



LAWYERS AND
LEGAL CULTURE IN
BRITISH NORTH AMERICA

Beamish Murdoch of Halifax

PHILIP GIRARD

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Foreword

THE OSGOODE SOCIETY FOR CANADIAN LEGAL HISTORY

Philip Girard is well known to Osgoode Society readers as the author of an award-winning biography of Bora Laskin. Girard's *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* is much more than a biography of Nova Scotia's best-known nineteenth-century lawyer and legal author. It is also a first-class account of an everyday lawyer's practice in the first half of the nineteenth century and has a great deal to say about the British North American legal profession and legal culture. Girard places Murdoch and the legal profession in one colony in the broader context of what we know about the international history of the legal profession at the time, and he also draws interesting links between Murdoch's legal practice and legal ideas and the politics of the period, especially arguments over responsible government.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, formerly attorney general for Ontario and chief justice of the province, and officials of the Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. It has published eighty-four books on the courts, the judiciary, and the legal profession, as well

as on the history of crime and punishment, women and law, law and economy, the legal treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

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Acknowledgments

This book began as a doctoral thesis in history at Dalhousie University, and I would like to thank my supervisor, David Sutherland, and committee members Michael Cross and Judith Fingard for their advice and critique along the way. After its completion in 1998, I decided to put it away for a while – a decade, as it turned out – while I pursued other projects. When I returned to it in 2008, it was clear that there had to be at least one new chapter (chapter eight), significant revisions to the others, and a completely new introduction and conclusion. In that process I have accumulated more debts, especially to research assistants Jeffrey Haylock and Daniel Huffaker and to Jim Phillips for encouragement and feedback throughout the rewriting process. Conversations with Richard Devlin about contemporary issues facing the legal profession have also stimulated my thinking.

The librarians and staff at the Sir James Dunn Law Library at the Schulich School of Law and the Killam Library at Dalhousie have been unfailingly helpful, as have the archivists and staff at the Public Archives of Nova Scotia. I am grateful for the insightful comments of the Osgoode Society's anonymous reviewers and for funding from the Social Sciences and Humanities Research Council of Canada. The Centre for Criminology and Sociolegal Studies at the University of Toronto provided a congenial home where I completed the final revisions to the manuscript while on sabbatical leave. Len Husband and Curtis Fahy at the University of Toronto Press were a pleasure to work with, as was Marilyn MacFarlane at the Osgoode Society.

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LAWYERS AND LEGAL CULTURE IN
BRITISH NORTH AMERICA

Beamish Murdoch of Halifax

Introduction

Beamish Murdoch (1800–76) was, in the economical language of the *Dictionary of Canadian Biography*, a Nova Scotian ‘writer, lawyer, and politician.’¹ By examining and contextualizing his life and career, this book aims to explore the role of lawyers and the development of legal culture in a particular settler society, British North America, from roughly 1800 to 1867.

The reader may well ask whether we need more work on pre-Confederation lawyers in British North America. There are excellent studies of Ontario lawyers and of the Law Society of Upper Canada, of early Montreal law firms, and of lawyers and legal education in New Brunswick and Quebec, in addition to work placing lawyers in the larger context of their regional legal cultures.² We have learned much about the contours of old-style gentlemanly professionalism and its adaptation to an early colonial society with a more fluid social structure, more widespread landholding, and a more scattered population than the mother country. We know about the importance of the education and socialization of lawyers through long apprenticeships, eventually leading to university legal education beginning with McGill University in 1848. We have studied the drive of lawyers to organize themselves in ways distinct from both England and the United States, first with the statutory creation of the Law Society of Upper Canada in 1797, then with similar bodies in Quebec in the 1840s, and with a mix of voluntary associations and statutory measures in the Maritimes before they too cre-

ated robust statutory bodies in the post-Confederation period to which all lawyers had to belong. We are familiar with lawyers as ideological entrepreneurs, both upholding the 'mixed and balanced' constitution present in each of the colonies and developing arguments against it during the campaign for responsible government.³ We are interested in the relationship between lawyers and business and lawyers and the state, though, aside from the work of G. Blaine Baker, we do not yet know much about this in the pre-Confederation period.⁴

We could of course stand to learn more about all these things, but this book seeks to do something different. It aims, first, to examine in detail the professional life of a single nineteenth-century lawyer, thus permitting a new, more grass-roots perspective on the work and role of colonial lawyers. Second, it posits that nineteenth-century lawyers shared a British North American experience. While the empirical focus of the book is Nova Scotia, the existing literature from the other colonies is regularly invoked to show how, well before Confederation, and in spite of minimal formal, personal, or commercial contacts between the Maritimes and Upper and Lower Canada, British North American lawyers shared a similar *mentalité*, made similar choices about what lawyers should or should not do, and played similar roles in their communities and their societies. Comparisons with lawyers in England and the United States will further highlight this account of the British North American lawyer. These will be pursued especially in chapter 4 and in the Conclusion, where I analyse the Canadian example with the aid of Michael Burrage's work on the impact of national revolutions on the legal profession.⁵

I approach my subject through the lens of cultural history. As described by David Sugarman and Wesley Pue, one of the main preoccupations of this perspective is 'to describe and analyse the production, transmission and reception of the ideas and practices of lawyers in society over time: of how differing fractions within and beyond the legal community consume the practices and ideas of lawyers and their larger significance ... A cultural approach to lawyers in history would also critically describe and assess the role of lawyers as potentially important actors in the complex process by which notions of national distinctiveness and personal identity were imaginatively constructed.'⁶ But a legal-cultural approach is not restricted to the study of ideas, as Sugarman and Pue make clear: 'What lawyers did, how they earned their bread and butter, their practices and ideas, how they dealt with clients ... the reputation of lawyers, and the extent to which there was access

to legal advice and assistance (as well as alternatives to lawyers and litigation)' are also essential parts of the enterprise.⁷

Nor is legal culture restricted to legal institutions or to ideas and practices within the legal profession. Lawrence Friedman has described legal culture as 'ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds,'⁸ and, even though the concept has been criticized, it remains an important tool in socio-legal and legal-historical work.⁹ Legal culture as used in this book follows the further development of Friedman's idea by Michael Grossberg and Ann Fidler as well as Sugarman and Pue. Legal culture should be understood as having a lived or behavioural component as well as an intellectual one, and I follow Grossberg in understanding legal culture as 'an arena of conflict occupied by a myriad of sub-cultures capable of influencing law, and in turn, being influenced by it.'¹⁰ In other words, legal culture is not monolithic in any given society and it is always dynamic. Legal culture in British North America, as we shall see, was a terrain on which a variety of subcultures interacted within the matrix of an inherited tradition of English common law.

An advantage of the cultural approach is its ability to straddle disciplinary frontiers that often isolate bodies of scholarship from one another. Ideally, this book will appeal not just to legal historians but to social, economic, intellectual, political, and urban historians, comparative law scholars, scholars of the contemporary legal profession, and historically oriented sociologists. Lawyers are specialists in the law, but law touches on virtually every aspect of life; in the colonial period, this was especially so, since specialization within legal practice was almost unknown. The myriad involvements of colonial lawyers thus call for an open-ended historical approach that triangulates what lawyers did, what they said and thought, and what others said about them.

This examination of the legal career of Halifax native Beamish Murdoch will focus on three main themes: the lawyer as professional, as contributor to intellectual and cultural life, and as economic actor. Murdoch's life, his writings, and the surviving sources from his law practice permit a more detailed analysis of these themes than would be possible for most other lawyers of this period. Although biographical in form, this is not a traditional biography. It does not examine to any great extent the psychological development of its subject, and it is more a 'career of' Beamish Murdoch than a 'life.' The book proceeds mostly in chronological sequence (chapters 2, 3, 5, 6, and 8), but chapters 7 and

9 are thematic accounts covering Murdoch's political and cultural contributions respectively, while chapter 4 departs from the biographical format to consider trends in the growth, mobility, and organization of the Nova Scotia bar to which Murdoch belonged.

One feature that makes lawyers difficult to study is the seemingly protean nature of their involvements. In addition to mastering their chosen profession, lawyers often played important roles in politics and contributed to the development of political ideas, worked as officeholders or civil servants, served as leaders of voluntary societies and reform movements, appeared in religious controversies, contributed to literature and journalism, acted as spokespersons for various economic interests, and became directly involved in business enterprises outside their law practices. Not all lawyers did all these things, but a surprising number of colonial lawyers functioned in many of these capacities over the course of a lifetime. Beamish Murdoch, for example, participated in all of the above activities except the last, and his identity as a professional lawyer – 'one of the fraternity,' in the contemporary phrase – both subsumed and was a function of all of them.

It has been suggested in the context of the early-twentieth-century Montreal bar that the wide range of lawyers' non-legal activities was an important factor in defining their professional identity.¹¹ One of the goals of this study is to examine the life of a lawyer who came before the public eye in many capacities, but not primarily as a politician or a judge, in order to better understand the synergies created by these many roles. In spite of the seeming prevalence of anti-lawyer sentiment in British North America, the colonial population needed and expected lawyers to assume a variety of leadership roles, and not just those in the political or judicial sphere. In the colonial period, the role of lawyer included ideals of statesmanship, scholarship, and gentlemanly behaviour. At some level most colonial lawyers tried to include all three as part of their professional 'image.' This theme is integrated into the entire book, although it features most prominently in chapters 3, 6, 8, and 9. The formative influence of his Anglo-Irish Uniacke patrons on the young Murdoch is explored in chapter 3. Murdoch's political ideas as an opponent of responsible government are explored in chapter 7. The fact that his stance would appear to have been contrary to his material interests directs us to the role of ideas in political debate, and more generally in colonial society as a whole. It is argued that Murdoch's aversion to political reform was rooted in his convictions about the transcendent rightness of traditional British ideas about the constitu-

tion, and his belief that civic virtue could never flourish under a party system. Yet Murdoch adapted to the new order in the urban sphere by serving as recorder of the city of Halifax from 1850 to 1860 (see chapter 8), when city politics were arguably more democratic and responsive than provincial politics; and in his *History of Nova-Scotia, or Acadie*, written in the 1860s, he effectively recanted his earlier views and came to accept not just the legitimacy but the desirability of popular sovereignty as the fundamental basis of the political order.

Chapter 9 is a study of Murdoch's contribution to literature, legal letters, and provincial history. His four-volume *Epitome of the Laws of Nova-Scotia* (1832–3), described by David Bell as 'the apogee for the whole nineteenth century [of] lawyerly literary achievement in the Maritimes,'¹² provides a uniquely comprehensive overview of the substantive law, legal institutions, and legal culture of the colonial legal order on the eve of the achievement of responsible government.¹³ In the days before law reporting and legal periodicals, both of which effectively began in British North America only in the 1850s, uncovering evidence of how lawyers thought about their profession and about the law is a difficult task. They accepted the law as a kind of cultural given, upon which it was not necessary to elaborate. When rhetorical emphasis was required, as in legislative debates, lawyers' views tended to be hidden behind stock phrases such as 'the rights of Englishmen' and 'British justice.'¹⁴ It is mainly in private papers that one gets the occasional glimpse of their opinions on these subjects. The *Epitome*, as a statement of one lawyer's reflections on the organization of the substantive law, the relationship of colonial law to English law, the position of indigenous peoples, and many other topics, is thus a document of some significance.

Uniting all aspects of Murdoch's cultural endeavours were two principal aims: his concern with 'improvement' and his desire to delineate a Nova Scotian identity. For Murdoch, the former meant both self-improvement through constant self-education and self-discipline, and self-exertion in concert with others to improve one's society.¹⁵ Through his journalism, literary efforts, political contributions at the provincial and city level, law-reform activities, leadership of temperance societies, and involvement in philanthropic activities and voluntary associations, Murdoch was a veritable whirlwind of improving activity, unusual perhaps in its breadth and assiduity among the British North American lawyers of his day, but not in its basic thrust.

With regard to his second aim, Murdoch's attempt in the *Epitome* to uncover a Nova Scotian identity secreted in the interstices of the colo-

ny's laws and legal institutions 'ranks with Judge Haliburton's literary effusions,' according to one commentator, 'as impressive evidence of emergent self-confidence in the region.'¹⁶ It is worth adding that Murdoch's views on the Nova Scotian identity as expressed in the *Epitome* are much fresher and more nuanced than those that can be inferred from his *History of Nova-Scotia, or Acadie*, published over thirty years later. And even though Murdoch was concerned only with the question of a Nova Scotian identity, his description of provincial law as 'simple, elegant, and free' would probably have struck a chord in the other British North American colonies, even in Quebec after the mid-century transformations leading to the abolition of seigneurial tenure (1854) and the codification of private law (1866).¹⁷ In his redrafting of the charter of the city of Halifax in the 1850s, Murdoch tried to practise what he had preached in the 1830s, as will be seen in chapter 8.

The historical value of the *Epitome* would be much lessened if its author had been a theoretical lawyer with limited knowledge of the law's practical side. On the contrary, he was a typical lawyer of his day, neither the most nor the least successful of his peers. While he was eventually recognized as a leader of the bar, Murdoch's account books reveal the painstaking process of building up a clientele as a sole practitioner, the long steady climb to financial independence for those young entrants of the 1820s and 1830s who had no ready-made network of business contacts through kin or social position, and the final solidification of a reputation and a reasonably lucrative practice by the 1840s.

The primary sources documenting Murdoch's professional career are, while not unique, certainly far from common for this early period, and they are supplemented by the legal papers and/or correspondence of his Nova Scotian contemporaries William Young (1799–1887), Harry King (1807–65), and William Blowers Bliss (1795–1874).¹⁸ Murdoch's papers include the commonplace book he kept during his apprenticeship from 1814 to 1820, letter books for the 1820s, and account books from the 1820s to 1850s. Chapters 5 and 6 use these sources to develop the third theme of this study, the lawyer as economic actor, by means of a detailed analysis of the growth of Murdoch's clientele (both numerically and in terms of gender and social status), the changing variety of services he provided, and his professional income over the first two decades of his professional career. The prevalence of 'small' clients, mainly artisans and small tradesmen and their widows, in the early years of Murdoch's career, and their continuing presence thereafter, offers a fuller picture of the role of lawyers in their communities than has

hitherto been available. Lawyers provided a range of services to all but the very poor and the lowest echelon of day labourers, not just to the amply propertied.

Murdoch had very few corporate clients and, outside the rapidly growing centres of Toronto and Montreal, neither did many other pre-Confederation British North American lawyers. Important work has been done, especially by G. Blaine Baker, on the role of a small group of Montreal lawyers who played an active role in the emergence of early transportation, banking, and manufacturing companies in Quebec in the 1830s–1860s.¹⁹ In the generation after Murdoch's death, Halifax lawyers would become active in the creation and promotion of large financial corporations. But in the period covered in this book, virtually all of the hundreds of lawyers in British North America advised individuals rather than business corporations, and they did so as sole practitioners or in two-man partnerships rather than as members of law firms.

The career of a single lawyer in any historical period needs to be assessed with reference to the activities of his or her peers. Thus, the lens broadens in chapter 4 to examine trends in the legal profession at large, quantitative, geographic, and organizational. First I provide a detailed quantitative study of lawyers in nineteenth-century Nova Scotia, with particular reference to the first half of the century and to lawyerly mobility. During the second quarter of the century, the bar moved beyond its urban base in Halifax and spread out to virtually every settlement of any size in the province. It is generally known that these two decades witnessed an exponential increase in the numbers of lawyers and in their geographic mobility, but there has been no detailed study of the latter phenomenon.²⁰ It will be argued that the blanketing of the British North American countryside with lawyers provides important evidence of the economic role of lawyers and of their integration within colonial society. There follows a study of how Nova Scotia lawyers tried to organize themselves through the creation of a voluntary society, set within the context of developments elsewhere in British North America and the United States. Analysis of these collective actions by lawyers complements the more individualistic focus of the main narrative, and allows for some generalizations about lawyers and the legal profession in Nova Scotia and British North America.

This portrait of a nineteenth-century lawyer and his ambient legal culture paints a less colourful picture than the bold tones found in the anti-lawyer polemics (and some histories) of the colonial period, and a