

## The Future of Canadian Legal History in a Smaller, Hotter World

Philip Girard

Schulich School of Law, Dalhousie University

As we reflect on the achievements of the Osgoode Society and the writing of Canadian legal history over the past thirty years, we also need to think about the next thirty years, about where the discipline can and should go in the future. I want to suggest that future work will look quite different from what we have done in the past. We have spent the past thirty years filling in many of the spaces outlined in Dick Risk's 1973 prospectus, charting the rise and fall of legal institutions and doctrines, putting flesh on the bones of our *dramatis personae*, from the famous to the infamous to the previously unknown, and teasing out the relationships with our legal metropolises, England, France, and the U.S.A. We have gone beyond Dick's prospectus in many ways, challenging the promise of Canadian legal liberalism by exploring its performance with respect to women, the disadvantaged, and marginalized groups of all kinds. Even so, Dick's colouring book is not full yet, and we will continue to fill in the spaces. But increasingly, I think, we will colour outside the lines, we will go back and colour over in different hues pictures we thought were complete, and we may add completely new pictures. I will frame these new lines of inquiry in the form of four challenges: the comparative challenge, the corporate challenge, the environmental challenge, and the aboriginal challenge. I will only speak about the first three of these as my co-panellist Mark Walters will address the third.

My first challenge is a methodological one. Canadian legal history must and will become more comparative and more internationally focused than it has been. In the past we have understood this to mean tracing "outside" influences on our law, or occasionally, tracing our influence on the laws of other countries. This is important work that should continue, but it is not what I mean by a comparative methodology. An example of what I do mean is provided by Michael Burrage's recent book, *Revolution and the Making of the Contemporary Legal Profession: England, France, and the United States* (OUP 2006). Burrage hypothesizes that national revolutions have a profound effect on the structures and development of the legal profession in the nations in which they happen, and sets out to prove it by looking at the history of the legal professions in each of his chosen countries over the *longue durée*. In doing so he challenges conventional historical wisdom on almost every point, because his comparative method leads him to ask questions that simply do not occur to someone who works exclusively within a particular national tradition. Comparative analysis will not only lead us to ask new questions about Canadian legal history, but will enable us to shed light on the experience of other countries. Studying comparatively the very different ways in which professional organization evolved in the U.S. and Canada over the 19<sup>th</sup> century, for example, sheds light not just on the Canadian experience but also on the American.

My second theme is what I have called the corporate challenge. We have been slow to explore the rise of the corporation and its impact on the legal order, whether in private or public law. Rande Kostal's *Law and English Railway Capitalism* (OUP 1994) showed that English rail companies were embedded in a web of law that shaped every aspect of their activities, but

he has had as yet no imitator in Canada. The existing Canadian literature views the corporation primarily through the lens of labour and employment law, through the role of the legal profession in facilitating corporate activities, and through case studies of particular corporations. But the growth of private, regulatory, and criminal law aimed at protecting investors and the public from the economic, health, and environmental hazards of corporate activity has been much less explored. How did Canada measure up in responding over the long haul to what Karl Polanyi called *The Great Transformation*? Contrary to a prevailing vision of Canada as a kinder, gentler version of the nation to the south, there are hints in the existing literature that “Canadian conditions” have been invoked consistently by legal officials, policy makers and business leaders to justify lower levels of protection from various risks and hazards than those enjoyed by Americans.<sup>1</sup>

The third challenge, which overlaps to some extent with the second, is the environmental one. Canadian legal history has been slow to respond to the recent upsurge of interest in environmental history, with the exception of Jamie Benedickson’s excellent book *The Culture of Flushing: A Social and Legal History of Sewage* (UBC Press 2007) and a small article literature. One of the questions that will be increasingly asked of Canada in the future is: “how well have you exercised the stewardship entrusted to you over a huge portion of the earth’s surface?” In spite of our tendency to self-congratulation on environmental matters, I think it is increasingly clear that the answer to that question is “not very well at all.” Law has been part of the problem, in the sense that the liberal paradigm of property law has rewarded most those who have been able to foist the negative externalities of their exploitation of property resources on others, thereby degrading air, water and soil resources and the biosphere at large. But law must also be part of the solution, in the sense of re-internalizing those externalities and instituting a much more effective form of stewardship over our portion of the biosphere, in concert with other national and international actors. Why, in spite of many efforts going back to the 1909 federal Commission on Conservation, which published over 200 reports on the state of Canada’s natural resources during its 12-year lifespan, so little should have been accomplished on the legal and political fronts, is a major question that urgently awaits exploration.

The final challenge is that relating to the contribution of aboriginal peoples to Canadian law and their changing position vis-à-vis the law of European origin received into Canada. This challenge has already begun to be taken up by scholars of both aboriginal and non-aboriginal origin, among whom my co-panellist is one of the most prominent.

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<sup>1</sup> Dimitry Anastakis, “A ‘War on Pollution’? Canadian Responses to the Automotive Emissions Problem, 1970-1980” (2009) 90 C.H.R. 99; Stephanie Ben-Ishai & Poonam Puri, “Dual Class Shares in Canada: An Historical Analysis” (2006) 29 Dal. L.J. 117