

A Trying Question: The Jury in Nineteenth-Century Canada By **R. Blake Brown**

Lori Chambers

Volume 102, numéro 2, fall 2010

URI : <https://id.erudit.org/iderudit/1065585ar>

DOI : <https://doi.org/10.7202/1065585ar>

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Éditeur(s)

The Ontario Historical Society

ISSN

0030-2953 (imprimé)

2371-4654 (numérique)

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Citer ce compte rendu

Chambers, L. (2010). Compte rendu de [*A Trying Question: The Jury in Nineteenth-Century Canada* By R. Blake Brown]. *Ontario History*, 102(2), 239–241. <https://doi.org/10.7202/1065585ar>

Book Reviews

Autumn 2010

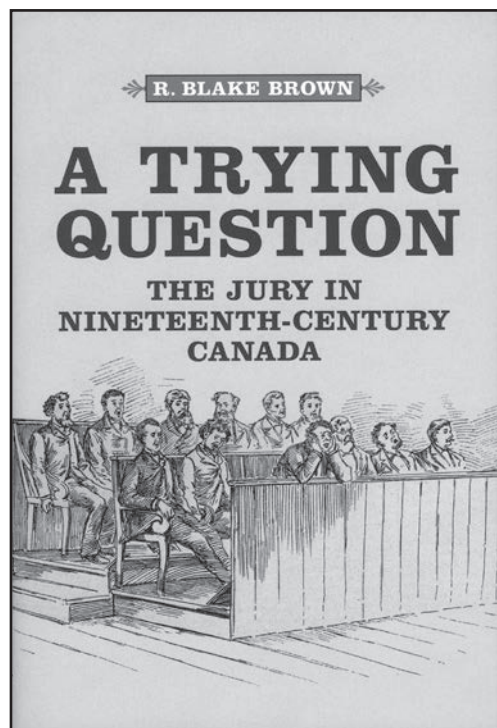
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A Trying Question: The Jury in Nineteenth-Century Canada

By R. Blake Brown

Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2009. xiii + 335 pages. \$65.00 hardcover. ISBN 978-1-4426-4038-2 (www.utppublishing.com)

The jury remains a central symbol of justice and, writes Brown, “holds a cherished place in the legal imagination of many Canadians.” (p. 3) Juries, however, try only a small minority of modern cases in Canada, an apparent contradiction that has its origins in the nineteenth century. R. Blake Brown’s impressive monograph, *A Trying Question: The Jury in Nineteenth-Century Canada*, provides a detailed and perceptive explanation of the intellectual, geographical and political reasons for the decline of the jury. The jury came to British North America “as a key plank of English legal culture” (p. 7) but local conditions created challenges from early in the history of the colonies. Brown explores the decline of the jury in



two jurisdictions—Nova Scotia and Upper Canada/Ontario—as test cases to explore the ways in which geography, infrastructure and development, climate, politics, economics and immigration impacted the

history of the jury.

Brown divides his monograph into three parts that are broadly chronological. First he explores juror apathy and allegations of jury packing prior to 1850, before responsible government had been established in either Upper Canada or Nova Scotia. He illustrates convincingly that jurors complained of the time and travel spent meeting their responsibilities, plus the out-of-pocket expenses. He finds that these problems were particularly acute in Nova Scotia because of the distance between settlements and the chronic poor state of the roads. They were even worse than those in Upper Canada! In the tension-filled era preceding the achievement of responsible government, moreover, allegations of packed juries “flew furiously” (p. 16) in newspapers in both jurisdictions and undermined the image of law as just and neutral. In response to these concerns, Upper Canada reformed the process of jury selection, reducing discretion and imposing safeguards to ensure wide political representation, but by so doing produced new problems of complexity and expense. In Nova Scotia, such reform came more slowly, the manner of selecting jurors continuing to be highly political well into the era of responsible government.

In the second part of *A Trying Question* Brown explores the impact of responsible government on the jury as an institution, and on public ideas about jurors themselves. Brown writes, “jurors were perceived to lack the competence to evaluate evidence, particularly in complex cases.” (p. 171) He argues that reforms in jury selection in Upper Canada continued to arouse complaints about costs and inconvenience. In Nova Scotia, a series of highly politicized cases in which jury selection was contentious for party and ethnic reasons further undermined citizens’ faith in juries.

Ironically, moreover, in both colonies the achievement of responsible government undercut the perceived need for the jury; if the state was not an oppressive institution, and instead represented the interests and values of the majority, the protection of the individual by a jury of his peers was no longer necessary. Liberal thought, rising to prominence at the middle of the nineteenth century, threatened the very existence of the jury.

Finally, Brown turns his attention to the fate of the jury in post-Confederation Canada. Complaints about the cost of the jury system remained endemic, and he records that citizens were as disinclined as ever to serve. Jurors were perceived as “irrational decision makers” (p. 173) and, particularly in Ontario, were thought to be a threat to economic expansion because they were overly keen to punish corporations in the era of emerging monopoly capitalism. Fear that the jury could be either prejudiced or simply inadequately educated for the task at hand was offset by a growing faith in the general population that judges and lawyers were impartial professionals (a view certainly encouraged by lawyers themselves). Brown sees the decline of the jury as intimately linked to the rise of law as a self-regulating and powerful profession. In Nova Scotia, limits were placed on the use of trial juries; in Ontario, legislation eliminated the jury in all but a minority of trials.

Brown concludes that, despite differences between Nova Scotia and Upper Canada/Ontario, similar factors led to the decay of the jury system in both provinces. He makes four points. Jury service was simply too personally burdensome for too many people and it became increasingly difficult to empanel juries. Citizens believed that elected legislatures reduced the likelihood of government tyranny; the grand jury in

local administration—“cloistered and secretive” (p. 219)—could not withstand the appeal of responsible government. Thirdly, newspaper evidence convincingly demonstrates that as juries became more expensive they became increasingly unpopular. And finally, citizens believed that legally-trained legislators were well suited to introducing liberal principles that reflected the tenor of the late Victorian era. Brown weaves these themes together in a seamless narrative that is as entertaining as

it is informative. The test case jurisdictions, Nova Scotia and Upper Canada/Ontario, reflect both problems and ideas linked to local conditions, and broad themes that should be further explored in comparison with other regions, colonies and provinces. *A Trying Question* should be required reading for anyone interested in the historical administration of justice.

Lori Chambers
Lakehead University

Mohawks on the Nile: Natives among the Canadian Voyageurs in Egypt 1884-1885

By Carl Benn

Toronto: Dundurn Press, 2009. 280 pages. \$40.00 hardcover.
ISBN 978-1-55002-867-6 (www.dundurn.com)

Trapped in Khartoum and besieged by Muslim forces, Major-General Charles Gordon sent a desperate message to the British army requesting aid. The only route to Sudan was south along the Nile River, a trip that required an incredible expenditure of men, supplies and money. In the end it was all for naught: Gordon was killed, the Muslims captured Khartoum, and the British Empire recorded another story of English bravery.

Carl Benn has found an overlooked element of this story: the British army's deliberate recruitment of Mohawk boatmen from several Iroquois communities,

engaged to navigate the expedition southward up the Nile. Benn's purpose for writing this story is twofold. First, he wished to show that the Mohawks' contribution fell within norms of Iroquois “cultural practices, work patterns, and alliance relationships.” (p. 10) Secondly, Benn contends that aboriginal history, if it is to be comprehensive, “ought to be understood within broader settings beyond the narrower realms that tend to structure scholarly inquiry about the First Nations.” (p. 17)

Mohawks on the Nile is a bit disappointing at first, but more satisfying in its final chapters. The first three chapters recount the Mohawk



MOHAWKS on the Nile

*Natives Among the
Canadian Voyageurs in Egypt
1884-1885*

CARL BENN