Book Notes

Fighting Over God: A Legal and Political History of Religious Freedom in Canada by Janet Epp Buckingham. Montreal: McGill-Queen's University Press, 2014. 329 pp., $34.95 pb.

Fighting Over God: A Legal and Political History of Religious Freedom in Canada provides a broad overview of religious conflicts played out in the political sphere throughout Canadian history. The book is structured around several broad categories: education, broadcasting, freedom of religious expression, employment, religious practices, and family life. Janet Epp Buckingham presents a detailed history of Canadian religious conflicts that spilled over to the legal and political spheres. Perhaps inevitably, the history frequently becomes a commentary on current events, with the conclusion devoting significant time to this. The tension between impartial history and commentary is a mixed blessing, as the book is at its most readable and engaging when Buckingham shapes history into a narrative and then offers an interpretation.

An example of the book's approach can be found in the chapter on broadcasting. Much of the early history is a fairly dry recital of historic radio stations and discussion of various regulations to religious radio messages over time. However, as the chapter progresses, the CRTC becomes a frequent target. The arguments made by religious groups are made "rightly," and religious television stations are "ghettoized" by their status as specialty television channels that subscribers must opt into, as opposed to being in the default packages foisted upon all cable subscribers. When Buckingham departs from a recall of unbiased history and instead begins drawing conclusions about the impact of regulation, the book is engrossing. Buckingham is talented at building up a case over time to justify her views towards the present. Unfortunately, her talent frequently left me wondering if history ought to be so persuasive.

I am not convinced that this book is an impartial history. However, despite the occasional interpretive liberty, the vast majority of the book reads as an even-handed history of religious conflict during many of Canada's formative years; the work is clearly not chiefly aimed at persuasion or argument.

This tension between presenting history and persuading the reader makes it difficult to give a concise review of the book. Buckingham's writing is largely successful both in the historical overview provided and in the persuasive passages: the histories seem detailed and create a narrative, and the persuasive passages succeed at persuading. However, serving two masters makes the book, as a whole, less effective. The persuasive passages often left me unconvinced, as they are provided to cap off a historical narrative and do not devote

themselves fully to a comprehensive argument. For instance, in discussion of how faith-based broadcasters alone have been singled out by the CRTC with regulations which are "a nuisance at best and discriminatory at worst," I would have been gratified to read about the path to licensing that Al-Jazeera English went through and how this is distinguished from the regulations on religious stations. Therein lies my apprehension. In an argumentative piece, it would be reasonable to expect comparisons to non-religious entities to provide context for the point being advanced. On the other hand, in a historical overview it is unnecessary to cover material outside of the work's focus for the sake of comparison. In the end, the reader is left with a history shaped into a narrative leading towards arguments that were often unpersuasive due to that initial historical focus.

On the historical front I find the material is overall fair-handed and successful in providing a history of religious conflicts in certain areas throughout Canada's history. Some chapters steer close to becoming a list of legislative decisions with little context, although generally as the chapter progresses the narrative starts to emerge so this can be easily forgiven. My only contention with the history is the scant mention of the spiritual struggles of First Nations peoples. Buckingham does devote a page and a half to residential schools; however, I feel this is insufficient. Residential schools were state-sponsored efforts to empower followers of one religious group to wipe out the spiritual practices of an entire range of peoples, with both political and legal backing. Yet the legal and political history in this area is brief, with no mention of specific legislation or court challenges. The contrast is especially stark given that the following section, denominational education, spends almost twenty pages discussing specific statutes and court cases with admirable thoroughness. Furthermore, during the chapter on religious practices, the banning of spiritual practices such as the potlatch and sun dance are mentioned in the shortest section of the entire book, weighing in at a mere four sentences, filling less than sixty words. These two sections represent functionally the entirety of discussion regarding First Nations religious history. I understand this was not the focus of Buckingham's work; however, an explanation of the omission of Aboriginal religious struggles would have helped the history feel more complete.

In regards to the persuasive sections, I differ on some conclusions but find all comments to be made in the spirit of academic discourse. My largest issue in this regard is in the conclusion, where the narrative switches to the present and the battle between secular governance and religious rights is taken up. Only at this point, I am unconvinced there was a pitched battle. Buckingham adopts the ever-useful balancing of rights philosophy to discuss issues in the present time, but narrates the conflict by declaring winners and losers. In cases where religious

institutions come into conflict with the equality rights of gay or lesbian persons, a result in favour of equality rights is a case that has "not been resolved in favour of religion." But what about the Unitarian and United Churches, who were happy to marry homosexual people and welcome them into the clergy? Would their adherents not see it as a resolution in favour of both equality *and* religion? A conflict involving a specific organization is frequently used as a synecdoche for a conflict between religion and society generally; making a conflict between a specific collection of religious institutions and a branch of government into a conflict between religion and secular philosophy generally. Overall, *Fighting Over God* is a worthy history which thoroughly examines Canada's long history of attempting to regulate and control religious groups through state machinery, though it occasionally undermines itself by straying from history to commentary.

- Keith Barron

"Métis"—Race, Recognition and the Struggle for Indigenous Peoplehood by Chris Andersen. Vancouver: UBC Press, 2014. 267 pp., $32.95 pb.

In *Métis*, Chris Andersen argues for a political understanding of Métis peoplehood and the Métis Nation that is more than just a racialized administrative concept and is instead fundamentally tied to the Red River settlement. *Métis* lays out a compelling narrative of Métis nationhood and explains why links to pre-colonial Métis people, rather than just self-identification as Métis, must be central to any rational and just understanding of Métis claims today. Andersen relies on the Canadian Census and the decisions of the Supreme Court of Canada to develop his analysis and in doing so demonstrates the danger that imbuing their definitional outputs with constitutive powers poses to Métis identity. While his argument is situated in sociological theory, his observations inspire reflection for anyone interested in the future of Indigenous peoples in Canada, both within the legal system and beyond it.

The racialization of "Métis" reduces it to something rooted in mixed ancestry and separated from traditional tribal communities. This "Métis-as-mixedness" understanding has two main features, which prevent it from enjoying the emancipatory power that postcolonial theory normally attributes to such manifestations of hybridity. First, it relies on the assumption that if the Métis are a hybrid people then First Nation and Inuit people must not be, since if all Indigenous peoples were hybrid the term would not have any significance. Second, it reduces the Métis to the product of natural historical conditions instead of recognizing that they emerged from ongoing and constitutive struggles. This understanding is not innate to Métis peoplehood but actively produced and reproduced by the institutions of the Canadian settler state.

Andersen traces the history of the racialization of "Métis" to the beginnings of the Canadian colonial project. Racial classification has played a central role in grounding, justifying and assessing these projects throughout the world. Over time, its legitimacy has become ingrained as a result of official policies which reinforce its creation and presentation by government authorities as natural, timeless and universal. Those who have incorporated ethno-historical arguments into their understandings of Métis today might object to Andersen's re-positioning of the term, on the basis that failing to honour communities which contemporarily self-identify as Métis merely reproduces the racism and general discrimination these communities have always endured. Andersen, however, argues that conflating these other settlements with the social and political dynamics of Red River relies entirely on the reduction of a complex Métis identity to nothing more than mixedness. On this basis, "Métis" is merely a translation of historical pejorative terms for métissaged outsiders, like "half-breed" or "mulatto."

While the Court's decision in *R. v. Powley* has been widely heralded as enumerating a framework for adjudicating Métis claims to s. 35 rights, Andersen shows how the decision was not actually sympathetic to Métis peoplehood. Instead of focusing on the connections of the Sault Ste. Marie Métis to Red River and recognizing a single Métis people, the Court reproduced a racialized description. This was not for lack of evidence of such links before it. By describing communities on the basis of four axes (distinctiveness, continuity, stability and geographical proximity), the Court eliminated consideration of the historical, social, economic and political networks within which the Métis Nation acted. Arguably such considerations have been prevented generally by the use and occupancy logics, which plague Canadian Aboriginal rights jurisprudence more broadly.

The most interesting example of the absurdities inherent to the currently dominant understanding of "Métis" is the chapter Andersen devotes to the people of NunatuKavut. This community has advanced its land claim and sought recognition as both Métis and now, Inuit. It is an example which illustrates how pursuing recognition through State structures has the capacity to produce a deep misrecognition. The process of seeking recognition itself produces, enhances and solidifies official recognitions grounded in racialized self-understandings. This community is located further south than other Inuit communities where *kablunangajuit* ("partly white men" or "mixed bloods") have always received funding as Inuit. However, as the community itself made clear in its submissions in the *Powley* case, its geographical presence in the Southern region was not a reaction to European exploration and settlement but must instead be understood as prior occupation. It is an Inuit culture that was using the constitutional

descriptor of "Métis" as a result of governmental categorizations during the 1970s and 1980s that disassociated communities from the Labrador Inuit Association and Innu Nation. Since *Powley*, and a 2007 case where the community sought an injunction for highway construction on the basis Newfoundland's violation of the duty to consult, the NunatuKavut community has advanced its claims on the basis of its Inuit status.

Ultimately, Andersen argues that taking Métis peoplehood (and thus Indigenous peoplehood) seriously means recognizing that mere historical separateness from "Indian," "Inuit" and non-Native communities—the only possibilities contemplated by the current juridical approach to s. 35—does not make an Indigenous community Métis. Instead, it makes it a part of whatever larger Indigenous people the community was a part of historically. Courts and governments would do well to abandon their attachment to racialized categorizations, and instead work seriously to respect the s. 35 rights and claims of Indigenous peoples more broadly and in accordance with their rights of self-determination as nations. Section 35 should work to promote self-identification rooted in political consciousness as citizens of an Indigenous nation, rather than social relations of hybridity constructed and kept in place by the state.

- Julia Kindrachuk

Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems by Sylvia McAdam (Saysewahum). Saskatoon: Purich Publishing Ltd., 2015. 118 pp., $25.00 pb.

Sylvia McAdam wrote down laws that were never intended to be reduced to writing: the physical laws of *nêhiyaw* (Cree) peoples. These laws were in place prior to colonization, and these laws continued to be in place at the time Treaty 6 was signed. In *Nationhood Interrupted*, McAdam argues that we must understand these laws if we are to understand the terms of Treaty 6.

These laws are called *manitow wiyinikewina*, "Creator's Laws," and are the "birthright" of all *nêhiyaw* people. *nêhiyaw* women are the keepers of these laws. While colonization in its myriad forms has disrupted the people's connection to these laws and made them "lawless," these teachings can be recovered. This short, but timely, book is part of that process of recovery and revitalization.

Nationhood Interrupted argues that reconciliation between Indigenous and non-Indigenous persons requires a respect for the sovereignty of Indigenous peoples. The first step is to honour these relationships by encouraging Indigenous laws and teachings. The form of this support is to be determined by Indigenous peoples, as part of the process to undo the effects of colonization upon their laws and nationhood. McAdam argues that a necessary part of this justice-building is non-

Indigenous people "giving it back." This does not mean leaving Canada, but to restore livelihood, give compensation, show respect for the land, and restore the freedom of Indigenous peoples.

This book's value lies in three areas. First, this book helps us to understand that *nêhiyaw* laws may play a role in political events, as the laws create responsibilities to all else in creation. It is against the laws to stand by idly as humans, animals, and the earth are harmed. "It's contrary to *nêhiyaw* laws to remain silent about ongoing devastation." This obligation to all things—a positive obligation to prevent destruction—is not often found in the common law, or in European spiritual traditions. This difference assists us in understanding why Indigenous people are the dominant land protectors in Treaty 6 territory: their law requires it, whereas colonial laws do not. Indeed, McAdam argues that she is not an environmentalist, or an activist of any sort. Rather, she is a *nêhiyaw* woman living her tradition. She is defending the land, waters and animals—her relatives.

Second, this book helps us understand claims of sovereignty. In addition to the call to protect the earth and our other relatives, it is fundamental and radical in that it asserts Indigenous sovereignty. In the author's case for sovereignty, she notes that *nêhiyaw* babies are not born Canadian. McAdam herself does not identify as a Canadian person: distinct nations continue to exist throughout Turtle Island. When one is born to the Cree, they have a distinct bundle of inherent and treaty rights. McAdam argues that the numbered treaties were not intended by the *nêhiyaw* to take away their rights or access to land and water. Therefore, attempts to limit their access to, or protection over, these areas is inconsistent with the treaties, properly interpreted. This fundamental assertion of sovereignty derogates from the Canadian State's claims.

Third, this book helps us understand the treaties. At the time Treaty 6 was signed, *nêhiyaw* law was the law of the land: it bound those who acted. According to that law, the First Nations treaty negotiators were not authorized to extinguish collective or family rights. The Canadian State continues to collect land ceded by those with no jurisdiction to cede that land. Currently, this ceding of land is done through (overwhelmingly male) Indian Act chiefs, whereas according to *nêhiyaw* law, woman hold jurisdiction over the land and water. That is, the colonial system has imposed a governance model onto the *nêhiyaw* and now relies upon that system in order to continue to acquire land. Far from ceding the land to the Crown, Indigenous people were acting from a place of nationhood when they signed Treaty 6. The *nêhiyaw* were adopting the Queen and her children as their relatives. The treaty was a matter of alliance between nations.

In short, *nêhiyaw* laws were in place at the time that Treaty 6 was signed. The historical colonial interpretation of that document is

inconsistent with *nêhiyaw* law. If the colonial interpretation were the proper one, then the contract would have been illegal at the time it was signed as no one had power to give away or cede land. On the proper interpretation of it—one informed by *nêhiyaw* legal norms—the Cree's nationhood status and legal systems survived the signing of Treaty 6. *nêhiyaw* laws have different requirements of individuals than does the common law, including a much better treatment of non-human entities. It is this difference that can explain the strong leadership role that many Cree people take on issues of land defence. It is compliance with these laws that led Sylvia McAdam to co-found "Idle No More."

In conclusion, this short book serves to preserve *nêhiyaw* law from destruction while introducing non-Indigenous people to this law. This is important because, as Elder Jimmy Myo stated, "You cannot begin to understand the treaties unless you understand our cultural and spiritual traditions and our Indian Laws."

Nationhood Interrupted moves from law to political obligation, which McAdam calls "sacred conservation" motivated by "protective love" of the earth. Many may disagree with Ms. McAdam's political conclusions and activity, including "Idle No More." Those persons should read this book, in order to better understand the basis on which she and other land defenders act.

- Daniel LeBlanc

Moving Aboriginal Health Forward: Discarding Canada's Legal Barriers by Yvonne Boyer. Saskatoon: Purich Publishing Limited, 2014. 224 pp., $35.00 pb.

The current health status of Aboriginal peoples in Canada is comparatively worse than the health status of other Canadians. The Aboriginal population experiences increased rates of suicide, diabetes, HIV/AIDS, and hepatitis C, as well as many other diseases, and has a lower life expectancy than non-Aboriginal Canadians. In *Moving Aboriginal Health Forward: Discarding Canada's Legal Barriers*, author Dr. Yvonne Boyer uses her background as a health care professional and her knowledge as an Aboriginal law practitioner to examine the causes of, and the solutions to, these health inequities. Boyer argues that the law is a determinant of health and that the historic and current legal relationships between Aboriginal peoples and the Crown has created and maintained the poor health status of the Aboriginal population post-contact.

The book is divided into two parts. Part one reviews historic evidence demonstrating the pre-contact Aboriginal population had distinct traditional health care practices, and these practices provided for the relatively good health of the Aboriginal population. Boyer discusses several traditional health practices, ceremonies and beliefs

of various Aboriginal groups as documented by "Jesuits, explorers, traders, anthropologists, and social scientists." The author uses the evidence of these pre-contact practices to conclude there are constitutionally protected Aboriginal rights to both health and the use of traditional Aboriginal practices to maintain health. The analysis regarding how this conclusion is reached is not discussed until later in the book, leaving the reader to wonder exactly how this determination is made.

The author concludes part one by discussing the factors that led to the decline in Aboriginal health post-contact, namely "epidemics of new disease; the loss of traditional lifestyle; the change to a nutritionally inadequate diet; the depletion of food resources; the dislocation of life styles; confinement to reserve land; and the implementation of laws to force assimilation." The author presents a compelling argument that the government's historic policies, laws and practices directly caused, contributed to, or were inadequate in alleviating the detrimental effects of these factors with disastrous consequences.

The second part of the book examines whether breaches of Aboriginal or treaty rights have contributed to the poor health status of Aboriginals, reviews the impact of laws and policies on current Aboriginal health status and provides recommendations for creating Aboriginal health policies. Boyer proposes that the law is a determinant of health. Although other scholars have argued this idea before, Boyer's application of this concept to the Canadian Aboriginal experience is welcome and worthwhile. The author discusses how the Constitution, the *Indian Act* and the *Criminal Code* currently impact Aboriginal health status. For example, jurisdictional conflicts between the federal and provincial governments may lead to delays and gaps in Aboriginal persons receiving health treatment, underfunding of programs for Métis and non-status Indians, and a "convoluted system of delivering—or not delivering—health care to First Nations and Inuit." As a further example, the *Indian Act* historically prohibited certain Aboriginal ceremonies and practices, damaging Aboriginal culture and health, and creating inequality. Also, other laws and government policies infringe Aboriginal health rights through the regulation of health professionals (which excludes traditional healers), the potential of both criminal and civil liability of traditional healers, and the restriction of the ability to collect natural medicines.

The author returns to the conclusion that there is an Aboriginal right to health protected by s. 35 of the Constitution and conducts an analysis using the *Van der Peet* test to support her proposition. The analysis is brief and is quick to accept there is an Aboriginal right to health; counter-arguments and further discussion regarding the possible extinguishment or justified infringement of this right would

have increased the depth of the analysis. The content of the right could also be more clearly developed. As well, a discussion regarding the future practical complexities and possible ramifications of the recognition of an Aboriginal right to health would have been an interesting addition to this section (see for example *Hamilton Health Sciences Corp. v. D.H.*, released after the book was published). In addition to constitutionally protected Aboriginal health rights under s. 35 of the Constitution, the author also discusses additional rights created by treaties.

The book concludes with recommendations to guide law and policies makers in bettering the health status of Aboriginal peoples. There are many complex issues connected with poor Aboriginal health status, including poverty, lack of adequate housing, unemployment and other social inequities, which prevent a simple solution. Boyer argues these complex issues are both the direct and indirect consequences of law, policy, and colonialism, and bases her recommendations on this premise. The author recommends that Aboriginal health rights protected by the Constitution and by treaties must be recognized, and these rights must be reflected in health policies. As well, health care policies and laws must take a collaborative, holistic and evidence-based approach. These recommendations are quite broad and general; specific examples of how health care policies and laws can implement these recommendations are lacking. However, this is a very complex problem and specific recommendations are likely beyond the scope and purpose of this book.

Boyer balances statistical data with examples and stories, which humanizes and adds context to the discussion. By including several different First Nations groups, as well as the Métis and Inuit in her analysis, the author adds a richness to the discussion and refrains from oversimplifying distinct histories and traditions. However, the author covers a lot of material from many different perspectives, resulting in a loss of fluidity in her argument. Topics are briefly introduced, discussed and abandoned, leaving the reader wanting further explanation or a clearer link between the topics.

The purpose of *Moving Aboriginal Health* forward is to introduce "new ways to deal with old problems" and to provide "practical solutions" to improve the health status of Aboriginal people. This is an ambitious goal as Aboriginal health is an extremely complex subject. As the author tries to cover a significant amount of material in a relatively short book, the analyses and discussions feel at times too brief. As well, organizational issues occasionally detracted from the argument. However, overall this book is well researched and compelling. It is extremely timely and the topic is very important. There are many propositions introduced throughout the book that provoke thought in the reader. The relationship between the law and

Aboriginal health cannot be ignored if there is to be an improvement in the health status of Aboriginal people. For scholars, policy makers and practitioners interested in Aboriginal health or Aboriginal law, this book can form the basis for further research and dialogue and most certainly has the potential to move the discussion of Aboriginal health forward.

- Janelle Souter

Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919 by Thomas G.W. Telfer. Toronto: University of Toronto Press, 2014. 297 pp., $45.00 hc.

In this concise book, Thomas G.W. Telfer attempts to fill a gap in Canadian commercial legislative history by examining the absence of a federal bankruptcy law in Canada between 1880 and 1919 and its re-emergence nearly forty years later. Telfer walks the reader through the period just before repeal in 1880 up to the federal bankruptcy law's passing in 1919. The book highlights certain "ideas, interests and institutions" that influenced the legislation's course. The book examines the law and societal attitudes as they related to bankruptcy and bankrupt individuals from the time of confederation to 1919 and highlights how these ideas and morals can still be found, imbedded in Canada's modern bankruptcy law.

Telfer's analysis begins in Part One by looking at why the federal bankruptcy law was repealed in 1880. Throughout Telfer's analysis, the bankruptcy principles of equal sharing of a debtor's assets and the discharge from bankruptcy serve as a measure of societal, commercial and institutional attitudes toward bankruptcy law. By focusing on these two principles, he highlights how the existing federal bankruptcy laws were seen as too debtor friendly and that they were out of line with late nineteenth-century commercial morals, which viewed the bankrupt individual as evil and unworthy.

The repeal of the national bankruptcy law favoured local, as opposed to more distant, interests. The Canadian economy at the end of the 1800s was rural and dominated by local markets. Repeal of the federal law favoured local creditor interests because they were better positioned than those further away to realize upon the debtor's assets in the absence of the equal sharing principle.

Institutions played an important role in the law's repeal. The judiciary adopted non-uniform interpretations of the statute and were too liberal in their stance on collusion amongst debtors and creditors. Canada's federal system allowed federal politicians to wash their hands of bankruptcy law because they knew the provinces would fill the legislative gap, pursuant to their constitutional power over property and civil rights. These institutions helped to undermine any defence to the legislation's repeal.

Part two highlights the inadequacies of the provincial government's response to the absence of federal bankruptcy legislation. Essential elements of modern bankruptcy law, such as the discharge of the bankrupt and the power to compel a debtor to make an assignment into bankruptcy, were absent from the provincial acts. The provincial approach led to a patchwork of differing laws that took years to come into force. In the years between the federal law's repeal and the provincial laws being enacted, debtors and creditors were left dealing with the harsh and unsuitable common law rules which did not recognize a bankrupt's discharge, encouraged creditors to race to grab what assets they could from the debtor, and allowed preferences to creditors to become commonplace.

In the interim period, attempts at federal reform persisted. However, there was little consensus on whether a federal law should exist or what its scope and content should be. The equal sharing principle was agreeable to most, but the moral evil of bankruptcy proved a formidable obstacle to any reform that included the discharge of the bankrupt. The existence of provincial legislation in the area further hurt the reform effort because the passing of a federal bankruptcy law had little to offer federal politicians in the way of political enhancement.

Telfer's historical analysis of repeal includes an examination of the detrimental effects it had on Canadian society. Debtors with no chance of discharge from their debts absconded to the United States in large numbers. This resulted in a glut of commercially able and savvy individuals in Canada. The ability of debtors to prefer certain creditors, which often were those closer in proximity and relationship to the debtor, had a detrimental impact on Canadian commercial relations with England and, to a lesser extent, the United States.

The eventual passing of a federal bankruptcy law is evaluated alongside economic, institutional, and societal attitude changes, which led to reform. These changes were all significant yet not conclusive on their own in explaining the passing of the *Bankruptcy Act of 1919*. One of Telfer's strengths is his ability to weave social, economic and institutional themes into a cogent argument that underpins the legislative reform.

Telfer's use of sources is impressive; from House of Commons debates, legislation, and case law, to common literature and newspapers of the day, the historical era is captured from the perspective of both the scholar and the layperson. The discussion of societal attitudes toward bankruptcy contains what could be the most interesting use of sources in the entire book. Novels from the time period are used to give context to the societal belief in the evil and unworthy debtor and the stigma attached to bankruptcy. These beliefs weighed heavily in the debate concerning reform of the federal bankruptcy law.

While Telfer's explanatory framework is convincing, a section of the book is dedicated to alternative explanations for the legislative change he examines. He points to legislative change in the United States and England as possible contributory factors. However, he highlights distinct differences between the legislation adopted in the United States and what was actually enacted in Canada and the long time period that elapsed between English reform, which occurred in 1883, and the Canadian reform of 1919. Other theories such as path dependence and historical institutionalism are put forward as possible influences.

The book makes itself readily accessible to a non-scholarly audience while remaining uncompromisingly meticulous concerning its detail and legal insight. Law students, professors and those interested in Canadian history generally can all take away something of value from this book. Telfer's analysis is easy to follow and the reader is directed by clear section headings. No legal background is required to derive insight from reading this book.

Ruin and Redemption fills a void in the history of Canadian commercial law. It takes a topic that would seem uninteresting to a non-legal reader and immerses them in a historical examination of a specific time and place and how it was impacted by, and shaped the reform of, bankruptcy law generally. It shows how a multiplicity of different factors can play a role in legislative change and how significantly those factors can evolve over mere decades.

- Sean Tessarolo

Revisiting the Duty to Consult Aboriginal Peoples by Dwight G. Newman.* Saskatoon: Purich Publishing Ltd., 2014. 191 pp., $35.00 pb.

In *Revisiting the Duty to Consult Aboriginal Peoples*, Dwight Newman reinforces and revises an earlier treatise on the duty to consult in light of recent Supreme Court pronouncements regarding this area of law. Newman guides the reader through the complexities of this field with both clarity and rigour. The introduction sets the tone for the remainder of the book with a careful discussion regarding the theoretical and historical underpinnings of the duty to consult. The author does not take for granted any prior knowledge on the subject, and the novice reader would not feel lost in the analysis. Throughout the beginning stages of the book, Newman matches an appropriate use of the factual scenarios in each case with their corresponding legal standing, greatly increasing readability.

In chapter two, Newman sets out the legal considerations that revolve around the duty to consult, including when the duty arises and to whom it applies. The chapter combines jurisprudence, legal

* For assessment purposes and approval for publication, this book note was reviewed by former faculty editor Mark Carter in place of Dwight Newman.

tests, and lower court interpretations, while recognizing the limits, implications, and inconsistencies that have resulted from recent Supreme Court decisions. The author does not stop at recognizing several shortfalls of lower court interpretations of the duty to consult, but goes on to tackle the unclear areas and offer suggestions. The chapter most interestingly ends with a consideration of how the duty to consult interacts in several current issues including: when the duty to consult is triggered in the context of a Métis group or a non-status Aboriginal group; or when there are competing claims between Aboriginal communities.

The strong legal backdrop leads to a discussion regarding the scope and content of the duty to consult. Newman canvasses several levels of court decisions and academic literature when interpreting key concepts in the area, such as "meaningful consultation," "the spectrum analysis," "the honour of the Crown" and "accommodation." Once again, the factual and legal material is balanced to give the reader both a jurisprudential and practical understanding of how the duty to consult arises, as well as how the courts have interpreted various cases. In the highpoint of chapter three, Newman offers his take on how these various concepts will play out in current issues, for example, the natural resource context. The chapter concludes with an appreciation some of the shortfalls when setting strict legal norms for the duty to consult as the author suggests we need to overcome these minimal thresholds to ensure that every party's rights are protected and recognized.

Newman acknowledges that an adherence to legal text and case law leaves an excess of unanswered questions with practical significance. He thus opts to examine the duty to consult pragmatically, or as "law in action." Not only does this approach allow the average legal reader a more realistic insight into the material, it also adds significant depth to the discussion on the topic as a whole. The chapter combs through provincial, Aboriginal, and corporate initiatives and policies that have arisen in the duty to consult context. Newman uses the chapter to explore the breadth of the duty to consult as well as the number of contributors that have helped shape the doctrine. Naturally, the chapter having a practical or real-world focus leads to an interesting discussion in the natural resource arena with some commentary on the current pipeline issues. In the end, the author suggests that the diversity of Canada and its people requires a diverse approach to the duty to consult, something the courts cannot significantly guarantee.

The book truly grasps all facets of the duty to consult in Canada covering everything the interested reader would want to know. The author then moves into a comparative discussion, looking at the international take on the duty to consult, specifically looking to international treaties. Further, a discussion includes how other

countries have proceeded in this area of law, specifically in the Australian and Latin American contexts. The chapter presents an immense amount of international material and ties the similarities and differences back to the Canadian framework, while looking at the advanced role Canada has played internationally in this field. Ultimately, it is apparent that there is little certainty in how international norms and obligations will affect Canadian law in this area in the future. Nonetheless, Newman's analysis is demonstrative that the duty to consult spans far wider than our national context and one cannot fully appreciate its breadth without knowledge of the international component.

Chapter six sums up the topic with recognition of recurrent themes that run through the text, namely, maintaining an honourable relationship between the Crown and Aboriginal peoples, coupled with the ambition to reach economic and co-operative prosperity between all the interested groups. It must be remembered that the approach to any Aboriginal law context has a focus on reconciliation, as Newman stresses this core concept throughout the piece.

In closing, *Revisiting the Duty to Consult Aboriginal Peoples* covers the area of law with unparalleled research and analysis. The multi-faceted approach answers nearly every imaginable question on the duty to consult. Newman never leaves his discussion at the current state of the law but frequently continues to offer insight and predications on future developments of the duty to consult. The book is a must read for both novice and expert law scholars alike and I would recommend the text for any reader with an interest in the topic. As Newman states in closing, the fact that many Aboriginal rights and title cases result in an "all or nothing" finding by the courts, combined with years of litigation and longer years of preparation makes the duty to consult the ideal avenue for disputes. Certainly, Newman succeeds in his goal of clarifying common misconceptions and inconsistencies pertaining to the duty to consult in this piece and proceeds to offer suggestions in theoretical, legal, and policy driven interests moving forward.

- Jordan Thompson

To Right Historical Wrongs: Race, Gender and Sentencing in Canada by Carmela Murdocca. Vancouver: UBC Press, 2013. 280 pp., $32.95 pb.

Aboriginal over-representation in the Canadian criminal justice system is a well-documented and highly studied issue. There have been many critiques of the *R. v. Gladue* decision and the effectiveness, or rather ineffectiveness, of the *Criminal Code* s. 718.2(e). Carmela Murdocca, in *To Right Historical Wrongs: Race, Gender and Sentencing in Canada*, furthers the discussion where many scholars have focussed on the strict legal implications of the section. By examining the practical barriers of addressing historical injustices in the sentencing

process, Murdocca concludes that s. 718.2(e), meant to address the over incarceration of Aboriginal's in Canada, has actually reinforced the racism present in the criminal justice program.

At its core, this book analyzes much more than the provision alone. The author's analysis goes to the social and political trends following World War II. She looks at Canada's attempt to take responsibility for a number of historical wrongs and its implementation of reparative justice initiatives for historically marginalized citizens. Murdocca's work is thought-provoking and well researched. She sets the stage well, summarizing these late twentieth-century trends, explaining the historical context of s. 718.2(e), its application in the *Gladue* decision, as well as providing surprising incarceration statistics since its enactment. Murdocca draws from a wide range of sources from historical and recent government documents, parliamentary debates, jurisprudence, media commentary, and public records reports from several Canadian organizations. For those well read on this topic, parts of this book may be familiar, as sections are reprinted from Murdocca's own previous work, *From Incarceration to Restoration: National Responsibility*, *Gender and the Production of Difference* and *National Responsibility and Systemic Racism in Criminal Sentencing: The Case of R. v. Hamilton*, as well as *The Place of Justice* by Nicolas Blomley and Sean Robertson. Notwithstanding these excerpts, Murdocca presents an original perspective on the discussions surrounding culture-based sentencing, through many innovative and compelling arguments.

As the title suggests, the author goes beyond the general implications for Aboriginal offenders, and specifically focuses on women and other Canadian marginalized cultured groups. She organizes the book into four distinct chapters, highlighting how the provision affects these different groups in separate, but at times overlapping and contradictory, ways. Chapter one explores several government reports, delving into the reasons behind s. 718.2(e), and the need to understand restorative approaches in sentencing when addressing historical injustices. The author goes on to examine the concerns of the provision and in particular demonstrates the objections of Aboriginal women advocates against the provision. Murdocca explains how the treatment of s. 718.2(e) has actually been more damaging in certain circumstances to Aboriginal communities, especially when involving women and sexual abuse cases. She contends the Canadian courts fail to acknowledge the differences of traditions among Aboriginal communities and instead continue to cast their own broad ideas of tradition. Through many examples, she demonstrates that this has resulted in ineffective sentencing based on misguided perceptions, instead of the factual, historical underpinnings of Aboriginal justice.

The third chapter, "Her Aboriginal Connection" analyzes the *R. v. Gladue* decision and demonstrates how the interpretation of s. 718.2(e) to sentencing obscures the impact of colonialism. She emphasizes when one still has to prove they are "Aboriginal enough" for s. 718.2(e) to apply, the ineffectiveness of the provision is abundantly clear. She stresses the repeated references by sentencing judges to the difference between Aboriginals on-reserve and off-reserve, conveying the idea that off-reserve Aboriginals are less deserving. Murdocca argues that the historical injustice is enough, and that the connection between those injustices and the systemic problems of today must be better recognized. She challenges the court's interpretation and the constant requirement of proof of harm based on the white society's standard. Chapter four is focused on the potential of applying s. 718.2(2) beyond Aboriginal offenders and explores the political rationales for the distinction between historically marginalized cultures.

Although most of this book is presented as an overview, Murdocca provides a detailed examination of *R. v. Hamilton*. She is highly critical of the decision, which makes a distinction between systemic factors and cultural factors of Aboriginal peoples versus Black Canadians. She provides a well-supported argument that there was no parliamentary intention to limit the provision to Aboriginal offenders. Despite this, the courts have read it in such a way to avoid a "floodgate" approach. Considering the underuse of the provision for Aboriginal convictions, she persuasively states that this is a very weak and unsupported concern. The book concludes with a recap of the recent trends in the court's application of s. 718.2(e), specifically in *R. v. Ipeelee*. Though it is clear that she credits Canada for "attempting" to be creative in sentencing, she takes the position that a sentencing hearing is not the most effective time in the criminal justice process to try and link the present with the past.

While Murdocca provides a wealth of information and brings awareness of larger issues relating to s. 718.2(e), *To Right Historical Wrongs* does not offer much in the way of resolution. Murdocca's only progressive remarks come in the clarification that she is not proposing the provision be eliminated, emphasizing that more needs to be done concerning the disproportionate incarceration rates. How or what that may entail is unfortunately not explored. While the title *To Right Historical Wrongs* may be read as to suggest there is a solution, the book is rather a summary of the past injustices. With Murdocca's evident wealth of knowledge, a proposal of at least some recommendations for the future would have been appreciated and furthered her otherwise compelling arguments.

"There is a grave social and ethical crisis at the heart of this book—one that destroys lives and entire communities." Murdocca successfully delivers this message, while challenging the reader to

think about race-based sentencing, the connections between historical injustices and existing racism. Murdocca makes several courageous criticisms of what appears, at first glance, to be a provision to amend and improve the long lasting impacts of colonialism. She joins the theory of reparative justice and the study of incarceration rates by carefully scrutinizing the disconnect between political motivations for amending historical injustices, and the vastly disproportionate reality of the Canadian penal system. While it may not be groundbreaking in ways to improve the current sentencing regime, it would be of interest to a broad span of readers, from those in public policy, to members of the legal community, or anyone with a general interest in Canada's criminal judicial system. With more Indigenous and racialized people in Canadian prisons now than at any other time in history, *To Right Historical Wrongs: Race, Gender and Sentencing in Canada* is a contemporary and interesting read, surely to provoke reflection and start conversation.

- Stacey Walker

Speaking Out on Human Rights: Debating Canada's Human Rights System by Pearl Eliadis. Montreal: McGill-Queen's University Press, 2014. 429 pp., $34.95 pb.

In *Speaking Out on Human Rights*, Pearl Eliadis explores the distinct structures and institutions that define, promote and protect Canada's human rights systems. Aiming to engage an expansive audience beyond academic or human rights practitioners, she examines Canada's public human rights infrastructure through a wide legal lens. The book canvases a substantial array of relevant topics from the influence wielded by the media to that of the *Charter of Rights and Freedoms*. Eliadis draws upon and blends personal anecdotes and her own diverse experiences in human rights work to great effect. Her book contextualizes the debate and criticism that public human rights institutions have faced over the years, with specific reference to some of the most notable cases and events. She offers perspectives on, and suggestions for, the future of Canada's human rights systems, with particular attention to the argued effect that an "increasingly inhospitable political and policy environment" has brought upon on them.

Eliadis begins by offering a general overview of international human rights systems, examining Canadian commissions and bodies through comparisons with their equivalents abroad. She continues by probing deeper into the structural elements, functions and activities of the Canadian systems. This provides a thoughtful perspective on the emphasis that has historically been and continues to be placed on equality rights by Canada's human rights institutions. The development of these agencies, principally tribunals and commissions,

is discussed both within the context of impactful social movements, as well from that of legal functionalism. By employing this dual perspective, Eliadis evenhandedly tracks the growth and shifts that have characterized the evolution from first to second generation human rights commissions in Canada. According to the author, a significant transition has resulted, in part at least, in response to certain political pressures and legal demands, but also to what she describes as the "growing catalogue of human rights."

Chapters three and four respond to the various doubts and criticisms that plague Canada's human rights organizations, whether they have been fair and legitimate in their operation and whether they are still needed. Eliadis tackles head on the notions that commissions are undemocratic or do not effectively accommodate modern conceptions of rights and freedoms. In her analysis, she methodically separates myth from reality. She concludes that, despite changing perceptions towards human rights since the formation of Canada's human rights institutions, a "demand" for those organizations and their roles nonetheless persists. The key components of our human rights infrastructure remain integral to the proper functioning of a democracy through the public participation they allow and the meaningful dialogue they facilitate.

The final chapters of *Speak Out on Human Rights* examine more recent human rights issues and related events that have received particular public attention, such as those that were set in motion following the *Whatcott* decision in Saskatchewan. The author suggests that it is now well established that Canada's human rights systems integrate and accommodate rights, freedoms and social values while always remaining guided by a pursuit of equality. Her careful exploration of timely cases and important recent contributions made by Canada's human rights commissions highlights the vital role they continue to play in mediating competing and evolving social values, while promoting equality rights in Canada.

Eliadis concludes with a persuasive series of ten ideas that incorporate twenty-two different recommendations toward the improvement of human rights systems in Canada. These proposals address many of the argued shortcomings earlier identified in her book. Avoiding a one-size-fits-all remedy, her approach here is to remain sensitive to the diversity and uniqueness of Canada's institutions. She skillfully weaves together the book's preceding themes of independence, accountability and access to justice, to offer potential solutions and ideas to harmonize, support and strengthen Canada's human rights protection systems.

Readable and straightforward in its form and delivery, *Speaking Out on Human Rights* consistently presents a balanced discussion of the functioning and effectiveness of Canada's contemporary human

rights systems. The book is broad in its overview and impressive in what it accomplishes. Eliadis succeeds brilliantly in what she sets out to accomplish at the book's commencement: to examine pervasive criticism of the systems and to refocus the policy debate on the principles of equality, independence, impartiality and competence. The author's assessment is straightforward and reasoned. Her analysis is engaging throughout, and the depth and thoroughness of her research are made evident through clear writing and a comprehensive set of appendices.

To any informed and objective discussion of the present state of human rights commissions and tribunals in Canada, the contents and information presented in *Speaking Out on Human Rights* pose as essential reading. The concepts explored are thought provoking and important. Given the abolition of the Saskatchewan Human Rights Tribunal in 2011, by way of Bill 160, the book and its insights are particularly timely during what could be considered a transition period of sorts for human rights protection in the province.

Human rights systems and institutions continue to guard and protect human rights in Canada. *Speaking Out on Human Rights* rightly brings these structures to the forefront of any discussion on Canada's human rights policy. The subjects it explores are not only worthy of continued attention but, in a practical sense, are required reading for any advocate for fairness and equality of rights, or for any individual interested in the mediation of rights conflicts. By providing an enriched understanding of how the Canadian human rights systems function, Eliadis's work allows for a greater appreciation of the apparatuses themselves, while confronting the question of whether our country will, in her words, "continue on its path as a pluralistic, progressive and open society."

- Grace Waschuk

Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression by Byron Sheldrick. Waterloo: Wilfred Laurier University Press, 2014. 170 pp., $29.99 pb.

Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression by Byron Sheldrick gives an interesting overview of the history and growing prevalence of the use of litigation as a tactic to silence one's political opponents. The author argues that since the 1990s there has been an increase in the use of strategic litigation against public participation ("SLAPPs") in Canada, and that the current rules of civil procedure are not equipped to effectively deal with such lawsuits in a timely and cost-effective manner. Drawing on an abundance of Canadian examples from the early 1990s to the present, the author argues that these lawsuits usually do not have a strong basis in law; rather they are intended to divert the defendant's

resources. The author also argues that the fear of litigation deters further opposition, thus chilling public participation. Winning the litigation is not the main purpose, and often the plaintiff does not have a strong case, but these suits will almost always pass the "frivolous or vexatious" standard and therefore proceed through the courts. Sheldrick ultimately puts a call to the provinces for comprehensive legislation to regulate the use of litigation as a political tactic.

SLAPPs have the effect of taking a public or political issue and transforming it into a damage claim rooted in the private law of torts. The most common tort claimed is defamation, although abuse of process, interference with contract or economic advantage, nuisance and trespass are often claimed. The common theme woven throughout the book and the main reason why the author argues that SLAPPs are problematic, is the significant power imbalance between the parties that effectively limits access to justice. As a tactic, these legal battles are long and drawn out, with the intention of bleeding the defendant's financial resources and diverting resources away from the activism that lead to the suit. This also has the effect of chilling future activism for fear of legal liability.

SLAPP litigation poses an interesting challenge to the larger issue of access to justice. One of Sheldrick's proposed remedies is not to increase access to defend against the litigation, but to decline representation to those wishing to bring forward a SLAPP. Sheldrick discusses the ethical question posed to lawyers representing a client in bringing forward a SLAPP suit. Since there is little or no merit in the plaintiff's case, Sheldrick argues it is unethical for the legal community to bring the suit forward and utilize the legal avenues available to silence opposition.

This is an interesting proposition; however, it is one that is not realistic. Once the frivolous and vexatious threshold has been met, it cannot be up to the legal communities to decide which clients deserve representation and which do not. To put that decision in the hands of the lawyers or law societies sets a dangerous precedent that allows certain values to be weighed over others, without any checks and balances. Ultimately this does not increase access to the justice system; rather it restricts it in a new way. The unethical undertone of a SLAPP is the dominant theme of the book, and Sheldrick rightly shifts the onus to the organization utilizing litigation as a political tactic, and to the provincial legislatures to regulate these practices.

For the second half of the book, Sheldrick directs his focus to the legislative regulation of SLAPPs, which belongs to the provinces. He begins with the history of the short-lived attempts at regulation by the NDP in the 1990s and early 2000s, in both British Columbia and the Maritimes. He then analyzes the strengths and shortcomings of the only current anti-SLAPP legislation, in place in Quebec. The

remainder of the analysis focuses on the recommendations from a 2010 Blue Ribbon panel in Ontario, which he finds to be the strongest attempt at regulation.

The panel recommended that once it has been established on a balance of probabilities that a matter of public communication is involved, a burden that falls to the defendant, only those cases that have a "substantial likelihood of success" should proceed. While this would reduce the number of SLAPP suits, the panel's recommendation did not explain how "success" was defined nor did Sheldrick elaborate. Clarification of how "substantial" was to be measured was also missing, as was what impact this would have on the case actually being heard for its merits. If a claim were to go forward based on a substantial likelihood of success, it is likely that the defendant would try to settle to avoid leaving the quantum of damages in the hands of the court. Knowing that the case has met the "substantial likelihood of success" test, the plaintiff could use this as leverage to increase the settlement. However, the panel's recommendations received strong support from the Ontario Bar Association. In 2013, the resulting Bill 83 was introduced, however it remains to be seen what the future will hold for the Bill.

The discussion of SLAPPs is quite timely. A portion of the book is dedicated the usage of SLAPPs in what the author calls a "judicialization of parliamentary and political debate." Citing the Cadman Affair, the civil suit brought by Prime Minister Stephen Harper as a private citizen against the Liberal Party, Sheldrick explains that members of Parliament may not carry out their "parliamentary duties" for fear of litigation. Sheldrick furthers that this causes a chill on political debate amongst MPs for fear their colleagues will utilize the courts as a "mechanism for seeking redress for comments made within the context of political debate." As we near an election, where political debate is at its peak, it will be interesting to see whether or not the threat of SLAPPs will impact the discourse.

Blocking Public Participation is an accessible and engaging introduction to SLAPP litigation in Canada. The author draws on interesting and high-profile examples to illustrate the tactical uses and growing prevalence of SLAPPs. The argument is well balanced, and easy to follow. Sheldrick focuses on a niche area of litigation, and although the book might not be helpful by way of practice, specialists and non-specialists will still benefit from its valuable glimpse into a unique, interesting and often dramatic area of public interest litigation.

- Amanda Zalmanowitz