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Harvesting and Replanting the Field
On the Achievements of A History of Law in Canada

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Harvesting and Replanting the Field: On the Achievements of *A History of Law in Canada*

A HISTORY OF LAW IN CANADA, VOLUME ONE: BEGINNING TO 1866 is a major achievement in Canadian legal history and the culmination of five decades of work.[1] The book is an end to an era of legal history writing in Canada, as its authors look behind to the work that has been done, pulling together the strands of doctrinal, social, intellectual, and professional histories of law, crime, and the courts. The book is also a beginning to a new era, as its authors show paths to where the field can go next and – sometimes intentionally, sometimes not – identify the flaws in what we, Canadian legal historians, have done so far. Canadian legal historians will justly start their work with this book for a generation or more to come.[2]

The seeds of modern Canadian legal history first sprouted in 1973 when University of Toronto law professor Richard Risk published the first of four articles on law and the economy in 19th century Upper Canada/Canada West/Ontario and a broader "prospectus" for Canadian legal history.[3] In 1979, a group of lawyers, judges, and others, including historian Peter Oliver at York University, founded the Osgoode Society for Legal History. The Osgoode Society has published, previous to *A History of Law in Canada*, some 112 volumes. This is not every book in English-language Canadian legal history published since 1981, but it is such a large portion that the series commands

1 Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada, Volume One: Beginning to 1866* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2018), xvii, 904.

2 The author would like to thank Hadley Friedland and Joshua Nichols for their comments on an early draft of part of this review. The opinions expressed are the author's alone.

3 R.C.B. Risk, "Nineteenth-Century Foundations of the Business Corporation in Ontario," *University of Toronto Law Journal* 23, no. 3 (July 1973): 270-306 and "Prospectus for Canadian Legal History," *Dalhousie Law Journal* 1, no. 2 (December 1973): 227-45. The other three articles are "Golden Age: The Law about the Market in Nineteenth-Century Ontario," *University of Toronto Law Journal* 26, no. 2 (July 1976): 307-46; "Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective," *University of Toronto Law Journal* 27, no. 4 (January 1977): 403-38; and "Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century," *University of Toronto Law Journal* 27, no. 2 (July 1977): 199-239.

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attention. Oliver's editorial hand shaped the field: he balanced the society's output between academic studies of cases and legal phenomena; biographies and memoirs of judges, lawyers, and legal academics (more or less academic depending on the book)[4]; and books aimed at the legal profession's own sense of antiquary and history.[5] In the late 1970s and early 1980s, University of Western Ontario professor David Flaherty held a series of conferences and also edited two books on Canadian legal history.[6] The first of these was the original 1981 book published by the Osgoode Society, featuring articles by several scholars who would lead the field until today (Risk and also Constance Backhouse and Paul Craven among others). Conferences and books appeared elsewhere in Canada too: in 1984, for instance, Peter B. Waite, Sandra Oxner, and Thomas Barnes edited a book on Nova Scotian legal history that drew on papers from a conference at Dalhousie the year before.[7]

From its start, modern Canadian legal history was influenced by developments in British and American historiographies – especially the social history of law work done in or about England[8] and the Law and Society and

4 The fourth and fifth books in the series were biographies of John Beverley Robinson and Lyman Duff: Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press for the Osgoode Society, 1984) and David R. Williams, *Duff: A Life In the Law* (Vancouver: UBC Press for the Osgoode Society, 1984). Depending on how you count, somewhere between a fifth and a quarter of the series have been biographies and memoirs.

5 This is the smallest group of books, ranging from Marion MacRae and Anthony Adamson, *Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784-1914* (Toronto: Clarke, Irwin for the Osgoode Society, 1983) to law firm history – Clifford Ian Kyer, *Lawyers, Families, and Businesses: The Shaping of a Bay Street Law Firm, Faskens, 1863-1963* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2013) – to commissioned court histories like Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910-2010* (Vancouver: UBC Press for Osgoode Society for Canadian Legal History, 2010).

6 David H. Flaherty, *Essays In the History of Canadian Law* (Toronto: University of Toronto Press for Osgoode Society, 1981) and David H. Flaherty, *Essays In the History of Canadian Law, Vol. II* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1983). Louis Knafla organized a similar workshop in Calgary in 1979, leading to John H. Baker and Louis A. Knafla, eds., *Crime and Criminal Justice In Europe and Canada* (Waterloo, ON: Wilfrid Laurier University Press for Calgary Institute for the Humanities, 1981).

7 Peter B. Waite, Sandra Oxner, and Thomas G. Barnes, *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984). A similar, but Prairie-themed conference was organized by Louis Knafla at the University of Calgary in 1984, leading to Louis A. Knafla, ed., *Law and Justice In a New Land: Essays In Western Canadian Legal History* (Toronto: Carswell, 1986).

8 See, especially, Douglas Hay et al., *Albion's Fatal Tree* (London: Allen Lane, 1975); E.P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975); and, a little later, J.M. Beattie, *Crime and the Courts In England, 1660-1800* (Princeton, NJ: Princeton University Press, 1986). The fact that Beattie was a professor of history at the University of Toronto and

then Critical Legal Studies historical work done in the United States.[9] Inspired by these somewhat different models, Canadian legal historians came to cover a wide range of topics and almost always with an eye toward the law in its broader social, economic, and political context. Risk's 1970s articles were largely about specific doctrines of contract and business law, yet he explained both changes in law and the effects of law with an alertness to how the changes came about and shaped their contexts. These pieces are clearly inspired by the concerns and methods of the American literature.[10] The British social history influence is even deeper and more profound, with several attempts to bring the concerns, methods, and theories of historians like John Beattie, Douglas Hay, Michael Ignatieff, and E.P. Thompson to bear on Canadian questions.[11] The first two volumes of essays edited by Flaherty included chapters on women and the law, political corruption, ideology in magistrates' courts, patterns of court use, the law of nuisance, and more.

Hay was a professor of history at Memorial and then law and history at York University cannot be overemphasized as helping to inspire and develop Canadian legal history in this period and since.

9 See, for example, Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973); Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law & Society Review* 10, no. 1 (Fall 1975): 9–55; Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977); and Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36, no. 1&2 (January 1984): 57–125. Gordon was particularly involved in the Canadian movement, having attended at least one of Flaherty's conferences among other things. See, for example, Gordon and David Sugarman, "Richard C.B. Risk, a Tribute," in G. Blaine Baker and Jim Phillips, eds., *Essays In the History of Canadian Law, Volume VIII, In Honour of R.C.B. Risk* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1999), 3–17.

10 See also Jennifer Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880–1930," in Flaherty, *Essays in the History of Canadian Law, Volume I*, 281–322 and James Muir, "Instrumentalism and the Law of Injuries in Nineteenth-Century Nova Scotia," in Philip Girard, Jim Phillips, and Barry Cahill, *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2004), 361–91.

11 See Jim Phillips, "Albion's Empire: Property, Authority and the Criminal Law in Eighteenth-Century Canada," *Legal History* 10, no. 1–2 (2006): 21–9 for a discussion of Douglas Hay's influence, while Beattie's influence can be seen, for example, in the Canadian essays in Greg T. Smith, Allyson N. May, and Simon Devereaux, *Criminal Justice In the Old World and the New: Essays In Honour of J.M. Beattie* (Toronto: Centre of Criminology, University of Toronto, 1998).

As the field grew, and as times changed, the topics covered expanded. More attention was paid to matters of race[12] and Indigenous people.[13] Atlantic Canada has been central to the research throughout: since the 1984 book edited by Waite, Oxner, and Barnes, two additional collections of essays have been published on Nova Scotia's legal history[14] and another volume of essays dedicated to the legal history of Newfoundland and PEI followed.[15] Several monographs on Atlantic Canadian legal history topics have also appeared, along with a wide number of articles in *Acadiensis*, the *Canadian Historical Review*, Canadian law journals, and more.[16]

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12 See, for example, James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Kitchener-Waterloo, ON: Wilfrid Laurier University Press for Osgoode Society for Canadian Legal History, 1997); Constance Backhouse, *Colour-Coded: A Legal History of Racism In Canada, 1900-1950* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1999); Barrington Walker, *Race On Trial: Black Defendants In Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2010); and Barrington Walker, ed., *The African Canadian Legal Odyssey: Historical Essay*s (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2012).

13 See, for example, James Youngblood Henderson, *First Nations' Legal Inheritance* (Winnipeg: University of Manitoba, Faculty of Law, Canadian Legal History Project, 1991); Sidney L. Harring, *White Man's Law: Native People In Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 1998); William C. Wicken, *Mi'kmaq Treaties On Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002); Shelley A.M. Gavigan, *Hunger, Horses, and Government Men: Criminal Law On the Aboriginal Plains, 1870-1905* (Vancouver: UBC Press for Osgoode Society for Canadian Legal History, 2012); and Wicken, *The Colonization of Mi'kmaw Memory and History, 1794-1928:* The King V. Gabriel Sylliboy (Toronto: University of Toronto Press, 2012).

14 Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law, Volume III: Nova Scotia* (Toronto: University of Toronto Press for Osgoode Society, 1990); Girard, Phillips, and Cahill, *Supreme Court of Nova Scotia*.

15 Christopher English, ed., *Essays In the History of Canadian Law, Volume IX: Two Islands, Newfoundland and Prince Edward Island* (Toronto: University of Toronto Press for Osgoode Society, 2005).

16 See, for example, Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government In Newfoundland, 1699-1832* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2003); David G. Bell, "Maritime Legal Institutions under the Ancien Régime, 1710-1850," *Manitoba Law Journa*l 23 (January 1995): 103-31; Rusty Bittermann and Margaret McCallum, *Lady Landlords of Prince Edward Island: Imperial Dreams and the Defence of Property* (Montreal and Kingston: McGill-Queen's University Press, 2008); Barry Cahill, "The Sedition Trial of Timothy Houghton: Repression in a Marginal New England Planter Township during the Revolutionary Years," *Acadiensis* 24, no. 1 (Autumn 1994): 35-58; Jacques Paul Couturier, "Point De Fort Pour La Loi"? La Justice Civile Dans La Societe Acadienne De 1873 a 1899," *Revue d'histoire de L'Amerique française* 45, n° 2 (décembre 1991): 179-205; Paul Craven, *Petty Justice: Low Law and the Sessions System In Charlotte County, New Brunswick, 1785-1867* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2014); Christopher English, "The Development of the Newfoundland Legal System to 1815" *Acadiensis* 20, no. 1 (Autumn 1990): 89-119; Greg Marquis, "Framing the Boy Problem in the Early Twentieth Century: The Willie Doherty Murder of 1902," *Urban History Review / Revue d'Histoire*

The growth of legal history in the subsequent decades came as a result of the tending and care of a great number of people, including the authors of *A History of Law in Canada, Volume One: Beginnings to 1866*. Philip Girard, Jim Phillips, and Blake Brown have each contributed in many ways to the field, and have written about and edited collections on both Atlantic Canadian and national legal histories.[17] This volume, and its post-Confederation companion, are the harvest of a half-century of historical work – not just the English language work cited here, but a large field of French language work as well. The authors synthesize all of the literature published to date and fill in some of the gaps in the field with their own new research. It is a mammoth undertaking: *Volume One* has 703 pages of text and 180 pages of notes. The book has incredible merits in its own right, and, like any harvest, it contains seeds for the next crop of legal history.

Context

A History of Law in Canada is part of a tradition of national surveys of legal history. The authors point to their various predecessors in the United States,

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Urbaine 47, no. 1/2 (Fall 2018): 27–37; Margaret E. McCallum, "The Acadia Coal Strike, 1934: Thinking about Law and the State," *University of New Brunswick Law Journal* 41 (January 1992): 179–96; James Muir, *Law, Debt, and Merchant Power: The Civil Courts of Eighteenth-Century Halifax* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2016); Stephen E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Text," *University of New Brunswick Law Journal* 48 (January 1999): 41–64; Arthur J. Stone, "The Admiralty Court in Colonial Nova Scotia," *Dalhousie Law Journal* 17, no. 2 (October 1994): 363–429; Harvey Amani Whitfield and Barry Cahill, "Slave Life and Slave Law in Colonial Prince Edward Island, 1769–1825," *Acadiensis* 38, no. 2 (Summer/Autumn 2009): 29–51; Bruce Ziff, "The Law of Property in Animals, Newfoundland Style," in *Property on Trial: Canadian Cases in Context,* ed. Eric Tucker, James Muir, and Bruce Ziff (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2012), 9–34.

17 See, for example, R. Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press for Osgoode Society for Canadian Legal History, 2009); R. Blake Brown, "A Master Mariner's Left Testicle and the Law of Surgical Consent in Mid-20th Century Canada," *Canadian Bulletin of Medical History* 36, no. 2 (Fall-Autumn 2019): 255–80; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for Osgoode Society for Legal History, 2005); Philip Girard, *Lawyers and Legal Culture In British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press for Osgoode Society for Legal History, 2011); Philip Girard and Jim Phillips, "Rethinking 'the Nation' in National Legal History: A Canadian Perspective," *Law & History Review* 29, no. 2 (May 2011): 607–26; Allyson N. May and Jim Phillips, "Homicide in Nova Scotia, 1749–1815," *Canadian Historical Review* 82, no. 4 (2001): 625–61; Jim Phillips, "Judicial Independence in British North America, 1825–67: Constitutional Principles, Colonial Finances, and the Perils of Democracy," *Law & History Review* 34, no. 3 (August 2016): 689–742; and Jim Phillips and Bradley Miller, "'Too Many Courts and Too Much Law': The Politics of Judicial Reform in Nova Scotia, 1830–1841," *Law & History Review* 30, no. 1 (February 2012): 89–133.

Australia, and New Zealand.[18] Although unsaid, this book, and the other national surveys in the common law world, grow out of a tradition in Britain that goes back to the 19th century in works by Frederick Pollock and Frederic Maitland,[19] constructed around areas of legal structure and doctrine. Law and Society scholar Lawrence Friedman initiated the new legal history survey with *History of American Law* (first published in 1973), paying attention to doctrine, too, but also in a broader context. For Friedman the law was shaped by the rest of the society, economy, and culture around it, and in turn shaped those other parts of the human experience too. In Pollock and Maitland, the first section of the second volume is "Tenure," and it goes on to discuss the various ways in which real property could be held in medieval England. In Friedman's *History of American Law* the chapter is titled "An American Law of Property" – a title that signals how what was distinct about the United States led to the development of a distinct law about land. For the Girard, Phillips, and Brown volume, one of the chapters that discusses real property is titled "Land Law and Policy: Titles, Tenure, Squatters, Indigenous Dispossession, and the Rights and Obligations of Ownership." Here are the formal areas of law that concerned historians a century ago: titles, tenure, rights and obligations. Here too, in linking land law and policy, is Friedman's context of 45 years ago. But in squatters and Indigenous dispossession we see their argument that Canadian legal history is inherently a history of colonialism and settlement: Indigenous people are not displaced or replaced but dispossessed (an action of law) while settlement is represented by the squatter – a person operating outside of law (at least at first). Squatting and dispossession are both places of conflict as well. *A History of Law in Canada* is a history of doctrine, of law in context, and of the conflicts of colonialism.

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18 Alex Castlers, *An Australian Legal History* (Sydney: Law Book, 1982); Lawrence M. Friedman, *A History of American Law*, 4th ed. (New York: Simon & Schuster, 2005); Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America,* 3 vol. (Cambridge: Cambridge University Press, 2008); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (St. Leonards, NSW: Allen and Unwin, 1995); Peter Spiller, Jeremy Finn, and Richard P. Boast, *A New Zealand Legal History* (Wellington, NZ: Brooker's, 1995).

19 Frederick Pollock and Frederic W. Maitland, *The History of English Law Before the time of Edward I*, 2 vol. (Cambridge: Cambridge University Press, 1895); Maitland, T*he Constitutional History of England* (Cambridge: Cambridge University Press, 1909); Maitland and Francis C. Montague, *A Sketch of English Legal History* (New York and London: G.P. Putnam and Sons, 1915). John H. Baker's *An Introduction to English Legal History* (Oxford: Oxford University Press, 2019), now in its 5th edition, is the closest analogue to these early works.

Indigenous law

The book opens with an introduction and three chapters on legal roots: Indigenous, French, and British traditions. The importance of Indigenous law in made evidently clear in the introduction, and concern with Indigenous law runs through its very structure. We should expect it to remain a central concern in the second volume. For Girard, Phillips, and Brown, inclusion of Indigenous law is a necessary, political act: "We begin with Indigenous law because its very existence has been contested and problematized over time, and not just in the distant past."[20] Such a commitment is limited by the sources available. They make use of studies by historian Susan Hill, and legal scholars like Hadley Friedland, Sarah Morales, and Val Napoleon among others. But there are many Indigenous legal histories and legal traditions that have not yet been published in ways accessible to academics from outside of the communities, or, where published, the histories and traditions cover only certain elements of the laws. Given the resources they have, however, the authors make excellent work of demonstrating that the Indigenous peoples of what became Canada had fully developed, rigorous laws and legal traditions. Although perhaps unsurprising, the authors' assertion and demonstration of these legal traditions as one of three key sources for Canadian legal history, on par with French and English law, marks this book as special.[21] Law is what governs people and what people use to govern. The practice of colonial state actors to determine what was or was not law for the state's purposes did not, in and of itself, obliterate an Indigenous legal past or present within and amongst Indigenous communities.

A History of Law in Canada also uses Indigenous history, or contact history, moments as key time points in the narrative. The Great Peace of Montreal, 1701, serves as the temporal demarcation between parts two (1500-1701) and three (1701-1815): "The summer of 1701 thus marked a grand constitutional settlement where the Indigenous peoples of northeastern North America agreed to share their space with the British and French as kin, provided each party followed

20 Girard, Phillips, and Brown, *History of Law in Canada*, 4.

21 As the authors point out, the three-volume edited collection *Cambridge History of Law in America* has significant Indigenous content in its first volume, but the content "fades over the next two, with Indigenous law virtually absent from volume 3 (the twentieth century)" (p. 6). Wes Pue and DeLloyd Guth attempted to assert the three inheritances model by opening their collection with a chapter by James (Sakej) Youngblood Henderson, and including several others with Indigenous content, but the integration was not as thorough as it is here, and the book did not have the same profile as *A History of Law in Canada, Volume One* already has. See DeLloyd J. Guth and W. Wesley Pue, eds., *Canada's legal Inheritances* (Winnipeg, MB: Canadian Legal History Project, Faculty of Law, The University of Manitoba, 2001), 1-31.

their own laws and respected those of the other."[22] The assertion of the Peace as a foundational constitutional law sets the book apart from other Canadian constitutional histories, including those like Peter Russell's *Canada's Odyssey,* that attempt to integrate Indigenous experiences into their narrative.[23] Here is a serious reconsideration of Canada's constitutional history to take into account Indigenous agency. The integration of Indigenous legal history into their narrative is an incredible advance for both legal history and Canadian history.

Their theme of Indigenous law is one of the seeds from which Canadian legal history can continue to grow: studying the content of Indigenous law and practice, both before and after sustained contact with Europeans and settlers began, is an avenue that clearly needs more study. The ways in which Indigenous and colonial laws coexisted and rubbed against one another also offer more avenues of study.[24] Finally, a willingness to take up the challenge of re-conceptualizing Canadian constitutional law from an Indigenous perspective – taking moments like the making of the Haudenosaunee covenant or the St. Catharine's Milling case as central constitutional events – offers new avenues for understanding the constitutional past and present.[25]

I am troubled, however, with some of the ways the authors frame Indigenous law. Having noted that archeological evidence points to human habitation of North America 15,000 years ago, and Stōlō ancestors 6,000 years ago, they conclude "Indigenous law is thus much older than either the common law or

22 Girard, Phillips, and Brown, *History of Law in Canada*, 21.

23 See, for examples of absence, W.P.M. Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (London: H. Milford, Oxford University Press, 1922); Peter Russell, *Canada's Odyssey: A Country Based On Incomplete Conquests* (Toronto: University of Toronto Press, 2017); and Alain Gagnon, Guy Laforest, Yves Tanguay, and Eugénie Brouillet, *The Constitutions That Shaped Us: A Historical Anthology of Pre-1867 Canadian Constitutions* (Montreal and Kingston: McGill-Queen's University Press, 2015). The Great Peace is mentioned in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 76.

24 For examples of work already done on matters of family law, see Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building In Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) and Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018).

25 Since *A History of Law in Canada, Volume One* appeared, new books like Gordon Christie, *Canadian Law and Indigenous Self-Determination* (Toronto: University of Toronto Press, 2019); Joshua Ben David Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020); and Kent MacNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019) have added to the literature discussed in the book or cited elsewhere in this review.

the civil law."[26] Here they de-historicize both Indigenous and European laws. While law in North America probably goes back 6,000 and 15,000 years in some way, as historians such statements are not particularly helpful. On the one hand, consider instead that the founding of the Haudenosaunee Confederacy has been dated by some scholars as 1142,[27] a date nicely coincident with the invention of the common law in the reign of Henry II (1154-1189). And the Confederacy and the common law crossed paths in 1763, with the Royal Proclamation almost coincident with Blackstone's *Commentaries on the Laws of England* (published in the last half of the 1760s). In volume one, Blackstone asserted that the "maxims and customs" of the common law were of "higher antiquity . . . [and] used time out of mind."[28] Historians of English law would treat such statements warily as descriptions of the common law in practice, without denying the long lineages of some concepts and elements. Should not historians considering Iroquoian law do likewise, and simultaneously accept that elements of Iroquoian law in 1763 were similar to or the same as they were in the 1100s and also assume that the law had also changed to meet changing circumstances? On the other hand, it is probably true that Iroquoian laws predated the Confederacy, and continued into it; but English and Norman laws from before Henry II were also incorporated into the common law: it was not the start of English law, just a moment in it.

Later in the same paragraph the authors also note "perhaps the most fundamental difference from modern European law is simply that law was mixed in with everything else, or as [Patrick] Glen states more colourfully: 'Law is thus not command, or decision, and can be found only in the bran-tub of information which guides all forms of action' in Indigenous societies."[29] It is true that Indigenous laws, until historically recently, were not written down, and that accessing Indigenous law and legal traditions for study involves working with Indigenous people, their stories, language, spaces, and more.[30]

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26 Girard, Phillips, and Brown, *History of Law in Canada*, 27.

27 Barbara A. Mann and Jerry L. Fields, "A Sign in the Sky: Dating the League of the Haudenosaunee," *American Indian Culture and Research Journal* 21, no. 2 (1997): 105–63.

28 William Blackstone, *Commentaries on the Law of England*, vol. 1 (Oxford: Clarendon Press, 1765), 67. For a discussion of the idea of time out of mind and criticisms of it, see Gerald J. Postema, "Roots of our Notion of Precedent," in Laurence Goldstein, *Precedent in Law* (Oxford: Clarendon Press, 1987), 9–33.

29 Girard, Phillips, and Brown, *History of Law in Canada*, 27, quoting H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed. (New York: Oxford University Press, 2014), 62.

30 See, for example, Friedland, *Wetiko Legal Principles*; Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding

But, while European laws were often written down, and often administered through formal agents of the state and state structures, social and cultural historians have long pushed past this narrow understanding of European law. For instance, in trying to place law within a model of British society and economy, historian E.P. Thompson argued "the law [of 18th century England] did not keep politely to a 'level' but was at *every* bloody level." Carolyn Steedman has helpfully glossed this passage: "We can expand Thompson's version of 'level' and 'everywhere' to encompass not only the productive, and property, and affective relations he alluded to, not only the criminal law that the Tyburn crowd evoked, but also legal philosophy and the many ways that philosophy was interpreted for use in everyday life."[31] Historians of law, especially those concerned with the social, cultural, and intellectual histories, have absorbed this message to find law not only in the commands of courts or actions of police, but also in the ways people act and think relatively independent of the formal law. The authors understand, and appear to broadly accept Thompson's argument in other parts of the book (without employing his Marxist model), but instead of using it to build bridges between Indigenous and European experiences of law they ignore his argument to unnecessarily differentiate between the two.

There are clear differences between the various Indigenous laws in what became Canada and European laws. But I am concerned the authors' descriptions quoted above unduly exoticize Indigenous law to a point that creates a space between Indigenous practices called "law" and European practices called "law." One of the most important elements of Indigenous law scholarship is to assert that Indigenous law is as robust as European law, ordering Indigenous societies as thoroughly (but differently) as European law ordered European and settler societies. To make distinctions between Indigenous law and European law that invent or emphasize differences so starkly opens up space to question whether Indigenous law is law *per se*, or whether it is just some non-law way of ordering society that, while good for pre-contact eras, is incapable of handling the complexity of issues to which laws must respond in 1800 or today. I understand and empathize with what I

Indigenous Legal Traditions," *Lakehead Law Journal* 1, no. 1 (2015–2016): 16–44; and Sarah Morales, "*Stl'ul Nup*: Legal Landscapes of the Hul'qumi'num Mustimuhw," *Windsor Year Book for Access to Justice* 33, no. 1 (2016): 103–23.

31 E.P. Thompson, *The Poverty of Theory and Other Essays* (London: Merlin, 1978), 288–9 and Carolyn Steedman, "At Every Bloody Level: A Magistrate, a Frame-work Knitter, and the Law," *Law & History Review,* 30, no. 2 (April 2012): 388–9.

imagine to be the impulses in the statements above, but I find them regrettable in what is otherwise an exceptional, inspiring integration of Indigenous law into Canadian legal history.

Details and pluralism

The chapter on Indigenous law distinguishes between Mohawk/Iroquois, Inuit, Haida, Gitxsan, and other traditions, showing both similarities and drawing attention to differences. The refusal to paint a singular Indigenous legal tradition is simultaneously a necessary but important political position. The distinctions they draw in discussing Indigenous legal traditions are maintained in discussing much else in the book as well. Take, for example, the discussion of reception. A colony receives the law of its parent country up to a particular date. In discussing the reception of law in the British colonies in the 1700s, the authors distinguish amongst Upper Canada, New Brunswick, PEI, and Nova Scotia. They then turn to the reception of particular laws, like those regarding real property and land tenure. Again, they distinguish between each of the colonies. On land they speak to what law was received (or not), why, and to what effect.[32]

These sorts of specificity are a particular strength of *A History of Law in Canada*. The detail ensures that, where knowable, the histories of different peoples and places are distinguished and clarified. Colonies are not forgotten or lumped together; rather, the diversity of the history and the implications thereto are followed and explained. There is no unitary history of law in the spaces that become Canada, or even just three histories of law (Indigenous, French, English). And so, it follows, there is no unitary history of the spaces that become Canada writ large. Again, this decision embeds an argument of legal history and Canadian history – an argument that is particularly acute for historians of the Atlantic region, who know the ways the distinct regional and local histories are left out of national narratives.

The authors frame this discussion of complexity as legal pluralism. Although not a new theory,[33] legal pluralism has seldom been so seriously embraced in Canadian legal history writing. The survey nature of *A History of Canadian Law, Volume One* makes the embrace more possible than in

32 Girard, Phillips, and Brown, *History of Law in Canada*, 338-49.

33 See, for example, John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1-55 and Martha-Marie Kleinhans and Roderick A. Macdonald, "What Is a Critical Legal Pluralism," *Canadian Journal of Law and Society* 12, no. 2 (Fall 1997): 25-46.

most monographs and articles. A broad national perspective gives them the opportunity to see pluralism more clearly. They also see it on several levels: among Indigenous, English, and French traditions; among individual colonies or places in northern North America; in the sources of law and legal ideas[34]; in the structure of the colonial legal system with high and low law jurisdictions; and in a wide variety of courts and tribunals responsible for only sometimes overlapping matters. Building on the work of Jerry Bannister, Edward Cavanaugh, Paul Nigol, Russel Smandych, and others, they also address (semi-) privatized law in Newfoundland and Rupert's Land.

A History of Canadian Law offers another form of pluralism in its approach, one that underscores the importance of the social, cultural, and critical turns in legal history scholarship. This history of Canadian law is a history experienced by, brought to life by, a plurality of people. Long discussions are devoted to the way women, slaves, workers, and common people experienced the law. In doing so they share stories: of Marie Brazeau, an immigrant to New France in 1681, whose parents used a fiduciary substitution to ultimately leave her inheritance to her children instead; of Peter Kirby, tried for highway robbery in Nova Scotia in 1846; and many others.[35] For all of their discussion of institutions, structures, and laws, Girard, Phillips, and Brown weave in many examples to give life to the history and their text.

Pluralism offers another line for future research. More work on the interaction of plural legal structures within a space and between spaces will help us develop a richer sense of the complexity of Canadian laws. Girard, Phillips, and Brown's book also creates a space for a more radical legal pluralism in Canadian legal history – one that takes legal history ideas and theories beyond the places people are accustomed to seeing law and into those places we are not. What, for instance, can a legal pluralist history tell us about the internal organization of churches and faith groups, or companies in the industrial revolution, fraternal societies, protest movements, and political parties? This work has been started by historians working in other fields, but it has only fitfully been attempted by legal historians.[36] The power of *A History*

34 Girard, Phillips, and Brown, *History of Law in Canada*, 413–19, 390–406, 252–66.

35 Girard, Phillips, and Brown, *History of Law in Canada*, 161–2, 585.

36 Besides Griffiths and Klienhans and Macdonald cited above, see Stuart Henry, *Private Justice: Towards Integrated Theorising In the Sociology of Law* (London: Routledge & Kegan Paul, 1983) for theoretical and empirical examples of a broad legal pluralism. See also, for example, Paul Craven and Tom Traves, "Dimensions of Paternalism: Discipline and Culture in Canadian Railway Operations in the 1850s," in *On the Job: Confronting the Labour Process in Canada*, ed. Craig Heron and Robert Storey (Montreal and Kingston:

of Canadian Law is to show what we already know, and provide license to Canadian legal historians to take more risks in broadening the field.

The book as a book

One implication of the precision and detail is the length of the book and the density of its prose. At more than a third again as long as another recent history of Pre-Confederation Canada that touches on some of the same themes (928 pages),[37] this is a book that I fear will be in search of an audience who actually reads it. It will rest on many historians' bookshelves and in the e-book catalogues of many universities, to be consulted on specific topics and specific locales. But these traits also serve to close the book to many audiences. In a one-semester legal history of Canada course, one I have taught and will teach again, can I assign even just this first volume as a core text and expect my students to read it? Probably not. While I have and will recommend it to my colleagues and students in the faculty of law, I expect its size and the breadth of its detailed discussions will mean most will look away. As for my Canadian history colleagues, I fear too many of them, as well, will be turned away by the size of this book. That is a real loss, for the specific book and the field in general. Despite the great work that has been done in the last 50 years that is synthesized in this book, I am doubtful *A History of Law in Canada* will find much of a broader audience among Canadian historians.

Those who do pick it up and read through it will be rewarded on every page. Girard, Phillips, and Brown have achieved an incredible feat. They have brought together a wide range of literature and created a truly novel work. The book does so much more than provide an analytical narrative of Canada's legal past. Their commitment to Indigenous histories and to revealing the plurality of Canadian experience is a model for all Canadian historians about how to write a survey given the range of work done and people and approaches to consider. We have here not only a history of law in Canada up to 1866; we have

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McGill-Queen's University Press, 1986), 47–74; Albert Schrauwers, *"Union is Strength": W.L. Mackenzie, the Children of Peace, and the Emergence of Joint Stock Democracy in Upper Canada* (Toronto: University of Toronto Press, 2009); and Russell Smandych and Rick Linden, "Administering Justice Without the State: A Study in the Private Justice System of the Hudson's Bay Company to 1800," *Canadian Journal of Law and Society* 11, no. 1 (Spring 1996): 21–61.

37 Elizabeth Mancke, Jerry Bannister, Denis McKim, and Scott W. See, eds., *Violence, Order, and Unrest: A History of British North America, 1749–1876* (Toronto: University of Toronto Press, 2019); this book is 536 pages long.

a new model for thinking about and presenting Canadian pre-Confederation history.

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