

10-1-1996

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Recommended Citation

J M. Bumsted and Wendy J. Owen, "A Note on the Nineteenth Century Law of Seduction" (1996) 19:2 Dal LJ 411.

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Two Notes on Atlantic Legal History

J. M. Bumsted and
Wendy J. Owen*

A Note on the Nineteenth
Century Law of Seduction

The authors examine Prince Edward Island's Seduction Act of 1876, which departed from the model of seduction legislation of other Canadian provinces. Based on study of the limited surviving court records they note a number of ways in which the tort of seduction operated differently in nineteenth century Prince Edward Island than it did elsewhere.

Les auteurs examinent la Seduction Act de 1867 de l'Île du Prince Édouard qui diffère de la norme législative des autres provinces canadiennes en matière de séduction. Se référant à un nombre limité de dossiers de la cour existants encore aujourd'hui, les auteurs rapportent les moyens selon lesquels le délit de séduction opérait différemment sur l'Île du Prince Édouard qu'ailleurs au Canada.

One of the trickiest parts of Canadian legal history is getting the generalizations right. Nowhere are generalizations more dangerous than those that result from assuming—without positive evidence—that all jurisdictions have handled matters in all eras in the same way or ways. A good example of the problems involved is offered by the tort of seduction. In 1986 Constance Backhouse described the law of seduction of nineteenth century Canada in the *Dalhousie Law Journal*.¹ According to her account, the tort had come to relate almost exclusively to fathers and daughters, with seduction legislation that “provided fathers with direct property interests in their daughters’ chastity, over and above their interest in the loss of services, which could be enforced against seducers who did not marry the young women they impregnated.”²

The action for seduction, Backhouse maintained, was unpopular in Canada with judges, but “hundreds of fathers continued to bring suit,”³ and were often successful to the extent of large financial awards with

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1. C. Backhouse, “The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada” (1986) 10 Dal. L.J. 45 [hereinafter *The Tort of Seduction*]. Backhouse repeats most of the story in her book *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Osgoode Society, 1991), 40–81.

2. Backhouse, *The Tort of Seduction*, *ibid.* at 45.

3. *Ibid.* at 46.

juries “extremely sympathetic to a father’s sense of loss upon the seduction of his daughter.”⁴ She goes on to discuss at length the Upper Canadian *Seduction Act* of 1837,⁵ observing that the Upper Canadian act was replicated in Manitoba and the North-West Territories. No seduction legislation appears to have been passed in Nova Scotia or New Brunswick, so they would have been governed by the common law rather than statute.

That leaves Prince Edward Island. Backhouse does note Prince Edward Island legislation, notably an act of 1852,⁶ which allowed seduction actions to be brought in the name of the woman only. She describes the Island as “the only Canadian jurisdiction to enact such legislation in the nineteenth century,”⁷ adding that its effect was largely nullified by a judicial ruling two years later stating that before a seduced woman could sue in her own name, she would have to provide evidence that “at the time of the seduction, she had a parent, guardian or master who would have been entitled to maintain the action at common law.”⁸ Backhouse finds this judgment “astonishing,”⁹ although it was a common-sense interpretation of the wording of a statute badly drafted. More to the point, however, she overlooks the passage and administration of a Prince Edward Island statute of 1876,¹⁰ which repealed that legislation. This statute bears no resemblance to any of the generalizations about seduction in nineteenth century Canada advanced in Backhouse’s article.

The *Seduction Act* of 1876, as the PEI statute was usually known, not only provided for unmarried mothers to sue the father for damages and/or support of the child in their own names, but also authorized such litigation by special hearings of justices of the peace who were instructed to conduct their hearings “in as private a manner as the circumstances of the case shall admit of.”¹¹ Judgments were not to exceed \$200 and were to be paid within a reasonable time, no more than twelve months from award. Appeal from any order or judgment was to the Island’s Supreme Court.

4. *Ibid.* at 46.

5. *An act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate Children liable for their support*, 7 William IV (1837), c. 8 (U.C.).

6. *An Act to provide a Summary Remedy for Females, in certain Cases of Seduction*, 15 Vict. (1852), c. 23 (P.E.I.).

7. Backhouse, *The Tort of Seduction*, *supra* note 1 at 54.

8. *McInnis v. McCallum* (1854), Peter’s P.E.I. Reports 72 (S.C.).

9. Backhouse, *The Tort of Seduction*, *supra* note 1 at 55.

10. *An Act to continue for certain purposes, the Seduction Act, and to make other provisions in lieu thereof as regards all future actions*, 39 Victoria (1876) c. 4 (P.E.I.) [hereinafter *Seduction Act* of 1876]. S. 1 of the *Seduction Act* of 1876 repealed 21 Victoria (1858) c. 15, which had continued, with some amendments, the original 1852 legislation, *supra* note 6.

11. *Ibid.* s. 4

This Island legislation was at considerable variance with the Upper Canada *Seduction Act*.¹² It not only provided for an unmarried woman to bring the action in her own behalf, through application to the Chief Justice of the Supreme Court or any other Supreme Court justice, but it conceived of damages far beyond the honour of fathers, specifically mentioning the matter of the financial support of the child. Moreover, it called for private hearings, rather than public trial by jury. Finally, it limited liability to \$200, a considerable amount of money in the late nineteenth century but probably not beyond the capacity to pay of most fathers. Although the Island passed no other family law legislation during the nineteenth century, it is possible that the act was intended to fill a gap in the operation of the poor law or as a particular piece of necessary family law. In either case, the legislation was quite at variance with the Upper Canadian approach. But extensive research in newspapers and legislative records has turned up no further information about the act or its implementation. In any event, about the only feature the Prince Edward Island *Seduction Act* of 1876 shared with the Upper Canadian *Seduction Act* of 1837 is that both acts were passed by their respective legislatures without debate or explanation. We must take care not to view the *Seduction Act* of 1876 as progressive legislation. It appears to have been designed chiefly to implement the Island's sense that such matters should be dealt with as discreetly as possible with a minimum of publicity. The community was not keen to have its dirty linen washed in public. Nevertheless, it renders inaccurate Backhouse's generalizations about the Canadian law of seduction.

There being no surviving magistrates' court records for the Island, it is not surprising that there are no records for the ad hoc hearings provided for by the seduction statute. On the other hand, in the Supreme Court records there are files of the affidavits that began the seduction process. These files are not complete, since whole years of documents are missing, and other justices may have received affidavits in addition to those who saved them. They offer no evidence about the judicial result at the end of the process commenced by the affidavit. There is some evidence that the petitioners did receive awards, however. The volume of ongoing affidavits over the years would not likely have been maintained if at least some did not meet with success. Moreover, subsequent legislation attempted to deal with evasion of awards to mothers.

12. *Supra* note 5.

Through 1900 the number of plaintiffs involved by years is as follows:

1876	18	
1877	17	1892	14
1878	15	1893	12
1879	10	1894	20
....		1895	16
1884	20	1896	24
1885	19	1897	17
1886	14	1898	27
1887	10	1899	23
1888	1	1900	9

After 1888, the forms were no longer signed by the plaintiff, but become merely court records of the action kept by a clerk. The number of affidavits declined precipitously after the turn of the century, but the records continue until 1922. Nevertheless, Prince Edward Island between 1876 and 1900 dealt judicially with nearly 300 seduction cases for which initial affidavits survive, and probably substantially more. Since Backhouse found only 152 reported cases for nineteenth century Canada and Ontario (excluding Prince Edward Island after 1876), it would appear that the Prince Edward Island approach brought forward far more females than did the adversarial system in effect elsewhere in Canada. This should surprise nobody. While very limited evidence, the available documents, particularly those between 1876 and 1888, do enable us to offer some comments about seduction in Prince Edward Island.

For those years 1876–1900 in which records appear to be fairly complete, there were, on average, seventeen requests per annum for a hearing. The requests were generated in a variety of ways—via local justice of the peace, via attorney, via father, directly from the petitioner—and before 1888 were accompanied by an affidavit. The act spoke of damages and financial support for the child, and most affidavits talk about financial responsibility rather than compensation. Most insist that the “criminal connection” was with the named father and no other. Some claim that the father might disappear were he not placed in custody and put under bail. Several note that he had only just returned to the Island, having left it when word of the pregnancy was received. All affidavits before 1888 list the name of the father and his place of residence, while a few list his occupation or standing in the community. A few specify where the seduction took place (aboard a ferry boat, at her master’s house, at her father’s house), and a few claim seduction under promise of marriage. One affidavit claimed seduction under repeated promises of marriage, with this father the only one documented as having willingly

paid anything (\$10.00) since the birth of the child. Most actions followed the birth, although a handful were begun while the plaintiff was still pregnant. In one case in 1888, a justice of the peace wrote that he had found out that one potential plaintiff's husband was still living in the United States. The defendant was her husband's brother.

Could a married woman take action under the *Seduction Act* of 1876? The answer presumably was no, since there is no further action recorded. There was no standard form for the application. One plaintiff wanted "some little amends for the injury that has been done to me," while another, saying she was in a "family way," added defiantly that the named defendant was "the rightful father of her Child and no one else living in this world." Only one plaintiff listed her age—it was twenty-two. In some cases the accompanying documents discuss the names of the justices to which the case would be sent. Some correspondents in effect nominated people, usually the justices living closest to the plaintiff.

Some information can be gleaned about the plaintiffs from the documents. Their stated residences were widely scattered across the island, in both isolated rural and well-populated surroundings. Of the 100 affidavits surviving between 1876 and 1885, thirty-seven (or thirty-seven percent) were signed with a mark. A fair number of the other signatures were obviously laboriously written. Few of the women involved, even those who began an action around the census dates, show up in the 1881 or 1891 nominal census, suggesting that they came mainly from the margins of society. Little else can be positively asserted. Although some of the plaintiffs appear to have come from the respectable middle classes, most appear to have been either working or serving girls. More than half of the alleged fathers lived in a different place from the plaintiff, and most of the occupations, when given, suggest that the putative fathers had some social standing. Only a handful of fathers of plaintiffs are anywhere in view. Some plaintiffs are described as the daughter of _____, but this was not universal and not even frequent; it appears to be more for identification than anything else.

Despite the limitation of liability to \$200, there was obviously in later years some refusal of defendants to pay. In 1895 a statute¹³ precluded judgment debtors in seduction suits from claiming statutory protection from imprisonment for debt, though it restored that protection once the judgment debtor had spent nine months in gaol.

We would not argue that the Island experience after 1876 utterly changes our overall understanding of the Canadian tort of seduction,

13. *An Act to amend Thirty-ninth Victoria, Chapter Four, and Fortieth Victoria, Chapter Six, respecting Seduction*, 58 Victoria (1895) c. 5 (P.E.I.).

although it does remind us that all provinces need be accounted for before generalizations are advanced. There was an alternative Canadian model of seduction legislation to the Upper Canadian one, and it produced considerably different results.