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**CULTURAL LAW
(LAW 333.001)
Reading List and Seminar Outline**

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Required Texts

Nafziger, James A.R., Robert K. Paterson and Alison Dundes Renteln. 2010. *Cultural Law: International, Comparative, and Indigenous*. Cambridge: Cambridge University Press.
(all page references below are to this text)

Additional readings (mostly online) will be provided to students during the term as necessary and particularly to communicate salient new developments (new court cases, new legislation and new international agreements).

**Week 1: Cultural-Legal Interaction
(pp. 36 to 64)**

This class will focus on specific instances where differences between cultures were invoked to seek modification of the application of general laws.

- In the *Lyng* case a Native American tribe sought an injunction to protect traditional land use from compromise by the building of a road and in *Church of Lukumi Babalu* a Florida town sought to ban animal sacrifice by followers of the Santeria religion. Do these cases suggest a valid argument can and should be available for the legal protection of minority cultural (religious) values?

The debate between cultural relativism and universality will be discussed along with how different groups are more or less comfortable with adversarial attempts to solve cultural differences.

- Do you think there should be such a thing as a cultural defence? Or should the law attempt to deal with cultural questions on an *ad hoc* basis (such as taking cultural differences into account as part of the sentencing process in criminal cases)?

Week 2: The Meaning of Cultural Law
(pp. 64 to 88)

This class will discuss the notorious difficulty of legally defining the term "culture" and survey some attempted definitions, such as the definition of "cultural industries" in connection with the creation of an exemption to the economic liberalization established under the *North American Free Trade Agreement (NAFTA)*.

Culture as a human right is the subject of several international conventions. These vary from the specific (such as the *Convention on the Rights of Persons with Disabilities*) to the more general (such as the *UNESCO Convention on Cultural Diversity*).

- What sorts of conflicts do you think could arise as a result of attempts to protect different cultural manifestations?

Sometimes laws (such as those governing the sale of kosher food) have been held invalid for upholding certain religious beliefs to the exclusion of others.

- In what ways do you think the law upholds certain cultural values and beliefs to the express or implied exclusion of others? In what ways can this threaten the values of a multicultural society (like Canada's)?

Week 3: The Law of Cultural Heritage
(pp. 206 to 251)

This class will discuss the ways the law specifically addresses property that is seen as cultural in character.

- What is the difference between the terms "cultural property" and "cultural heritage"? Why is the difference important?
- Who are the groups with the most clearly defined vested interests in such laws? (Artists, museums, indigenous persons?) How do they interact in the formation of such laws?
- When will and should art-importing states (such as Canada) be willing to enforce the cultural heritage protection laws of vulnerable countries whose cultural heritage is at risk (such as Cyprus in the *Goldberg* case)?
- What should be the obligations of those importing artworks to ensure that no illegality is associated with their acquisitions?
- Should museums and art dealers be subject to legal as well as ethical constraints on their activities?

- When is it appropriate for a Canadian court to apply the unique cultural laws of foreign countries (such as Indian religious laws as to the legal personality of Hindu statues in the *Bumper* case)?

Week 4: Cultural Patrimony and Export Controls on Cultural Property
(pp. 297 to 315)

This class will discuss the cultural property export controls of Canada and other countries. The scope of such laws will be assessed and compared. Cultural patrimony laws that vest title to certain property (such as pre-Columbian artifacts in Mexico) in the state will also be discussed.

- Should such laws extend to the removal from Canada of property that did not originate here (e.g. Picasso)?
- How can countries recover properties that have been smuggled out in violation of such laws? How does enforcement and recovery pursuant to a treaty work?
- What effect do free trade agreements (like *NAFTA* and the *EU*) have on such laws?
- What is the future for such laws in light of globalization? Can they be seen as dated as based on nationalistic theories that should no longer apply?

Week 5: Indigenous Cultural Heritage
(pp. 425 to 473)

Indigenous peoples' cultural heritage resonates in Canada in light of our large First Nation, Inuit and Metis populations and the level of constitutional protection now afforded indigenous rights. This class will examine international developments concerning indigenous peoples (such as the *UN Declaration on the Rights of Indigenous Peoples*) as well as Canadian and American laws relating to indigenous cultural rights. A special focus will be the experience of both countries in relation to repatriation of indigenous cultural property from museums and other public institutions, along with the level of legal protection extended to ancestral remains.

- How is the term "indigenous" to be defined? Does it matter if a state (e.g. China) refuses to recognize a group as being indigenous?
- What is the best approach to repatriation; detailed legislation, as in the US, or a more co-operative model based on non-binding codes of practice (Canada)?
- Can and should courts resolve disputes surrounding the cultural heritage of indigenous peoples? Is negotiation a better alternative to litigation?
- What level of legal protection should apply to ancestral remains? The *Kennewick Man* case will be discussed in relation to the issue of "unidentifiable" ancestral remains.

Week 6: Litigation of Stolen Art Claims
(pp. 514 to 543)

Claims involving stolen art usually involve valuable property that has often been lost trace of for decades and only recently rediscovered by its original owner. There is a major difference between how common law jurisdictions (such as the United Kingdom) and civil law jurisdictions (such as Quebec, see *L'Ange Gardien* case) approach title to stolen property that has been bought by an honest purchaser. It is thus critical to determine whose laws apply (*Winkworth*) and this is the province of complex conflict of laws rules.

The *Goldberg* case shows how courts approach stolen art cases and the various legal issues involved.

- Is it fair that ordinary common law rules about the inability to get title to stolen property should apply if Anglo-Canadian or US law applies but not if the civil law (Quebec and Continental Europe) applies? How should courts decide which country's laws should apply to decide who has title?
- What sort of elements should acquit owners in establishing due diligence in searching for their lost properties?
- Do you agree with the courts reasoning in *Winkworth*? Do you think the American court took a different approach in *Goldberg*? Which approach do you prefer and why?

Week 7: Statutes of Limitation and the Recovery of Stolen Art
(pp. 543 to 573 and 603 to 611)

Statutes of limitation have always played a major role in the satisfactory resolution of claims for the return of stolen artworks. The leading examples of this are US and European cases involving claims by heirs for the recovery of properties confiscated during the Nazi-era.

- Do you think limitation statutes should apply at all in such instances of gross violations of human, as well as property, rights? Which of the two approaches to the application of limitation statutes in American law (the "discovery" and the "demand and refusal" rules) do you prefer and why?
- What sorts of factors might you apply to decide whether such claims had been delayed "unreasonably"? See *Sanchez*.
- Should distinctions be made between different types of thefts? Perhaps those associated with human rights violations should be exempt from limitation statutes? What constitutes a human rights violation? Can colonization be seen as a violation of international law for such purposes?

This class will conclude with a discussion of the rules recently drafted by the International Law Association for resolving such claims. Do you think these rules are an improvement on the common law and, if so, why?

Week 8: Class Visit to the UBC Museum of Anthropology (MOA)

For several years now I have taken the class to the UBC Museum of Anthropology of whose External Advisory Board I am a member and whose professional staff I know well.

Before this visit I will give the class some background to the museum's history and mission and the significance of this to the content of the course. In particular, I will remind the class of the role of anthropology museums in relation to changing laws and public policies involving Native peoples.

The class will first hear a presentation by a MOA curator that will focus on the role of the museum and its progress in addressing First Nations' concerns and repatriation requests in particular. The class will then be given a tour of the collections and conservation laboratories, as well as other resources in the newly-expanded building.

After this visit, the class will re-group to discuss impressions and ask questions about the appropriate role of such museums in today's society. This exercise will serve as an introduction to the remaining three classes.

Week 9: Intangible Cultural Heritage (pp. 614 to 642)

This class will focus on the unique problems faced by the law in trying to afford appropriate protection for intangible cultural heritage (including traditional knowledge and languages). This question is one of particular importance to indigenous and non-Western cultures. While the obvious legal solution to this issue might seem to be the use of intellectual property norms these have not always been effective in practice.

- What are the limits of conventional intellectual property laws in relation to the often communal, ephemeral but perpetual character of many indigenous cultural practices and customs?
- What problems (or solutions) do international agreements such as those surrounding the World Intellectual Property Organization (WIPO) and the WTO (World Trade Organization) *Agreement on Trade-Related Aspects of Intellectual Property Rights* pose for intangible culture?
- Can existing legal norms, such as those governing contracts and privacy, afford appropriate protection for intangible cultural phenomena or is human rights law the

solution? Are *sui generis* (unique) types of laws needed and, if so, what form should they take?

Week 10: Visiting Presentation

Week 11: Museum Law
(pp. 674 to 695)

The laws surrounding museums will be discussed with particular reference to the following issues;

- What do we mean by a museum? Why do we ask that question?
- Have museums entered a new stage of relevance to the communities they serve? In light of globalization and the spread of the internet what significance does the storage and display of objects now have? Who is the museums' constituency in light of globalization and multiculturalism?
- What solutions appear to be available for the financial crises many museums appear to be in?
- Should museums have to justify themselves in economic terms as many seem to feel they should? What do you think about the opposition to monetization coming from groups like archaeologists and anthropologists?
- What are the ethical issues surrounding museums accepting gifts or purchasing material that may have been stolen or looted? Should museums be accountable in such situations and, if so, to whom?

Week 12: Museum Law (continued)
(pp. 695 to 739)

This class will discuss recent changes in museum management and the law applicable to such management.

- Should certain museums (such as the British Museum and the Louvre) regard themselves as "universal" and entitled and obliged to play a different role than others?
- Can museums (such as those in countries with large indigenous populations, like Canada) pursue a "bicultural" agenda to address indigenous and other concerns or should they be more responsive to all facets of the community they serve?

We will discuss the 1992 *Task Force on Museums and First Peoples* and the impact it has had on institutions in Canada , such as MOA.

- Do you think, from the insights gained on visiting MOA, that it is a different institution from what it might have been because of the recommendations of the *Task Force*?
- Do museum directors risk liability for breach of fiduciary duty if they attorn to the interests of a particular group in the community?

The issue of deaccessioning will be discussed in relation to museum directors' liability for breaches of fiduciary duty.

- Should museums be able to sell objects from their collections and, if so, in what circumstances? Is compliance with non-binding ethical guidelines enough to protect museum directors from legal liability?
- Should deaccessioning be the subject of regulatory legislation?