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Résumé de l'article

La réforme des lois sur la propriété des femmes mariées en Ontario au XIXe siècle a donné aux épouses la possibilité de gérer des commerces indépendamment de leurs maris. Cependant, les tribunaux, en interprétant ces lois, ont continué à voir dans l'épouse une partenaire dépendante, ayant des obligations de travail et de service envers son mari. Le travail qu'elle faisait dans une entreprise familiale était considéré comme une contribution volontaire au bien de la famille et à l'avantage du mari; les règles gouvernant la propriété d'une femme limitaient sa capacité de gérer sa propre entreprise pour elle-même; et il lui était difficile d'obtenir des crédits. Cet article examine des cas où les femmes ont cherché à contrôler les biens de leurs propres entreprises. Il nous démontre les limites de la réforme et conclut qu'une connaissance à la fois des lois et de leur application est nécessaire pour comprendre pourquoi les femmes ont été marginalisées dans le monde des affaires et dans l'histoire commerciale.

Married Women and Businesses

By Lori Chambers

Married women's property law reform in the nineteenth century made it legally possible for wives to run businesses independently of husbands. This provided a means of survival for some households in which husbands were absent, irresponsible or unlucky. However, marital property law reform as interpreted in Ontario courts still conceptualized the wife as a dependent partner in marriage who owed labor and services to her husband. Women's businesses were often domestic in nature: women ran boarding homes and schools, and provided laundry, sewing, food preparation and millinery services. If such services were provided from the base of the husband's home, or in businesses in which husbands also labored, the courts had to determine to whom profits belonged in the case of intact marriages. A woman's ability to run a business on her own account was limited by the particular rules assigned to married women's property ownership, and her labor in a family business was constructed as a labor of love, performed for the benefit of family, and to the profit of her husband. Women

faced significant challenges in obtaining credit and maintaining ownership of enterprises. By examining Ontario cases in which wives sought to control the assets from their businesses, this paper explores the limitations of reform, and applies the "understanding that business is not gender neutral to the history of business"¹. While married women's property law reform was enacted throughout the western world, this paper focuses exclusively on Ontario to reveal the specific challenges faced by businesswomen in one jurisdiction. It is hoped that these questions can also be examined with regard to other regions by scholars more familiar with the legal particularities of each province/state. Despite transformation in attitudes on the bench with regard to women's intelligence, women were not granted the rights necessary to take an equal role in the economy and to establish themselves as entrepreneurs. Ironically, this was not because women were viewed as incapable of working or of overseeing business ventures, but because they were perceived as subordinate within the home. While husband and

¹ Melanie Buddle, *The Business of Women: Marriage, Family, and Entrepreneurship in British Columbia, 1901-1951* (Vancouver: University of British Columbia Press, 2010), 15.

Abstract

Married women's property law reform in the nineteenth century made it legally possible for wives to run businesses independently of husbands. However, marital property law reform as interpreted by the courts of Ontario still conceptualized the wife as a dependent partner in marriage who owed labour and services to her husband. A woman's ability to run a business on her own account was limited by the rules assigned to married women's property ownership, and her labour in a family business was constructed as a labour of love, performed for the benefit of family, and to the profit of her husband. Women faced significant challenges in obtaining credit and maintaining ownership of enterprises. By examining Ontario cases in which wives sought to control the assets from their businesses, this paper explores the limitations of reform, and asserts not only that business is not gender neutral, but also that understanding law is essential to understanding why women have been marginalized in the business community and business history.

Résumé: *La réforme des lois sur la propriété des femmes mariées en Ontario au XIXe siècle a donné aux épouses la possibilité de gérer des commerces indépendamment de leurs maris. Cependant, les tribunaux, en interprétant ces lois, ont continué à voir dans l'épouse ne partenaire dépendante, ayant des obligations de travail et de service envers son mari. Le travail qu'elle faisait dans une entreprise familiale était considéré comme une contribution volontaire au bien de la famille et à l'avantage du mari; les règles gouvernant la propriété d'une femme limitaient sa capacité de gérer sa propre entreprise pour elle-même; et il lui était difficile d'obtenir des crédits. Cet article examine des cas où les femmes ont cherché à contrôler les biens de leurs propres entreprises. Il nous démontre les limites de la réforme et conclut qu'une connaissance à la fois des lois et de leur application est nécessaire pour comprendre pourquoi les femmes ont été marginalisées dans le monde des affaires et dans l'histoire commerciale.*

wife were now two individuals at law, the wife remained under the control and care of her husband. This imposed significant limitations on the wife's ability to obtain credit and claim debts and therefore to conduct a separate business for her own support, or that of her family. The failure of the courts to see women as full participants in businesses reified existing notions of women as subordinate in marriage, and erased the importance of women's non-familial labor. These assumptions have encouraged historians of business to ignore women, and to further perpetuate misconceptions about women's lack of interest, and success, in the business world.

Women's Work and Women's Businesses

Business historians, until recently, have largely ignored women. In the Canadian context, Michael Bliss dismisses women as irrelevant to his topic, asking "what right-minded woman, almost certainly destined for marriage and motherhood, would think of business as a career, even if she did have the head for it?"² Such cursory treatment is insulting, and while more recent historians would avoid such blatant

² Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1987), 352.

sexism, limited work has been done to explore the options available to married businesswomen in Canada. Recent works by both Peter Baskerville and Melanie Buddle challenge this neglect and suggest that women's businesses contributed significantly to the burgeoning frontier economy of British Columbia.³ Women's businesses have not been explored in the same detail with regard to Ontario. This province was, by the late nineteenth century, a developed industrial economy, and evidence amassed by Susan Ingram and Kris Inwood,⁴ Livio Di Matteo and Peter George,⁵ and Peter Baskerville illustrates that married women's property reforms facilitated the accumulation of property by some Ontario married women. Although these authors provide thought-provoking proof that women inherited and controlled growing proportions of family wealth, only Baskerville explores the fact that women earned property

through entrepreneurship, asserting that "self-employment for Canadian women is far from being simply a late twentieth-century phenomenon"⁶. Echoing Joan Scott and Pamela Sharpe, he argues that while all women's business opportunities were shaped by domestic expectations, gender segmented economies also offered women distinctive possibilities for entrepreneurship⁷. Despite his emphasis on the revolutionary impact of the married women's property acts, however, Baskerville does not distinguish between the ability of a married woman, and an unmarried woman, to conduct a business on her own account. Moreover, while women were increasingly present in the marketplace, this did not undermine notions of women's separate sphere; they remained responsible for domestic tasks and, as the court cases below will illustrate, were still believed to be subordinate to their husbands.⁸

³ Peter Baskerville, *A Silent Revolution? Gender and Wealth in English Canada, 1860-1930* (Kingston: McGill-Queen's University Press, 2008); and Buddle, *Business of Women*.

⁴ Susan Ingram and Kris Inwood, "Property Ownership by Married Women in Victorian Ontario", *Dalhousie Law Journal* 23 (2000), 406-49.

⁵ Livio Di Matteo and Peter George, "Canadian Wealth Inequality in the Late Nineteenth Century: A Study of Wentworth County Ontario, 1872-1902", *Canadian Historical Review* 73 (4) (1992), 452-83; and Livio Di Matteo and Peter George, "Patterns and Determinants of Wealth Among Probated Decedents in Wentworth County, Ontario, 1872-1902", *Histoire sociale/Social History* 31 (1998), 1-34; and Livio Di Matteo, "Wealth and Inequality on Ontario's Northwestern Frontier: Evidence from Probate", *Histoire sociale/Social History* 38 (2005), 79-104.

⁶ Baskerville, *Silent Revolution?*, 204.

⁷ *Ibid.*, 192. See also: Joan Scott, "Comment: Conceptualizing Gender in American Business History", *Business History Review* 72 (1998), 242-49; and Pamela Sharpe, "Gender in the Economy: Female Merchants and Family Business in the British Isles, 1600-1850", *Histoire sociale/Social History* 34 (2001), 283-306.

⁸ Interestingly, Baskerville does spend considerable time providing evidence that a large number of self-employed married women lived apart from their husbands. The purpose of marital property law reform was, in large part, to allow such women to support themselves and their children, and controversy about women and their businesses largely arose not with regard to women in such circumstances, but when they labored with husbands in joint businesses, or used marital homes in which husbands lived as the bases for businesses they described as their own.

As Baskerville's evidence for Ontario illustrates, most women in business, married and unmarried, were what John Benson has described as penny capitalists, a "working man or woman who went into business on a small scale in the hope of profit (but with the possibility of loss) and made him (or her) self responsible for every facet of the enterprise"⁹. Neither Baskerville nor Benson, however, interrogate why women might have lacked available cash, or what role limitations in married women's property law might have played in the inability of women to obtain necessary credit. Both note that small businesses, particularly those run from the home, were difficult to quantify and were missed in early census data.¹⁰ Baskerville asserts that large numbers of women were engaged in businesses such as keeping boarders, but such work was not documented in traditional business history sources. For example, census takers were instructed in 1901 that "if married [and other] women...are only carrying on domestic affairs in a household without wages they are not to be classed

as having an occupation"¹¹. Similarly, when husbands and wives conducted businesses together, only the husband was recorded in the census as a business-owner and "family businesses and the role of women within them have received [little] attention"¹². Historians have contributed to the invisibility of the female entrepreneur and categorized the work of woman "as non-wage contributions to family survival"¹³. Because most women did not make a fortune in business, it has been easy to ignore their work. However, even marginal survival "can be considered a form of business success"¹⁴ and women's activities in the business sphere illustrate their "financial and economic agency... and [contributions] to the economic development of the regions in which they lived"¹⁵. Women's successes need to be acknowledged and documented; this will allow us to overcome our conception of the wife as mother/helpmate. Moreover, married women operated businesses under significant disadvantages in comparison both to men and to unmarried women. These differences deserve atten-

⁹ John Benson, *The Penny Capitalists: A Study of Nineteenth-Century Working-Class Entrepreneurs* (New Brunswick, New Jersey: Rutgers University Press, 1983), 6.

¹⁰ Buddle, *Business of Women*, 14.

¹¹ *Census of Canada*, 1901, as quoted in Baskerville, *Silent Revolution?*, 197.

¹² Baskerville, *Silent Revolution?*, 223.

¹³ For further information on women's contributions to the family economy see: Bettina Bradbury, "Pigs, Cows and Boarders: Non-Wage Forms of Survival among Montreal Families, 1861-1891", in *The Challenge of Modernity: A Reader on Post-Confederation Canada*, ed. Ian McKay (Toronto: McGraw-Hill Ryerson, 1992), 65-91; Bettina Bradbury, "Surviving as a Widow in 19th Century Montreal", *Urban History Review* 17 (3) (February 1989), 148-60; Bettina Bradbury, *Working Families: Age, Gender and Daily Survival in Industrializing Montreal* (Toronto: McClelland and Stewart, 1993); and Marjorie Griffin Cohen, *Women's Work, Markets and Economic Development in Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1988).

¹⁴ Buddle, *Business of Women*, 49-50.

¹⁵ Baskerville, *Silent Revolution?*, 234.

tion. This paper explores the challenges that married businesswomen faced despite marital property law reform; the courts continued to view married women as dependent and subordinate, even as women themselves asserted that they were running their own enterprises or were full economic partners with their husbands.

Nineteenth-Century Marriage and the Law of Property

The ability of a married woman to even articulate a claim to a business as her own was dependent upon marital property law reform. In Ontario, as under other colonial regimes, before reform the legal institutions of England¹⁶ ensured that male control of property within marriage was unfettered. The common law before statutory reform treated the husband and wife as a single legal unit. As the eighteenth century jurist, William Blackstone, put it:

by marriage the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least incorporated and consolidated into that of the husband: under whose wing and cover she performs everything.¹⁷

As Blackstone also made clear, the unity of the married couple was premised on

the subordination of the wife: she was “so entirely under his power and control that she can do nothing of herself, but everything by his license and authority”.¹⁸ A married woman could not sign a contract or enter into a business on her own account. Her personal property, even wages earned outside the home, belonged to her husband. While a married woman retained ownership of her real property – land – the husband had the right to manage such property for the duration of the marriage and the wife could not claim the rents or profits from land (even when she needed such monies for survival). The wife performed essential tasks in the economy by acting as an agent for her husband, pledging his credit, for example, when she made purchases. She did so, however, on his authority, which could be revoked. Creditors knew to look only to the husband for payment, as a wife owned nothing in her own right. Even after the death of her husband a woman remained vulnerable, as he could will his property to others, leaving her impoverished. Women were rendered financially dependent, obliging them to yield to masculine control.¹⁹ To prevent the dissipation of estates, the English legal system extended certain protections to wives and children. Wealthy families

¹⁶ Each North American British colony inherited English law as it existed at the date of the creation of the colony.

¹⁷ Sir William Blackstone, *Commentaries on the Laws of England, in Four Books* ed. George Tucker vol. 2 (1803) reprinted New York, 1969, 242.

¹⁸ *Ibid.*, 433.

¹⁹ For a full description of the status of the married woman, see: Chris Clarkson, *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940* (UBC Press: Vancouver, 2007); and Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1997).

could place property in trust in the Court of Chancery and, by the late eighteenth century, women were serving as trustees of their own equitable estates.²⁰ Wives with property in trust could not sell their lands, but could use the profits from such land for their survival. A Court of Chancery was established in Upper Canada in 1837²¹, but few families had adequate resources to create trust funds for wives and daughters. The majority of wives, therefore, were absolutely financially dependent on their husbands.

Law reflected and reinforced popular ideas about women's role and abilities. The ideal wife as portrayed in romantic and Victorian literature and advice manuals was not an independent or assertive individual and she showed little inclination to meddle in public affairs. Instead, she was a docile and giving helpmate who "revered her husband and minister[ed] unto him."²² As economic production moved from the home to the marketplace, the middle-class companionate family came to be seen as a "haven in a heartless world"²³ and [middle class] women's ideal place was increasingly circumscribed within the confines of the home. It was presumed by society and in law that the husband, "by his education and manner of life, has acquired more experience, more aptitude for business, and a greater

depth of judgment than the woman" and was therefore better prepared than the wife to provide for the family and to ensure its financial viability.²⁴

It has long been recognized, however, that the idealized middle class vision of the family as 'haven in a heartless world' was unattainable for working families. Women and children were employed across the economy, earning necessary cash for family survival. Moreover, men could readily disappear, and it became increasingly evident that not all men met the obligations inherent in marital unity or even tried to ensure the "financial viability" of their families. This problem created public support for limited reform of property law. If deserted wives and women married to feckless and irresponsible men could work and retain their wages, they could support dependent children. And if they could run home-based businesses, performing feminine tasks such as providing boarding, food and laundry services for men, they might also avoid dependence on charity. A volatile economic climate encouraged reform and by shielding some family property from seizure by creditors, separate property protected families (and speculative husbands), not just wives, so that middle class men could see benefits for themselves in reforms that would also protect

²⁰ Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge: Cambridge University Press, 1990).

²¹ For information on the Court of Chancery in Upper Canada, see: Elizabeth Brown, "Equitable Jurisdiction of the Court of Chancery in Upper Canada", *Osgoode Hall Law Journal* 21 (1983), 275-314.

²² William Alcott, *The Young Wife, or Duties of Women in the Marriage Relationship* (New York, 1837; reprinted New York, 1972), 35.

²³ Christopher Lasch, *Haven in a Heartless World* (New York, 1977).

²⁴ Peregrin Bingham, *The Law of Infancy and Coverture* (London, 1816), 162.

working class women.²⁵ Limited rights were granted to wives in 1859, and these rights were expanded in 1872, 1873 and 1884.

Reform of 1859

The Act of 1859 gave all women a statutory separate estate analogous to that which could be achieved in equity through a marriage settlement, but with the husband serving as trustee (since without a settlement, there was no opportunity for the family to name an alternative trustee). A wife's real property (land) would be held in trust and could not be alienated by her husband, but neither could the wife sell her estate to use it for her day-to-day maintenance. The husband also served as trustee over his wife's goods, but the act did not make it clear to what degree he (or the wife herself) had dispositive powers over such property. An abused wife could apply for an order of protection for her wages earned outside the home.²⁶ The act, like the provisions in equity that preceded it, was dependent on judicial discretion for its success. It attempted to minimize the problems faced

by women married to abusive, irresponsible men, while simultaneously preserving family unity and the authority of the husband. By allowing ownership on the part of the wife, but maintaining control in the hands of the husband, however, the act dramatically limited the context in which a woman could conduct a separate business. Without an order of protection against an abusive or deserting husband, a wife did not have a right to alienate her property, and without a right to use property, she could not incur the liabilities necessary to pursue a separate business. The Act of 1859 insulated the earnings of the wife only when her husband was abusive and, even then, only if she had obtained an order of protection. When a wife had obtained an order of protection, she was liable for all debts that she might contract in respect to a separate business and her earnings could be attached if she failed to pay for rent or common necessities.²⁷ In all other circumstances, a woman's wages and income from a business were still considered the property of her husband and were therefore attachable for his debts. The new provisions, therefore, did

²⁵ It is worth noting that bankruptcy and insolvency laws were also reformed during this period and connections have been drawn between marital property law reform and bankruptcy law. For a full discussion of the law of bankruptcy in the United States, see: David Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, New Jersey: Princeton University Press, 2001). For a discussion of connections in the Canadian context, see: Philip Girard, "Married Women's Property Law, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820-1867", in Philip Girard and Jim Phillips, eds. *Essays in the History of Canadian Law, vol iii - Nova Scotia* (Toronto: Osgoode Society, 1990).

²⁶ An Act to secure for married women certain separate rights of property (1859) 22 Vict. C. 34, section 1, 4, 5 and 6.

²⁷ Evidence suggests that magistrates did not hesitate to award such orders of protection when women produced proof that husbands were absent or abusive. For further information, see: Lori Chambers and John Weaver, "The Story of Her Wrongs: Abuse and Desertion in Hamilton, 1859-1892", *Ontario History* 93 (2001), 107-126; and Lori Chambers and John Weaver, "Alimony and Orders of Protection: Escaping Abuse in Hamilton-Wentworth, 1837-1900", *Ontario History* 95 (2003), 113-35.

not create insurmountable problems for creditors, as the husband remained the legal owner of the business, unless there was a protection order, even if he played no role in its day to day operation. They did, however, create insurmountable problems for women who wanted to run businesses but who could not obtain goods or credit with which to do so.

This was confirmed in *Foulds v Courtlett*. From the early 1859 until 1862 a husband and wife team had operated a shop. The husband managed a confectionery business while the wife ran a fancy-goods store (in the same building). She had always given orders for her own goods, but he had paid for them. In 1862 the husband gave up his business but the wife continued as before and the couple continued to cohabit. In 1869 she purchased goods for which the husband subsequently refused to pay. In 1871, judgment was rendered for the plaintiff:

I entertain a very strong opinion that where a husband knowingly permits his wife, who is cohabiting with him, to carry on a business of buying and selling in a shop in which he is frequently seen, that such business is to be considered to be his business, and that in the absence of notice to the contrary from him, all persons dealing in the shop, or supplying goods to it, are dealing not with a person under a known disability like a wife, but directly with him, and that his authority to her will be presumed. The fact of his coming forward and swearing that he did not buy the goods, or authorize her to pledge his credit, or that he did not interfere with the business,

though cognizant from day to day of all that she was doing, cannot in my judgment free him from liability.²⁸

The creditor could not obtain redress from a wife who did not have a protection order, and to deny him recourse against the husband as well would be unjust to the creditor. The court was careful to assert that this case did not involve a wife in need of protection: “it would no doubt invest this case with a very different character if the parties lived separately”.²⁹ Despite her business acumen, the wife was held to remain under the care and control of her husband; while she might do all the work, he was entitled to all the profit and, if he so chose, he could undermine her work by making the business liable upon contracts of which she did not approve. Moreover, should she wish to continue her business, she would face grave difficulties in obtaining goods and credit on her own account (unless, perhaps, she were to take the step of separating and seeking an order of protection).

Reforms of 1872 and 1873

The Act of 1872 improved on the practical relief afforded to wives under the reforms of 1859. It removed the necessity of protection orders and gave all wives the right to hold and control their earnings obtained from work outside the home. It also granted wives dispositive powers over personal property – money and goods – powers that were essential to the use and enjoyment of that property.³⁰

²⁸ *Foulds v Courtlett* (1871), 21 UCCP 368.

²⁹ *Ibid.*, 372 and 374.

³⁰ An Act to extend the rights of property of Married Women (1872) 35 Vict., c. 16.

The *Married Women's Real Estate Act* of 1873 provided a mechanism, analogous to orders of protection under the Act of 1859, under which abused and deserted wives could apply for dispositive powers over their separate real estate, but made it clear that married women did not ordinarily have such powers.³¹ The two acts were based on the continuing belief that it was unwise and unnecessary, except in the most exceptional of circumstances, to separate the interests of husband and wife, "two parties who are in ordinary cases – to all intents and purposes – one".³² These acts created considerable confusion. As critics of the new laws observed, "before the statutes to which we refer were enacted, the rights of husbands and wives...were pretty generally understood, not only by the legal profession whose business it was to comprehend them, but by the community at large".³³ Under the new act, the husband acted as trustee over what was ostensibly his wife's property. It was frequently unclear who owned property that was being used in common by a family and who had the right to alienate land, chattels, or money. Confusion dramatically transformed the way in which creditors needed to interact with married clients to protect their own interests. They had to treat married women as independent citizens and to acknowledge their ability and right to

handle money and business dealings. Nonetheless, the husband was assumed to be the head of the household with primary responsibility for, and authority within, the family.

While under the Act of 1859 wives simply could not make binding contracts, except as agents for their husbands and with regard to their husbands' property, after 1872 they could be held liable on contract with regard to their separate property, but only with regard to certain types of property under specified conditions. This placed limitations on the ability of married women to establish separate businesses. The Act of 1872 provided that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried".³⁴ However, married women were denied dispositive powers over their real property under the *Married Women's Real Estate Act* of 1873. A wife, therefore, could be held liable only to the extent of her separate personal property, her money and goods, and such property was notoriously easy to transfer. The plaintiff had to prove that the wife possessed separate estate at the time at which the debt was contracted, the contract itself, and possession of the same separate property at the time of judgment.³⁵ Once a debt was contracted,

³¹ An Act to facilitate the conveyance of Real Estate by Married Women (1873) 36 Vict., c. 18.

³² "The Rights of Married Women", *Globe*, 18 May 1869, 4.

³³ George Holmsted, "Married Women's Rights of Property", *Canadian Law Times*, vol. 3 (February 1883), 64.

³⁴ An Act to extend the rights of property of Married Women (1872) 35 Vict., c. 16, section 9.

³⁵ *Lawson v Laidlaw* (1876), 3 OAR 92.

a wife could dispose of the separate property to which reference was made in the contract and purchase land or goods that could not be vulnerable to suit. Creditors not well versed in the specifics of the law might fail to ensure that a contract contained sufficient reference to the separate estate to be enforceable. They might also make the mistake of entering into a contract on the basis of ownership of real estate; under the Act of 1873 such property could not be sold in execution of a debt under any circumstances. This created an impossible situation for creditors:

this further proves how illusory the remedy at law would be, for the intelligent married woman would take care that the property with reference to which she might be supposed to have contracted, would not wait to be charged with a judgment, and in virtue of it she would probably be entitled to plead in bar of action that she had parted with it.³⁶

Not surprisingly, creditors were vociferous in expressing their discontent with the state of the law. Ironically, the failure to see the wife as a debtor in her own right facilitated fraud by married couples and could be an advantage to those who wished to avoid debts. For example, in one case the husband was insolvent, but suppliers, knowing of his insolvency, had none-the-less provided stock for his wife to launch a separate business. She gave a note for payment, but did not own any separate estate. She allowed her husband to carry out the day-to-day operation of

the business, allegedly paying him a salary, and the family continued to cohabit as before. Goods supplied to her had been seized by creditors of her husband, and she initiated suit to reclaim them and was clearly an active agent in the fraud. The court found for the creditors and concluded that the business “was substantially the same old business, both in character and management, as that carried on by the husband before the insolvency”.³⁷ To deny the wife’s liability would be to impose a substantial injustice against creditors, and her goods were determined to “follow the rule of the common law and become the property of the husband”.³⁸

I think it must be really and truly her separate trade or business, not resting on the observance of a few empty forms, very transparently veiling the plain reality. I cannot believe that the Legislature intended to legalize an attempt like the present to evade the plain requirements of the law.³⁹

Clearly, law reform had created problems for creditors and loopholes that could be exploited by unscrupulous couples.

More important, but less publicly discussed, was fact that the provisions of Act of 1872 created problems for women running businesses. With the difficulties outlined above, many creditors were wary of lending money to businesswomen, however astute such women might be. Running a business without access to easy credit limited the potential scope and success of women’s independent ventures.

³⁶ *Clarke v Creighton* (1881), 45 UCQB 524, Armour J in dissent.

³⁷ *Meakin v Samson et al.* (1878), 28 UCCP 355 at 363.

³⁸ *Ibid.*, at 365.

³⁹ *Ibid.*, at 366.

Moreover, since a wife could be held liable under a contract only when she owned separate estate, women without such property, who needed to work to support themselves and their children, faced considerable obstacles in obtaining credit, whether for a business or for necessities. Justice Wilson lamented this problem:

if the woman have no capital or separate estate, as is the case with many who go into business, so that there is no fund or assets of any kind for her creditors to look to for payment, unless the goods then bought are to be considered as the fund upon which the faith of the sales were to be made to her, a fund diminishing day by day as her business goes on until it disappears and is represented by goods purchased from others, or it may be by only a number of bad or doubtful debts, or perhaps by nothing, and the creditors are debarred from establishing a personal claim against the woman which will be binding upon her subsequently acquired property – if, in fact, the business of the married woman can be carried on only under such disadvantages, and if her creditors are to be hand-bound in that manner – will it be possible for the married woman to carry on business as it must be carried on, and as it is carried on by those in trade or business? Or will anyone credit her with such risk against him of ever being paid?⁴⁰

Moreover, if women lived with husbands, and obtained credit from them or worked with them, their businesses would no longer be considered to be “separate” from the interests of husbands.

Judges were confronted with numer-

ous disputes that illustrated these problems. In a further case that illustrates the problems inherent in definitions of separate property, the plaintiff had been married in 1870 and brought money to the marriage which she had earned as a seamstress. Her husband had worked a farm, but it failed, and she used her money to run a separate business as a tavern-keeper. During some of this time, her husband went to Red River in search of other employment opportunities. Eventually, she and her business partner hired her husband to work the bar for a limited monthly salary. She asserted that she explicitly excluded him from ownership or management: “I told him he was not a success, and I would try it myself, and I would give him \$15 a month, and he could mind the bar”.⁴¹ She asserted that “[he] could have been in a good position if he had attended to it. He ran to horse races, and I do not know what he did with his money.”⁴² As Spragge C.J.O. affirmed, “the character and habits of the man, his wife’s estimate of him, and his non-success in life so far, throw light upon the position of the two at what may be called a crisis in their married life; and are aids to us in forming an opinion, as to whether the arrangement between them was merely colorable or was real—a mere device to fence off, and defeat creditors, or an arrangement really and actually entered into for the carrying on of a business by the wife.”⁴³ Customers confirmed

⁴⁰ *Berry v Zeiss et al.* (1881), 32 UCCP 231, at 239.

⁴¹ *Murray v McCallum* [1883] O.J. No. 62 at para. 2.

⁴² *Ibid.*, at para. 18.

⁴³ *Ibid.*, at para. 19.

that they did business with her, not the husband: “he would not assume the responsibility himself without Mrs. Murray was there... He was not looked on in the business as having any control in it... She told me she had to do it for the sake of supporting herself and her family.”⁴⁴ Goods belonging to the wife had been seized to settle debts of the husband, but her ownership was upheld by the court of first instance. The decision was appealed.⁴⁵ Spragge C.J.O. acknowledged the non-traditional nature of this arrangement: “the parties placed themselves in a position which was a reversal of the old time rule of the relation of husband and wife... she became under the arrangement, to use a homely but expressive phrase, the ‘bread winner.’”⁴⁶ Reviewing the very great change in that “branch of the law... placing the property and the personal earnings of married women more and more under their own control”⁴⁷, Spragge argued that the couple knew that they “trod upon dangerous ground, and probably knew their danger sufficiently well to leave no room for question whether the business carried on was not the separate business of the wife.”⁴⁸ Cameron, J.A. agreed, asserting that “as matter of law, such property or the proceeds of such occupation or trade

cannot be held to be the husband’s or be made liable for his debts.”⁴⁹ Burton J.A., however, asserted that “any interference by the husband in the conduct of the business with the wife’s concurrence deprived it at once of its separate character.”⁵⁰ He would have allowed the creditors redress. Patterson J.A. was also “unable to conceive a clearer case of interference by the husband in the conduct of the wife’s business.”⁵¹ The Court being equally divided, the judgment of the Court below was affirmed, and the appeal was dismissed with costs.⁵²

The laws of 1859, 1872, and 1873 were problematic because the husband managed all family property but owned only some of it. When a wife brought property to a marriage, inherited during the marriage, or earned wages outside the home, her relationship with creditors was fraught with difficulties. She had limited powers of contract. Her separate business was not clearly defined by statute. And her husband, as trustee of her real property, could misrepresent himself as owner and thereby fraudulently obtain credit for which the property itself could not be held liable. Without full and clear control over the assets they might acquire in a business conducted in the home, and in a context in which claims against mar-

⁴⁴ *Ibid.*, at para. 7.

⁴⁵ *Ibid.*, at para. 12.

⁴⁶ *Ibid.*, at para. 20.

⁴⁷ *Ibid.*, at para. 26.

⁴⁸ *Ibid.*, at para. 27.

⁴⁹ *Ibid.*, at para. 64.

⁵⁰ *Ibid.*, at para. 37.

⁵¹ *Ibid.*, at para. 49.

⁵² *Ibid.*, at para. 66.

ried women were complex, such women faced considerable obstacles in obtaining the goods and credit necessary to conduct businesses, a fact which limited the potential size and nature of separate businesses; for example, it would have been more manageable to establish a laundry business, which did not require large capital investment, than to open a store for which goods had to be purchased. Not only did this limit the business opportunities available to married women, but it would also have reinforced preconceptions about the types of work to which women were suited. Moreover, even when women conducted businesses that did not require credit—running boarding houses, laundry services or other personal services—their profits were vulnerable if such businesses were conducted within the marital home in which a husband still resided. At least, after 1872 and 1873, such women were better protected in cases in which husbands had absconded. While popular stereotypes depicted women as passive and lacking understanding of the business world, women contested such depictions and conducted businesses despite the disadvantages they faced. Creditors, while wary of lending to married women, seem to have been concerned not that women were incapable of intelligent management of money, but that the law allowed loopholes that made collection difficult. Questions of ownership were endemic, and the business and legal communities were convinced that reform was necessary. Businesswomen

themselves must have been even more concerned that their rights needed to be clarified; while in some cases the loopholes in the law could be advantageous to husband and wife business partnerships, notions of women's subordinate status in marriage were reified in cases which determined that wives were not independent businesswomen. A return to the harsh conditions wives had faced under the common law would have been unacceptable, and members of the bench and the legal profession increasingly argued that the only way to ensure creditors adequate remedy against married women was to grant all married women unequivocal dispositive powers over all separate property. One contributor to the *Canadian Law Times* complimented Justice Armour for his attempt to "grapple fairly with the difficulty... of the question of liability of married women under the Act of 1872... and to drag creditors out of the slough of despond into which they have strayed" and expressed hope that his comments might "have the effect of arousing the attention, not only of jurists, but of legislators, to the anomalies to which the decisions of the Courts have given rise".⁵³ In 1883, George Holmested, an advocate of reform, asserted that "the result of the present state of the law in Ontario is simply to enable married women to commit frauds with impunity, provided they can get anyone foolish enough to deal with them".⁵⁴ The central issue, in his opinion, was that:

there is nothing to prevent a married woman

⁵³ "Correspondence," *Canadian Law Times* (May 1881), 318-319.

⁵⁴ Holmested, "Married Women's Rights of Property," 76.

from entering into a contract upon the faith of having a separate estate sufficient to answer it, and immediately afterwards disposing of the whole of it, with the satisfaction of knowing that both herself individually and any property that she may afterwards acquire will be free from liability so the debt so incurred.⁵⁵

The solution, in his opinion, was to give married women the same rights over their separate property as men enjoyed with respect to their property. It is noteworthy, however, that he, and other proponents of reform, rarely mentioned the interests of women themselves. Wilson J.'s question as to whether it will "be possible for the married woman to carry on business as it must be carried on, and as it is carried on by those in trade or business? Or will anyone credit her with such risk against him of ever being paid"⁵⁶ was extremely unusual. Moreover, the husband continued to be perceived as rightfully the dominant party in marriage. This belief was evident when reformers responded to the concerns of creditors in 1884. And this fact had significant, and troubling, consequences for married businesswomen.

Reform of 1884

Under the Act of 1884, married women were made liable on contract, and every contract entered into by a married woman was deemed to bind her separate property, both that held at the time of the contract and any that she might subsequently acquire.⁵⁷ When a married woman reneged on a contract, her land, as well as money and chattels,

could hereafter be liquidated to make good on the debt. However, despite its more liberal terms, the Act of 1884 was not intended to place wives on an equal footing with their husbands, and continued to limit the ability of married women to conduct businesses on their own account. Wives and their separate property were not made liable for the support and maintenance of the family, which remained the exclusive responsibility of the husband, and the liability of the wife on her separate contract remained proprietary, not personal. She could not be imprisoned for debt. For couples, this could be an advantage, as property could be transferred to avoid debts; the courts also wanted to protect women, and their dependent children, from financial ruin. But such 'protection' was incompatible with full independence and limited the scope of women's businesses. Such limitations also reveal the continuing assumption of marital unity, and of wifely subordination and obedience; a husband, after all, was not to be denied his right to marital consortium, whatever the economic behavior of his wife. As Holmsted would later argue in his 1905 treatise on married women's property law, the law "persistently regards the female as the weaker vessel and the subject for special protection by the law against both herself and her husband". He believed that these "special contrivances" showed that the Act of 1884 had failed to eliminate the problems faced

⁵⁵ *Ibid.*, 77.

⁵⁶ *Berry v Zeiss et al.* (1881), 32 UCCP 231, at 239.

⁵⁷ An Act respecting the property of Married Women (1884), 47 Vict., c. 19.

by married women themselves and by creditors under earlier marital property legislation.⁵⁸ The Act of 1884 eliminated the most glaring injustices evident under the legislation of 1859, 1872, and 1873 by depriving the husband of his role as trustee over his wife's estate. Women who wanted to conduct businesses on their own account, however, remained at a disadvantage in obtaining credit because of their limited liability, and women who worked in family enterprises were not joint owners of such businesses and were not conceptualized as businesswomen at all. Perhaps not surprisingly, even the most ardent proponents of reform did not concern themselves with this aspect of the limitations of reform.

The ownership of property was essential to the right of a woman, but not a man, to make a contract. Disparity of rights created problems for creditors, as the *Canadian Law Times* put it, because it was "manifestly unfair to those who cannot ascertain the capacity of those with whom they are treating."⁵⁹ It was also, of course, manifestly unfair to women themselves who were more likely than men to be denied credit, even when they needed such credit to provide for themselves and their children. Moreover, the question of agency plagued relations with creditors. A wife could still act as agent for her husband, purchasing necessities under his authority, and couples were sometimes deliberately ambiguous about who owned property with reference to which a contract was made. In the context of

the traditional belief that husbands were responsible for family maintenance and support, the courts refused to hold women liable for household goods unless the creditor took the explicit step of entering into a contract with specific reference to the wife's separate estate. Although the husband no longer served as trustee over his wife's property, he could now act as her agent. If creditors did not search title adequately they could find themselves without recourse. In this context, many business people, while recognizing the abilities of women, nonetheless remained wary of entering into market-based relationships with women entrepreneurs.

A case involving a female tavern-keeper illustrates the propensity of men – and the courts – to consider wives' property to belong to husbands and thus to limit wives' ability to carry on separate businesses. The case concerned a wife who had conducted a successful tavern business in England. Upon arrival in Canada, with the money she had earned, she and her husband purchased farm property. She assumed the property was in her name. Her husband, however, had handled the transaction and kept the land in his own name, and then refused to either work the farm or to obtain gainful employment. He beat his wife severely and she ultimately left him, and the home for which she had paid, and supported herself through wage employment. In 1889 she sued him for chattel property still in the home and sought a conveyance of the property into her name. She wanted to

⁵⁸ George Holmsted, *The Married Women's Property Act of Ontario* (Toronto, 1905), 7.

⁵⁹ "Editorial Review – Married Women's Property Law Acts," *Canadian Law Times* (February 1888), 41.

use this property to again set herself up in the tavern business. In his defence, Robert Beales admitted that “I never interfered with the business”, but he asserted none the less that “it was my property”:

Q: Supposing the plaintiff had not been your wife, supposing she is not your wife but simply your landlady and the property was sold just as it was done in this case and she comes to this country just as was done in this case and that money was put in this house and land, wouldn't you have thought...

A: Circumstances alter cases.

Q: Do you not think that she would be entitled to that property supposing she was not your wife?

A: I see your point, that she is my wife.

The court ordered the property sold, the remaining mortgages on it to be paid, and the money left to be split between husband and wife. The defendant was to pay his own costs and those of the plaintiff, and she was barred from bringing a suit for alimony or pledging his credit. Although the court went beyond the strict letter of the law in protecting some assets for the wife to ensure her survival and showed clear sympathy for her plight, she was nonetheless denied justice. Her husband had dissipated her property to such an extent that she did not have sufficient funds to go into business for herself and without separate property obtaining credit would have been challenging, despite her previous business experience and success.⁶⁰

An 1886 case also reveals the problems that remained for women in asserting their ownership of business-based

property. Robert Smith had obtained judgment against George Lewis, but the debt remained unsatisfied. Lewis's wife, Eliza, owned considerable separate property and Smith claimed that such property had been transferred to Eliza to avoid legitimate debts. In their defense, George and Eliza argued that the property had been purchased with the proceeds from a business in which husband and wife had labored together. They had owned a store and Eliza argued that “it was my work the same as his, and more so, because I spent more time in the store than himself, and took a deeper interest in it”. She hired a housekeeper to perform her household duties so that she could devote herself entirely to the store. The store had originally been purchased with the husband's money, and the property in question had been purchased with proceeds from the sale of the store. George and Eliza argued that he had been solvent at the time of the purchase, but Smith's solicitor asserted that a wife did not have a claim on a family business:

Q: You don't think that a wife should do any work for her husband?

A: I did work for him.

Q: But you think she should be paid. You do not think she is under any obligation to work for her husband.

A: I do not think that is a proper question to put to me.

Eliza and George were able to produce books from the business that illustrated that George had not been indebted at the time of the purchase. George argued

⁶⁰ *Beales v Beales*, RG 22, Chancery 515/23/4/10-501/1889, AO.

that he had always promised that his wife would have property in her own name, and that without such a promise she would not have married him. At the time of the conveyance he had been leaving on a trip to England and wanted his wife to have clear title in the case of a mishap:

My intention was simply – I was in no ways liable to anybody, and I had a perfect right to do as I liked with my property...I was a free man...I was going away...the ship might have sunk and taken me down and my wife would have been left and would have had to run a certain amount of law business, which I wanted to avoid...I thought to myself ‘Now, George, you are going away. You have promised this thing to your wife for years. You are going to do this for her: she has worked solidly for you...’ That is my sole and true intention in doing it. I did not know that I owed money that I could not pay, and my intentions were to pay every man every dollar that I owed. I never wanted to defraud a man out of a cent.

The case was dismissed on consent of both parties, although the settlement has not been located. However, George Lewis’s closing comment to the court is telling. Asked what evidence he had regarding his long-standing promise to convey property to his wife, whether such intention was set out in any marriage settlement, he responded, “I just wish it had been”. Without the protection of a written marriage settlement or other statements of intent and ownership, questions regarding ownership of marital property remained endemic. George and Eliza seem to have had a view of marriage as an economic partnership of equals,

but the court did not share their view, even as Eliza’s success and intelligence in business were recognized. Her claim on the business-based property, in the eyes of the law, arose not from the work in a joint business that had helped the couple to accumulate personal wealth, but from her husband’s right to provide for her, a fact that illustrates the subordinate role women were still expected to play in marriage and the central limitation of property law reform. She was conceptualized as his helpmate, not a businesswoman or entrepreneur in her own right. Such conceptualization, by law-makers, judges, census-takers, and too many historians, has rendered businesswomen, and the problems they faced, invisible.

Conclusions

Until recently, historians of business have paid limited attention to the role of women in the marketplace, assuming instead that women were “destined for marriage and motherhood”⁶¹. Even works that have highlighted the market-based work of married women, and asserted that the married women’s property acts opened new avenues for women’s entrepreneurship, have ignored the specific challenges that remained within marital property law, even after reform. The married women’s property acts did not overturn the conceptualization of the wife as helpmate and married women continued to face significant challenges in asserting and proving independent ownership of businesses and business assets in Ontario courts. Some women, it is becoming in-

⁶¹ Bliss, *Northern Enterprise*, 352.

creasing evident, used the married women's property acts to ensure survival by combining the obligations of family and marketplace by being self-employed or working in family enterprises. Women's business successes deserve recognition. Moreover, the constrained circumstances in which married women had to operate businesses require acknowledgement. Married women who wanted to enter into businesses encountered serious liabilities as a result of the special nature of separate marital property and the relationship between husband and wife. They could not obtain credit as readily as could men, and when working in joint ventures, it was not clear that they would be able to claim the profits of their labor as against husbands or creditors. These problems limited the types of businesses

in which women could engage and the extent to which their businesses could expand. Courts continued to interpret women's business rights conservatively and protectively, deferring to the rights of husbands. These problems, ironically, reinforced the invisibility of women's work and perpetuated stereotypes about the types of businesses women were capable of undertaking (those most related to the home and domestic activities). The challenges women faced make their enterprises that much more laudable and worthy of study. Using the sources and tools of business and legal history, historians of women need to flesh out our understanding of women's work/entrepreneurship and to challenge on-going under-valuing of women's business abilities and successes in the past.
