

TRANSFORMING COLONIAL CATEGORIES? CUSTOMARY LAW, LEGAL PLURALISM AND THE CULTURAL HERITAGE OF INDIGENOUS PEOPLES

IPinCH Working Group on Customary, Convention and Vernacular Legal Forms
York Centre for Public Policy and Law, York University
Main Workshop January 28-29, 2012

All daytime event take place in the York Research Tower, Rm. 626

Confirmed Participants for Faculty Workshop: Kirsten Anker (McGill Faculty of Law and Centre on Human Rights and Legal Pluralism); Catherine Bell (Faculty of Law, University of Alberta); Rosemary Coombe (CRC in Law, Communication & Culture, York University); Haidy Geismar (Museum Studies, Anthropology, NYU); Patricia Goff, (Political Science, Wilfred Laurier), Ronald Niezen (McGill University, Department of Anthropology); Brian Noble (Department of Sociology & Anthropology, Dalhousie University); Makere Stewart-Harawira (Educational Policy Studies, University of Alberta); Val Napoleon (Faculty of Law, University of Victoria); Sean Robertson (University of British Columbia).

Graduate Student Participants: Graduate students working with workshop participants include IPinCH Graduate Student fellows Sarah Carr-Locke (Simon Fraser University), Davina Two Bears (Indiana University), Emma Feltes (Dalhousie University), Nicole Aylwin (York University). Other invited students include, Lucie Edwards (Balsillie School of International Affairs), Tate LeFerve (New York University), Eugenia Kisin (New York University), Surinder Multani (York University), Neil Reddekopp (University of Alberta) & Hadley Freidland (University of Alberta). Invitations will also be sent to the York University Sociolegal Studies, Indigenous Studies graduate students to attend the workshop and to learn about student opportunities with IPinCH

Faculty Workshop Biographies

Kirsten Anker

Kirsten Anker teaches in the areas of property and Aboriginal peoples and the law, and has research interests that combine property, Aboriginal title, legal theory, translation studies, anthropology, education, evidence, and alternative dispute resolution. Her doctoral dissertation, entitled "The Unofficial Law of Native Title: Recognition of Legal Pluralism in Australia", explores various aspects of claiming Native (Aboriginal) Title as a way to inspire a re-imagination of law. With undergraduate degrees from the University of Sydney in Physics and Law, Professor Anker was a Boulton Fellow at McGill in 2004. She is currently one of the principal researchers on a project in partnership between McGill Faculty of Law and Justice Canada, investigating the inclusion of Indigenous legal traditions in the Transsystemic Legal Education program at McGill.

Catherine Bell

Catherine Bell is a Professor of Law at the University of Alberta specializing in Aboriginal legal issues, dispute resolution, property law, cultural heritage law, and interdisciplinary community based legal research. She has been a visiting professor at the University of Niigata (Japan), University of Victoria, Program of Legal Studies for Native People (University of Saskatchewan) and Akitsirag Law School for Inuit students (Nunavut). For several years she also served as a lead faculty member for the Banff Center for Management Aboriginal Leadership and Self-Government Program. She is the recipient of numerous major research grants, has been nominated for teaching awards, and has recently been honoured with the Aboriginal Justice Award and a McCalla Professorship. Professor Bell is published widely on Metis and First Nation legal and policy issues and has acted as an advisor to First Nation, Canadian government, and Métis organizations. She is also the author of two books on the Métis settlements of Alberta and co-editor of, and contributing author to *Intercultural Dispute Resolution in Aboriginal Contexts* (with David Kahane); *First Nations' Cultural Heritage and Law: Case Studies, Voices and Perspectives* (with Val Napoleon); and *First Nations' Cultural Heritage and Law: Reconciliation and Reform* (with Bob Paterson). Professor Bell engages students from the University of Alberta and abroad in her research. Current research programs include a legal history project on Metis constitutional rights in Alberta (with Dr. Nathalie Kermoal) funded in part by the Province of Alberta and SSHRC and an international MCRI concerned with intellectual products of cultural heritage, including rights and interests of indigenous peoples.

Rosemary Coombe

Rosemary J. Coombe is Tier One Canada Research Chair in Law, Communication and Culture at York University in Toronto. Professor Coombe teaches in the Communication and Culture graduate program and supervises students in law and social and political thought. She contributes to scholarship in anthropology, cultural studies and legal theory. Her current research work focuses upon the global proliferation of cultural claims under conditions shaped by informational capital and the intersections of neoliberalism, indigenist social movements and human rights. This includes studies of cultural property disputes, music and cultural rights, the evolution of the rights of culturally defined collectives, the invocation of 'community' rights in international environmental policy, the evolution of governance norms over cultural heritage, and the postcolonial remaking the public domain under intellectual property laws reconceived as human rights. She received her doctorate at Stanford University in 1992 where she was trained in anthropology and in law. She holds three law degrees and previously taught at the University of Toronto Faculty of Law. Her publications may be found at www.yorku.ca/rcoombe.

Haidy Geismar

An Assistant Professor of Anthropology at New York University Department of Anthropology and Museum Studies, Geismar is the author of the forthcoming volume *Treasured Possessions: Cultured Resources: Intellectual and Cultural Property and indigenous rights in the Pacific* (Duke University Press). Since 2000 Geismar has worked with the Vanuatu Cultural Centre, investigating the ways in which people from Vanuatu (ni-Vanuatu) work through the museum to generate powerful discourses about cultural value, which then extend into national

marketplaces, government and international engagements. Since 2004, she has also been working in Aotearoa New Zealand, collaborating with curators to investigate alternative models of value for Maori cultural production in both museum and marketplace.

Professor Geismar has written about value in the so-called tribal art market, the practice and form of indigenous contemporary art, the constitution of intellectual and cultural property in the Pacific and its relationship to discourses and practices of indigeneity, the entangled histories of photography and anthropology and its ongoing legacy, the social life of photographs, the theoretical purchase of material culture studies, and the politics of cultural property in museums. She has taught classes on Anthropology in and of Museums; Cultural Property rights and Museums; Anthropology of Art; Materiality; Money, markets and Morality; and Digital Culture. Geismar is currently in the very early stages of a new project which effects the impact of digitization on conceptions of materiality in museums, and the impact of digital technologies on the possible futures of ethnographic display.

Patricia Goff

Dr. Goff specializes in international political economy, international relations theory, and international organization, with a particular interest in trade, intellectual property, and the cultural capacity of international organizations. She is co-editor (with Kevin C. Dunn) of *Identity and Global Politics: Theoretical and Empirical Elaborations* (Palgrave, 2004) and co-editor (with Paul Heinbecker) of *Irrelevant or Indispensable?: The United Nations in the 21st Century* (Wilfrid Laurier University Press, 2005). She is also author of *Limits to Liberalization: Local Culture in a Global Marketplace* (Cornell University Press: 2007).

Ronald Niezen

Dr. Ronald Niezen has worked with the Cree of James Bay and is well versed in Native American ethnohistory. As a Canada Research Chair, he is now studying how indigenous peoples have constructed politically distinctive identities that have shaped emerging patterns of transnational networking and cooperation, as well as political lobbying at multiple levels in international society. Niezen's work situates indigenous political distinctiveness in the context of a more general understanding of "identity construction," which places particular emphasis on the dynamics of cooperation across cultural boundaries. The importance of these dynamics has been accentuated by the many new possibilities of communication and self-expression in the contemporary world. Through his research, Niezen shows how contemporary processes of cultural expression are helping those who represent indigenous peoples to articulate the objectives of their communities as well as to engage in honest and informed negotiations with their counterparts, the representatives of nation-states and the institutions of global governance. In this way, these representatives are able to promote truly viable programs of community-based development.

Brian Noble

A socio-cultural anthropologist, Professor Noble's major focus of research is political, legal, and knowledge practice relations between indigenous peoples' and the apparatuses of the state. Central to this is a deep consideration of the practices of colonialism, and the possibility of anti-colonial movement. He has conducted ethnographic research on cultural and intellectual property, customary law, problems of ontology, ethics and trust in research, museums and institutional relations. The work necessarily addresses how anthropologists deploy their expertise in encounters between indigenous and state parties, and in the courts or other arenas. A key current project with a network of engaged anthropologists in Canada addresses the possibility of treaty praxis and relational ontology as means of achieving political reconciliation between Indigenous and non-Indigenous peoples' collectives. In addition, Dr. Noble is Co-Investigator in the SSHRC MCRI "Intellectual Property in Cultural Heritage", and co-chair of its Working Group on Collaboration and Relations. He has worked closely with Secwepemc, Mi'kmaq, Blackfoot, and Kwakwaka'wakw peoples. Dr. Noble also conducts ethnographic and historical research on science, technology, and expertise as public culture, with interests in ethnology, palaeobiology, primatology, natural history, law, and public-scientific performances of the biological.

Makere Stewart-Harawira

Stewart-Harawira was appointed to the University of Alberta in September 2004 from the New Zealand Maori University, Te Whare Wananga o Awanuiarangi. During her 10 years there she taught graduate courses on International Relations and Indigenous Studies, and developed a postgraduate program. While in Auckland she taught at the University of Auckland where undertaking her academic studies, at Tangaroa College where I also serving time as acting-HOD of the Maori Bi-lingual Unit, and Hillary College. Her research and scholarship is driven by her passions for global governance and transformation, ecology and sustainability, and the vital importance of traditional Indigenous knowledge systems to which traditional language maintenance is integral. Stewart-Harawira's research projects include, *Global Citizenship, Regional Integration and the Revitalisation of Traditional Languages and Cultural Knowledge: Responses to Declining Post-Modern Imperialism* (Standard SSHRC-funded), *Energy Development and the Prosperity and Wellbeing of Aboriginal Communities in Northern Alberta* (SSHRC-funded Northern Research Initiative) and *Dialog. Research and Knowledge Cluster Relating to Aboriginal Peoples* (SSHRC Knowledge Clusters Program).

Val Napoleon

Val Napoleon is of Cree heritage from Saulteau First Nation and she is an adopted member of the Gitksan nation. Her doctoral research focused on a substantive articulation of Gitksan law and the development of a Gitksan legal theory. In June 2010, Val was awarded the University of Victoria's Governor General's Gold Medal for her dissertation entitled *Ayook: Gitksan Law, Legal Order, and Legal Theory*. She publishes and teaches in areas of aboriginal legal issues, indigenous legal traditions, indigenous feminism, oral histories, restorative justice, and governance. Val formerly taught at the University of Alberta in the faculties of native studies and law. In January 2012, she will join the Faculty of Law at the University of Victoria as the Law Foundation Professor in Aboriginal Justice.

Sean Robertson

Why is the cultural heritage of some communities considered part of the public domain and subject to being commodified without consent? What happens when intellectual property rights surrounding these commodities become so heavily policed that descendant communities are virtually barred from using their own cultural heritage? Questions such as these illustrate the everyday political lives of trademarks, copyrights and patents of concern to former lawyer and University of British Columbia (UBC) Post-doctoral Fellow, Sean Robertson. Now working with IPinCH Advisor and UBC Professor of Law Robert Paterson, Sean earned his PhD in the Simon Fraser University Department of Geography, exploring the interactions between international and national laws, the tensions between the public domain and the protection of traditional knowledge, and the politicization of intellectual property. His collaborative research with British Columbia First Nations communities addressed the use of traditional ecological knowledge in political and legal struggles. For this doctoral research, Sean received funding from SSHRC as well as the Law Foundation of British Columbia.

Schedule of Workshop Activities

Saturday January 28, 2012

9:30am-10:00 am:

Welcome and questions posed, Nicole Aylwin, Rosemary Coombe, and Patricia Goff

WORKSHOP DISCUSSIONS

Each presenter will speak informally about the questions that drive them and the issues and concerns they focus on within the broad themes of the workshop. Each twenty minute presentation will be followed by a full ten minutes of question and discussion. Moderators are assigned only to field questions.

10:00 am- 10:30 am:

Patricia Goff, “Accommodation Strategies in International Institutions”

International institutions have tried various strategies to accommodate difference. The lion's share of their attention has been given over to accommodating the unique challenges faced by developing countries. "Special and differential treatment" and "policy space" are two examples of policies intended to bridge the spectrum of *economic* difference displayed by member states in institutions of economic governance. What strategies have international institutions employed to accommodate *cultural* difference? How do organizations with diverse memberships ensure that a variety of legitimate cultural practices are honoured? This paper seeks to explore this question with special emphasis on indigenous cultural practices. I examine whether the recognition of indigenous customary law by three institutions - the Convention on Biological Diversity; the World Intellectual Property Organization; and the International Labour Organization - has been effective in accommodating cultural difference.

10:30 am – 11:00 am:

Ronald Niezen, “When Law Encounters Custom and Custom Encounters Law”

The paper I propose would consider the problem of stereotyping and boundary enhancement through customary law initiatives. It may be worthwhile to discuss this issue at three levels: 1) an ethnographic study of an inherent jurisdiction constitutional and legislative initiative in a Canadian aboriginal community; 2) customary law as elaborated within the Permanent UN Forum on Indigenous Issues; and 3) a more general consideration of law as constructive of forms of human belonging.

11:00 am – 11:20 am:

COFFEE BREAK

11:20 am-11:50 am

Kirsten Anker, “Legal Pluralism and the Limits of Modern Law”

My contribution will focus on legal pluralism as constituted by formal processes of recognition, and will start with the observation that protection of objects, places, people and relationships in modern law involves recognising something as something – some set of facts as some legal category that attracts a remedy. The possibility that some things may fall without the relevant category, and that the lines drawn are conceived within the dominant legal culture, gives rise, in the case of the protection of indigenous cultural heritage and rights, to allegations of ongoing colonialism, Eurocentrism and prejudice – the example that comes to mind is the debate in the Marshall and Bernard case about whether it was proper to define title in terms of the common law concept of occupation that is incompatible with the lifestyle of “nomadic” or “semi-nomadic” peoples. Justice LeBel’s suggestion was that aboriginal law (“conceptions of territoriality, land-use and property”) should help define aboriginal title. In putting the recognition category one stage earlier – “aboriginal conceptions”, “customary law” and so on – this approach pays more heed to the sui generis characterisation of aboriginal rights, but does not deal with the issues of exclusion and inclusion which go hand in hand with categorisation itself. One problem I will identify is the reification of objects of protection or recognition in the conventional legal model, the assumption that they are either there or not there, authentic or invented, rather than drawn out by the processes of naming and claiming.

11:50 am-12:20 pm

Makere Stewart-Hariwira, “Indigenous ontologies, global citizenship, and new formations of global governance” OR ALTERNATE

12:20 pm to 1:30 pm

LUNCH

1:30 pm -1:45 pm

Sarah Carr-Locke, “Opportunities for Graduate Students with the IPinCH Project”

1:45 pm – 2:15 pm

Val Napoleon, “Living in the World Today: Indigenous Legal Traditions”

What are the ways that we might identify, articulate, and draw from the intellectual resources contained in indigenous legal traditions? How might indigenous legal processes be taught and applied to today’s complex conflicts and social dysfunctions? I will draw on the recent treatment of Lon Fuller’s interactional law as one approach to explore and substantively articulate indigenous law. I will also draw on ancient indigenous stories and practical legal methodologies.

2:15-2:45 pm

Sean Robertson, “The stewardship model of property: Toward an indigenous cultural heritage protection model?”

Based on a rereading of transcripts from my doctoral research with Sinixt, Okanagan and Secwepemc peoples, my workshop presentation will explore the meanings of authorship, use, alienability, exclusion, and nonmarket obligations pertaining to the production and/or use of indigenous heritage both within Native communities and in their relationships with non-Natives. Thinking ahead to the outlines of a stewardship model for cultural property, I will present some initial differences and commonalities across Native laws, the common law and international regimes. I will also draw upon the expertise of other participants in respect of expanding my empirical lens to include non-Native norm-making communities (government cultural officials, ranchers) and making refinements to my analysis of plural legal systems.

2:45-3:15 pm

Haidy Geismar and/or Rosemary Coombe, “Intellectual Property and Indigenous Peoples: Obstacles, Ontologies, Opportunities”

Although international institutions have been enamoured with the idea of extending intellectual property protection to indigenous knowledge and cultural expressions and various models of *sui generis* protection have been proposed and in some cases legislated, the policy field remains fraught. Some indigenous activists maintain that all forms of intellectual property are merely instances of Western imperialism, often caricaturing the history and form of intellectual property in the process. Various forms of ontological difference are used to support the proposition of absolute incommensurability in a fashion that may serve more to entrench narrow ideologies than open dialogue. From this perspective indigenous peoples and intellectual property are inevitably in an oppositional relationship and the only way forward involves utter rejection of such models in favour of an abstract model of free, prior, and informed consent to further indigenous self-determination. Such a position may embrace and support customary law or it may further marginalise it. Others point to instances where intellectual property policy making has itself furthered indigenous self-determination, suggesting that under certain conditions the encounter of IP and IP may mutually engender new political formations. It might also be argued that indigenous peoples have played a crucial role internationally in opening the eyes of policy makers to the human rights principles and prospects for reshaping intellectual property norms

and practices and that new norms developing internationally to govern heritage goods owe their origins to indigenous rights activism, providing new opportunities for customary law in sustainable development.

3:15 pm-3:50 pm

COFFEE BREAK

3:50-4:20 pm

Brian Noble, “Ways of Pluralizing around IP”

I've been doing a lot of work and thinking around these questions, and am toying with bringing forward a very workaday, close-up case (or two) on sought-after IP assignment, which highlight the process of 'customary' practices infecting, while being entailed by, bureaucracies, and what the implications of this might be for future pluralist political unfoldings (on latter, thinking of folks like Tully, Mouffe, Connolly). I'd also like to place this in the sweep of the late-in-the-game signing onto the UNDRIPS of the big-4 settler states: USA, Canada, Australia, NZ. Then, I'd like to see if we can talk about alternatives.

4:20 pm – 6:00 pm

Moderated Discussion on Standing and Emergent Questions

Moderator: Nicole Aylwin or Catherine Bell or Rosemary Coombe

1. As Indigenous rights are increasingly forged in international legal arenas, what are the political dangers in using the term ‘customary law’ and to what extent and under what conditions might these be avoided? Is ‘free, prior, and informed consent’ an adequate vehicle for recognizing and respecting indigenous means of governing intangible cultural heritage?
2. How useful is the concept of legal pluralism and how does it need to be transformed to accommodate the situations in which indigenous peoples now struggle to further aspirations for self-determination?
3. Do we need to make distinctions between variants of colonial history to understand shifting sovereignties? How much variation do we find even among settler states in terms of the autonomies recognized and asserted with respect to heritage goods?
4. What resources do you recommend for scholars exploring these issues? Other scholarship, web sources, other projects, etc. Some readings will have been circulated in advance; others are invited for submission to the organizers at any time.

6:00 pm- 6:45 pm

Walk around campus/quick nap

6:45 – 8 pm

DINNER

8 pm onwards: informal conversational gathering at location TBA

Sunday January 29, 2012

10am-12pm

Planning Meeting for SSHRC Conference Grant and publication ideas for workshop papers.