

**Philip Girard, Jim Phillips, and R. Blake Brown**

*A History of Law in Canada: Volume One—Beginnings to 1866.* Toronto: University of Toronto Press, 2018. 928 pp.

This publication makes a significant contribution to a field of inquiry that has been hugely enriched through the encouragement of the Osgoode Society which, in 1981, inaugurated what is now a collection of over one hundred titles. This latest contribution offers stimulus to further research and should be of interest to several constituencies. *A History of Law in Canada* might arouse interest within the legal profession, as well as among instructors of legal history, and their students, upon whose curiosity we depend for ongoing exploration of the subject matter, and on the part of those generally intrigued about the evolution of Canadian society, institutions, or the economy.

The factors that make the field of legal history of ongoing general importance include the opportunity to understand how societies implement systems of law and governance, how choices are made among alternative institutions and decision-making procedures, how changes are introduced, continuities preserved, and how legal systems interact. Choices and changes (frequently the outcome of conflict or resulting from contested reform initiatives) underpin the dynamic of the narrative, a narrative emphasizing legal pluralism—common law, civil law, and Indigenous law. The authors summarize the “story” line as “a search for a balance between liberty and order in a context of continuing legal pluralism” (p. 5). The enduring and evolving relationship between liberty and order is indeed a staple of legal historical analysis. Legal pluralism, variously described in this volume as a “hybrid legal order” (occasionally “culture”) or a “polyglot legal environment,” or even an “amphibious zone,” adds further complexity.

The emergence in the period after 1760 of a “mixed legal tradition”—British and French—involved controversy and acrimony when established arrangements and efforts directed towards preservation confronted measures directed towards replacement, innovation, and the creation of new institutions. Among less familiar examples of interaction between societies, as illustrated by the evolution of Canada’s legal arrangements, is an elaborate discussion of “intercultural legal relations” involving nineteenth-century Indigenous and European communities. In reference to written codes adopted by Mohawk chiefs, and elsewhere, the authors are careful to acknowledge and discuss challenging methodological and theoretical issues associated with research into Indigenous legal traditions.

The scope of the law that constitutes the subject matter of *A History of Law in Canada* encompasses the broad realms of public and private law. On the institutional and constitutional side, the volume reviews the evolution of foundational governance arrangements and law-making procedures while simultaneously assessing changes in court structure, judicial appointments, and the separation of powers and independence, among other principles affecting the intersection of order and liberty. The evolution of criminal law and procedure as well as

*Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, 2021, Volume 36, no. 3, pp. 536–538. doi:10.1017/cls.2021.23

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punishment and policing are extensively canvassed. The law respecting women and children, along with matters of property and inheritance that might now be addressed within the framework of family law, are also featured prominently, reflecting voluminous recent research.

In their analysis and presentation of particular aspects of law, the authors typically combine descriptions of doctrine and competing principle with case studies or vignettes illustrating the circumstances of litigants or legislative reformers. This pattern of presentation allows readers to appreciate potentially abstract debates about future directions in the law alongside personal experience within the social and economic circumstances of the era.

Although highlighted intermittently, the implications of law for economic and resource development receive comparatively limited attention until the book's final Part, dealing with the period from 1815 to the 1860s. This discussion draws heavily upon (and suitably acknowledges) the exceptional contributions of R. C. B. Risk but is much less inclined to explore the applicability, or otherwise, of arguments concerning the law and economic development associated with American legal historians J. Willard Hurst and Morton Horwitz.

Returning for a moment to the broadly conceived story of pluralism revolving around common law, civil law, and Indigenous legal traditions, the authors explicitly note the existence of pluralism or diversity within these frameworks. The analysis, however, is largely about the challenges of general interaction between and among common law (English), civil law (French), and various Indigenous traditions, a subject of widespread current attention.

The possibility of additional complexity in the evolution of Canadian law might be noted as no mention of the United States appears in the six-page Table of Contents listing Parts, Chapters, and Sections. Nor is the United States mentioned in the statutory, name, or topical indexes—apart from a group of entries under “Revolution, American.” And yet, if we approach Canadian legal history with a view to understanding and accounting for change and continuity, the United States' experience is hugely important, which this text does in fact confirm with frequent reference to American states and judicial decisions.

Notwithstanding the scope of the overall discussion, navigation of the material presents challenges, given the wide-ranging subject matter. Some topics are not easily located even though they appear regularly. Reception—with a dozen or so specific references—is one prominent example. Language and language rights—also discussed on numerous occasions—is another. More surprisingly, given respectful efforts to explain features of Indigenous legal systems emerging from recent research, is the lack of specific guidance to half a dozen or so references to the Covenant Chain and its significance, although these can be located under “treaties with Indigenous peoples.”

References to subjects that are of considerable importance today—the evolution of which might interest twenty-first-century readers—may also be difficult to identify. The history of access to justice is arguably a topic worth understanding for possible contemporary relevance. The same could be said of environment and ecology, a subject of profound importance today that is described as a “major characteristic of Indigenous legal traditions” (p. 28), which is occasionally

mentioned in connection with the experience of individual Indigenous communities. It may well figure more prominently in *Volume Two*, anticipated in 2021. I await the companion volume with enthusiasm.

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