PROFESSOR FORCESE: Welcome back. In this podcast I speak to Professor Constance Backhouse about the importance of legal history in understanding Canadian law. I began by asking Professor Backhouse to introduce herself.

PROFESSOR BACKHOUSE: Well, I’m Constance Backhouse, I’ve been teaching for decades, but at the University of Ottawa only since the year 2000 and I teach in first year a thematic course on the introduction to Canadian legal history. I teach an upper year course on legal history and I teach a number of year feminist law courses both on campus and in an exchange format with the University of Puerto Rico in the exotic January term where the students get to spend two weeks down on the beach studying feminist legal principles with Puerto Rican students in the sun.

PROFESSOR FORCESE: That’s great. So youre first year course on legal history, what’s your principal preoccupation?

PROFESSOR BACKHOUSE: Well, all law is really history in the sense that legislation was passed not in the present but in the past, right? And we’re looking at statutes that were generated by public need (in theory) by legislators who passed statutes that form one base for our law and then there were disputes where parties had a disagreement about what the right answer was to a legal issue and they go to court. And then a judge issues a decision which sets a framework that we call common law decisions. But that’s all in the past too. And then they refer to previous common law decisions when they’re trying to make their mind up about current disputes.

Canadian law is history. What legal historians do is probe more deeply into the history to try to figure out why it happened the way it did, what were the driving factors that caused legislators to pass statutes, that caused judges to rule the way that they did, and it gives a complexity to what the students will be studying in first year, which is primarily legislation and cases, but it’s also a whole lot of fun because it brings the people back into law. And so you get to find out more about who they parties were, who was the plaintiff who was upset, who was the defendant who was complained against? You get to find out who the lawyers were and what their background was and who the judges were and what their background was and you try to make sense, and then you can follow all these old newspaper accounts where they’re trying to make sense of what was happening at the time. And you put it all back together in a far more detailed narrative about a case that makes students understand it much more fully. And it’s also lots more fun than just reading a decision, which is kind of the graveyard of the issues that spawned that spawned the disputes.

PROFESSOR FORCESE: One of my favourite quotes from Oliver Wendell Holmes, the former US Supreme Court Justice is that “the life of the law is experience, not logic” and we tend to be guilty in the way we teach law of teaching it almost as though it’s an end product that was inevitable and to lose some of the context. And if you’re a law student coming into law school you may be tempted to arrive at a similar conclusion. Is that notion that the law is dynamic, very historical…Is that particularly the case in a discipline like Common Law?

PROFESSOR BACKHOUSE: I think so. I also think that we’ve inherited this notion that there are overarching principles of law. One can make sense of this. That all came out of Harvard also where Holmes was for awhile in the late 19th century, where Langdell, who was the Dean, believed that what the legal profession needed to do was to become like science, because science was all the rage, and so if we could just convince lawyers and judges and citizens that law had a system to it, it was understandable in principle, that that would make us more prestigious, more powerful. And surprisingly that notion that law is principled and knowable through logic and rational analysis, that’s still with us and that still forms the basis for much of how we teach in Canadian law schools.

PROFESSOR FORCESE: Are there particular points in speaking generically about Common Law history and the inheritance of Common Law from the UK, are there particular points in historical time that you consider pivotal or very important as a legal historian in understanding the way our legal system operates?

PROFESSOR BACKHOUSE: No. Easy answer. I probe under the surface of decisions and statutes for unlikely glimpses of people who were trying to change the law, people who were resisting law that we now see was very unfair, people who were getting smashed up via unfair law. I look for not what we would now see as pivotal moments, most of which go to the victors of the current system. But I look for the small guys who resisted oppression and were seeking justice and I find their voices that inspire me and a lot of people around me to keep fighting to create a fairer system of law.

PROFESSOR FORCESE: Presumably some of those victims have had a discernible and important impact on the shape of the law. Can you think of examples from your own research of circumstances where the victims ended up having such an important impact that it continues to resonate?

PROFESSOR BACKHOUSE: Yes. There was a woman was a farmer in Alberta. And she did not only all of the normal work that a farmer who’s a woman does in the house, which is considerable, but she also really engaged because her husband was often away, in ranching and she was out there doing all of the kind of “manly” things that we associate with farming. And her husband was violent and nasty and eventually she sought a divorce and the ranch was in his name, which was very common historically. She had no title to any of the valuable property in the family and he argued it was all his. And it went all the way up to the Supreme Court of Canada where, despite the evidence that was produced that this farm woman had actually done really every single thing her husband had done to create the wealth in that property of the farm over decades of hard work, the Supreme Court said “well, we’re sorry. The title is in his name. The farm goes to him; she doesn’t get it.”

And that loss – and that was a huge loss and it was in the early 1970s – such a loss that the growing women’s movement was actually pumped up by it and across Canada there were outraged meetings in church basements and community halls, and women everywhere from farm leagues all the way through to the urban regions of Canada said “this is a travesty, an outrage” and consequently new legislation was passed in virtually every province in Canada within several years to transform that so that could never happen again. And we also hold it up as an example of a very good loss in law. Had she won, I bet nothing would have moved systemically quite so quickly as it did with this massive loss that was really…The judges made a decision that was out of sync with the times. They were wrong in that result and there was just a basically revolution occurred and law changed. Irene Murdoch. She deserves to have buildings named after her and all kinds of recognition for the fact that it was her case that spawned the change.

PROFESSOR FORCESE: So that’s an instance where in the Common Law system, it wasn’t responsive to changing social mores and expectations and the response came through the legislature. Are there circumstances where the legislature is out of step and the correction comes from the judicial system?

PROFESSOR BACKHOUSE: Yes. Abortion is a very good example of that. Abortion was extremely difficult to obtain and there was legislation in our criminal code that made abortion criminal unless it was a procedure that had been approved by a large committee of doctors in an approved hospital and in essence the hospitals were not setting up committees and the doctors were not approving applications and there was a delay of months and months while they tried to figure out what to do with the applications.

The law was not functioning and it was such a nasty and emotional debate, the whole question of abortion, that the legislators were really unable to come to an agreement to move forward collectively on reform of the law. And with the *Charter* into force in the mid-1980s on the equality law, finally we had the first woman on the Supreme Court of Canada, Madame Justice Bertha Wilson. She wrote the majority decision that said the legislation contravenes the fairness of equality rights for women. And so in one fell swoop it was the Supreme Court of Canada that made that statute inoperative. It was a direction that we might have got to legislatively many decades later, but the fact that we still haven’t been able to deal with it in Parliament suggests that it would have taken a great deal of time. So there’s an example where law moved forward because of a judge’s decision.

PROFESSOR FORCESE: As a student and scholar of legal history, have you been able to discern general patterns about using law to promote social change?

PROFESSOR BACKHOUSE: Well that’s all I study. One could study the law of railroads and the law of the sea, bankruptcy – I just met a legal historian who studies the law of bankruptcy historically – but I go looking for examples of sexism and racism and nastiness to poor people, nastiness to gays and lesbians. I hunt down what law did to contribute to those kinds of discrimination patterns. And are there patterns one discerns? I guess the most exhilarating for me is that wherever there is oppression, there will be resistance. And sometimes that resistance comes in the form of a legal challenge. Sometimes it comes on the ground and resistors get jailed or treated badly and the law has to try to move with it and there you see the resistance inside law.

One wonderful example that most Canadians still don’t know about is a woman named Viola Desmond whom we call “Canada’s Rosa Parks”, but she challenged race discrimination in Nova Scotia 9 years before Rosa Partks did in Montgomery, Alabama. So really we ought to call Rosa Parks “the United States’ Viola Desmond”. Viola Desmond was a middle-class African-Canadian woman who lived in Halifax and ran a beauty salon. She went to a movie in New Glasgow, Nova Scotia in 1946. She went there because she was travelling with her business and her car broke down and had to be repaired so she went to the movie while she was waiting. And the white people at the ticket wicket told her that she should sit in the balcony and she said “I don’t see very well from the balcony, I’m going to sit on the main floor.” And they told her “you people can’t sit on the main floor.” And that’s when she realized it was because she was African-Canadian and the theatre had a policy of seating Blacks in the balcony, only in the balcony.

So she went and she sat down on the main floor, all by herself, thinking that because she was very well-mannered and well-behaved and she had paid for a ticket that nothing bad would happen. But the theatre manager was called in, he walked over to her on the main floor, said she had to leave. She said, no I’m not disturbing anybody, I’m going to stay. And he went out and got the police and they physically dragged her out of the theatre and took her to jail and locked her up overnight. Now, there were no laws, no legislation that said that Blacks had to sit in the balcony in theatres. But there was a statute that said anybody who bought a theatre ticket had to pay the province a certain number of pennies in tax.

The main floor tickets cost a little more than the balcony floor tickets and they wouldn’t sell Viola Desmond a main-floor, more expensive, ticket. They would only sell her the cheaper balcony ticket, and she was one cent short of tax. And she was hauled out of jail and into court the next morning. She had no lawyer, she wasn’t told she could get a lawyer and it was treated as a case of tax evasion. And she was convicted of tax evasion in New Glasgow in 1946 and fined $20 and costs. So she went home to Halifax. She was very upset. She was bruised, she was frightened. She’d never been to jail and as anybody knows who’s been to jail it is not a fun place to spend the night. She went to see her minister who was a very famous Black minister in Halifax and he and his wife helped her find a lawyer and they contested the finding of guilt on tax evasion. And the case went through two or three more layers of court as they appealed the decision up into the Supreme Court of Nova Scotia and in every layer of judgment, the courts ruled in favour of the conviction. So it was a moment of unbelievable shame in terms of Canadian legal history. We wouldn’t even admit that we were racist. Nobody even talked about race on the record at all. We pretended it was just a matter of tax evasion and we used a tax statute to enforce a racially segregated seating policy. And so I did a great deal of legal history on this case, met with people who remembered Viola Desmond, met with people she worked with in her beauty salon, customers of hers, talked with the people who used to run the theatre, checked into the background of the police officers and the judges and the lawyers. It’s the most amazing story and when it became publicly circulating, there was a little bit of embarrassment in Canada about this history that’s not well known and to my great celebration the current Lieutenant Governor in Nova Scotia, the first Black woman to hold that position in Nova Scotia, had a ceremony in which she gave a posthumous pardon to Viola Desmond. Viola Desmond is long dead but her sister is alive and her sister accepted the pardon and it was in all of the newspapers to realize that we are trying to right the wrong from the past.

PROFESSOR FORCESE: So were there any heroes in that case other than the victims themselves. Did the legal profession throw up someone to advance the case?

PROFESSOR BACKHOUSE: Well, wouldn’t it be fun to say that there was a Black lawyer in Halifax who was a rabble-rouser and a rebel and made the argument, and ultimately lost, but made a good case? There were a number of Black lawyers who had been called to the Bar in Nova Scotia by the time of this case. None of them were practicing at the time of this case. So she was at the mercy of a white lawyer. And his name was Bisset; he came from Newfoundland and had practiced for quite some years in Halifax and he was someone with a very good reputation, known as a gentlemen, principled upstanding lawyer.

He made a decision to argue this case without making any reference whatsoever to race. He argued that they were procedurally incorrect. Looking back at it now, he lost with that strategy. I’m sure that he thought it was the wisest strategy. I bet that he looked at all those white judges – they were all white – and thought to himself “If I go and argue against race segregation overtly, we will lose. But I might be able to win this with a purely technical procedural argument.” So I expect it was a good faith decision. But with the hindsight I would say, better to have had a good loss like Irene Murdoch, where the argument was made squarely and the judges would have had to say “We will use tax law to enforce discrimination”. That would’ve been helpful. At the very least it would have been clear. So I don’t think she got great representation. Would she have got better representation with a Black lawyer? One can really hope so. Certainly a Black lawyer would’ve known more about the experience of race discrimination than any of the officials in the legal system who prosecuted this case and heard it afterwards. One could only hope, and that’s one of the reasons today why I’m leading a large group of people insisting that the legal profession needs to diversify in terms of race, and appointments to the judiciary need to diversity in terms of race, that that in fact is merit. That will bring people with a wider range of life experience onto our legal system and we will have fairer decisions. So it’s a lesson from legal history that helps us make assessments like that.

PROFESSOR FORCESE: And so students who are interested in engaging and using the law to advance change in society…What lessons do you draw from these historical events, some of which are quite tragic, in terms of the sorts of skills and aptitudes and attitudes that students and then lawyers should bring when they encounter these sorts of circumstances?

PROFESSOR BACKHOUSE: Well, I guess the first thing one should remember is that we need more lawyers arguing for equality, arguing for fairness, arguing for an end to discrimination on the basis of class and race and sexual orientation and gender, disability…So people need to choose their careers in ways that will allow them to make these arguments, to take these cases, to be in the right spot for clients to come knocking on your door. So that’s the first thing.

The second thing I would say is strategy is very interesting to consider. And when you look back historically, it’s like having a laboratory. These people are all dead, so we’re not experimenting on live people. You can learn a great deal by studying the historical record. Thirdly, it’s way more interesting than just reading the surface decisions that will take up the bulk of the time of first year law. Far more fun! I came to law from history and I think I wept for the first year just about every second day at having lost the exciting part of dead people. The ones who inspire you, the ones who were evil and nasty, the strategies to try to make change. It’s all there in living colour and panorama, in history. And it’s all there in law too, it’s just not visible so easily in the ways in which the first year curriculum is constructed. So there’s lots of lessons. Also just having heart, having recognized people were up against unbelievable terrible situations in the part and they still fought back.

One of my favourite stories is a woman in the middle of the 1800ss in Toronto in a courtroom. She was Francophone; she didn’t even speak English very well and she was a prostitute who had been gang raped by a drunken group of men who had broken into the brothel after hours and raped her and another woman who was in the same room, violently. And she laid charges. She went to the police and she said “I deserve protection the way any other woman does.” That was in the 1850s in Toronto. And believe it or not, the police and the Crown Attorney actually took the case to court…where the people in the courtroom jeered at them, laughed at the testimony and they were booted out of court, basically told “You’re not worth convicting somebody for rape, even thought the evidence is so clear. We’re not going to believe you.” And the newspaper described the story – it’s not in the case decision – that Mrs Rogers, the brothel keeper, stood up on the witness stand and “through tears”, she harangued the court and told them “I deserve protection.” When I read that I was just a young feminist, many decades ago, and we were fighting for change in rape law that would say that past sexual history has nothing to do with whether women are raped or not (except to make them more vulnerable) and I read about her words and the laughter in the courtroom that greeted them, and the verdict, and I thought “my gosh, if Ellen Rogers can stand up and say those words in the 1850s in front of a jeering, booing crowd, surely we can say them now. Surely we can make more of a dent now.” So even the losses are incredibly inspiring to me.

PROFESSOR FORCESE: Great, wonderful. Thanks for your time. Anything else you’d like to add?

PROFESSOR BACKHOUSE: Well, if any of the students would like to learn more about legal history, in the summer, when they still have a free life, they might want to look at books that are published by the Osgoode Society, which has its own web-site. It’s based in Toronto and publishes books on legal history. It’s got over 50 books in the last 30 years or so and some of them are really fun and they’re worth looking at, either finding one in a used book store or downloading one and seeing what there is to learn about legal history, but I would student Canadian legal history, not American legal history, because we have an amazing legal history and that’s the one we need to know.