawyers into firms. These first two topics also include the existence of competition from non-lawyers and prohibitions against this competition. The third topic is the government of the profession. What have been the attitudes of lawyers and the public towards self-government? What have been the structure, powers, policies and effects of the governing bodies; what have been the means and extent of public accountability; and what has been the actual degree of independence of lawyers in relation to government and large corporate clients? The fourth topic is attitudes and responsibilities about law, the practice of law, and public affairs. What have been the attitudes of lawyers, and the public, towards values expressed in law and change in law; what have been the perceived responsibilities of lawyers towards clients and the public; and what have been the consequences of any gap between attitudes and perceptions, and reality. The fifth topic is legal education and qualification to practice, which is one of the few topics of legal history that has been written about already, even though much remains to be done.

All these themes have been influenced by massive changes that have not been limited to Canada, including technological changes, industrialization, urbanization, interdependence, and changing attitudes towards the individual and government. How much of the legal history of Canada is distinctive, particularly in contrast to England and the United States? Of course, a multitude of particular differences can be collected. Three topics that include larger and more useful differences are unity and diversity, the use of government to accomplish economic objectives, and federalism. Beyond these, I suggest two much more general ways in which Canada has been distinctive. First, we have tended to make less use of law to establish or preserve important values. Of course, our legal records are an immense expression of values, but some are not included that might have been, and, more important, some that are included were not debated and formed through the legal processes or are expressed in obscure or prosaic forms. Second, we have had considerable faith in government, and have granted, or endured without

much protest, substantial powers to regulate our collective and individual affairs.

The Law and the Economy in the Mid-Nineteenth Century

As an example of work that can be done, I offer some preliminary thoughts about law and economic change in the mid-nineteenth century in Ontario. I have chosen the period from 1841 to 1867, from the union of Upper and Lower Canada to confederation, because dates are needed to limit research, and this is a familiar constitutional period that includes legal developments that are unified and important. I have limited my work to Canada West – Ontario – even though it was only a part of a unitary state, because of the differences between the common law and the civil law.

Much happened during this period that shaped the structure and issues of our law and government more than a century afterwards. Responsible government, the difficulties of accommodating the differences between the two cultures, and the emergence of confederation dominated the politics of the times and the writing afterwards. Less dramatic but crucial changes were made in municipal government, and court structure.

In 1841, the economy was dominated by the production of timber and grain, and the transportation system of the St. Lawrence. The timber and grain were produced primarily for export to England, and this market seemed to depend upon the preferential tariffs of the mercantile system. These preferences disappeared during the 1840's, but after a brief slump in the late 1840's, production increased and markets in the United States expanded. Transportation improvements seemed needed to market the Canadian products and to capture the trade of the mid-West. During the 1840's, canals for the St. Lawrence seemed crucial. During the 1850's, technology changed and railroads captured imaginations and pocketbooks. The general transportation objectives remained the same, but were only partly achieved. Canadian products were served, but capture of the trade of the mid-West remained a vision. Financing and control of economic activity was ultimately controlled in distant metropolitan centres, especially London and New York. This control was established primarily through private arrangements, and throughout the period these arrangements became

more complex and tended to allocate larger shares of power in Ontario.

An account of the legal development can be divided into four topics: the market, business organizations, the allocation of the natural resources, and transportation. First, the market. The law gave extensive powers for private ordering. The symbol and the most important expression of these powers was the law of contract. This was its golden age. Its major outlines had been settled by the English courts by the early nineteenth century and have remained settled in substantially the same form. Uncertainties, elaboration and change were small, and most were confined to three topics, consideration, conditions and damages. The essence of contract and the reason for the lack of major changes was its abstractness and generality. It established distant limits and few requirements, and permitted businessmen to make whatever agreements seemed useful. General rules that did not take the peculiar merits of each transaction into account enabled businessmen to plan and rely.

Credit and capital were usually badly needed and scarce. The sources were relatives, friends, merchants, and the financial institutions, especially banks. The usury legislation was substantially repealed during the 1850's, but it was continually debated. The need for capital opposed the immorality of usury, and both were caught up in political struggles more than other legal issues. The major form of credit was negotiable instruments – bills of exchange and promissory notes. Like contracts, the major outlines of the law had been settled by English courts, although the increasing complexity of commercial transactions, difficulty of communications, and transactions with the civil law community seemed to require more adjustment. Again, like contracts, the essence was abstractness and generality, which enabled businessmen to plan and rely.

Lenders wanted security. The simplest and probably most common form was a personal guarantee by a relative or friend of the debtor, given by contract or by becoming an accommodation party to a negotiable instrument. Upon default, guarantors sought technical defences, which were assessed in a multitude of cases. Mortgages were given of land, and bond mortgages were occasionally used in railroad financings. The most interesting security developments were the use of goods that were being purchased or produced as security, especially grain and timber.

During the 1850's legislation established a registry system and priorities for chattel mortgages, and enabled bills of landing and warehouse receipts to be used as security.

The significant forms of business organization were the partnership and the corporation; deeds of settlement and other complex trust arrangements were uncommon and unimportant. Partnerships were commonly used for all business purposes except financial institutions and the construction and operation of public utilities (canals, harbours, bridges, roads, railroads, telegraphs, and gas, light and water services). An accurate count of numbers cannot be made, but doubtless thousands were formed. The law was entirely common law, and it too was well settled. Most of the cases were about internal conflicts and accounting problems after dissolution. Large issues of function or power were never debated in either the courts or the legislative. A limited partnership act was enacted in 1849, but rarely used.

The corporation was used primarily for financial institutions and public utilities, occasionally for manufacturing, and only rarely for other business purposes. About 650 were created, although many of these never became established businesses. At first, individual statutes were enacted for each one. Later, general incorporation statutes permitted creation by registration of documents or by executive act. Most of the work of the courts was within a limited range that included problems about seals, calls on shares, and capacity. In the legislature, corporations were opposed and feared because of their power, although this attitude was confused by an assumption that corporations would naturally tend to become monopolies, and by a failure to distinguish the creation of a corporation from grants of powers that could be given, but need not be. (This attitude may, in retrospect, seem to have been right for the wrong reasons.) During the early part of the period, these attitudes limited the use of corporations to functions that had substantial public utility and that did not threaten to compete with individual businessmen. Limited liability was often debated, and the need for capital was opposed by the morality of individual responsibility, but it was always given. During the late 1850's and early 1860's the public utility characteristic and justification faded and the corporation became available for a wider range of private business purposes. The major outlines for

creation and internal ordering had been established, even though wide-spread use came decades later.

The land was a vast natural resource for settlement, agriculture, timber and minerals. By 1841, much of the land in the south had been granted. Crucial debates and problems had begun and continued until the land fit for settlement was substantially exhausted during the 1860's. The fundamental issues were the kind of a society the land should be used to make, and economic development, social structure, religion and education were all affected. The debate about the terms for grants was about free grants, cash sale, instalment payments and settlement duties, and major administrative problems were squatters, speculation, and the location of boundaries.

Once land was granted, each owner had extensive power to determine its use. The grants were made in fee simple absolute (subject to some reservations of timber and minerals), and the common law and legislation imposed only a few, distant restrictions. The common law gave owners power to impose restrictions and to divide ownership in ways that divided and impaired powers to determine use, but these powers were not often exercised. The power to transfer was equally extensive, and was supplemented by decisions of courts enforcing agreements for sale, and legislation that established a registry system to enable transactions to be made reliable. The right to take timber was usually given by licence to cut, and not a fee simple grant of the land, although much was cut by trespassers, settlers, and pretended settlers. The debates about policy were about revenue for the crown, monopoly, and development. The administrative problems were boundaries, collection of revenue, and accommodation between lumbermen and settlers.

The terms for allocation of the resources were established by statute and regulation, and extensive powers were delegated to the executive to set the terms for both land and timber. The work of the courts was largely interpretation and elaboration. The most important cases involved conflicting transfers by settlers made before and after grant of letters patent, and the nature of the interest of the owner of a licence to cut timber.

The rivers and streams were another important natural resource for water power and transportation of timber. The legal problems were products of conflicting uses: a mill might flood a farm, or impair the power for another mill, and might

impede a timber drive (or, more likely, be damaged or destroyed). The most important cases decided by the courts were about riparian rights (the doctrine of riparian rights was adopted only after an early flirtation with the doctrine of prior acquisition) and navigability, and legislation supplemented the common law about navigability. The results seem to have expressed two policies that were not entirely compatible: to encourage productive activity and to accommodate the conflicting uses.

The struggle to improve transportation facilities was dominated by the railroad boom of the 1850's. The government constructed and operated some of the facilities, primarily timber slides, roads and canals. The remainder, the majority, were undertaken by corporations that were essentially public utilities. The enabling statutes specified the approximate locations or routes, and gave large powers of expropriation. Usually no guarantee was given that competing services would not be created, but some reasonable expectation of protection seems to have been implicit. The statutes usually imposed simple controls over tolls, and standards for construction and operation, but lack of will, and administrative resources and expertise greatly restricted their effect.

The ships and trains presented problems of obligations to the users, and accidents. Obligations to users involved obligations to make services available and, more often and more interesting, liability for delay, loss, or damage to goods. During the 1850's the courts considered problems of the nature and termination of the liability of common carriers. During the 1860's, sweeping standard form exculpatory clauses appeared and were enforced, sadly but firmly, through a combination of freedom of contract and English authority. Accidents were problems of liability and negligence. Much of the law about liability for negligence was made during the nineteenth century, and much of it was made in cases about railroad accidents. Plenty of accidents occurred in Ontario, although most were governed by legislation that specified obligations to fence and imposed liability for failure to comply. In these, cases, through interpretation, and in cases involving fires and accidents to railroad employees, the courts tended to limit the liability of the railroads.

What were the influences that shaped this law? The first two are technology, especially the coming of the railroad, and the physical environment, especially distance and the natural resources. They imposed limits to what was conceivable or apparently possible, and shaped beliefs about what was useful or desirable. These influences were fundamental and pervasive, but did not alone determine the shape and content of the law. The next five influences are beliefs, or values.

The first was a belief in the need and feasibility of economic development, and a belief that law could help achieve it. The second was a belief that development could best be achieved through private initiative, which was expressed, for example, in the extent of the power of private ordering through contract and the power to determine the uses of the land. The third was a corollary or consequence of the second: a belief that each individual should bear the responsibility for his affairs which, was expressed, for example in decisions about parol evidence, disclosure, and negligence. The fourth belief, which was more ambiguous and uneven, was about the extent to which private power should be dispersed; for example, beliefs in a fairly wide dispersal were expressed in debates about corporations, and about land and timber policy. The fifth was a belief that the state should encourage private initiative. Some expressions of this belief are familiar, for example, the efforts to make favourable trading arrangements with England and the United States, the construction and operation of transportation facilities, and the grants of power and funds to the railroads. Another manifestation, which is less familiar but important, is arrangements to facilitate the operation of the market, for example, legislation setting standards for products and decisions about enforcement of contracts.

But an examination of beliefs or values as influences tempts us to exaggerate the effect on law of reason and deliberate effort. This study, and probably any other study of legal history, demonstrates that inertia, habit and ignorance have far greater effect. Beliefs, especially beliefs about the market, were inherited unexpressed and unexamined. Decisions, especially decisions about natural resources, were made and not made without awareness of consequences and alternatives. Responses were made to immediate and sharply-focused needs, and more diffused needs were not perceived. The last influence

on the law is the subtle effects of the legal processes themselves. Two are suggestive. The first is the effect of precedent, and the second is the inadequate or distorted perception of issues, caused, for example, by the rules of pleading and lack of legislative resources.

The courts decided thousands of cases about economic activity. The courts conceived their function to be primarily to settle individual disputes according to legislation or the settled authority of the common law, and secondarily to establish arrangements that would enable businessmen to order their affairs. The scope and obligation to change the common law seemed small, and was usually limited to consideration of particular contexts in the application of general principles, and the use and authority of precedent, especially English precedent, was extensive and strong. The process of common law reasoning was usually an attempt to pursue the logical implications of authority, regardless of the merits of individual disputes, and it was made even more formal and abstract by the forms of action and the rules of pleading. This process often impaired the function of enabling private ordering. The needs and problems of business were not often expressly and extensively considered, but it is in some of these discussions that I find the only potential judicial hero: William Hume Blake, the Chancellor from 1849 to 1862.

The legislature, not the courts, made the major changes in legal policy. The most distinctive feature of the statutes is that they tended to be responses to specific and imminent problems or wants, and were often distorted and limited in their immediate causes. The process that produced them shared this tendancy; the debates were often sharp, but erratic and repetitive, and attempts to gather facts and make comprehensive long-term plans and assessments of consequences and alternatives were rare. The legislature did much copying from England and New York, but more from convenience than felt obligation. The United States had a large influence on the statutes and virtually none on the common law. Both courts and legislature probably expressed public attitudes fairly accurately, and both tended to reflect the attitudes, rather than attempt to make them.

Conclusion

Much was accomplished during the mid-nineteenth century, especially during the decade from 1848 to 1858. But what can be the use of this study or any other study of legal history, apart from the pleasures of doing it? Legal history can not give us any specific lessons about how to manage our affairs. It can give understanding and perspective, especially about the functions and limits of the legal processes.

It pleases our vanity to believe that our times are troubled and important, but even taking this tendency into account, profound changes seem to be occurring. We struggle to establish our beliefs, to comprehend baffling inertia and complexity, and to control our affairs. The challenge of how to govern ourselves seem to be dominant. Much of the struggle is about our legal inheritance, especially the distinction between public and private, the legitmacy of law derived from secular authority and utility, and the form of law based on print, hierarchical delegation, and professionalization. The future will see fundamental changes, but prediction needs a prophet, not a lawyer.