

Book Notes

*by Dwight Newman, Book Review Editor**

We live in rich scholarly times. More books are appearing on pertinent constitutional law matters than can be covered by the *Review of Constitutional Studies*' traditional full-length book reviews. Amidst this surge of writing, though, we can increasingly benefit from guidance on some of the interesting new works that may be worth our closer attention.

In my relatively new role as Book Review Editor, my aim is to provide to readers of the *Review* shorter comments on a larger number of books in this new Book Notes section. I may, over time, find various ways of providing that coverage, including the use of other Book Notes writers. The aim is to provide a broader survey of interesting new books for the benefit of those interested in Canadian constitutional law. I hope this section may be of some use, and I am interested in any comments that readers may wish to offer concerning this new section of the *Review*.

On one further prefatory note, I must add that I have not refrained — as one would expect in the context of writing book reviews — from including my own works. They too are part and parcel of the larger emerging body of writing on Canadian constitutional law. In the notes on my own books, however, I have tried to simply describe their content as opposed to commenting on their merits and usefulness as I have done with the works of others. Readers can judge my books for themselves.

Frédéric Bastien, *La Bataille de Londres: Dessous, Secrets et Coulisses du Repatriement Constitutionnel* (Boréal 2013)

Recent years have brought about a wave of new books and articles on Canada's 1982 constitutional patriation, many of them bringing to the fore previously lesser-known parts of or interpretations of Canada's patriation. Upon its release, Frédéric Bastien's book provoked a media storm with its new accounts

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of interaction between Chief Justice Bora Laskin and Canadian and British government officials during the patriation process. The significance of those elements has since been challenged by others. Challenges notwithstanding, this book still stands as an important new history of patriation from a Québécois perspective, amounting to a deep-seated challenge to “la conception trudeauiste du repatriement” (p 96). Drawing on new archival evidence obtained from previously unreleased British Foreign Office documents, Bastien’s book generally offers, in lively form, a richer account of the international dynamics of patriation than has often been presented in many of the standard histories. Whatever one’s views on the issues surrounding Chief Justice Laskin, readers seeking a fresh perspective on patriation can certainly take away something of interest from *La Bataille de Londres*.

Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (McGill-Queen’s University Press 2014)

Janet Epp-Buckingham’s fascinating history contextualizes religious freedom issues in Canada and the responses of Canadian law to these issues. She traces three notable themes underpinning conflict around religious freedoms in Canada: the impact of religion on national identity, the place of religious minorities, and the significance of rising secularization. In doing so, she engages with numerous major religious freedom cases in Canadian history and reminds the reader of the broader context underlying religious freedom disputes in future. In the last chapter, Epp-Buckingham deftly sums up some of these issues, identifying the significance of such matters as the interaction of religion and the secular state, the privatization of religion, the accommodation of minority religious practices, the challenges of competing rights, and the role of collective rights. The book does not offer any particularly new theoretical framework for the analysis of religious freedom issues, but it is none the worse for it. *Fighting over God* provides an essential historical background for anyone wanting to engage in serious discussion of contemporary and future challenges on matters of religious freedom in Canada: it should be widely read.

Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Carswell 2013)

Ken Cooper-Stephenson has long been an advocate for *Charter* damages awards. Amidst the emergence of such a remedy in the Canadian courts in recent years, he has published his long-standing academic project on com-

parative approaches to constitutional damage awards in different jurisdictions around the world. This meticulous, life-long tort scholar focuses on the case law most pertinent to the tougher questions related to the topic and his book impressively draws from substantial research on a hundred different constitutional systems. Although the book suggests that courts will generally move toward such damages awards, each chapter carefully addresses a variety of technical considerations. Cooper-Stephenson's book is a major scholarly contribution that will likely help clarify discourse in the area of constitutional remedies.

Sir James Dingemans et al, *The Protections for Religious Rights: Law and Practice* (Oxford University Press 2013)

For the United Kingdom, explicit legal norms on the protection of religious rights are a new phenomenon. This book covers in detail the variety of European and international human rights norms that apply to religious rights. Just on these grounds, this work by Dingemans et al constitutes a major asset to international readers who may be interested in the jurisprudence of the European Court of Human Rights, the European Court of Justice, and the international committees and tribunals that have dealt with religious rights issues. Better still, this immensely useful text compares and analyzes scholarly perspectives on religious freedom issues in such diverse jurisdictions as Australia, Canada, India, New Zealand, Northern Ireland, Ireland, South Africa, Turkey, and the United States. The book then turns to domestic protections within the United Kingdom generally and then to thematic analyses of a number of specific areas including religion and employment, education, and the family. The book is doctrinal, even "black letter" in its orientation, but is all the more useful for it. This is not a short book, but it nonetheless offers a crisp, concise guide to international protections for religious rights. With religious rights issues at the forefront of constitutional disputes in Canada and elsewhere, *The Protections for Religious Rights* is a timely and immensely helpful book, and I expect that it will be welcomed by readers not only in the United Kingdom but also internationally.

Tom Flanagan, *Winning Power: Canadian Campaigning in the 21st Century* (McGill-Queen's University Press 2014)

Tom Flanagan writes from a unique perspective as a pre-eminent Canadian political science professor who was also a leading advisor in the current prime

minister's leadership campaigns and early federal election campaigns. In many respects, this is a political science book on the art of campaigning and is thus of interest to readers, in pertinent disciplines, as a prominent contribution to Canadian literature on political campaigning. However, its discussion also bears on constitutional case law pertaining to the regulation of election campaigns by highlighting some of the ways in which the regulation of the electoral process will often have unintended consequences. Chapters on the significance of money in politics and on the concept of the "permanent campaign" extend these themes. For example, a law regulating spending during an election campaign may simply push the use of funds into pre-writ periods, thus changing the effective length of campaigns (p 44). At the same time, attempts to regulate pre-writ activities would almost certainly run into freedom of expression issues (p 142). This is a theoretically rich, but nonetheless practical, book about a specific topic in the field of political science. Yet, in another way, its engagement with "real life" problems may help those thinking more broadly about freedom of expression and electoral regulation reconsider the effects of different constitutional positions.

Emmett MacFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press 2013)

Emmett MacFarlane discusses what he has termed the "black box" of the Supreme Court of Canada, bringing to bear a number of insider perspectives that he was able to access so as to better understand the Court, its decisions, and its broader role within Canadian society. This book is limited in some respects by its methodology. But, it is nonetheless an essential read for anyone interested in the Supreme Court of Canada. Drawing on both a comprehensive review of existing literature and a series of interviews with Court insiders, MacFarlane seeks to qualitatively engage with different models of legal decision-making and to assess how they align with the practice of the Supreme Court of Canada. Considering legal, attitudinal, and strategic models, Macfarlane effectively argues for a blending of these models. His conclusion is sensible, but it may be unconvincing to those more invested in any single aforementioned model; for instance, one foreseeable objection could be that these models are commonly grounded in more rigorous quantitative work that attempts to assess their fit in statistical terms. Nonetheless, MacFarlane's analysis sheds much light. His later chapters carefully and analytically describe the role of different actors in the Court's decision-making and engage with the Court's policy-making roles and interaction with the broader public.

They are major contributions to an accurate understanding of the Court and they lay the groundwork for further normative thought about the Court. The book does not present a simple sustained argument — its various insights illuminate many specific themes — but, it is arguably richer for eschewing oversimplified narratives. There is no doubting that MacFarlane has offered a leading multidimensional account of many dimensions of the Supreme Court of Canada and offered an essential resource on this important Canadian institution. Already available in paperback, *Governing from the Bench* is a book that can be resoundingly recommended to anyone interested in the inner workings of the Supreme Court of Canada.

Andrée Lajoie, *La vie intellectuelle de Roderick Macdonald: Un engagement* (Les Éditions Thémis 2014)

Amongst public law intellectuals in Canada, Professor Roderick Macdonald stands out as someone who has had a massive pedagogical and scholarly influence over a generation of younger legal scholars. Macdonald looms large not just in public law, as he has had a long-standing interest in certain areas of private law as well. Andrée Lajoie's biography on the intellectual life of Macdonald, launched on the occasion of McGill University's conference in his honour in early 2014 several months prior to his death, traces much of his thought and his impact on Canadian legal discourse and scholarship. Though Macdonald's thought has many strands, his influential discussion of legal pluralism will stand out as a contribution for the ages. Once one recognizes that many interacting legal norms come from systems beyond those sometimes called law, one can work with a very different conception of what the law truly is. Lajoie's slim-but-rich book is an accessible introduction to the thought of Roderick Macdonald and will stand as a lasting tribute to a scholarly life well-lived.

David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (UBC Press 2012)

David Milward's book is challenging in a number of different ways. It stands almost uniquely in Canadian legal discourse for its readiness to seriously engage with the ways in which Aboriginal approaches to criminal justice clash with orthodox interpretations of the *Charter of Rights and Freedoms*; it challenges pervasive academic perceptions of what Aboriginal approaches to criminal justice embody and reveals some of the internal complexity of different

Aboriginal cultural traditions bearing on these matters. It also problematizes the notion that there can be neat reconciliations between Aboriginal cultural traditions and certain orthodox liberal approaches to criminal justice, thereby adding a new level of complexity to Canadian legal life as we grapple with the integration of Aboriginal perspectives in the justice system. Some will find *Aboriginal Justice and the Charter* controversial — but its provocative nature is among its finest virtues, making for an important contribution that should be widely read.

Marcelo Neves, *Transconstitutionalism*, trans. Kevin Mundy (Hart Publishing 2013)

Marcelo Neves is a Brazilian constitutional scholar. Kevin Mundy has done the world a service by translating Neves's book, as has Hart Publishing in disseminating it. Rooted in a literature that is vastly different from that with which constitutionalists in Canada will be familiar, Neves' genuinely challenging book should ultimately prove expansive to the Canadian reader. The book seeks to separate the idea of constitutional law from the idea of a constitution associated with a particular state and to replace this concept with an idea of different legal orders all trying to solve problems that are often common to these different orders. To Neves, the increasing conversation between different constitutional legal orders does not mark some sort of convergence of legal systems so much as a necessary entanglement, a transconstitutionalism that starts not in any particular legal system but in the common problems faced by different legal orders. The book contains a complex set of ideas that are not easily reducible to a book note. But, these ideas bear significantly on present comparative constitutional circumstances. Their new availability in English through this translation offers a real opportunity for Canadian and international scholars to consider them at length. Scholars should take note of the new concept Neves brings to the discourse of international constitutional studies. *Transconstitutionalism* is a complex book, but it is definitively worth reading for its nuances.

Dwight Newman, *Natural Resource Jurisdiction in Canada* (LexisNexis Canada 2013)

This focused volume on a set of jurisdictional matters is a legal handbook that seeks to engage with the highly topical and important issue of who makes decisions on natural resource development in Canada. With the last treatise on the topic having been that of Justice LaForest (prior to his appointment to the

bench) in 1969, this contemporary book is engaged especially with the major changes wrought in 1982, which featured both a major amendment on natural resource jurisdiction (section 92A) and the constitutional entrenchment of Aboriginal and treaty rights that also have major effects in the context of natural resources (section 35). But, the ongoing changes in this area are notable, as matters like the extensive restructuring of jurisdiction through modern treaties and the recent devolution agreements with the northern territories also find a place within the discussion. The book is structured around a number of overarching principles and their more detailed application to a variety of specific areas. The book is ultimately concerned with natural resource jurisdiction in a holistic manner, recognizing both its general connections with constitutional law more generally and its inherent specificities.

Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing 2014)

The “duty to consult” doctrine has become the main topic of litigation in Canada’s Aboriginal rights case law over the last decade; it is also a doctrine that bears on many different areas of government policy and industry activity in the context of natural resources. This is a substantially revised and expanded version of a book originally published in 2009 that has since become a widely cited resource on the “duty to consult” doctrine. This 2014 book updates the discussion with the aid of more recent developments in “duty to consult” case law and also contends with a broader set of emerging issues related to the doctrine and some of their legal and policy implications.

Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st edn. (LexisNexis Canada 2013)

This text, already identified by LexisNexis as a numbered edition presumably to be followed by future editions, is a complete treatise on Canadian constitutional law, extending over some nine hundred pages. It seeks to offer a coherent, conceptual approach to understanding division of powers, *Charter* jurisprudence, Aboriginal and Treaty rights, and other matters of Canadian constitutional law. This fresh text seamlessly integrates older and newer jurisprudence, having emerged as a co-authored text from a collaborative effort between an academic and a practitioner, an Anglophone and a Francophone, a common law lawyer and a civilist, a Westerner and a Central Canadian. *The Law of the Canadian Constitution* is available in both a hardcover form for

libraries and practitioners and in a cost-effective softcover edition for student use. It is a new option as an English-language treatise on Canadian constitutional law that seeks to presents different ideas and approaches than those contained in other presently available works.