THE PARADOX OF CANADIAN PROGRESS: A HISTORY OF LAW IN CANADA, VOLUME TWO, LAW FOR THE NEW DOMINION, 1867–1914, JIM PHILLIPS, PHILIP GIRARD & R BLAKE BROWN (TORONTO: UNIVERSITY OF TORONTO PRESS, 2022)

I. INTRODUCTION

Jim Phillips, Philip Girard, and R Blake Brown humbly claim that their work offers nothing new to historians, but their book, *A History of Law in Canada, Volume Two: Law for the New Dominion, 1867-1914*,[1] proves otherwise. This 616-page masterwork brings together the actors, norms, and processes of the time with encyclopedic precision, capturing Canada's unsettling path to modernity and the pivotal role of law in this transformation. Much like its predecessor,[2] this volume promises to be an invaluable resource for researchers and a touchstone for future scholars.

II. THEMES

Following the methodology of the first volume, the authors forgo a formal thesis, opting instead to guide the reader through this history using two themes: (1) legal pluralism; and (2) the tension between liberty and order.[3] These themes frame events and details, making the historical evidence more understandable.

The pluralism theme delves into the co-existence of distinct legal traditions within Canada: Indigenous law, Quebec civil law, and Canadian common law.[4] Settlers largely dismissed Indigenous law, becoming increasingly assured that the "oral transmission and traditional practices" of Indigenous governance were merely "folkloric and not real law," allowing them to frame assimilation efforts as virtuous attempts to prepare Indigenous peoples for a modern world.[5] For these reasons, Indigenous law "went into partial eclipse during this period."[6]

Quebec civil law, by contrast, flourished. Although the British firmly believed that spreading their civilization would "aid" others,[7] their French subjects in Canada posed deeper

1 (Toronto: University of Toronto Press, 2022) [Phillips, Girard & Brown, *Volume 2*].
2 Jim Phillips, Philip Girard & R Blake Brown, *A History of Law in Canada, Volume One: Beginnings to 1866* (Toronto: University of Toronto Press, 2019) [Phillips, Girard & Brown, *Volume 1*].
3 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 5–9, 13–17.
4 *Ibid* at 5–7.
5 *Ibid* at 5. Consider also John Stuart Mill's observation that the prevailing view justified imposing governance on another nation if deemed beneficial to that society or necessary for the security of its neighbours: John Stuart Mill, "A Few Words on Non-Intervention" (1859) 60:360 Fraser's Magazine 772 reprinted in (2006) 27:3 New England Rev 252 at 260–61.
6 Phillips, Girard & Brown, *Volume 2*, *ibid* at 7.
7 Mill, *supra* note 5 at 261.

ideological "challenges" to this presumption.[8] As a result, French institutions and practices enjoyed significant accommodation for both idealistic and practical reasons.[9] However, the advent of Confederation imperiled this French-English equilibrium,[10] so the *Civil Law Code of Lower Canada*[11] was enacted just prior in 1865. This codification of Quebec civil law emerged as "a visible symbol of its renewal for observers inside and outside the province."[12] As a result, this law advanced in important ways, becoming more discerning.[13] Nonetheless, it still confronted hegemonic pressures akin to those faced by Canadian common law.

Those new to Canadian legal history might assume that Canadian common law soon rose as the hegemon, but this was not the case.[14] During this time, the Judicial Committee of the Privy Council acted as Canada's final court of appeal, reshaping Canadian political and legal institutions to Imperial preference by engaging in a "*judicial* statesmanship," which paid little heed to the Dominion's black letter law nor any accepted limit upon judicial discretion.[15]

The second theme examines how law was used to balance liberty and order within the new Dominion, with the priorities of nation building usually tipping the scale in favour of order.[16] The authors' best evidence for this tilted balance is the fallout from the Federal Government's push toward western settlement. Until the mid-nineteenth century, the British enjoyed de facto control over modern Washington and parts of Oregon.[17] But the rapid westward expansion of the United States threatened this hold.[18] The British soon feared that Americans would push them to retreat further from the Pacific Northwest and beyond the forty-ninth parallel into Rupert's Land if these territories were not settled quickly.[19] John

---

8 Britain had never confronted the legitimacy issues raised by imposing its civilizing influence on a colonial territory inhabited by white, Christian settlers originating from another European power: Frederick Vaughan, *The Canadian Federalist Experiment, From Defiant Monarchy to Reluctant Republic* (Montreal: McGill-Queen's University Press, 2003) at 22.

9 Phillips, Girard & Brown, *Volume 1*, *supra* note 2 at 334–37; Vaughan, *ibid* at 22–26.

10 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 5.

11 CCLC (1865).

12 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 6.

13 *Ibid*.

14 It was not until 1949 that the *Supreme Court Act* was amended, establishing the Supreme Court of Canada as the final appellate authority and ending appeals to the Judicial Committee of the Privy Council: see generally *Act to Amend the Supreme Court Act*, SC 1949, c 37.

15 Although Canadian legal insiders condemned the Judicial Committee of the Privy Council's condescending interpretation of the Constitution, the Imperial Parliament remained silent about this "*judicial* statesmanship" — presumably because it served Imperial interests: Vaughan, *supra* note 8 at 132 [emphasis in original].

16 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 7–9.

17 Although Old Oregon was nominally under joint US–British occupation from 1818, the Hudson's Bay Company upheld Britain's territorial claims through forts and trade routes. After John Astor's withdrawal (1813–14), the Company faced minimal American competition, coexisting with the region's 80,000 Indigenous inhabitants: Stephen R Bown, *The Company: The Rise and Fall of the Hudson's Bay Empire* (Toronto: Doubleday Canada, 2020) at 350–51.

18 The gold rush started in California in 1848, bringing a flood of American settlers, which spread north to Oregon (1852), then to northeastern Washington (1855): see generally Alice Applegate Sargent, "A Sketch of the Rogue River Valley and Southern Oregon History" (1921) 22 Q Oregon Historical Society 1 at 4; J Orin Oliphant, "Old Fort Colville (Continued)" (1925) 16 Washington Historical Q 83 at 87. In 1858, this wave of US miners and other settlers surged into British Columbia, where British perceived such US immigration as a threat to their claims to sovereignty: Bown, *ibid* at 398–99.

19 After the international boundary agreement in 1846, the Hudson's Bay Company continued administering Vancouver Island and New Caledonia much as it had the Columbia Department, but by 1849 Britain took a more direct approach to colonizing to prevent American encroachment: Bown, *ibid* at 397.

O'Sullivan's 1845 call for "manifest destiny" only heightened British concerns, especially as it began to resonate through the US Capitol.[20]

This threat explains the new Dominion's urgent push for control over the west. Within 30 years of Confederation, the prairies were surveyed, the North-West Mounted Police were established, and a trans-Canadian railroad was built.[21] Indigenous and Métis resistance was suppressed, numbered treaties were signed, and new reserves were created.[22] Through these actions, the Dominion laid the groundwork for the mass immigration that followed.[23] The American threat may have been neutralized and Imperial control secured, but these ends came at a high price: the loss of Indigenous life, liberty, and culture.[24]

The authors also examine how law mediated the tension between liberty and order in other contexts. For instance, Parliament refined criminal law to curb the "antisocial" pursuit of liberty.[25] This refinement led to more efficient enforcement, transforming a colonial administrative practice, which relied on governors with their ties to elite locals, into a bureaucratic routine with specialized public services and standardized procedures of state-imposed order.[26] This governance approach profoundly impacted the evolution of the modern administrative state in the following years.[27]

In addition, the authors explore the slow growth of political and economic freedom during this period,[28] particularly for minorities.[29] They uncover stories that may unsettle modern readers, revealing the deeply ingrained callous indifference to suffering among seemingly civilized Canadians of the era. Despite widespread liberal rhetoric, practices often fell well short of the ideal.

---

20 As John O'Sullivan put it, the unspoken element of America's claim to Oregon was a new revelation of right — a "manifest destiny to overspread the continent" — constituting, in his view, a new chapter in the law of nations: John L O'Sullivan, "Annexation" (July–August 1845) United States Magazine & Democratic Rev 5, online: [perma.cc/VAG4-8RFB]. See e.g. US, *Congressional Globe*, 29th Cong, 1st Sess 134 (3 January 1846) (Rep Winthrop).

21 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 7–8.

22 *Ibid*.

23 Alan Green, Mary MacKinnon & Chris Minns, "Conspicuous by their Absence: French Canadians and the Settlement of the Canadian West" (2005) 65 J Econ History 822 at 823 ("[i]n 1871 the total population of western Canada was only about 110,000, by 1891 about 350,000, with those of European origin highly concentrated in Manitoba and British Columbia. The population nearly doubled in the next decade, rising to almost 650,000, and more than doubled (to 1.75 million) between 1901 and 1911").

24 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 8.

25 *Ibid*.

26 *Ibid*.

27 Early twentieth-century progressives aimed to remove decision-making from partisan politics by entrusting authority to scientifically trained experts to more efficiently serve the public interest: William E Akin, *Technocracy and the American Dream: The Technocrat Movement, 1900–1941* (Berkeley: University of California Press, 1977) at 3.

28 Phillips, Girard & Brown, *Volume 2*, *supra* note 1 at 8.

29 *Ibid* at 9.

III. STRUCTURE

The book has four parts, 16 chapters, and a short postscript, which sets up the third volume, "on the Eve of the Great War."[30]

Part One of this book explores the law of the new Dominion and the evolution of its institutions, forming the foundation of Canada as a modern administrative state. In its five chapters, it outlines the key transitions every first-year law student should know. It details the shift from judges traveling long distances to makeshift courts in sparsely populated areas to a more organized judicial system. It tracks the change from separate colonies to a constitutional dominion with a federal system, a crucial step toward nationhood. It follows the development from a mix of legal traditions, which interfaced as necessary, to a more unified system based on a model of Imperial modernity, which established standards that encouraged Quebec civil law while undermining Indigenous law, practice, and identity. Finally, it presents a history of legal practice and education, which helps law students understand the institutions of their present and the practice of their future.

Part Two consists of four chapters, focusing on the early relationship between the Dominion and the Métis and Indigenous peoples. It covers the westward colonial expansion from Ontario and the resulting Indigenous dispossession, assimilation, and resistance. It details the capture, trial, and execution of Louis Riel, and the formalization of the reserve system through the Numbered Treaties. It examines the creation of the *Indian Act* and its impact on Indigenous governance, set against policies that officially aimed to prepare Indigenous peoples for the modern world but merely resulted in a violent cultural genocide, the scars of which are still visible today. These oppressive policies included mandatory attendance at residential schools, which forcibly removed children from their families, language, and culture.

In Part Three, the focus shifts from Indigenous-settler relations to preparing settler society for the modern world. It covers four key laws for a modern commercial society: incorporation and insolvency law, labor and employment law, criminal law, and property law. Civil liberties often gave way to the needs of a rapidly industrializing world, a world which would blindly push humanity into the horror of the Great War.[31]

Part Four comprises two chapters that scrutinize the dual role of law during this period in both perpetuating and contesting the subjugation of women and minorities. These chapters investigate the gradual advancement of civil rights for women, exploring the transformation of women's status within familial, legal, and political domains. Additionally, they examine examples of shameful policies and actions that targeted racialized minorities, which might trigger some readers. These examples particularly focus on the challenges faced by Black, Chinese, Japanese, and South Asian communities during this era, underscoring Canada's failure to become a country as tolerant as it was diverse — a goal yet to be realized today.

---

30 *Ibid* at 613.

31 Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (London: Penguin, 2012) at 562 ("the protagonists of 1914 were sleepwalkers, watchful but unseeing, haunted by dreams, yet blind to the reality of the horror they were about to bring into the world").

IV. REFLECTIONS

Framing historical characters and events often presents challenges, especially when recounting violence, and Canada's history from Confederation to the eve of the Great War is no exception. This period tells the story of modern nation-building, and the sacrifices deemed necessary to achieve it. Many of these sacrifices were imposed through actions that continue to impact people today: actions once seen as justified, which are no longer viewed that way today. Consequently, this history has not transcended the present, its resonance still complicating historiography. Yet, the authors succeed, revealing more about the past than themselves — a virtue that grants any historical work a greater chance of seasoning with age.

Despite having multiple authors, the book achieves a singularity of voice. The writing is excellent throughout. However, readers seeking to be transported through time by historical narrative may be disappointed; by design, the book does not serve this purpose. Instead, it is an extended compendium of Canadian legal history from 1867 to 1914 and an invaluable resource for any legal researcher of the time.

A History of Law in Canada, Volume Two, Law for the New Dominion, 1867–1914 provides a thorough treatment of a wide range of legal subjects and will undoubtedly become a foundational text in the literature. This impressive work, the second of three volumes, represents a high watermark in the field and is a must-have addition for any law library.

Fenner Stewart
Associate Professor, Faculty of Law
University of Calgary