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### Civil and Common Law: A Historical Analysis of Colonial and Postcolonial Canada

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## Civil and Common Law: A Historical Analysis of Colonial and Postcolonial Canada

### Cover Page Footnote

I owe a lot of gratitude to countless mentors and friends for aiding me in this article. Specifically, I would like to thank: Dr. Scott Himsel, for the days in his office spent wrangling my writing style; Dr. Stephen Morillo, for his direction and his advice; Jeff Beck (Wabash College Lilly Library) for his aide in navigating databases; and Deborah Polley (Wabash College Lilly Library), for finding the strangest of books in the farthest of places.

## **CIVIL AND COMMON LAW: A HISTORICAL ANALYSIS OF COLONIAL AND POSTCOLONIAL CANADA**

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MENTOR: STEPHEN MORILLO

### **Abstract**

Legal historians divide European law into two principal families: common law (British law) and civil law (continental European law). Common law judges favor cases; courts “discover” law on a case-by-case basis and those cases make precedents for future ruling. Civil law courts favor codes; courts compare cases to existing laws and those laws control judges’ rulings. The two rarely interact, save one prominent example: Canada. British common law supposedly superseded French legal traditions in colonial Canada. But is history so binary? Did British common law truly “conquer” French civil law? Through analysis of Canadian legal history, this article demonstrates how French civil law has been part of legal development in Canada throughout its history and plays a role in the country’s modern, hybridized legal system.

### **Introduction—How Historians Have Failed in Canadian Legal History**

Some three decades after France ceded the provinces of New France (*Nouvelle-France*) to the British Empire following the Seven Years’ War, Admiral Sir George Cranfield Berkeley of Her Majesty’s Navy recorded his opinions of Britannia’s latest conquest and its feasibility as a future home for British language, culture, and law. A naval commander against the French allied fleets in the American War of Independence, Berkeley’s predicted rebellion for the young state, the new region of Lower Canada (Quebec). In his 1791 appraisal of Upper and Lower Canada, the Admiral wrote that “the Laws, Language, Customs and Religion of Lower Canada will always keep it distinct” and that the region’s extensive French influence gave it little merit or utility for the purposes of legal or cultural reform.<sup>1</sup> As such, Admiral Berkeley saw no future for Lower Canada other than as a potential member of the young United States.

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<sup>1</sup> Graham, Gerald S. *Sea Power and British North America, 1783-1820*. Cambridge: Oxford University Press, 1941.

Berkeley's observations regarding the interaction between the new state of Lower Canada and the British colonies of Upper Canada reflect a larger development in British colonial history. Since the Seven Years War's conclusion in 1763, Great Britain worked to include and absorb French Canada, an area wholly different from its neighboring English-speaking Protestant regions. Not only did the two regions find themselves separated by linguistic and religious differences, but their organizational structures and legislative hierarchies contained different frame values and cultural elements.

Of its divergent systems, the historical relationship between French Canadian civil law and Upper Canadian common law represents a major meeting point in colonial legal history. Within Canada, these two European cultural frame structures collided by force after Britain annexed France's Canadian holdings in North America, an event that called for the literal and cultural translation of British common law onto a formerly civil law system. Historians qualify this interaction between civil and common law in Canada as a conqueror-conquered relationship. Many scholars assert that the common law system of Great Britain destroyed French civil law, leaving only vestiges such as Quebecois civil trials. Within the context of this kind of historiography, French civil law exists only as an outlier of the "dominant" legal structure of contemporary Canada and its British colonial history.

On the other hand, binary approach to historiography ignores reality. While I am tempted to categorize Canadian legal history as a conquest of legal families, doing so misinterprets any kind of societal interaction. Historians of any field cannot treat cultural juxtaposition like a zero-sum game of winners and losers. Inevitably, one must reach new conclusions regarding the interaction between the multiple legal systems within colonial and contemporary Canada to fully explore the country's multifaceted legal origins and colonial influences. This paper will analyze how common law and civil law developed within Canada, especially in Lower Canada. This analysis will demonstrate that French civil law influenced later British legal development, creating a contemporary hybridized system that uses multiple judicial systems within its structure.

## **Early Interactions—Origins of Legal Development in British and French Canada**

### **THE HUDSON'S BAY COMPANY**

While French civil law and English common law in Canada often existed independently of each other before colliding in 1763, one sees a developing hy-

bridized system emerging underneath the two principal legal systems of the region even before Britain annexed the former *Nouvelle-France*. As former Canadian Chief Justice Bora Laskin summarized, British colonial interests in Canada achieved full force in the early part of the 17th century. These early colonies culminated in a royal charter in 1670 for the Hudson's Bay Company's colony in western Rupert's Land, the land that comprises modern-day Manitoba and Saskatchewan.<sup>2</sup> Until the independent country of Canada reorganized its charter in the 19th century, the Hudson's Bay Company had full clearance to enact its own policies and legislation within its charter land, but only so long as the Company administered its courts and jurisprudence "in conformity with the law, statutes and customs of England."<sup>3</sup> One of the oldest corporations within North America, the Hudson's Bay Company would later divide its judicial systems into courts akin to the English system of courts of Exchequer, a King's Bench, and other common law bodies, with any serious criminal trials being sent to Westminster for a more formal judicial treatment.

### **CALVIN'S CASE**

However, Canadian legal history did not begin in 1670. Rather, it began in 1608. In that year, Canadian common law jurisprudence rose from *Calvin's Case*, a Court of King's Bench decision in England regarding Robert Calvin, a Scotsman. Calvin inherited land in both Scotland and England.<sup>4</sup> Calvin's guardians, John and William Parkerston, bequeathed land to Calvin in Haggerston, England, as well as his homeland in northern Scotland.

The defendants Richard and Nicholas Smith "unjustly, and without judgment, did disseise Rob. Calvin, gent. of his freehold in Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard in Shore-ditch," on the grounds that Calvin was a Scottish citizen and not a subject under the kingdom of James I.<sup>5</sup> As Sir Edward Coke recorded, following the Writ of Assize, the Smiths argued that the right to property inheritance re-

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<sup>2</sup> Laskin, Bora. *The British Tradition in Canadian Law*. Toronto: The Carswell Company, Ltd., 1969.

<sup>3</sup> *Ibid.*, 7.

<sup>4</sup> Coke, Edward. *Selected Writings of Sir Edward Coke. Reports: Calvin's Case, or the Case of the Postnati*. Vol. I. Edited by Steve Shepherd. Indianapolis, IN: Liberty Fund, 2003.

<sup>5</sup> *Ibid.*

quired citizenship within the Kingdom of England; while the Court of King's Bench agreed with the defendants, it ruled that Calvin inherited the property. While the attorney for the defendants argued that Calvin was an alien of British law, the court sought to define such a term with legal qualifications:

An Alien is a subject that is born out of the ligeance [*sic*] of the king, and under the ligeance of another, and can have no real or personal action for or concerning land; but in every such action the tenant or defendant may plead that he was born in such a Country which is not within ligeance of the king, and demand judgment if he shall be answered.<sup>6</sup>

Because Calvin served as a subject under James VI of Scotland before his ascension to the throne of England, his legal right to inherit land in any territory considered within the "domain" of the Kingdom of England survived, regardless of Calvin's personal citizenship within Scotland. As such, the judgment of *Calvin's Case* protected the rights of the King's subjects in any of the King's territories, even if the subject was not technically an English citizen.

While *Calvin's Case* seemingly shows little connection to the colonial history of the Americas, its decision actually gave fundamental rights to all British settlers within the King's colonies. Even though most British settlers within the British colonies were not Englishmen, *Calvin's Case* gave legal precedent for jurisprudence within British colonies as natural extensions of English common law. As legal historians René David and John Brierley argue, the ruling in *Calvin's Case* made it so "English subjects carried [common law] with them when they settled new lands which were not under the control of a civilized nation."<sup>7</sup> The value claim associated with "civilized" notwithstanding, David and Brierley's point echoes the sentiment of British colonies and their role as natural children of common law tradition descended from English legal culture.<sup>8</sup> The legal charters of the Hudson's Bay Company and even the courts of Jamestown and other American colonies established themselves on the precedent established in *Calvin's Case* regarding their legal rights as British subjects.

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<sup>6</sup> Ibid.

<sup>7</sup> David, René, and John E.C. Brierley. *Major Legal Systems in the World Today*. London: Collier-MacMillan, Ltd., 1968.

<sup>8</sup> Ibid, 337.

## FRENCH CANADA AND FRENCH CIVIL LAW IN CANADA

In contrast, French holdings in North America had a wholly different legal history. According to William Eccles, a Canadian historian and former professor at the University of Toronto, the governing law of Acadia, Canada, and Upper and Lower Louisiana by the 17th century was that of the *Coutume de Paris*, the feudal code of the Kingdom of France.<sup>9</sup> Along with Louis XIV's expansions to the *Coutume* via his *Ordonnance Civile* of 1667 and his *La Grande Ordonnance Criminelle* of 1670, the civil codes of the French monarchy served as the sole legal tradition accepted within the colonies of *Nouvelle-France* since the declaration that created the French East India Company in 1674. Already, one sees the division in legal origins between these two systems; while *Calvin's Case* established English common law in British Canada, Louis XIV personally tailored a civil law structure in New France—a testament to the administrative power of the monarch within these two judicial systems.

While the French civil code of New France and the British common law of Rupert's Land fully developed within the same decade, the two differed drastically in structure and practice. As Eccles describes, French Canadian court cases revolved around three tiers. The seigneurial courts judged lesser cases of value less than 100 livres “with the consent of both parties, but there could be no appeal against [the seigneur's] judgment.”<sup>10</sup> The royal courts of Montreal, Trois Rivières, and Quebec decided cases of higher value unless the parties wished to appeal the case to the supreme courts of *Nouvelle-France*. If so, the case would head to the Sovereign Council, which contained the supreme appeal authority of the French colonies.<sup>11</sup> In rare cases, wealthy French subjects within the colonies could also bring their case to the Conseil des Parties within Paris, a parallel to the English system of an appeal sent to Westminster. By 1717, the Admiralty Courts of Quebec became another legal power within New France specifically for “the maintenance of law and order in port,” including its commerce, criminal prosecution, military organization, and other administrative factors.<sup>12</sup>

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<sup>9</sup> Eccles, W.J. *The French in North America, 1500-1783*. Markham, Ontario: Fitzhenry & Whiteside, 1998.

<sup>10</sup> *Ibid.*, 80-83.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

A French civil trial differed radically from an English common law trial. As Eccles succinctly explains, “lawyers were not allowed to practice in [French] colonies”; no French equivalent of an English barrister existed in the Canadian colonies within New France, as opposed to the varied lawyer professions of British Canada.<sup>13</sup> During French Canadian adjudication during the 17th and 18th centuries, litigants had to represent themselves or hire an alternate to act as the litigant within a trial. A *notaire* performed documentary work similar to an English solicitor by completing writs and other paperwork. While a litigant or his representative could argue against the testimony given by witnesses, “neither he nor his advocate had the right to interrogate or cross-examine,” as both were distinct qualities of common law jurisprudence that had yet to reach the court of New France.<sup>14</sup> Additionally, the “inquisitorial system” of New French judicial proceedings also reflected the civil law origins of the system, as courts within the seigneurial and higher courts sentenced the accused to interrogation under oath as a means of gathering information. In the event the five seigneurs of the criminal courts of New France did not unanimously agree on a ruling, serious cases of the Sovereign Council prescribed torture until the defendant confessed his guilt or the court believed him of his innocence. Of the 85 court-related executions recorded within Canada during the French colonial regime, six of them succumbed to “being broken on the wheel,” a torture tactic that more often killed the defendant rather than prompting a confession.<sup>15</sup>

#### SEGREGATED FAMILIES—HOW HISTORIANS ANALYZE THESE TWO SYSTEMS

When it comes to contrasting the two main legal systems present in colonial Canada by the 18th century, David and Brierley offer invaluable commentary in the form of a list of the “families of law” that “dominate” legal history. First, David and Brierley typify a “Romano-Germanic” civil law family based on “justice and morality.” This family includes continental European law, as well as ecclesiastical courts. However, “Romany Germanic law” contrasts itself with the “Common Law” family of England, a structure of law that “was formed primarily by judges who had to resolve individual disputes.”<sup>16</sup> According to David and Brierley, this individualistic quality of common law is one of

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> David and Brierley, 15-17.



the central differences between it and civil law courts. Common law centered around finding solutions to specific trials via precedents and other solutions previously enacted, while civil law courts seemed more concerned with statute-esque “general rule[s] of conduct for the future.”<sup>17</sup> Additionally, common law and civil law differed in their legalistic scope; while common law operates under the use of specific trial decisions as determiners for public law, civil law ultimately focuses in on its law as a private one focused on private rights that apply to the individual. This becomes a familiar tenet when considering the role of equity in later English legal history. In fact, David and Brierley argue that the two systems were so fundamentally different in their methodologies and scope that they have managed to maintain their independence separate of one another’s influence until recent years. Supposedly, the two families have remained segregated even in areas where the two systems historically interacted, including the Americas, the Caribbean, and Asia.<sup>18</sup>

#### **Early Hybrids—How British Colonies Used Civil Law Before the Seven Years’ War**

While David and Brierley would argue that common and civil law cultures were clearly divided at least until law internationalized in the 20th century, a more careful analysis of Canada’s colonial history complicates this assumption. Even before Great Britain annexed French Canada, British provinces with close proximities to New France began to organize their legal structures with both civil and common law jurisprudence in their purview. Nova Scotia offers the best example. Nova Scotia’s Governor and Council founded the civil government in 1749 and simultaneously created a general court “of original civil and criminal jurisdiction, embracing on its civil side both common law and equity.”<sup>19</sup> Even before England annexed New France following the Treaty of Paris in 1763, British Canada used civil law organizational structures within its courts. Laskin argues that few of these original colonial courts within Canada could be classified as purely common law organizations, as personnel limitations forced colonial Canadian courts to become general bodies of legal adjudication that handled cases that would have been separated between King’s Bench, Chancery, and Exchquer within England. Laskin summarizes:

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Laskin, 10-11.

Neither in Nova Scotia nor in Quebec in that century—and it is in those areas that the Canadian judicial system took its rise—was such a distribution of jurisdiction either applicable or possible.

Six years before the Seven Years War had even begun, civil and common law interacted in an early hybrid system in regions of colonial British Canada. Although this new approach to dealing with civil and common law was caused a number of factors, including the lack of judicial luxury to separate courts into various bodies, the mixing of these systems would not have occurred if not for their proximity as colonial regions of Canada. While this kind of legal merging may not have been consistent throughout every province of British Canada, its existence within Nova Scotia serves as an illustrative example of the future organization of a bi-jurisprudential Canada after Britain incorporated French Canada into its rule.

### **The “Defeated Civil Law” Approach—How Historians Analyze Legal Canada After 1763**

#### **THE TREATY OF PARIS OF 1763**

After England acquired Lower Canada as a surrender condition during the Seven Years’ War, the question of translating civil law custom to an English common law system culminated in the decades following 1763. England had to address the legal dilemma regarding the existence of the French civil law system in the context of a common law conqueror. While many historians argue that Britain completely dissolved French Canadian civil law, I would argue this was not the case. Turning an analytical lens at the hybridizations of these two systems into contiguous structures complicates our historical conclusions regarding colonial Canada. Historians often use the Treaty of Paris of 1763 as the beginning of a structural narrative. They suggest the Treaty of Paris between England and France following the Seven Years’ War tolled the death of French Canadian civil law. As the Treaty states in Article IV:

...the other islands and coasts in the gulph [*sic*] and river of St. Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most

Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned.<sup>20</sup>

In exchange for the land that comprised New France, Article IV of the Treaty of Paris of 1763 states that the King of England would respect the religious freedoms of French Catholics within the region. However, the treaty between Great Britain, France, Spain, and Portugal assumed that all governance within the territorial acquisitions of the Kingdom of Great Britain would be enacted “as far as the Laws of Great Britain permit.”<sup>21</sup> In this sense, the British Empire negotiated a total absorption of the land of New France within Canada, a region that would later become the provinces of Quebec, Manitoba, Saskatchewan, New Brunswick, and other states.

Historians use this stipulation to assert that British conquest of New France in Canada enforced an absolute of “no French law, anywhere.” Along with David and Brierley’s argument of the historical segregation of civil and common law, Bora Laskin assumes that “the existence of a civil law system in a part of Canadian heartland has had hardly any mitigating effect upon the persistence in other parts of Canada of the English common law.”<sup>22</sup> Laskin argued that civil law derived from French legal tradition in colonial Canada lost its power, becoming a victim of the haughty majority that was common law British rule.

### **CAMPBELL V. HALL**

One of the most-cited cases within this binary historiography is that of *Campbell v. Hall*, a 1774 case within the Court of King’s Bench of Westminster. In 1763, James Campbell purchased land for a plantation in the island of Grenada, a French colony until the Treaty of Paris. However, at the time of

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<sup>20</sup> *The definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain. Concluded at Paris the 10th day of February, 1763. To which the King of Portugal acceded on the same day*, “Yale Law School - Avalon Project Document Database.” Accessed April 7, 2013. [http://avalon.law.yale.edu/18th\\_century/paris763.asp](http://avalon.law.yale.edu/18th_century/paris763.asp).

<sup>21</sup> *Ibid.*

<sup>22</sup> Laskin, 1.

Campbell's purchase, Great Britain was reorganizing the island's government following the Seven Years' War.<sup>23</sup> A few months before Campbell had bought his land, King George III granted governorship of Grenada to General Robert Melvill in order to:

Make, constitute, and ordain laws, statutes, and Ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England.<sup>24</sup>

While Melvill was sailing to Grenada, King George III also passed a required sugar duty for the island. William Hall, a duty collector for the Leeward Isles, charged Campbell, who refused to pay the tax under the defense that the duty had not come from the island's rightful governor, and that he would only pay the former French duties until Governor Melvill passed new rates. When the case reached the Court of King's Bench, Lord Mansfield and his justices created a series of distinct rights regarding the King and conquered territories. These privileges included the legal standing of newly-won colonies; as the decision outlines, "A country conquered by the British arms becomes a dominion of the King in the right of the Crown," and that citizens of conquered territory immediately become British subjects who inherit British law.<sup>25</sup>

For the purposes of Campbell's rights, the King had given up the right to specifically legislate taxes by appointing a governor who would act as an extension of his authority. Nevertheless, the additional provisions of the case illustrate that British common law could overrule its legal predecessors, and that new territory of the British empire had to respect the rule of the King, Parliament, and the laws of England. As Canadian legal historians enjoy pointing out, the rulings of this case could also apply to French Canada, as the territory of Quebec practiced the same civil law as the former French colony of Grenada. These cases and their analyses show that, throughout the history of civil law-common law interaction, one trope emerges clearly: that any civil law practice still within the British Empire must be a near-extinct outlier when compared to the dominant legal tradition that is English common law within Canada.

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<sup>23</sup> *Campbell v. Hall* (1774) 1 Cowp. 204. [http://en.wikisource.org/wiki/Campbell v. Hall](http://en.wikisource.org/wiki/Campbell_v._Hall)

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

## QUEBEC'S ADMIRALTY COURT

English historian Gerald S. Graham agrees with the “common law only” view using the example of Quebec’s Admiralty Court. By 1791, Parliament had broken up the former lands of Canadian *Nouvelle-France* into two provinces, with Upper Canada as the English-speaking haven for US settlers and Lower Canada acting as the boundary for francophone Quebec.<sup>26</sup> Following this Constitutional Act of 1791, merchants within the harbor of Montreal became confused regarding the source of new taxes in the new territory of Lower Canada. Parliament soon discovered that the colonial administration of Lower Canada had usurped Parliamentary tax rates and had established statutes that overruled imperial tax rates. Eventually, merchants took cases to the Court of King’s Bench in Westminster in order to determine whether they should respect Parliament’s tax rates or Lower Canada’s tax rates. Before the turn of the century, the Court had ruled on enough cases to create a general precedent. In accordance with the Declaratory Act of 1778, no colonial administration could pass statutes to limit acts of Parliament. Graham writes:

The regulation of commerce between the Canadian provinces and foreign states remained with the imperial Parliament and could not be interfered with by colonial acts.<sup>27</sup>

In order to enforce its rule, Parliament established the Admiralty Court of Quebec to ensure that Lower Canada taxed its harbors according to imperial law. As Graham believes, British imperial interests dominated the civil ordinances of Lower Canada by creating a common law court made to ensure superiority. Similar to *Campbell v. Hall*, historians embrace this example as a means of furthering their interpretation of legal history as a “winner takes all” spectacle.

### The “Hybrid” Approach—How British Canada Coped with its Civil Law Conquests

## GOVERNOR MURRAY’S ORDINANCE

However, history is rarely so binary. The situation may look bleak; *Campbell v. Hall* did apply to French Canada, the new Admiralty Courts rejected Que-

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<sup>26</sup> Graham, 232.

<sup>27</sup> *Ibid*, 232.

becois tax rates. However, I will not jump to conclusions. Despite England's military conquest of the French in Canada, civil law continued to influence the region's legal structure. One example of this liminal jurisprudence somewhere between common and civil law traditions exists within the ordinance of Governor James Murray, Esq., Captain-General and Governor of Quebec, immediately following the Seven Years' War. In September of 1764, Great Britain appointed Murray as the governor of British-occupied Quebec (later Lower Canada). As governor of a recent conquest, one of Murray's first tasks was reforming the legal jurisdiction of Quebec as a British colony. In his Ordinance of September 17th, Murray created a "Superior Court of Judicature" for the colony of Quebec, a court "with Power and Authority to hear and determine all criminal and civil Causes, agreeable to the Laws of England, and to the Ordinances of this Province."<sup>28</sup>

While Murray's first proclamation seemingly reinforced other historians' imagined "common law Canada," Murray refused to nullify all of Quebec's civil law. Throughout the Ordinance, Murray wrote that French Canadians could not have their law destroyed "until they can be supposed to know something of our Laws and Methods," and that "The French Laws and Customs" of Quebec should be perfectly useable in all cases "where the Cause of Action arose before the first Day of October, 1764."<sup>29</sup> Murray's Ordinance also founded "an inferior Court of Judicature, or Court of Common Pleas," within the colony that hosted both common and civil law trials.<sup>30</sup> French *notaires* and other civil lawyers had the right to work within this new Court of Common Pleas. In his observations regarding the Ordinance, Murray writes a practical reason for this decision:

We thought it reasonable and necessary to allow Canadian Advocates and Proctors to practice in this Court of Common Pleas because we have not yet got one English Barrister or Attorney who understands the French language.<sup>31</sup>

In this sense, Murray established two separate adjudicating bodies that worked in tandem, one a court based around English common law and the

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<sup>28</sup> "Ordinance Establishing Civil Courts: Gov. Murray's Ordinance, Sept 17 1764." Accessed April 12, 2013.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

other based around historical French civil law. Less than a full year after the conclusion of the Seven Years' War, English common law in Canada combined with French civil law to make one hybridized system, an event that repeats throughout Canadian legal history.

### **CIVIL AND COMMON LAW IN LOUISIANA**

Anglophone governors of other former regions of *Nouvelle-France* used the same process of mixing civil and common law into one body. Following the Purchase of 1803, the United States ceded the colony of Louisiana as part of Napoleon's sale. Louisiana's long legal history involved both French edicts and *coutumes* as well as the *Siete Partidas* of Alfonso X of Spain; by the time the region transferred to American hands, Governor William Claiborne sought to eradicate all foreign civil law within the territory.<sup>32</sup> As Claiborne attempted to enforce American common law, the citizens of New Orleans broke out in armed rebellion, forcing legal reformation into a standstill.

Five years later, Claiborne had no choice but to support the work of Edward Livingstone, a New York lawyer, who met with a committee to create the first Civil Code of Louisiana.<sup>33</sup> A product of Livingstone's common law education, as well as the tens of thousands of Spanish and French laws of Louisiana, the colony's first legal code combined civil and common law into a contiguous body. As in Canadian history, common law traditions did not "conquer" civil law. Rather, common law absorbed civil law practice and kept its rulings in a dual system. This latent civil law influence in the United States is not confined to only Louisiana. In fact, "many of the southwestern states reflect traces of civil law influence in their state constitutions," such as California's modern civil law code based on Spanish colonial rule.<sup>34</sup>

### **THE QUEBEC ACT OF 1774**

Quebec's history as an official state of colonial Canada also perpetuates this multifaceted system. Following Quebec's transition period as a conquered

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<sup>32</sup> Tetley, William B. *Mixed jurisdictions: common law vs civil law (codified and uncodified)*. Montreal, Canada: McGill University, [www.cisg.law.pace.edu/cisg/biblio/tetley.html](http://www.cisg.law.pace.edu/cisg/biblio/tetley.html) (accessed April 25, 2013).

<sup>33</sup> *Ibid.*

<sup>34</sup> The Robbins Collection: Berkeley School of Law, "The Common Law and Civil Law Traditions." Accessed April 24, 2013. <http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.

holding, Great Britain passed the Quebec Act of 1774 for “making more effectual Provision for the Government of the Province of Quebec in North America.”<sup>35</sup> While governors after James Murray had attempted to stifle French civil law in the colony, they failed to eradicate its practice--much like the civil law of Louisiana. As a compromise, George III declared the end of any British acts that limited civil law’s power in non-criminal cases:

All and every Ordinance and Ordinances made by the Governor and Council of Quebec for the Time being, relative to the Civil Government and Administration of Justice in the said Province. [sic] and all Commissions to Judges and other Officers thereof, be, and the same are hereby revoked, annulled, and made void, from and after the first Day of May, one thousand seven hundred and seventy-five.<sup>36</sup>

While the Act retained common law courts for Quebecois criminal trials, it reinvented a hybridized system that is still used in Canada today. This system thrived in other Canadian colonies; Laskin offers one prominent example in the case of *Attorney General v. Baillie*. In 1842, the Supreme Court of New Brunswick ruled that its exchequer courts had no power over equity and civil law cases “but only common law jurisdiction.”<sup>37</sup> In many ways, Quebec’s civil law had infected British common law in Canada, creating a system that uses both legal families while maintaining a façade of purely English legal tradition.

### THE CIVIL CODE OF LOWER CANADA

Within a century of the Quebec Act, the Canadian Parliament extended the courts of Quebec with the 1857 Codification of the Laws of Lower Canada Act. The Act culminated a year before Canadian independence as a result of decades of lobbying within Canada’s colonial Parliament system. Parliament created the *Code Civil du Bas-Canada*, a reference of centuries of French civil law dating back to the *coutumes*. Effectively, this Civil Code compiled all

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<sup>35</sup> "Quebec Act, 1774: 14 George III, c. 83 (U.K.) ." Accessed April 17, 2013. [http://www.solon.org/Constitutions/Canada/English/PreConfederation/qa\\_1774.html](http://www.solon.org/Constitutions/Canada/English/PreConfederation/qa_1774.html).

<sup>36</sup> Ibid.

<sup>37</sup> Laskin, 12.



French Canadian civil law into one bilingual resource.<sup>38</sup> Along with its modern descendant, the Civil Code of Quebec, these codes advise courts throughout Canada how to claim inheritance, enforce civil rights, provide evidence, and conduct other legal acts within Canada's hybridized law system. David and Brierley describe this dual system succinctly: "the laws of some states cannot be annexed to either [legal] family, because they embody both Romano-Germanic and Common Law elements."<sup>39</sup> With common and civil law under its colonial and postcolonial belt, Canada adopted a mix of two very different legal traditions, creating a new system that would affect much of Canada following the Seven Years' War.

### **Multiculturalism in Law—How Canada's Dual Legal System Makes It Unique**

#### **THE HYBRIDIZED COURTS OF MANITOBA**

As an independent country, Canada maintains the same dual system as its colonial predecessor. While some historians argue that surviving pieces of civil law are vestiges limited to Quebec, it is not so. Legal historians Dale and Lee Gibson give such an account in their history of Manitoba law. By the 1890s, civil law and common law systems had reached Manitoba following Canada's independence in 1867. Even in Manitoba's colonial history, practicality stopped Manitoba from using a divided system of law:

For reasons of economy, the province had never adopted the English system of establishing separate courts to deal with those matters that historical accident had labeled 'equitable' rather than 'legal.'<sup>40</sup>

Instead of separate courts, postcolonial Manitoba subdivided its Court of Queen's Bench. This single court handled common law on one side and civil law and equity on another side.<sup>41</sup> In fact, litigants of Manitoba had to change their practices to accommodate the subdivision in which they practiced, whether they worked in the common law or the civil law section. As Gibson

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<sup>38</sup> Foran, Thomas. *The Code of Civil Procedure of Lower Canada*. Toronto, Canada: Carswell & Co., 1886.

<sup>39</sup> David and Brierley, 17.

<sup>40</sup> Gibson, Dale, and Lee Gibson. *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970*. Winnipeg, Manitoba: Hignell Printing, Ltd., 1972.

<sup>41</sup> *Ibid*, 180.

and Gibson illustrate, Manitoba's hybrid system inspired other provinces of Canada, including Ontario's "fusion" of common and civil law traditions. By 1895, a Queen's Bench Act joined the subdivisions into one contiguous system that seamlessly dealt with common and civil law cases. As this example proves, Canadian "bijuralism" did not cease when the country became independent. Rather, the dual traditions of civil and common law carried onward into Canada's modern history.

### INTERNATIONALIZING LAW—EXTRADITION LAW IN POSTCOLONIAL CANADA

Canada expanded its dual system beyond the bounds of English and French legal traditions. Canadian historian Bradley Miller outlines how Canada internationalized its law earlier than other countries, especially its extradition law. At first, Miller argues that early postcolonial Canada began to "fetishize the English common law" by holding true to the same precedents as Great Britain for its extradition policies.<sup>42</sup> However, the country's first drafts of the Extradition Acts of 1877 were "bold repudiations of imperial policy and provocative assertions of colonial autonomy."<sup>43</sup> Already, Canada began to exert its dual legal traditions by looking beyond its common law parent and towards the extradition laws of other countries. By the time these Acts passed in Canada's Parliament, their legal origins pointed "towards a universal international law, an international law rooted more in treaties than custom."<sup>44</sup> Key qualities of this new Canadian extradition law included "international cooperation against crime," as well as new measures for political asylum that differed from British law. These marked changes show that Canada's legal development following its independence used less common law and more "international law heavily influenced by Europe."<sup>45</sup>

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<sup>42</sup> Miller, Bradley. "A Carnival of Crime on our Border': International Law, Imperial Power, and Extradition in Canada, 1865-1883." *The Canadian Historical Review*. 90. no. 4 (2009): 639-669.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

## INTERNATIONAL PRECEDENTS IN THE SUPREME COURT OF CANADA

Canada internationalized not only its extradition courts, but all of its legal practices. Law professor Csaba Varga illustrates how Canadian law has grown to incorporate international precedent, especially in the Supreme Court of Canada. Since 1985, the Supreme Court of Canada has drastically increased its use of foreign precedent and authorities. In the past two decades, Varga notes that the Supreme Court of Canada relied upon international decisions and doctrines in 36.4% of its citations.<sup>46</sup> Quebecois courts lead the way in foreign citation, with 59.7% of its total sources coming from international precedents and authorities. Statistics like these show the growing internationalism of Canadian legal culture, a phenomenon that has its roots in the country's dual legal system. In this sense, Canadian law is becoming "a collective, multicultural and multifactorial search for a practical solution, assessable by international standards."<sup>47</sup> While some historians fear this makes Canadian law a bland amalgamation of foreign sources, Varga disagrees. In the modern era, law is less about precedent's origins, and more about how it is used: "By gradually eliminating the law's substantive nature, legal self-identity is mostly preserved in a rather procedural sense."<sup>48</sup>

## THE SUPREME COURT ACT OF 1987

The Supreme Court Act of 1985 marked a significant moment in Canadian legal history. In a surprising decision, the Act reformed the Supreme Court of Canada to enforce a minimum of three Quebecois justices, representing a third of the Court's justices.<sup>49</sup> With Canada's long history of combining civil and common law traditions, the new direction of the Supreme Court is not surprising. While some may point to French Canadian civil rights as the reasons for the Act, Canada's decision represents another way Canada has adhered to its hybridized legal history. Because of this new organization, a representative chunk Canada's Supreme Court intimately knows the Civil Code of Quebec and other civil law edicts. As William Tetley writes:

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<sup>46</sup> Varga, Csaba. "Meeting Points Between the Traditions of English-American Common Law and Continental-French Civil Law: Developments and the experience of postmodernity in Canada." *Curentul Juridic*. 14. no. 1 (2011): 24-47.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Supreme Court of Canada, "Supreme Court Act. R.S.C., 1985, c. S-26." Accessed April 25, 2013. <http://laws-lois.justice.gc.ca/eng/acts/S-26/page-1.html>.

The common law justices are in most cases well versed in the civil law, however, as are the Québec judges in the common law. The two legal traditions therefore continue to be living realities in the highest court of the land, and they interact with one another without compromising the integrity of either system.<sup>50</sup>

The Canadian legal education system also embraces this multifaceted approach to practice. Since the 1950s, University of Toronto law students have been required to take either “Public International Law” or “Comparative Common and Civil Law,” forcing new Canadian lawyers to turn their scopes globally or consider the country’s dual system.<sup>51</sup> Within the context of modern jurisprudence, Canada acknowledges both its colonial legal history as well as its growing multiculturalism in law.

### CONSIDERING CANADA’S NATIVE AMERICAN ORIGINS

Canada’s legal history involves more than civil and common law interaction. While some historians only look Canada’s European colonial origins when considering the country’s legal history, I believe this is an oversight. When French and English settlers arrived in Canada, the land was not uninhabited. Canada was home to dozens of “First Nations,” including the Mohawk, Iroquois, and other Native American tribes who interacted with these early settlers. Historians do not consider cultural interactions a win-lose game, so they should not discount interactions between Native American and early European communities. As essayist John Ralston Saul argues, these early networks influenced Canadian law more than most historians acknowledge. Native American legal culture greatly complicates our view of Canadian law.

Saul cites Canadian legal egalitarianism as a prominent example of Native American law in modern practice. American and English notions of “equality of opportunity” do not equate to Canadian ideals toward public education and health, nor do they match with French *égalité*. Instead, Canadian equality under the law may come from Aboriginal approaches to “the concepts of meritocracy and individualism with the needs of the group.”<sup>52</sup> Canadians often use the trope of society being “a common bowl” out of which to

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<sup>50</sup> Tetley, n.pag.

<sup>51</sup> Girard, Phillip. “Who’s Afraid of Canadian Legal History?” *University of Toronto Law Journal*. 57. no. 4 (2007): 727-754.

<sup>52</sup> *Ibid.*

eat; this same language exists in treaties between French or English settlers and Aboriginal people throughout Canadian history.

The same applies to Canadian marriage law. When Canadian churches had no means of handling “hundreds of thousands of Inuit and First Nations people” who were living without legal marriages, the country applied so-called “common law marriages” in the fashion of the settlers’ tribal counterparts.<sup>53</sup> The notion of modern Canadian legal aid may also stem from Ottawa legal custom. In the 1950s, Northwest Territories justice John Turner decided that “the concept of paid defence simply could not work in a society not based on cash.”<sup>54</sup> In response, Turner adopted free legal aid for poor Canadians within the Territories, a system that “spread from Inuit principles of a non-financial-based society to the other territories and provinces of Canada.”<sup>55</sup> Too often ethnocentrism and frame values cloud the historian’s judgment even when the originators of Canadian legal history have been living in the region for tens of thousands of years.

### **Conclusion—The Future of Canadian Legal Historiography**

Saul ultimately argues that Canada is the epitome of multiculturalism within law. This is due to the profound role that multiculturalism has had on the country’s history, linguistics, religion, and legal development. When considering the role of “history in law” within Canada, the kinds of questions that the historian must answer have to include the role of the country’s broad diversity. While diversity may not always play a role in legal development, it certainly has in Canada; the country’s civil, common, international, and aboriginal legal origins shine through all of its law.

Historians often treat the interaction between social customs and communities as zero-sum competitions of winners and losers. However, to enforce to enforce a binary division between civil and common law systems in Canada is to ignore the broader picture of Canadian history. Canadian legal historians cannot ignore these interactions; these meeting points reveal the true source of Canadian law. Although common law is a very powerful system within Canada, its civil law history had a centuries-long influence on Canadian jurisprudence. By the mid-1750s and beyond, Canadian legal structure

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

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adhered to both civil and common law systems, creating something entirely new. After the conquest of Quebec, this hybridized system integrated further and impacted the majority of the country by the 19th and 20th centuries.

Modern Canada has taken its dual system further than ever imagined. What was once a historic interaction between imperial holdings has grown into a unique legal culture that incorporates international and foreign law. In this sense, Canada proves itself to be the very essence of "history in law." Intentionally or not, the country's legal practice reflects centuries of overlapping traditions and customs that have manifested into what we see today. By ignoring this inherent multiculturalism within law, historians lose the vitality of the landscape of Canadian legal history.

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