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Abstract

This is a book that every student of Canadian law should read in the first month of law school, before the smoke of the Charter of Rights and Freedoms gets in their eyes and they succumb to the notion that Canadian law really began in 1982. The smoke that blurred the eyes of previous generations of law students carried the message that law arrived in Canada in whatever year English law had been deemed to be received in British North America. With this first volume, A History of Law in Canada Volume One: Beginnings to 1866, and the anticipated publication of volume two, the authors might be able to keep law students clear-eyed and engaged with legal history through their upper years as subsequent volumes roll out. All to the good.

Book Review

A History of Law in Canada, Volume One: Beginnings to 1866 by Philip Girard, Jim Phillips & R. Blake Brown[1]

SHELLEY A.M. GAVIGAN[2]

THIS IS A BOOK THAT EVERY STUDENT of Canadian law should read in the first month of law school, before the smoke of the Charter of Rights and Freedoms gets in their eyes and they succumb to the notion that Canadian law really began in 1982. The smoke that blurred the eyes of previous generations of law students carried the message that law arrived in Canada in whatever year English law had been deemed to be received in British North America. With this first volume, A History of Law in Canada Volume One: Beginnings to 1866, and the anticipated publication of volume two, the authors might be able to keep law students clear-eyed and engaged with legal history through their upper years as subsequent volumes roll out. All to the good.

This first volume is organized in four parts, with thirty-five chapters, supported by 176 pages of endnotes (by my count, 1,987 notes in total) containing a motherlode of Canadian legal history sources. It builds and grows in a manner that reflects the expansion of the European, and then Canadian, presence in northern North America over time and, inversely, the diminishment of the influence accorded to Indigenous laws. "Part One: Introduction" introduces the authors' framework and methodology and the "deep roots" of the three legal

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traditions—Indigenous, French, and English.[3] "Part Two: European Chartered Enterprise, New France, and the Encounter with Indigenous Law, 1500–1701" and "Part Three: The Long Eighteenth Century, 1701–1815" cover the longest temporal periods (201 and 114 years, respectively). Part Three almost doubles Part Two in number of chapters (ten and six, respectively), whereas "Part Four: British North America, 1815–1860s" covers a mere fifty-one years in fifteen chapters.

Each part involves chapters on law and governance and the growth of public institutions, private law, public law, relations and alliances with Indigenous peoples, Indigenous law, and the interface of European and Indigenous law. In Part Four, the chapters devoted to the first half of the nineteenth century reflect the nature of the shift in settler–Indigenous relations. The themes of transformation, "civilization," and dispossession are carefully developed. They demonstrate how the ground was laid for future intrusions by a young Canadian state into the governance of Indigenous peoples through both continued dispossession and destructive government law and policies, including aggressive settlement of the Northwest Territories:

> By the eve of Confederation Indigenous peoples were very much worse off than they had been in 1815: no longer...allies, no longer important cogs in colonial economies, and no longer living largely unmolested in traditional territories. The tide of white settlement and encroachment had swept over them. Settler law was generally of little assistance in stemming this tide.[4]

Notwithstanding what is foreshadowed, the approach taken in A History of Law in Canada might be said to be a long breath of fresh air—but to offer this assessment of this colossal contribution to Canadian legal history is to resort to a puny, misplaced metaphor. Size matters, but this book is more than a massive compendium of sites and moments of importance in the legal history of early Canada.

The book's organizing thesis and framework is that the law in Canada is based on three "pillars": English common law, French civil law, and Indigenous law.[5] Three, not two, founding legal systems and traditions. The elevation of Indigenous law to its rightful place in Canadian legal history is welcome. So too is the thorough and finely grained presentation of (introduction to, for some)

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3. Girard, Philips & Brown intimate this in the titles of chapters 2-4. See "Roots: Indigenous Legal Traditions" in Girard, Philips & Brown, *supra* note 1 at 26; "Roots: French Legal Traditions" in *ibid* at 42; "Roots: British Legal Traditions" in *ibid* at 60. See *e.g. ibid* at 7 (for the reference to legal pluralism's "deep roots").
4. *Ibid* at 613.
5. *Ibid* at 17.

the rich and complex legal heritage of what began as French colonies, which perhaps provides illuminating evidence that heretofore, in English Canada, the typical hat tip to the foundational significance and relevance of Quebec's civil law tradition has tended to be more rhetorical than substantive.

The authors' history of the "beginnings" of the three legal "pillars" is one that involved no less than sixty nations[6] and seven or eight differently configured colonies over the vast region of northern North America, over a tumultuous and transformational period covering three centuries. Given the scope and components of the project, the authors would have been forgiven for presenting A History of Law in Canada as a volume in three distinct parts, in which discrete attention was paid to each legal "pillar" over the period. This would have been a notable contribution, but one too modest for the combined talent and ambition of Philip Girard, Jim Phillips, and R. Blake Brown. Their contribution is all the more interesting and innovative because of the integrative approach they have taken.

This is the first Canadian study to bring all three "pillars" together, a daunting undertaking acknowledged by the authors.[7] More specifically, Indigenous law and French civil law join English common law at centre stage, not simply in cameo appearances in one or another chapter. Writing not in a singular voice but with a unified voice, the authors emphasize the relationships and interrelationships between all three over time. The result is more tapestry than map of roads under construction or washed out.

Thus, an important theme of The History of Law in Canada is one of legal pluralism: The coexistence of three legal traditions of the "pillars"—not as silos but as connected and interconnected traditions and relationships that shaped and were shaped in relation to each other. For Girard, Phillips, and Brown, the "most significant legal achievement[s] of [the] early period" were the Great Peace of Montreal in 1701,[8] "which poured Indigenous content into the form of a treaty document familiar to Europeans,"[9] and the Covenant Chain, which was "meant to enable European and Indigenous peoples to live together" in a "mutually beneficial" manner and in "relative autonomy."[10]

The issue of the relationship between form and content in and of law in a social formation is raised here, not least by the different perspectives of the

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6. *Ibid* at 30. Girard, Phillips & Brown observe that there were "nearly sixty First Nations in North America when European contact intensified around 1500."
7. *Ibid* at 5.
8. *Ibid* at 167.
9. *Ibid* at 142.
10. *Ibid* at 167.

parties. As Girard, Phillips, and Brown note, "Such an agreement, from the Indigenous point of view, represented the beginning of a relationship of kinship, not the finalization of a 'deal.'"[11] Were treaties such as the Great Peace of Montreal empty vessels into which any content could be poured?[12] Could the "content" of Indigenous principles, values, social relations, norms, and law alter the self-confidence of the Europeans' legal forms, transform them, or inevitably be contained and constrained by these agreements? How much Indigenous content could be accommodated? Or were the Europeans and the Indigenous peoples with whom they negotiated the terms of their uninvited coexistence always fundamentally worlds apart, notwithstanding the intentions, good will, and best efforts of the Indigenous peoples? Despite the promise of the Great Peace of Montreal, where the Indigenous nations evinced a willingness to adapt and to deal with the Europeans, the "relentless tide of settlement" inevitably imperilled the prospect of lasting mutuality and cooperation.[13]

One of the strengths of this first volume of The History of Law in Canada is its exquisite attention to the variability in not only forms of law but also forms of colonialism over time and territory in North America. The French of the early period appear in a relatively less unfavourable light than the English. As but one instance, the authors note that there is little evidence that the French Crown viewed North America as "terra nullius,"[14] whereas letters patent issued in some of the English colonies in the period after the 1620s "often ignored the presence of Indigenous peoples…as if the land were already vacant."[15] That said, "[t]he courts, both seigneurial and royal, were key elements in the creation of a settler society in the St Lawrence valley."[16] Not every colony was a settler colony: neither Newfoundland nor Rupert's Lane was settled in the early period, where resource extraction in the form of fish or furs did not involve settlement.[17] In the northwest, Rupert's Land was never intended to be a settler colony (no wives, no clergy, no courts), and, as the authors remind us, the Hudson's Bay Company understood the "necessity of seeking the consent of the Indigenous inhabitants

11. *Ibid* at 84.
12. These are questions with which I have been preoccupied for a very long time. See *e.g.* Shelley AM Gavigan, "Legal Forms, Family Forms, Gender Norms: What is a Spouse?" (1999) 14 CJLS 127 at 131-38.
13. Girard, Phillips & Brown, *supra* note 1 at 168.
14. *Ibid* at 91.
15. *Ibid* at 168.
16. *Ibid* at 99.
17. *Ibid* at 129-32.

before building any forts, and following Indigenous laws in order to establish trading relations."[18]

In the authors' hands, law comes in from the superstructural margins through the imperial and colonial histories they present, which demonstrate, for instance, the "confidence of the French state in the law as a critical tool of colonialism"[19] and the success achieved through the "transplantation and adaptation to local circumstances of the backbone of the civil law…dealing with marriage, family, property, and succession."[20] So compelling is the evidence they marshal of multiple sources of law, plural legal orders, and traditions that even the most skeptical of legal pluralism (and the evocative "luxuriant polyjurality" in Lower Canada)[21] will have to concede legal pluralism's presence, relevance, and importance in the legal "stories" of their legal "pillars." This is vividly illustrated in the decision in Connolly v. Woolrich,[22] in which a Quebec trial judge's "full-throated endorsement of the validity of Cree law"[23] (whilst also drawing on common law, civil law, international law, and canon law) was upheld by the Court of Appeal of Quebec to recognize that a Cree marriage between a white man and a Cree woman was a valid marriage—"the apogee of Lower Canadian polyjurality."[24] Who can resist legal history thus told?

But from the high-water mark of "intercultural law," involving the friendship among allies in 1701, to Lower Canada's 1866 Civil Code, which was silent on Indigenous interests in property and clearly "a project of, by, and for settlers,"[25] the nineteenth century emerges as notable for the decline of both pluralism and friendship, in which "the fluidity and pluralism that had been the hallmark of the interaction between colonial law and Indigenous peoples gave way to the view that European law was supreme."[26] Nowhere was this more evident than in the role of property law and legal instruments such as deed registration, which papered over the fact of the continued dispossession of the Indigenous peoples and "served…to confirm settlers in the view that they, rather than the Indigenous inhabitants, were the 'true' owners of the land."[27] Indigenous title

18. *Ibid* at 135.
19. *Ibid* at 170.
20. *Ibid*.
21. *Ibid* at 435.
22. [1867] QJ No 1 (Qc CS), aff'd [1869] QJ no 1 (Qc CA).
23. Girard, Phillips & Brown, *supra* note 1 at 438.
24. *Ibid* at 437.
25. *Ibid* at 427.
26. *Ibid* at 489.
27. *Ibid* at 348.

disappeared in the relentless colonizing dust storm that swept European settlers onto Indigenous peoples' land.

As a reviewer, one would be remiss not to aver the many chapters devoted to private and public civil law and common law traditions, sources of law and reform, legal education, the legal profession, and the judiciary (and the wonderfully independent progressive judges of the early Newfoundland bench). Notwithstanding my own inclinations, I confess to having found the chapter on corporate law riveting and the civil law chapters to be as illuminating as they are beautifully written.

A History of Law in Canada concludes with two important chapters expressly devoted to those "less favoured by law."[28] These two chapters tell important stories of oppression and inequality but also of agency, workarounds, and resistance. Chapter thirty-three tackles the role of early Canadian law in the racialized inequality of Black people. The contribution of law as a progressive force for transformation and the elimination of racism and Black people's oppression is not robust in Canadian history (and legal historiography) and is a shorter story in these pages. While the institution of slavery "for all intents and purposes [was] dead" by 1815 in the British North American colonies, the legacy of slavery endured through decades-long, legally supported racism and discrimination against Black communities, citizens, and their children.[29] Discriminatory legislation was the site of longstanding objection and resistance to injustice by Black communities in Canada, and this chapter foreshadows issues and struggles that have continued to this day.

Relations of family, gender, and generation, as well as the struggles of married women and widows, are given pride of place in the private law chapters. Issues of marriage, gender, and patriarchal legal principles are deftly integrated and interwoven throughout the book, not simply in the penultimate chapter. Chapter thirty-four, "Less Favoured by Law II: Women and the Law," really serves as the exclamation mark.

This book leaves no doubt about the authors' command of the field and the historiography. Built on formidable research foundations, their own (principally in this volume, that of Girard and Phillips) together with those of Canadian and Quebec legal historians, this book represents as much a tribute to the excellent research and scholarship of other legal historians as it does evidence of the authors' own important contributions. It also represents the best practices of research and scholarship. The fully accessible footnotes are an encyclopedia of Canadian

28. *Ibid* at 662, 683.
29. *Ibid* at 368.

legal historical writing; honoured are the scholars described by the authors as the leading historian or leading legal historian in the area. Their care in finding and working with sources of Indigenous law of the region and period, together with their extensive knowledge of Francophone Canada's legal historiography, represent an invaluable contribution to knowledge (and, not incidentally, to the edification of non-Indigenous and unilingual anglophones respectively).

The authors lead by example, encouraging legal historians to be innovative, imaginative, and rigorous. They identify gaps and under-researched areas of Canadian legal history, including law and the economy in British North America, corporate law, and the development of areas of common law and civil law doctrine, among others. They caution us to be wary of tropes, of an exclusive preoccupation with debates at law's highest levels, and to look at law's everyday practices and interactions. They remind us of the importance of evidence and archival research and, often, the limits of what we can find because the impact of law on people's personal lives, regrettably, often "remain[s] a closed book to the researcher."[30]

An invaluable resource for current and future students and researchers, indeed for anyone interested in Canadian history, A History of Law in Canada Volume One: Beginnings to 1866 tells a compelling (hi)story from beginning to end. Appearance to the contrary, one does not need a forklift to carry it. It fits within a good-sized backpack, and when next we are all able to travel, it is within the weight requirements for carry-on luggage. An august, surely enduring contribution and an authoritative reference, this is an even better book to read.

30. *Ibid* at 163-64.