Law’s Encounters: Co-existing and Contradictory Norms and Systems
Canadian Law and Society Association, Annual Meeting 2014
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Faculty of Law, University of Manitoba

Conference Papers - Abstracts

Friday June 6, 2014

8:30    Registration Opens

9:00    Welcome ceremonies (Moot Court)

9:30    Plenary Speaker – Jean Teillet (Moot Court)

10:45   Break (Room: Common Rooms 203A and 203B)

11:00 – 12:30    Panel sessions (8 concurrent sessions)

1101 – Human Rights, Prisoners’ Rights: Challenges and Remedies (Room: Moot Court)
Chair: Palma Paciocco

Kyle Kirkup, University of Toronto, “Encounters with Administrative Violence: Gender Identity and Sex Segregation in Canadian Prisons”

From birth certificates, driver’s licenses, and passports that require an “M” or an “F” to sex segregated public washrooms and homeless shelters, our daily interactions with the administrative state are mediated by systems of sex and gender. As a result, bodies that are not readily classified within this administrative system tend to experience
marginalization, high rates of violence, and what Dean Spade calls “diminished life chances.” This paper uses the story of Synthia Kavanagh — a transgender woman who successfully brought a human rights complaint against the Corrections Service of Canada — as a window into the administrative violence enacted in Canada’s federal and provincial prisons. The central claim developed in the paper is that the policy of segregating prisoners on the basis of sex has profoundly negative consequences for those who do not fit neatly within this administrative system, and should be reformed. Not only do transgender people encounter difficulty accessing gender-affirming medical care while in prisons that do not accord with their gender identity, but they also experience high rates of violence and sexual assault. To make this argument, Section I briefly traces the history of sex segregation in prisons in Canada. Section II sketches the contemporary Canadian legal framework that administers sex and gender in prisons, while Section III surveys strategies to better ensure that Canadian prison practices accord with the needs of those who cannot be easily classified within this system. The paper concludes, however, that when examining strategies for reform, it is important that we not lose sight of the underlying forces — such as difficulty accessing government identification and resulting lack of unemployment — that often bring transgender people into conflict with the criminal justice system in the first place.

Colleen Matthews, York University, “The Role of Canadian Courts in Integrating International Human Rights Principles into Canadian Law”

This article considers how Canadian courts use international human rights instruments when interpreting Canadian law. It is a descriptive account of an ongoing empirical study, as well as some preliminary results. The Supreme Court of Canada has held that international treaties are not part of Canadian law unless implemented by statute, although courts may consider international principles in interpreting legislation and the Canadian Charter of Rights and Freedoms. This paper argues that, while international human rights instruments have not been incorporated into Canadian law by statute, Supreme Court decisions that have used them as interpretive aids have not been insignificant. The purpose of the empirical study is to obtain a broader view of Canadian court use of international human rights sources, at the superior trial and appellate court levels, and the Federal Court and Federal Court of Appeal, as well as the Supreme Court.

The article begins by describing the study, which has quantitative and qualitative components and comprehensively surveys Canadian court cases since the seminal case of Baker v Canada (Minister of Citizenship & Immigration) in 1999. It then analyzes the survey results from two Canadian jurisdictions, considering such questions as the frequency of court references to specified international human rights instruments (by year and court level); whether and how courts distinguish among different types of instruments; whether citations are in majority, dissenting or concurring judgments; and whether the international sources are used in statutory or Charter interpretation. The paper also considers issues like the rationales courts provide for turning to international human rights sources; how they determine relevance and persuasiveness; and whether they identify principles that can be applied in future cases. Finally, the article summarizes notable observations to date and discusses next steps in the study.

Jeffery Hewitt, York University, “Prison: A Luxury Lifestyle of the Oppressed?”

I am interested in the quiet phenomenon that coincides with our ever-increasing desire for numbers in legal discourse with little or no political debate and about what it all may mean. In two of my areas of interest, anti-discrimination and Aboriginal people there are some interesting numbers. Drawing on data from various sources such as Canada’s National Housing Survey, Office of the Correctional Investigator and the United Nations, as well as scholarship from Harry Arthurs, Peter Hogg, John Borrows, Sakej Henderson, Kent Roach and others relating to the Charter of Rights and Freedoms, Aboriginal Peoples, court dialogue and remedies, I propose to explore whether there is potential leverage to shrink the gap between Aboriginal and non-Aboriginal Canadians.

Canada is facing a crisis when it comes to the overall situation and daily lives of Aboriginal people. So much so that data reveals the glaring and disquieting gap between the lives of Aboriginal and non-Aboriginal Canadians is so vast that for some Aboriginal people, going to prison offers an increased standard of living with access to mold-free housing, clean
water, heat, clothing, health care and education that is not always found on-reserves or even available in cities for the Aboriginal population. Do changes to the Canadian Human Rights Act and the growing number of Aboriginal complaints before the Canadian Human Rights Tribunal offer us insight into change?

Bruce Ryder, York University, “Canadian Human Rights Tribunals and Social Transformation: Practices and Potential Systemic Remedies”

Ever since the 1987 ruling of the Supreme Court of Canada in Action Travail des Femmes (1987), Canadian anti-discrimination jurisprudence has recognized that systemic remedies are necessary to address systemic forms of discrimination. Human rights statutes across the country endow human rights tribunals with broad remedial authority, including the power to issue future compliance orders. This paper examines the practices of human rights tribunals to determine how often they are issuing systemic remedies, in what contexts, and explores whether the issuance of systemic remedies by human rights tribunals has shifted over time and differed between jurisdictions. The paper will conclude by considering the potential of systemic remedies issued by human rights tribunals to contribute to the transformation of relations of social subordination.

1102 – The Place of Law in Migration and Migration Research (Room: 309)

Chair: Amar Khoday, University of Manitoba

Shauna Labman, University of Manitoba
Laura Madokoro, McGill University
Sarah Zell, University of British Columbia
Mara Fridell, University of Manitoba

Movement and migration spark multiple encounters with law. The law itself is changing and at times contradictory as the migrant moves through differing domestic state laws, and too often between laws or within the international realm. Navigating the meaning and influence of law during the migratory journey is a challenge that is often blurred in societal perceptions and understandings. This roundtable intends to examine the study of migration and migrants and the role of law as a subject, advocacy tool, and academic discipline. Discussion will focus on the multiple meanings of law in migration, the relationship between academics and advocates on migrant rights issues, and the necessary disciplinary encounters and allegiances involved in the study of migration. As such, the roundtable will address not only law’s encounters with migration but encounters with law from different disciplinary perspectives studying migration. Migrant scholars working in other disciplines – History, Geography, Sociology - have been invited to participate in the discussion.

1103 – International Intercultural Intersections (Room: 204)

Adetoun Ilumoka, independent Scholar, “Colonial Encounters in the Niger Area: Towards an Intercultural Legal Theory of the Development of the Modern Court System in Nigeria”

This paper traces the origins of the modern court system in Nigeria and its embeddedness in the political and social changes that took place in the 18th and early 20th century encounters between European traders and African indigenous communities on the Atlantic coast of West Africa. In understanding the changes that took place, it explores how knowledge systems are part and parcel of the imposition of political hegemony. I specifically pose the question of how the understanding of law as a particular form of social organisation as proposed by some scholars and participants in the work of the Laboratoire d’Anthropologie Juridique de Paris (LAJP) can advance a non-ethnocentric comparison between different cultural traditions.
I go on to examine how efforts at the development of such non-ethnocentric comparisons and dialogical approaches to intercultural legal theory or understandings of the development of law, can contribute to new perspectives on the reform of systems of dispute resolution today, reducing the tension in multilegal systems such as Nigeria.

Petia Tzvetanova, Independent Scholar, “Coexistence et contradictions entre normes internationales et droit interne”

Dans l’histoire du XIXème et du XXème siècle l’on peut considérer que le droit international et le droit interne se limitaient souvent à une simple coexistence en raison du fait que chacun couvrait des domaines qui lui étaient propres. Or, désormais, dans un monde de plus en plus globalisé, le droit international ou transnational se développe pour couvrir des domaines de plus en plus divers de la vie internationale mouvante. Outre ses domaines classiques d’échanges strictement interétatiques, le droit international s’enrichit en raison d’un besoin grandissant de traiter de nouveaux enjeux globaux tels que l’économie et le commerce, l’environnement, les immigrations... Et ses nouvelles actions transnationales peuvent entrer en contradiction avec le droit interne qui réglementait traditionnellement ces domaines.

Comment régler les éventuelles contradictions ?
Lorsque le droit international et le droit interne régissent chacun des situations différentes, ils peuvent tous les deux s’appliquer et coexister sans problème (sous réserve des spécificités des systèmes juridiques dualistes).

Si le domaine traité est identique ou proche en revanche, il faut opérer plusieurs distinctions pour tenter d’apporter des solutions.

Tout d’abord, il faut examiner la place du droit international dans la hiérarchie des normes internes de chaque Etat. Deux grandes distinctions sont à opérer entre la famille juridique continentale et la common law ; entre le monisme et le dualisme…

 Aussi, tout en gardant présente à l’esprit la hiérarchie des normes internes de chaque Etat, il s’agit de distinguer les actes adoptés par les pouvoirs publics, ceux rendus par les juges et enfin les actes juridiques de la société civile (entreprises, ONG, cercles de réflexion, communautés linguistiques…). Ces actes peuvent être internes mais aussi transnationaux. De même, leur force juridique, en fonction de la place de leurs auteurs dans l’ordre juridique concerné, saura plus ou moins les imposer face au camp opposé.

Par ailleurs, deux niveaux de cette coexistence entre les normes internationales et le droit interne sont à envisager. Tout comme l’ordre interne peut accueillir directement ou indirectement du droit international, la scène internationale peut « subir » les assauts de règles de droits internes (exportées par exemple par l’arbitrage commercial, la CIJ...).

Kathleen Duncan, McGill University, “Reflections on the Business of Indians and Indian Business”

There is an opportunity for Canada to improve its political, economic, social, technological and land outcomes, as the barriers to First Nations development are barriers to Canada's development. Canada needs First Nations to have authority over their own affairs. Canada needs mutually satisfying relationships between Aboriginal groups, government and industry. Canadians need legal barriers to Indian wealth removed. This is a major barrier to political power, social outcomes and the capacity to invest in technology and land development. First Nation populations are growing rapidly and have the potential to become a powerful force for Canada. The default for First Nation land to be owned in trust by the federal government is a form of wardship which reduces political and economic outcomes. A lack of infrastructure stifles economic development and innovation. Canadians cannot afford the outcomes related to the status quo of poor infrastructure. There a business case to be developed collaboratively that benefits all.

I began with the question "Why are Indians poor?" Despite the problems with the question, the answer is simply that the structures and authorities that control First Nations are different from those of other Canadians, and they create difficult challenges for Indians which decrease access to opportunities and reinforce a lack of capacity under law to retain assets and build wealth. Canadian society is largely unaware of the different legal structures that control the lives of Indians on reserve; greater understanding is a starting point. The business case for a better, mutually satisfying relationship between First Nations and other sectors of society is clear, but the processes to do so are not. While I
cannot offer five simple steps or a simple solution, I propose this comprehensive strategy: a transformation which requires an examination of everything that we do as business, as government and as individuals, beginning with prioritizing equality and inclusion of First Nations in Canada.


Recent shifts in Canadian migration policy have seen the number of people admitted into Canada as temporary migrant workers outstrip the number of people admitted as permanent residents and future Canadian citizens. Building upon a body of literature which has examined the social dimensions of “exclusionary inclusion” in Canada, most notably in the context of agricultural migrant labour and live-in domestic work, this paper interrogates social exclusion among workers under the NOC C & D occupational stream, a relatively new, fast-growing, under-studied and highly diverse temporary foreign worker program which brings migrant workers into industry sectors and social settings where they were never seen before. The paper establishes that migrant workers need not face spatial separation, discrimination from the community, or a historically gendered and racialized labour context in order to experience social exclusion; the author argues that the social exclusion of migrant workers is legally constructed and that the legal framework of this program itself presents barriers to migrants’ full participation in the life of the communities in which they live and work.

The author develops and applies a social exclusion analytical framework to ethnographic data collected through detailed interviews with advocates experienced in working with migrant workers, as well as interviews with current and former migrant workers in Brandon, Manitoba. Through the stories of migrant workers and advocates, the author illuminates the role of the legal framework of NOC C & D in migrants’ lived experiences, pointing to the specific characteristics of that program which operate to detach (temporarily if not permanently) migrant workers from the communities in which they live and work. The author concludes by outlining a set of demands borne out of this research which may be taken up by migrant workers and their allies, as well as directions forward for researchers now tasked with interrogating the increasingly complex and heterogeneous phenomenon of temporary labour migration to Canada.

Basil Ugochukwu, York University, “Is there a Sociology of Constitutional Human Rights Adjudication? Lessons from Two Commonwealths”

Canada’s promulgation of the Charter of Rights and Freedoms in 1982 could be considered in some sense similar to the adoption of written constitutions that enshrined human rights prior to independence in several Commonwealth African countries in the late 50s and early 60s. In both Canada after the Charter and African countries after independence the judiciary was permitted greater intervention in defining the policy choices of the more representative branches of government. In the old order that these dispensations replaced, the doctrine of parliamentary supremacy restricted the extent to which the judiciary could be involved in developing governmental policy. But while Canada’s experience with the judicial deployment of charter provisions to enhance human rights protection has been much lauded, the judiciary in several Commonwealth African countries – and certainly Kenya and Nigeria - still struggle to make meaningful impact in using constitutionally enshrined bills of rights to minimize abuses and expand access to human rights protection.

In this presentation, I intend to analyze some of the reasons for this disparity from a socio-legal perspective. After disposing of likely concerns over comparative equivalency and appropriateness, I will specifically attempt to extend the understanding of certain aspects of constitutional sociology to an analyses of factors (possibly contextually localized) that may define national/state constitutional behavior in this area. I will specifically pursue an inquiry into how the peculiar idiosyncratic dynamics of a particular socio-political environment could give character and content to its constitutional practices. I will hypothesize that more than mere constitutional human rights norms, other socio-legal and political factors also play a part in determining how effective a nation’s judiciary might be in using those norms to
expand human rights access. My analysis will examine comparative situations in Canada on the one hand and Kenya and Nigeria on the other.

1104 – Challenges in Community Justice  (Room: 205)  
Chair: David DesBaillets, Université du Québec à Montréal

Jennifer Raso, University of Toronto, “Administrative Justice: Discretion and Empowerment in Welfare Eligibility Decisions”

How can human rights become more accessible to more people, particularly the poor and disenfranchised? While much scholarship proposes improving access to rights-enforcing institutions, I argue for an administrative justice model that would infuse low-level decision-making processes with human rights values.

This model responds to paradoxical developments in administrative and human rights law. Human rights codes are foundational, quasi-constitutional laws with primacy over legislation regulating public programs. In *Tranchemontagne*, the Supreme Court of Canada found that this quasi-constitutional status obliged tribunals empowered to consider questions of law to decide certain human rights issues. Heralded as increasing access to justice, this decision promised that welfare recipients could raise both human rights and welfare eligibility issues to a single body: the Social Benefits Tribunal (SBT). However, SBT data suggests that many human rights issues remain unresolved today. Most caseworker-client interactions involve discretionary decisions that are beyond the SBT’s jurisdiction, yet it is precisely this exercise of discretion that can allow discriminatory factors to influence eligibility determinations (Davis, 1969; Prottas, 1979). Where caseworkers use their discretion to narrowly apply stringent and numerous eligibility criteria, their decisions are effectively final.

My administrative justice model uses human rights values to structure caseworker discretion. Socio-legal scholars have explored administrative justice’s relationship with procedural and substantive fairness (Kagan, 2010; Adler, 2003; Sainsbury, 1992; Mashaw, 1983), but the connection between fairness and human rights remains unexplored. I argue that administrative justice not only requires that decision-making processes be simple, efficient, and informal but that they empower welfare recipients and caseworkers. Discretion is central to administrative justice. Caseworkers exercise significant discretion when implementing policies that shape how welfare offices operate (Sossin, 2004; Lipsky, 1980). This discretion can be reconceived as a path by which human rights values can transform routine eligibility decisions into individualized, equitable and empowering experiences.

Alison Yule, The University of British Columbia, “The rehabilitation of dangerous offenders in Canada: A socio-legal analysis of legal and normative frameworks for balancing offender’s rights with community protection.”

Criminal laws, which address the sentencing, detention and post-sentence reintegration of dangerous offenders in Canada, have encountered significant changes over the past couple decades, reflecting the challenges in balancing the rights of offenders with policy demands for criminalization and community protection. In 1993, the Federal Minister of Justice established a Task Force on High-Risk Violent Offenders, and subsequently a comprehensive package of reforms was enacted, aimed at improving public safety. These included preventive detention schemes designed to detain or monitor designated dangerous offenders, after the completion of their sentence. While dangerous offender designations have been held Constitutionally valid in Canada, the challenge persists, of how to effectively rehabilitate dangerous offenders and reintegrate them, post-sentence, into the community.

Canadian Courts and special committees have stressed that rehabilitative measures should be preferred over a purely

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punitive approach in the management of high-risk offenders. Despite these recommendations, reactive, ad hoc models of law reform have led to punitive sentencing practices.

This paper seeks to engage in a critical reflection on the state of dangerous offender laws in Canada; how they have developed in light of socio-legal norms, from a rehabilitative to an increasingly punitive approach. This provides an apt starting point for critical reflection of whether safeguarding our communities necessarily means leaving the principle of rehabilitation by the wayside.

Ultimately, this presentation argues that, while socio-legal norms have influenced the development of dangerous offender legislation, little space has been created to critically reflect on the full meaning and application of the current legislative scheme in Canada and how it impacts on correctional outcomes, in light of other normative frameworks. This risks relegating the practice of protecting the community, to a narrow space of understanding.

Lisa Wright, Carleton University, “Community Safety for Whom? The Spatio-Legal Governance of People Who Use Illicit Drugs in Ottawa”

The recent debate in Ottawa over safer injection sites (SIS) has produced two contradictory discourses of community safety. Anti-harm reduction advocates have used the discourse of community safety to place people who use illicit drugs as both outside of the community and a threat to its’ safety. On the other side of the debate, the Drug User Advocacy League and other harm reduction advocates in Ottawa argue that people who use illicit drugs are members of the community and harm reduction services will produce safety for everyone.

This conception of people who use illicit drugs as a threat to community safety is historically embedded rationality of spatio-legal governance of people who use illicit drugs in Ottawa. Using a legal geography framework in this paper, I explore how the governmental logic of community safety reinforces the stigmatization and marginalization of users, exiling them from the community and consequently from the safety to which ‘community’ members are entitled.

Starting at the recent debate over the SIS I work through the legal and geographic regulations from the past 20 years that have governed people who use illicit drugs in Ottawa in order to understand how the practices of community safety came to be a governing rationality. I focus on law enforcement, health services and municipal government, theorizing them as components of an urban regulatory network targeting people who use illicit drugs.

Amanda Nelund, University of Manitoba, “Encountering Informal Justice: Examining Community Justice Programs for Women in Conflict with the Law”

Although sometimes conceptualized as separate from the formal legal sphere critical scholars have shown the connections between informal and formal justice. This paper traces the contours of this informal-formal justice space by examining community justice programs for women in conflict with the law. I look at the various aspects of both formal and informal justice present in community programs and argue that these types of spaces must be complexly theorized as neither totally free, community places nor co-opted extensions of the formal justice system. Instead I argue that these programs are hybrid spaces and that when they are run from a feminist or indigenous perspective hold potential to be emancipatory spaces for women in conflict with the law.

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Evar Oshionebo, University of Calgary, “Prescription of ‘International Best Practice’ in Mineral Extraction Contracts: International Corporate Social Responsibility in the Making?”

Natural resource extraction contracts between multinational corporations and developing countries contain provisions requiring adoption of ‘international best practice’ in the execution of mining projects. For example, the Iron Ore Exploration Agreement between the Republic of Liberia and BHP Billiton World Exploration Inc. provides that:

The Operator shall conduct all of its operations hereunder using appropriate modern and effective Plant and Equipment, Infrastructure, materials and methods. Such operations shall be conducted in a proper and workmanlike manner, with due diligence, efficiency and economy, in accordance with the laws of Liberia and with the best mining and engineering practices used by efficient operators in similar operations, elsewhere in the world.

‘International best practice’ is said to represent “a kind of prevailing global or regional consensus (or compromise)” for the attainment of private and public goals. However, for the reasons advanced in this paper, it is doubtful whether contractual provisions on ‘international best practice’ can impact positively on the behavior of resource extraction companies in developing countries. The overarching aim of this paper is to determine what constitutes ‘international best practice’ and whether contractual provisions on ‘international best practice’ address adequately the negative social externalities associated with the mining industry including environmental degradation and pollution.

Mohsen al Attar, Queen’s University Belfast & Andrea Buitrago, McGill University, “Effective Control over Trade Lawmaking – A Path to Political Equality”

Contemporary Canadian trade agreements are formulated by small wings of the executive, operating largely in secret and with near absolute parliamentary license. Elite deliberations compounded by closed-door consultations with private interest groups have led to denunciations of diminishing political equality. Indeed, if defined as effective citizen control over government decision-making, current trade lawmaking processes appear to undermine political equality.

For instance, Canada’s chief trade negotiator, Steve Verheul, has consistently declared it inappropriate for him to speak publicly during trade negotiations, either to the citizenry or to Parliamentarians outside the executive branch. Yet, in reference to the Canada-EU free trade agreement, the president of Canada Pork International, Jacques Pomerleau, declared: “We really appreciate having been consulted since the very beginning of the negotiations and being kept appraised [sic] of all the latest developments pertaining to our products”.

In this article we argue that there are similarities between the structure of the Greek polis and the current Canadian political system, which instead of recalling a democratic nature, presents similarities in terms of the political inequality suffered in the polis between citizens who were male native-born individuals and the exclusionary status of women and slaves. By privileging industry actors over citizens, trade lawmaking in Canada is stratifying citizenship.


How does the use of visual evidence in law shape the investigation and prosecution of domestic violence cases? And how does the circulation of images of violence in mainstream media influence how gender violence is defined? This paper explores what can be gained from positioning images at the starting point of analyses when theorizing about violence against women (VAW). In so doing, it considers two sites: the legal system, where photographs of injuries and videotaped statements are increasingly becoming a privileged form of evidence due to reform strategies emphasizing ‘victimless prosecutions’; and mainstream media, where visuals of violence have become a focal point of concern due to a recent string of high profile sexual violence cases where images – and their distribution – performed a critical role in defining and generating attention to the crimes. The discussion will also draw from trial transcripts and a recent photojournalism essay entitled “Shane and Maggie,” a visual documentation of one instance of domestic violence in the couple’s turbulent relationship, to examine the various ways in which images act in relation to those who experience violence. The paper will conclude with a discussion of what can be gained through merging feminist legal thought with the methodological insights of Actor Network Theory, which draws our attention to how objects act. Although the frameworks can be considered theoretically incompatible, the discussion illuminates how both can be combined to generate new ways of seeing and thinking about violence against women.

Amanda Glasbeek, York University, “Is Seeing Believing? Sexual Assault and CCTV Images in the Courtroom”

The use of CCTV footage as evidence in courtrooms has only recently come under academic scrutiny and, to date, no research exists on the specific use of camera images in sexual assault cases in Canadian courtrooms. Yet, as previous research on women’s experiences with urban surveillance cameras has shown, women expect that CCTV can act as to corroborate their claims of sexual assault in public places, a view that coincides with the Supreme Court ruling in R. v. Nikolovski (1996), in which it was held that a video image, “although silent, remains a constant and unbiased witness with instant and total recall of all that it observed.” This paper investigates whether CCTV can act as an unbiased witness to corroborate women’s stories of sexual assault by examining all sexual assault cases tried in Canadian courts between 2008 and 2013 that called on evidence obtained from CCTV cameras. Significantly, while a large number of cases in which video evidence was entered resulted in conviction, in no case did the video footage on its own offer ‘proof’ of sexual assault charges. Rather than stand on its own as a “silent witness,” video evidence is coupled with other legal and extra-legal factors that structure its uses, and usefulness, in the courtroom. Drawing on feminist analyses of VAW, STS examinations of the place of visual evidence in courtrooms, and surveillance studies insights into the workings of CCTV, this paper seeks to initiate empirical and theoretical discussion into how, in courtroom cases of sexual assault, seeing is structured by believing.

Benjamin Berger, York University, “Epistemic Disorder in Contemporary Justice: What We See in the Case of R. v. N.S.”

In certain literal ways, the recent Supreme Court of Canada case of R. v. N.S. was concerned with what we feel we must see in the attempt to do justice. That case put the religiously motivated practice of veiling into the spotlight, asking whether and how much it mattered, in a contemporary criminal trial, that those participating be able to see the face of a witness. Is observation of the witness’s facial expression and demeanor essential to a fair trial? And what should the protection of religious freedom and equality (not to mention gender equality) say about how we respond to such situations? Reflection and commentary on these points is important, but this paper is interested in a different tension that the N.S. case exposes: a curious disarray in the epistemologies that animate modern justice. On the one hand, portions of our trial practices and the doctrines that govern them are underwritten by an Aristotelian understanding of knowledge and the discernment of truth. And yet prevailing approaches to legal reasoning – and, in particular,
constitutional justice – have become deeply Platonic in form and inspiration. Although much ink is spilled toiling over other philosophical distinctions about the concept/idea of justice, the issue of epistemology has been largely ignored. This paper explores the idea that we are in a state of epistemic confusion about the nature of justice and that N.S. can show us the nature and consequences of this confusion.

1107 – Power, Apologies and Privacy (Room: 308)

Chair: Margot Young, University of British Columbia

Diego Garcia-Ricci, University of Toronto, “Redressing power imbalances: towards the incorporation of a human rights approach in the protection of privacy”

In the 1970s and 1980s, as a response to the challenges posed by information technology (IT), industrialized countries enacted data protection laws as means to protect citizens’ privacy. While these laws provide important safeguards for the protection of privacy, they currently fail to adequately address privacy invasions posed by new uses of personal information. This paper will explore the contradiction that exists between existing data protection laws and modern collections of personal data.

Both state and private corporations argue that more personal information is needed if a more secure and efficient world is sought. This argument has enabled both public and private organizations to collect as much personal data as they deem necessary. In many cases, these organizations require very private and sensitive information as a condition for the provision of goods or services. Power imbalances have been created as a result. If citizens wish to obtain those goods or services, they will have no choice but to surrender their privacy by disclosing their personal information. Although data protection laws place restrictions on the collection of personal data, they do not offer adequate mechanisms to challenge current collections carried out by public and private organizations. By adopting a human rights perspective to this problem, this paper will examine new ways in which another area of law, namely human rights, could be used to narrow existing legal limitations. If a human rights approach is followed, current power imbalances could be redressed, thus reducing the contradictions that today exist in data protection laws.

Kerri Scheer, University of Toronto, “‘Sorry for your loss’: The role of apologies, the advent of Apology Act legislation, and the importing remorse into administrative court contexts”

The Ontario Apology Act allows individuals and organizations to apologize for wrongdoing without the threat of these expressions being used as evidence of liability in civil and administrative proceedings. The Ministry of the Attorney General has stated that, “The goal of the legislation is to encourage sincere apologies, saying ‘sorry’ for a mistake or wrongdoing is the right thing to do”. The legislation provides an impetus for analyzing the socio-legal role of apologies in conceptualization and practice. There is a general dearth of research pertaining to the Apology Act, and scholarly work concerning apologies and remorse in law are typically limited to the criminal court context (concerning restorative justice and judicial decision-making). This research both highlights the understudied Apology Act in Canada and ventures relevant connections, regarding the role of apologies, to the reality of civil/administrative court contexts. The Apology Act, crafted with medical realm disputes in mind, focuses on "protecting" apologies from legal interference. However, a case study analysis of disciplinary records from the Colleges of Physicians and Surgeons of Ontario (CPSO) reveals that the reality of the treatment of apologies in administrative proceedings involves complex dynamics of judicial decision-making and adherence. While the legislative imagination might posit apologies as inherently "the right thing to do" and beneficial to the general social order and integration, the CPSO imposes its third-party interest of "governability" and prioritizes professional integration (regarding the medical body). The implications might be understood via Goffman’s notion of "remedial work"; that is, who is empowered to appraise whether an apology mobilizes an action from unacceptable to acceptable? Specifically, given the divergences in state and legal appropriations/negotiations of apologies and corresponding governance, what are the implications for complainant (apology recipients) in bringing their (medical realm) disputes to the administrative court arena?
Shauna Van Praagh, McGill University, “New Encounters? Lessons for and from Cyber-Bullying”

Cyber-bullying is often talked about and responded to as if it were a completely ‘new’ site for grappling with complicated pictures of youth and complicated connections among different areas of law. But perhaps it is only ‘new’ in the way that issues and challenges in a changing society have always posed ‘new’ challenges to law. That is, the frameworks and understandings of responsibility (criminal or civil) and of harm are already imbued with the flexibility necessary to respond to intimidation through electronic means. In this sense, it might be argued that there is nothing particularly ‘new’ about cyber-bullying when placed in the context of ongoing discussions of law in and of society.

On the other hand, I want to suggest that the important ‘newness’ of the phenomenon, and the interest it provokes among members of society at large and among participants in law, is in its capacity for turning into a ‘renewed’ site for exploring methodology, pedagogy and multi-disciplinarity. Cyber-bullying provides a forum for developing particularly persuasive arguments for turning to young people for their input, narratives and normative understandings; reconsidering the lessons to be learned from encounters between education and legislation; and exploring the ways in which approaches within (state and non-state) law can be fruitfully integrated and expressed.

This paper/presentation is linked to a broader project on children’s voices in law and children’s stories as law – a project with sites of examination that range from adolescent medical decision-making to the impact of residential schools in Canada to the accountability of girl soldiers in armed conflict. Just as children themselves can be sources and creators of effective and empowering rules of cyber-interaction, young people in general show sophisticated reasoning skills, awareness of their strengths and needs, and capacity to reflect on their own place in the universe. Throughout the project, I weave together legal pluralism, law and literature, and identity and legal theory, in developing methodological, substantive, and pedagogical approaches to law that integrate the insights, experiences, abilities and vulnerabilities of children.

1108 – Indigenous Encounters: Rights and Wrongs (Room: 206)
Chair: Lorraine Weir, University of British Columbia

Nicole O’Byrne, University of New Brunswick, “The Promised Land: A history of the Alberta Métis Land Settlements”

In 1984, the authors of Alberta government’s McEwan Joint Government-Métis Committee recognized that “the land has always been of paramount importance to Métis people.” In response to the report’s recommendations, the Alberta Legislative Assembly passed the Constitution of Alberta Amendment Act (1990). This amendment provides that the provincial crown would not be able to expropriate Métis settlement land, owned in fee simple pursuant to the 2000 Metis Settlements Land Protection Act. It also confirms that the Métis own the land settlements outright and that the land is not subject to underlying provincial crown sovereignty. These legislative changes are significant because they mark a significant shift in the property ownership regime in the province of Alberta. However, the changes are also worth examining because the 1990 amendment marks the culmination of a lengthy effort by the Métis of Alberta to change the provincial government’s position regarding the purpose of the land settlements. During the 1930s, the provincial government allocated the settlement lands to the Métis as an inexpensive way to distribute relief to one of the poorest communities in the province. At the time, the government paid little attention to Métis arguments that self-governing land settlements should be set aside to enable them to protect their culture and identity. With the passage of the amendment, the provincial government recognized the basis of the historic Métis claims. In this paper, I analyse the events surrounding the introduction of the Metis land settlements to illustrate the historical significance the 1990 amendment.
Neil Vallance, University of Victoria, “Square Pegs in Round Holes: Re-categorizing the Vancouver Island (also known as the Douglas) Treaties of 1850-1854”

By far, the majority of historical treaties between First Nations and the Crown in Canada, including the Vancouver Island Treaties, are categorized as treaties of ‘cession’, containing a surrender of land in favour of the Crown. The other commonly applied labels are ‘trade and commerce’, and ‘peace and goodwill’. According to First Nation accounts, the Vancouver Island Treaties fit none of these pigeonholes. Instead, each treaty contains some form of arrangement to share jurisdiction over land and resources. As noted by Jana Promislow in her dissertation, all the standard categories provide an “over-representation of colonial interests” and “inadequately represent indigenous perspectives” (2012: 199-200), demonstrating an urgent need for fresh approaches. In 1985, Chief Justice Dickson, in R. v. Simon, noted that “it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties”, but it seems that no one has taken up his suggestion. The presentation will examine the utility of applying the principles and categories of the modern law of international treaties to the Vancouver Island Treaties, including the category of modus vivendi, defined in the United Nations “Treaty Reference Guide” (1999) as “an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an informal way, and never requires ratification”.

Andrea Anderson, York University, “The Silent Injustice in Wrongful Convictions: Is Race a Factor in Convicting the Innocent?”

The research concentrates on the phenomenon of wrongful conviction and the socio-legal context in which it operates. Within this study, the research investigates the race-crime dynamic. The connection between race and crime is made visible by the fact that racialized and Aboriginal people are over-represented, compared to the population, in every stage of the North American criminal justice system. While racial discrimination in the justice system is morally troubling, the prospect of incarcerating an innocent person is unthinkable. What happens when these two phenomena coincide? Since the 1983 Nova Scotia Court of Appeal decision in R. v. Marshall and the subsequent public inquiry, the role of systemic racism in wrongful conviction cases in Canada has gone unexplored.

Situated in the writings of Critical Race Theory, this research questions the absence of the experiences of racialized and Aboriginal people in the narratives and reports on the wrongfully convicted in Canada. If and when racial discrimination exists in cases of wrongful convictions, it is not documented and, in turn, it is denied. One explanation is that the same systemic barriers that racialized and Aboriginal defendants encounter in the justice system also exist when addressing race as a factor in wrongful convictions. Another reason is that lawyers have failed to engage in racial litigation and the judiciary has resisted in adopting critical race approaches. In the end, the need to rethink the current cause and approaches to the study of wrongful convictions is paramount.

Andrew Woolford, University of Manitoba, “Carceral Space and Indigenous ‘Education’: Assimilative Schools, Law, Exception and Genocide”

This paper situates various forms of schools for Indigenous assimilation (e.g., boarding, residential, and day schools, both secular and Christian) in relation to a spectrum of carceral spaces that includes the death camp, transit camps, slave labour camps, the blockade, wastelands, ghettos, and prisons, among others. In particular, drawing from the work of Giorgio Agamben, Michel Foucault, Derek Gregory and others, assimilative schools are examined with respect to the specific nature of law, violence, and exception within the temporally and spatially diverse forms taken by such schools in the United States and Canada. This discussion serves as a basis for demonstrating how assimilative schools, as ‘zones of elimination’ in which Patrick Wolfe’s notion of the settler colonial “logic of elimination” is enacted, are potentially enlisted in broader genocidal processes.
12:30 - 1:45   Lunch (provided) Common Room (Room: 203A and 203B)

CLSA – Annual General Meeting (Room: Moot Court)

1:45 – 5:00   Able to Lead: Intersections of Law, Disability, and the History of North American Social Movements (Room: Moot Court)

This workshop at the University of Manitoba on June 6, 2014 is organized in conjunction with the 2014 annual meeting of the Canadian Law and Society Association, bringing together leading North American scholars in law, history, and disability studies. It explores the ways in which people with different abilities have engaged politically; it interrogates the structural, systemic, legal, and social barriers to participation; and it illuminates the life stories of people with disabilities who have surmounted obstacles to demonstrate their ability to lead social movements for change.

The workshop themes intersect with the political life of Eugene T. Kingsley, a double amputee and prominent leader of the Socialist Party of Canada who was one of the foremost socialist intellectuals of his era. Disabled in a railroad accident in Montana in 1890, Kingsley ran for the US House of Representatives in California as state organizer of the Socialist Labor Party of America. After immigrating to Canada, he went on to serve as editor of the newspaper Western Clarion and ran for the British Columbia legislature and the Canadian House of Commons several times. Unknown to the public today, Kingsley played a pioneering role in the West Coast Free Speech fights of California and his ideas were read and debated from England to Tasmania.

Room: Moot Court
Chair: Ravi Malhotra, University of Ottawa

- Anne Finger, Independent Scholar, “Dances with a Cane: FDR’s Management of Public Perception of his Disability”
- Esyllt Jones, University of Manitoba, “Rehabilitation, Disability and the Medical Left in Canada and the US”
- Mark Leier, Simon Fraser University, “Setting the Stage: Class War in BC, 1900-1915”
- Geoffrey Reaume, York University, “Mad People’s Activism and Established Left-wings Groups in Ontario, 1980-1995”

3:15–3:30   Break (Common Room, 203A and 203B)

3:30 – 5:00   Panel sessions (7 concurrent sessions)
Engaging the fields of legal history, disability studies, immigration, and the law of employment, labour, national security and tort, this paper illuminates the story of Eugene T. Kingsley. As a prolific socialist writer, publisher, activist, and party organizer on both sides of the American and Canadian border, the triumphs and challenges of Kingsley’s life reveal not only the man himself, but also the formative years of modern radical politics in North America. Born in the antebellum United States, Kingsley the socialist emerged following a railway accident at Spring Gulch, Montana in 1890. While the incident left him a double amputee – having lost both legs – Kingsley’s convalescence was spent immersed in radical literature, and he left the Missoula hospital both physically and ideologically transformed. He sued the Northern Pacific Railway Company for damages, then joined Daniel De Leon’s Socialist Labor Party in California, serving as State Organizer, fighting for free speech, and running twice for the US House of Representatives. In 1902, Kingsley moved first to Nanaimo, British Columbia, where he worked as a fish monger, and then to Vancouver where he operated a print shop and became a leading member of the Socialist Party of Canada, editing its newspaper, the Western Clarion. Kingsley ran for the House of Commons and British Columbia Legislature no fewer than six times. This paper traces Kingsley’s life story through the prisms of law, critical disability theory, and history – exploring how Kingsley’s workplace injury at Spring Gulch shaped his economic critique and political understandings, and set him down a path of radical social change.

Patrick Craib, Independent Scholar, “‘We Have Been Muzzled’: The Public Politics of Socialist Speech in Vancouver and San Francisco, 1895-1919”

On October 8th, 1895, Socialist Labor Party of America organizer Eugene T. Kingsley was arrested for obstructing a sidewalk while addressing a crowd on the corner of Market and Seventh Street in San Francisco. The incident foreshadowed the arrest of other SLPA public speakers over the following year, culminating in mass public silent protests in 1896. On May 17th, 1909, in Vancouver, British Columbia, Kingsley again defended the right to public radicalism, addressing a crowd at City Hall after two individuals were sentenced for obstructing a thoroughfare in circumstances eerily similar to those he faced some 14 years prior.

In both instances, arguments over free assembly and speech highlighted the uncertain place of anti-capitalist radicalism in public politics at the turn of the twentieth century. Kingsley’s revolutionary ideology, which held particular sway in both contexts, underlined these debates and framed the content and mode of opposition to state suppression of speech enacted by both the SLPA and the Socialist Party of Canada. My paper historicizes these debates by comparatively examining two pivotal eras where Kingsley’s public political presence intersected with his revolutionary programme: the previously described events in San Francisco between 1895 and 1896, and the fight for free speech and freedom of the press in B.C. during the years 1909, 1912, and 1919. Paying particular attention to contemporary Impossibilist politics, I identify the looming contradictions arising in both circumstances out of opposition to state censorship, which came to characterize this transitory period of radical organization in Western North America.

Dustin Galer, University of Toronto, “Employers, Disabled Workers and the War on Attitudes in Late Twentieth Century Canada”

In the aftermath of the Second World War, a new war was fought in and around the Canadian workplace by people with disabilities and their allies. Wounded soldiers returning from abroad faced new obstacles in the labour market as a growing rehabilitation industry and postwar welfare state stepped up to meet their needs. Hiring campaigns conducted across North America were devised by veterans groups and their allies in response to employer attitudes and practices
that blocked disabled people from obtaining paid employment. Initially conceived as an extension of wartime efforts to “support the troops,” disability hiring campaigns eventually made their way into the postwar political and legal discourse of disability as they were recycled to address the chronic unemployment and poverty in the broader disability community.

Yet the hiring campaigns failed to produce a substantive impact on employment practices in both Canada and the United States. Many people found it counterintuitive to prioritize attitudinal change given that a traditional approach believed social and economic dislocation naturally emerged from the effects of individuals’ impairments. Hiring campaigns relied upon a negative ontology of disability, gesturing toward employers’ charitable impulses and connecting disabled peoples’ economic dislocation with broader systems of welfare. By the 1970s, high unemployment rates among working-age disabled people continued unabated, indicating continued prevalence of negative employment attitudes and practices. By the 1980s, however, a new generation of disability activists seeking social, political and legal change emerged to challenge existing approaches to the unemployment of people with disabilities.

Megan Rusciano, Washington College of Law & the University of Ottawa, “Full Inclusion: Addressing the Issue of Income Inequality for People with Disabilities in Canada”

This paper addresses the problem of income inequality faced by persons with disabilities as a human rights issue. Until very recently laws in Canada allowed persons with disabilities to be paid sub-minimum wages. From this history ridden with stereotypes about their ability to work, people with disabilities commonly face wage discrimination, which leads to a disparity between the incomes of people with disabilities and people without disabilities. This reality perpetuates a cycle of poverty by placing people with disabilities on the margins of society and reinforces the view that people with disabilities are unable to engage in meaningful work and must rely on social assistance programs. This issue of income inequality manifested in the Ontario Human Rights Tribunal’s case of Garrie v Janus Joan Inc. In that case, Terri-Lynn Garrie, a woman with a developmental disability, alleged discrimination on the basis of disability when she was paid sub-minimum wage for her work for over a decade. This paper uses the Garrie case as a starting point to evaluate the effectiveness of the legal mechanisms available in Canada to combat the issue of income inequality facing people with disabilities. It argues that Human Rights Tribunals can provide a forum to begin a dialogue around this issue, if the Tribunals recognize the core principles of the U.N. Convention on the Rights of Persons with Disabilities that underscore the right of people with disabilities to not only be included but also to flourish in society.

1202 – Investigating Legal Complexities in Family Law (Room: 204)
Chair: Susan Bazilli, International Women’s Rights Project

Josephine Savarese, St. Thomas University, “Trinny’s Story”

In this paper, I begin with the story of an indigenous youth known as Trinny. The facts are drawn from the records from the family court hearing. Trinny was eleven at the time his circumstances were reviewed by a family court and had experienced several child welfare placements. The hearing was conducted to consider the findings of a family group conference convened to make determinations on the file. At the hearing, Trinny’s grandmother argued for Trinny’s return to her home along with his siblings. Her request was rejected due to the concerns about her parenting and the level of abuse in the home.

In the conference presentation, I examine the use of restorative justice practices in the child welfare context. I explore the weight placed on representations from indigenous family members in contrast to professionals who are typically non-indigenous. I use Trinny’s circumstances to determine the strengths and limitations of the family group conference as a mechanism to promote indigenous justice. I reason that restorative processes are improvements on mainstream child welfare decision making because they provide families and communities with a greater role. At the same time, more effort is needed to address the socio-environmental deficits that indigenous families confront. The persistent
challenges leave families disadvantaged in child protection related decision making, irrespective of the benefits of restorative based methods.

Meiyen Wong, University of Toronto, “Canada’s Family and Criminal Law: A Comparative Study of Specialized and Integrated Domestic Violence Courts”

In 2000, Canada instituted its first Specialized Domestic Violence Court to address organizational and legal limitations of traditional courts in dealing with domestic violence. Despite legislative responses, family and criminal law have continued to operate independently and, as such have failed to respond comprehensively to families when domestic violence and family matters coincide. In response to the increasing recognition that domestic violence is often interlaced with other family issues involving safety and separation, in 2012, Canada introduced its first and only Integrated Domestic Violence Court to address barriers resulting from the fragmentation of family and criminal courts in dealing with cases involving custody, access, or support alongside a pending domestic violence charge. This paper explores the unique intersection of family and criminal law through a comparative analysis of the legal processes operating within Specialized and Integrated Domestic Violence Court structures. Notions of risk, harm, and violence juxtapose with notions of need, protection, and well-being to shape the distinct interpretation and application of family and criminal law in each court through cases of domestic violence with differential implications for families. I discuss the ways in which judicial strategies expose families to pervasive and continuous forms of state regulation, surveillance, and control. I conclude with examining how the management of families in relation to perceptions of riskiness derived from diverse logics of ‘best interest,’ create additional opportunities for further abuse and the revictimization of victims of violence.

Christina Hollingshead, York University, “Infanticide ‘defence’ and criminal law”

There has long been debate as to whether the infanticide ‘defence’ has any legitimacy within Canadian criminal law, and that debate was once again ignited when earlier this year, the Ontario Court of Appeal grappled with the Crown’s unprecedented contention in R. v. L.B., that the defence should be outright abolished. Moreover, the state argued that making an infanticide defence available in cases of intentional killings was “bad policy” because it “cheapens” the life of a child and is based on medically unsupported evidence that giving birth can lead to mental disturbance. It was also the Crown’s position that when the infanticide legislation was enacted in 1948, there was greater social stigma surrounding unwed motherhood that no longer exists. In fact in 1984, Canada’s Law Reform Commission recommended abolishing the infanticide provisions, but after the United Kingdom strongly recommended to Canada that it retain an infanticide law, calling it a “practicable legal solution” to a social problem, the defence was retained.

In R. v. L.B. the accused, a teen-aged mother, smothered to death two of her babies and pretended they had died naturally. Years afterwards, she admitted to the killings and was charged with two counts of first degree murder. There was no issue as to whether she had killed her children, instead from the outset of the trial the Crown’s position had been that if murder was proven, then murder convictions should be entered and that the infanticide defence should not be allowed. Instead, the trial judge found that the defence should be available to the accused and found that two counts of first degree murder had been proven but acquitted the accused of murder and found her guilty of infanticide. That led to the case finding its way into the hands of the Ontario Court of Appeal where its fundamental legitimacy was debated. The result was the Appellate Court examining in great detail for the first time, the infanticide provisions in the Criminal Code, and dismissing the Crown’s appeal. Moreover, a further application for leave to appeal to the Supreme Court of Canada was dismissed. The question remains – where do we go from here, when it seems we are adrift in a sea of neo-Conservatism, tough on crime, law and order agendas, pitting public opinion against public policy? This paper will focus on the historical journey of the infanticide defence, an interrogation of the psychological bases for post-partum depression (why do we make allowances for this type of depression when we do not for others?), as well as
encompass an international comparative analysis, and explore the legal and social ramifications of abolishing the infanticide defence in Canadian jurisprudence.

Vicki Trerise, University of Ottawa, “The Parens Patriae Jurisdiction: Clearing the Mists of Antiquity”

This paper explores the historical origins of the parens patriae jurisdiction of the high courts, which is said to originate in the inherent power of the sovereign dating from antiquity to protect those in society who cannot take care of themselves, in particular children and those who are mentally incapacitated. This study sheds light on two questions: is this doctrine actually of ancient origin? And how did these two subject populations came to be dealt with under one jurisdiction? The research begins in ancient Rome, then moves to the time of the Norman conquest of England.

Four separate strands of institutional development in England between the 11th to 16th centuries are followed. First the new Anglo-Norman regime transformed Anglo-Saxon society into a feudal society: a system of guardianship of minors was an integral part of the feudal tenures. Second, a guardianship authority with respect to person with mental incapacity, also related to landholdings, was the subject of such abuse by the feudal lords that by the early 14th century it was taken into the king’s prerogative powers. Third, the ecclesiastical courts played an active role in the administration of aspects of the law in this period, especially regarding family obligations. Fourth, from 1372 – 1530 during the formative years of the equitable jurisdiction of the chancery, almost all of the Chancellors were ecclesiasts.

Based upon an analysis of these interlocking narratives, the study concludes that there is a longstanding benevolent jurisdiction of state protection for persons suffering from mental incapacity. However, a reporting error with respect to a decision of the Court of Chancery in the 17th century added children to this pre-existing jurisdiction: such were the actual beginnings of the parens patriae jurisdiction.

1203 – Theorizing Juridical Norms and Systems (Room: 205)
Chair: Shauna Van Praagh, McGill University

Amy Swiffen, Concordia University, “Triage and Law”

If one considers the role of law in society one might say that the law’s role is to protect or serve the common good. However, what exactly is understood to be the common good is not straightforward and defining it goes beyond legal analysis into political, sociological, and philosophical territory. Different assumptions about the common good lead to different ways of understanding the role of law in society, including the authority or force of law, which entails the use of violence (legal violence). This paper considers different conceptions of the common good in legal theory and the assumptions about law and legal violence that they entail. The adequacy of these conceptions in the contemporary context is explored through the example of triage. Triage is often taken to be a medical concept but it actually emerged in military contexts. It was invented by one of Napoleon’s military surgeons who developed a system of sorting wounded solders and prioritising the use of medical resources with the goal of maintaining the fighting function of the army. Since then triage has come to be used far beyond the battlefield. Triage protocols are used in hospitals and to ration transplant organs. In Canada, they are increasingly enshrined in public emergency preparedness and health law and have also begun to emerge in contexts unrelated to health. For example, the concept of ‘legal triage’ involves constructing a legal environment favourable for pre-determined outcomes by priority sequencing issues and solutions. By drawing on theories of bipolitics, this paper argues that triage can be understood as a technology of power within a logic of governance in which biological existence functions as the common good.
Richard Jochelson, University of Winnipeg, “Assessing Representativeness in the Canadian Criminal Jury”

The Canadian jury selection process aims to select a representative jury, defined as a jury that corresponds to a cross section of society/the larger community. Though the issue of jury representativeness was the basis of a relatively recent appeal in Ontario (R. v. Kokopenace, 2013), thus far, there is no binding national case law to suggest that an accused can insist that she be tried by a person with whom she shares personal characteristics (such as ethnicity, disability, etc.). Certainly, there is Supreme Court authority which allows for challenging juror membership when a juror is suspected to possess racial bias, and for asserting that representativeness relates to the rights to be tried by a jury and the presumption of innocence under the Canadian Charter of Rights and Freedoms (R. v. Williams, 1998; for a recent Ontario court case see R. v. Muvunga, 2013; R. v. Sherrat, 1991). While there are recent Ontario policy directives to ensure that indigenous jury representation moves beyond a minimal standard (and to instil faith in the administration of justice), the degree to which jury representation is related to legal decision making is a matter that is unexplored in the Canadian extant literature. This project examines how society perceives the make-up of a representative jury, and whether different demographic variables (age, gender, ethnicity, education, and income) affect perceptions of representativeness. Some individual-level variables (e.g., education level and age) have been found to impact juror comprehension of jury instructions; it is possible they also affect interpretations of more abstract concepts. This study seeks to inquire into the affinity of certain groups of Canadians (e.g., male/female, age similarity to defendant, socioeconomic status), with statements of representativeness (e.g., “So long as juries are representative on the aggregate, it is not necessary that any particular jury be representative”). The study will identify perceptions of representativeness that inculcate our communities.

Alana Klein, McGill University, “Toward a new feminist jurisprudence on the substantive scope of criminal law”

This paper will consider the gender implications of recent Supreme Court of Canada jurisprudence expanding and in some cases restricting the scope of criminal liability. In particular, it will explore explicit and implicit gender dimensions in three recent Supreme Court of Canada decisions: R. v. Mabior, R. v. D.C., Canada (Attorney General) v. Bedford, and PHS Community Services v. Canada (Attorney General). It will place these decisions in the context of the role that feminist movements have played in driving criminalization and shaping criminal law over the last 50 years. The paper will argue that recent decisions – particularly Mabior and D.C. – fail to adequately respond to more recent (third wave) feminist insights around race, marginalization and value pluralism, affirming the continued relevance critiques that feminism has paradoxically driven criminalization, to the ultimate detriment of women. I will then consider whether newer approaches through emerging Charter jurisprudence restricting the scope of criminal liability can better engage with more recent feminist insights, particularly around marginalization and plural values. The tentative hypothesis is that these newer methodologies may respond to some of the weaknesses of earlier approaches to addressing gender dimensions of the scope of criminal liability, but that they depend on robust and engaged grassroots movements that may not be available for the most marginalized women. The paper will conclude by setting a course toward fleshing new methodologies of feminist engagement with the criminal law, including via grassroots mobilization and engagement with the least powerful.

Natalia Angel, York University, “Socio-Economic Rights and the Effects of Dialogical Justice: Lessons from Colombia”

In the Global South courts are becoming central actors in matters of social policy. In light of recurrent adjudication of socio-economic rights (SERs), the traditional question about the rights of judges to intervene in social policy has begun to shift to a question about how courts can best contribute to improving the lives of marginalized communities. Scholars are answering this question by encouraging experimental and dialogical justice. Rather than dictating a final resolution on a case, courts engage in this type of justice when their rulings aim to promote dialogue and negotiation among governments and affected population.
This paper discusses the potential of dialogical justice for the enforcement of SERs, through an empirical study of the outcomes of two landmark rulings of the Colombian Constitutional Court: the health case (T-760/08) and the garbage pickers’ case (T-291/09). These cases seek to guarantee –through a deliberative and participatory process- equal access to health care and means of subsistence for marginalized communities in Colombia. The study assesses and documents the characteristics of these judgments, the particularities of the contexts in which they emerged; contemplating whose voices are privileged and whose excluded from the judgments; and investigating what has been implemented, and how these rulings have impacted the lived realities of disenfranchised communities in Colombia.

The Colombian experience provides rich possibilities for examining the impact of dialogical rulings. To the surprise of many, a country with extreme inequality and human rights violations has a very progressive constitutional court. Its jurisprudence on SERs is becoming a point of reference for constitutional debates across countries. This study aims to expand knowledge on its dialogical approach and enrich the global academic conversation about SERs enforcement.

1204 – Distinguishing Indigeneity (Room: 206)
Chair: David Milward, University of Manitoba

Jeremy Patzer, Carleton University, “The Unavailable Sovereign: Societal Change and the Inventiveness of Aboriginal Law”

The 1919 decision of Re Southern Rhodesia is notorious in Aboriginal title scholarship, mostly for its infamous claim that Aboriginal peoples can be evaluated according to a “scale of social organization” to determine if their notions of property can be “reconciled with the institutions or the legal ideas of civilized society.” There are, however, two other salient details overlooked in contemporary commentary. Firstly, the social organization formula was but one component in a creative, multi-faceted argument that made the extinguishment of the group’s title inevitable in any contingency. Secondly, the dismay of the Committee at the absence of any prior statute or agreement by the Crown that would resolve the questions in dispute is tangible. Indeed, in a distinctly legal positivist era, the will of the sovereign formed an accepted source and horizon of justice. Reversing these two observations, the loss of the will of the sovereign formed a source of justice prompted a creative foray into determinations of Aboriginal title based on abstract and creative premises. This paper proposes a parallel with Aboriginal rights and title in Canada. For a period, a positivist judicial orientation was instrumental in glossing over Canada’s inconsistent use of treaty-making. Notably, the extinguishment of Aboriginal title either with or without treaty could be legally valid, so long as the Crown intended to extinguish it. Invoking the sovereign of a more “civilized” society embodied an implicit appeal to what should simply be considered right in the order of things. But what is a Supreme Court to do when changing social norms make such a justification of Aboriginal dispossession too antiquated and unpalatable? In effect, a partial “loss” of the will of the sovereign through socio-historical change in Canada marks the advent of a late 20th century foray into determinations of rights and title based on new and uniquely inventive premises.


First Nation’s self-government agreements in Canada, beginning with that signed by the Champagne and Aishihik First Nation in 1993, devolve a broad range of provincial and federal powers to First Nations. In this paper the author analyzes citizenship provisions in nineteen self-government agreements signed in the past two decades to determine the extent to which citizenship in self-governing First Nations differs from membership in other First Nations. The ability to determine citizenship is directly tied to the development of Aboriginal self-identity and the parameters of citizenship in a First Nation is indicative of the degree of political autonomy recognized by self-government agreements. The rules governing membership in First Nations in Canada are established by the federal Indian Act. While amendments made to the Act in 1985 recognize the right of First Nations to adopt their own membership criteria, the scope of those criteria remain circumscribed by provisions of the Act and models of federal funding tied to registration under the auspices of
the Act. Overwhelmingly, blood-quantum remains an essential basis upon which membership is determined. While a comparative analysis indicates that the criteria for membership has remained essentially unchanged under self-government agreements, the content of membership and the shift to the language of citizenship has changed the contours of First Nations’ citizenship. In this paper, I examine citizenship provisions under self-government agreements in order to assess how the content of citizenship differs from membership in other First Nations and explore the implications of the movement toward the language of citizenship for Aboriginal self-determination.

1205 – Encountering Religious Expressions in Law (Room: 311)
Chair: Benjamin Berger, York University

Dia Dabby, McGill University, “Children at the center and the margins of law’s conversations about religion and schools in Canada”

The intersection of religion and schools has increasingly become a site of interest in Canada in the past decade. A remarkable number of legal cases have been brought to the fore, challenging books about same-sex parents, kirpans in schools and ethics and religious culture programs. Drawing on a law and geography approach, I argue that the school constitutes a territory, and therefore, a novel site of legal pluralism. And although these cases differ in terms of content, they are reunited under a common site of analysis, namely, the school; a shared legal trajectory, notably the judicial review of internal decisions; and a common challenge, that of confronting one’s religious beliefs.

I suggest that a law and geography approach can provide valuable insight into the overlapping legal orders – what de Sousa Santos calls ‘interlegality’ – into the aforementioned cases. This paper unfolds in four parts. First, I explore the school as ‘territory’ in the Canadian legal context. Second, I propose that the school, as territory, becomes a form of social relations: as such, the former and latter build upon common relationship. Third, I advance that provincial and territorial education and school statutes address religion within the confines of their realm of jurisdiction, revealing a complex and multilayered portrait of how education and religion interact. Finally, I posit that student codes of conduct create internal legal orders in schools, which may or not be coherent with students’ right to freedom of religion as contained in provincial charters and the Canadian Charter of Rights and Freedoms. This paper seeks to engage in a deeper socio-legal discussion, where children are seen at both the center and the margins of law’s conversations on education and religion.

Peter Bush, Independent Scholar, “The Interaction between Presbyterian Church in Canada church law and secular civil law, 1995-2010”

The Presbyterian Church in Canada has a high-developed legal system, governed as it is by a series of courts – session, presbtery, synod, and assembly. The decisions of lower courts may be appealed to a higher court. Church law is codified in the Book of Forms which governs ministers, elders and members of the church within a church discipline.

The first decade of the 21st century saw significant additions to the accountability structures within The Presbyterian Church in Canada, such as the Judicial Process section of the Book of Forms; Leading with Care: A Policy for Ensuring a Climate of Safety for Children, Youth and Vulnerable Adults in The Presbyterian Church in Canada; and Policy for the Dissolution of Pastoral Ties (employment termination policies). These additions were influenced by advice from “the church’s legal counsel” located in a secular law firm. Thus the church relied on the secular legal system to build these policies. Such a move was a shift away from the churches’ previously stated view: “As long as the church is consistent in following its own rules, the civil courts will not intervene” to one that sought to design policies and rules guided by the secular legal system.
This paper will explore the interaction church law and secular civil law by:
a. delineating examples of secular legal concerns in the three documents cited,
b. describing how the interaction has changed the ways the church functions, and
c. asking if giving authority to the advice of “legal counsel” limits the church’s ability to follow a path theological consistent with its calling as a church.

Since the author is not a legal scholar, but rather is a church minister and student of church law, the paper will come at these questions from the perspective of the church and church law.

1206 – Canadian Legal History I: Individuals Encounter the Law in the 20th Century (Room: 308)
Chair: Maura Matesic

Ken Leyton-Brown, University of Regina, "Chinese Plaintiffs in the Courts of Early Saskatchewan: A Part of Business in a New Land"

As Chinese arrived in the region that, after 1905, became the province of Saskatchewan, they settled in the cities and many of the smaller centres, and engaged in a predictable range of occupations, often in partnerships with other Chinese or working for other Chinese. Most were involved in the running of restaurants or laundries, while others worked in confectionaries or in hotels and rooming houses; very rarely, individuals might be involved outside these traditional pursuits, owning a larger store, for example, or working as a tailor or cobbler. The lives of these men – virtually no women came to Saskatchewan in the early period – were usually characterized by hard work for little reward, and, in many cases, a chilling degree of social isolation: Chinese existed on the margins of Canadian society and were quite consciously excluded from full participation. Recent scholarship has shown, however, that attempts to marginalize the Chinese, and even to drive them away, were resisted by the Chinese, sometimes with considerable success. This paper contributes to our developing understanding of Chinese agency in this formative period through an examination of trials in which Chinese plaintiffs resorted to the courts to protect and further their interests in disputes involving their work lives. Appeals to courts of law were not at all traditional in the part of China from which they came, but in Canada Chinese learned that the law and courts could be used to advantage, and they showed themselves well able to assert themselves and to protect their interests.

Sarah Hamill, University of Alberta, “Sex, Race, and Motel Guests: Another Look at King v Barclay”

The 1961 case of King v Barclay is something of a footnote in the history of discrimination against African Canadians. If it is cited it is usually cited alongside the more famous racism cases such as Christie v York and is cited as proof of the widespread nature of racism in Canada. The relatively sparse holding of the Appellate Division of the Supreme Court of Alberta, which states that “in the circumstances herein, appellant was not a “traveller,” his purpose in asking for accommodation being one of investigation only,” is likely the reason behind King’s ‘see also’ status in Canadian legal history. This paper, by re-reading the trial decision, argues that the facts of King are more complex than the decision at appeal suggests. There is racism in King but it is not the racism that the case has come to stand for. King emerged out of a series of errors from both King and Barclay’s Motel which resulted in the latter assuming, or seeming to assume, that King wished to visit two prostitutes working out of the motel. For obvious reasons, however, Barclay’s Motel could not state such an allegation explicitly as that would have been tantamount to admitting that they knew the women in question were prostitutes. In order to recapture the full legal and historical contexts of King this paper examines both the history of racial discrimination in public accommodations and the longstanding struggle to prevent prostitutes from using such accommodations to ply their trade.

Lori Chambers, Lakehead University, "Secrecy and Disclosure in Adoption"

As initially legislated, an adoption order in Ontario divested “the natural parent, guardian or person in whose custody
the child ha[d] been of all legal rights in respect of such child”, and the child became “to all intents and purposes the child of the adopting parents”. The ties between the child and his/her natural parents were irrevocably severed by adoption, and the relinquishing parent had no right to access information about the child. Moreover, the adopted child could not obtain information about his/her natural parents. Closed adoption records were “rooted in the perceived need to obliterate the stigma of illegitimacy for the child and birth mother, and to protect the rights of possible adoptive parents.” Into the 1980s, Canadian courts consistently held that secrecy was essential to the security of adoption placement: “the sense of security of the child in his new home ought not to be disturbed. He must continue to know that this is indeed his home; that he is entitled to demand the loyalty of his new parents and that he is obliged to give them his loyalty in return. That sense of security and loyalty would be diminished if the adopting parents felt that a natural parent could interfere with the affection of the child or with their authority over him”. Such decisions, once unquestioned, have become increasingly controversial. With the rise of a vocal adoption rights movement, secrecy and closed adoption records were challenged. In slow stages, the Ontario legislature moved to provide means by which adopted children and birth mothers could obtain non-identifying information about each other and initiate searches for the purposes of reunion. In 1978, a voluntary registry for adoptees aged 18 and birth parents was created; if both the birth parent and the child registered, the registry workers would initiate contact between the parties and provide counseling. In 1987 adoptees were freed of the need to obtain permission from their adoptive parents before initiating a search. In 2005 the Ontario legislature passed the Adoption Information Disclosure Act which would have given all

4 Adoption Act, (1921) c. 55, s. 10 (1) (a), (b), (c), and 11 (2).


adult adoptees and birth parents an absolute right to information about adoption, but in a controversial court decision the legislation was determined to violate privacy rights. This paper provides an overview and critique of these changes.

Mary Stokes, York University, "Municipal Corporations in Court: High Law and Low Governance in Canada West/Ontario, 1850-1880"

‘High law,’ the law proclaimed by superior courts and found in published case reports, was once the default source for legal historians, but today is more often used as a jumping off point for legal archeology, whereby one or a few cases are mined for the story behind the judgement. In this paper I attempt a methodological experiment, returning to the use of caselaw in the aggregate, but in a ‘non-legalistic’ fashion. Using the reported cases as a digital database, I have tried to isolate the actors’ legal experience from the reporters’ doctrinal filter by searching the LexisNexis Quicklaw digitized database of all published Ontario judgments by keyword rather than by conventional legal rubrics. By searching for ‘city/cities,’ ‘town/s,’ ‘township/s,’ ‘village/s’ or ‘county/counties’ in the style of cause, I identified 448 cases in which municipal corporations were directly engaged with the ‘high’ legal system in Canada West/Ontario during the years 1850-1880. I do not claim that the search results are necessarily definitive or representative of the ‘high law’ of municipal corporations, but rather that they are illustrative and illuminative of the range of legal issues and problems which impacted municipal institutions and constituted their legal environment, directly or indirectly. I discuss the utility and limitations of this data generally and then proceed to examine three subsets of the sample which in my estimation best shed light on questions of the legal experience of municipal actors and, more specifically, on local government autonomy. The first group are cases dealing with the prerogative remedy of mandamus, wherein the claimant alleged a municipality was subject to judicial enforcement of legally prescribed duties. The second group deals with the quashing of by-laws as indicative of restrictions on local government power. The third are those cases dealing with municipalities’ liability for personal injury, as illustrative of legally-constituted responsibility.

1207 – The Idea of a Human Rights Museum
Moderator: Karen Busby, University of Manitoba

Karen Busby, University of Manitoba, “Architecture of Human Rights”

The Canadian Museum for Human Rights (CMHR) will be housed in an iconic building. This presentation will describe and analyze the narrative structure embedded in the building.

Armando Perla, CMHR, “Presenting Canada’s Legal Traditions at the Canadian Museum for Human Rights”

The CMHR is set to open its doors on September 20th 2014. Many of its exhibits are based on the vulgarization of human rights laws, legal doctrine and jurisprudence in order to make them accessible to the general public. The exhibit titled “Canada’s legal traditions” aims to present a narrative that speaks to processes of colonization and decolonization of legal traditions in Canada. Through the use of artifacts such as the Royal Proclamation 1763, Aboriginal treaties, the Proclamation of the Constitution 1982, and an Aboriginal judge’s robe, this museum exhibit aims to present the visitor with an invaluable piece of Canadian legal history. As such, this exhibit intends to walk the visitor through the history of legal traditions in Canada, acknowledging that Indigenous legal traditions pre-dated European contact. This paper will bring to light a great number of challenges that presenting complex legal ideas in an exhibit with limited text space poses to its developers. At the same time, it will highlight strategies that have been used to solve some of these challenges.

Andrew Woolford, University of Manitoba & Adam Muller, University of Manitoba, “Experience, Empathy, and the Modern Museum”
In this paper we will work to identify some of the challenges facing institutions such as the CMHR when it comes to engaging their audiences in ways likely to generate social transformations. Such transformations are a crucial part of the mandate of these so-called “ideas museums,” which increasingly rely on novel digital technologies to engage museumgoers in the stories they tell. It is widely believed that such engagement arises from and is intensified by the immersion of the museumgoer in the lives and experiences of others – in the case of the CMHR those who have either suffered gross human rights violations and/or overcome them. But do these technologies actually deliver the promised results? Can they actually bridge the inevitable distance separating the victim from the secondary witness to atrocity? We will consider possible answers to these questions with reference to a multimedia and immersive digital “storyworld” we, along with a diverse team of scholars, Aboriginal organizations, and private-sector tech partners, are currently engaged in constructing that centers on the experience of Canada’s Indian Residential School system.

Saturday June 7, 2014

9:00 – 12:15 Joint Graduate Student Workshop (Rooms: 204 & 205)

9:00 – 10:30 Panel Sessions (5 concurrent sessions for CLSA, 1 for CALT – room: Moot Court)

2101 – Socio-legal Issues of Health and Human Dignity (Room 309)

Chair: Sarah Hamill, University of Alberta

Poland Lai, York University, “Can law bring disability closer to “us”?”

Disability is all around us. According to Statistics Canada, an estimated 3.8 million adult Canadians reported being limited in their daily activities due to a disability in 2012. This represents 13.7% of the adult population. As well, the prevalence of disability increases steadily with age: 2.3 million working-age Canadians (15 to 64), or 10.1%, reported having a disability in 2012, compared to 33.2% of Canadian seniors—those aged 65 or older. (Disability in Canada: Initial findings from the Canadian Survey on Disability). It should be difficult to justify barriers – physical and otherwise – for people with disabilities that exist in our political, social and economic institutions. At the same time, people with disabilities remain among the most marginalized Canadians and this reality needs to be kept in mind.

Law is a means of constructing and structuring social relations. If disability is regarded as a social construct that requires changes to the social and physical environments that inhibit people with disabilities from fully participating in society, then law’s encounter with disability should raise important and interesting questions. I am interesting in exploring law’s gate-keeping functions in social policies: law’s account of what disability is, law’s determination of eligibility or ineligibility for certain functions and roles, and law’s power to accommodate differences. This paper then turns to the recent jurisprudence of the Supreme Court of Canada to further draw out the law’s encounter with disability. The most common criticisms regarding s.15 jurisprudence, especially in relation to the ground of disability will be discussed. I borrow from the relational conception of rights to explore the possibilities of focusing on relationships in constructing law that may reflect more appropriately differences from disability. The paper will conclude by proposing a health-related research project that seeks to investigate issues raised in this paper.

Elaine Craig, Dalhousie University, “Human Dignity reflected in the Supreme Court of Canada’s jurisprudence”

If one were asked to capture in a single word the Supreme Court of Canada’s characterization of the values underpinning the Canadian Charter of Rights and Freedoms it could be the word dignity. Indeed, human dignity has
been identified as the very foundation of Canada’s Charter rights. The ascendancy of the concept of dignity is not unique to Canadian law. International covenants addressing human rights almost uniformly refer to the principle of dignity, as do the constitutions of several countries. It is clear that legal orders around the world have embraced the principle of human dignity. (Canada is no exception.) Less clear is the definition of dignity. In some instances it is understood as a good in and of itself – every individual has the right to dignity. At other times it is used as the justification for other rights or freedoms - to deny someone equality before the law is to infringe their dignity. There is also disagreement about its legal origins. Among scholars two streams of thought appear to be most prevalent. The most common narrative relies on a Judeo-Christian conception of dignity as a reflection of inherent human worth. A second account understands dignity as evolved from the Aristocratic concept of dignity as status or rank. This paper examines the legal conceptions of dignity reflected in the Supreme Court of Canada’s jurisprudence.

Sophie Nunnelley, University of Toronto, “Donor Dilemmas: A Relational Approach to Sperm Donor Anonymity”

Persons born of donor sperm have increasingly been asserting a right to know their biological origins. Moreover, many policy-makers have responded. The traditional norm of keeping even the fact of donor conception secret has given way in many jurisdictions to a right of donor conceived individuals to learn the identities of their donors. Yet, notwithstanding policy movement elsewhere, both Canada and the United States remain at the stage of debate and non-regulation. Nor is there likely to be policy action as the result of litigation. In November 2012, the B.C. Court of Appeal decided against Olivia Pratten, a donor-conceived individual who was seeking, among other things, recognition of a constitutional right to know one’s biological origins.

This paper suggests that the debate over sperm donor anonymity has suffered from the different legal and political models of the family that are at play. Scholars and advocates speak to the issue from fundamentally different starting assumptions about how we decide what is a family, and what consequences flow from that designation. This substantially thwarts progress. Adopting a rough typology of theories about the family offered by scholars Martha Minow and Mary Lyndon Shanley – contract-based, community-based, and rights-based – the paper shows how each of these is at play in the sperm donor anonymity debate. It then argues for the adoption of a relational framing, which asks (i) what values and outcomes the different sides are concerned about and whether there is any congruence; and (ii) how changes to the law could structure relations so as to better support these (shared) outcomes. Following this approach, the paper suggests that providing adult donor offspring a qualified right to know the identity of their donor would be sound policy, but that this can only be done in the context of clearer protections for same-sex and sole parented families.

Angela Cameron, University of Ottawa, “Sperm Donation in Ontario: An Empirical Study”

This paper presents some of the results of an empirical study conducted by Angela Cameron and Vanessa Gruben. The purpose of the project is to learn about the use of donated sperm in the creation of families by speaking with people who have created their families in this way, and with people who work with these families. Our objective is to hear what they think about the current legal approach to gamete donation in Canada and how they think it should be regulated. We intend to use what we’ve learned in these conversations to propose law reform in the use of anonymous sperm donation in Ontario.

Our discussions with participants have focused on three areas. First, we have asked participants to speak to us about their experience with sperm donation. Second, we have asked whether participants believe that anonymous sperm donation should continue in Ontario and why. Third, we have asked participants what information they believe should be collected from donors, whether information should be collected on an ongoing basis, when information should be disclosed to the donor-conceived offspring and whether a registry is the best mechanism to accommodate the needs of all parties involved in gamete donation.
Using the lenses of feminist bioethics and feminist law reform, this paper will present our findings and recommendations in two key areas: the particular legal and social concerns of women-led families, and information registries.

2102 – First Nations, Resource Extraction Disputes and Law (Room: 308)

“Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law”

Authors: Rachel Ariss & John Cutfeet
Readers: Brenda Gunn, University of Manitoba
L. Jane McMillan, St. Francis-Xavier University
David Milward, University of Manitoba
Natalie Oman, UOIT

Keeping the Land focuses on the legal dispute between the Kitchenuhmaykoosib Inninuwug (KI) and the Platinex mining company over access to the First Nation’s traditional territory for mineral exploration. The ensuing court decisions revealed what might happen if the duty to consult and accommodate was taken seriously, as well as the problem in defining the scope of consultation and accommodation. The eventual jailing of the KI leadership for contempt of court heightened public awareness of the First Nation’s struggle for self-determination, the failure of Ontario’s Mining Act to respect Aboriginal rights, and the environmental issues raised by mineral exploration in Ontario’s far north.

The book analyzes a specific legal dispute through the lenses of KI law, recent Canadian jurisprudence on the duty to consult and accommodate and theories of legal and social reconciliation. The book provides a common starting point for a wide-ranging discussion that can interrogate the role of the duty to consult and accommodate in various struggles between First Nations, Canadian governments and resource developers. We see this as an opportunity to examine the presence and recognition of Aboriginal voices in public debate on resource extraction and consider law’s contributions to and detractions from the process of reconciliation.

2103 – Challenging Gender Inequalities (Room: 207)

Susan Bazilli and Richa Sharma, International Women’s Rights Project, “Limitations of Law in reducing the pandemic of Violence against Women”

This paper raises some questions about the limitations of law in reducing the pandemic of VAW in the case studies of India and South Africa that illustrate how addressing VAW primarily through the criminal justice system has blinded us to a critique of structural violence in postcolonial societies. We deconstruct the discourse on VAW through a reflection on the ensuing enactment of hyper-masculinities in the aftermath of violent neoliberal economic policies marginalizing certain Other men. We argue that a political economy discussion is absent in VAW analysis, rather that in Other societies it continues to be framed as a by-product of oppressive cultural practices. We argue that such legal reform is ineffective in ameliorating VAW due to failure in implementing laws meant to hold men and women accountable for violence, and in creating any cultural change in reducing its prevalence. Instead, we turn to the role that social movements have played in addressing this violence. Drawing on recent research we conclude that it is the mobilization of autonomous feminist social movements employing multisectoral strategies and engaging with the law that is more important in creating meaningful change to address VAW.

Indian status is a category conferred on some indigenous peoples by Canada’s Indian Act and transmitted on a patrilineal basis. Sandra Lovelace lost Indian status when she married a non-Indian. When the marriage ended, she could not return home to her reserve. In 1977, women in Lovelace’s community came together to demand reforms at a local level. Their campaign fell on deaf ears, and Lovelace submitted a complaint to the UN Human Rights Committee. Sandra Lovelace prevailed at the UN, and Canada partially reformed the Indian Act, but at a cost. The vision of Lovelace in the UN’s final decision is of woman who “naturally” should want to return home after the personal misfortune of divorce. These harms are real and significant, but their framing as cultural, emotional, and identity-based serve to overshadow the figure of Sandra Lovelace as an outspoken and pioneering activist.

This paper aims to understand how the turn to a UN human rights process can produce depoliticization and ‘culturalization’, and the particular place of gender in the process. I read Lovelace as performing a form of self-governance in local, national, and international arenas. The reforms Lovelace sought to Canada’s Indian Act turned on a battle between women’s individual equality rights and collective claims for indigenous self-determination. Indigenous groups advance alternative practices of sovereignty, with an example being the role of kinship in aboriginal political formations. Kinship ties were torn apart by Canada’s rules on status and the resulting out-migrations from reserve communities. If sovereignty is un-extinguished by colonial occupation, then the relations between indigenous sovereigns and the settler state are international, state-to-state questions, not questions of domestic politics. It follows, then, that indigenous women’s claims for equality rights and full membership in their communities are political questions that are simultaneously international and settler colonial. By exploring the interaction between these spheres of legality, I consider the limits of international law’s reading of indigenous rights.

Margot Young, University of British Columbia, “Equality and Social Justice: What has Section 15 to Offer Anyone Anymore?”

This paper takes up the challenges of the comparative frame that underpins any equality analysis under section 15 of the Canadian Charter of Rights and Freedoms. The paper proceeds from the last doctrinal statement about section 15 put in place by Quebec v A and looks at how well the Supreme Court has (or hasn’t) learned the lessons of the various critiques of its equality caselaw acknowledged in most recent judgments. More specifically, the paper looks at the doctrinal outcomes of this case in light of feminist critiques of agency and disadvantage as they must necessarily inform any equality calculus.

2104 – Engaging the Socio-legal Discourses of Mental Health (Room: 311)
Chair: Alana Klein


Since at least the days of ancient Rome, Western society has recognized an obligation to provide a framework of care and protection for those who are mentally incapacitated. In the historical development of the common law, this ancient doctrine of protection developed, many centuries later, to include children also within the umbrella of the parens patriae jurisdiction: these two vulnerable groups were recognized as being to varying degrees incapable of managing their own lives, and properly requiring the intervention of the Crown to ensure that they would not be abused or exploited.

This paper will look at the situation where the vulnerability, interests and rights of these two groups are in conflict in the most intimate and vulnerable of circumstances: the parent-child relationship in crisis. What are the ethical obligations of the state, as the parens patriae protector of both parties, if a child protection concern arises with respect to a parent with compromised mental capacities? If the state acts to remove the child, what is its duty to the parent? Are there special considerations at play when the removal of the child is as a result of the disability of the parent? How can the interplay of “rights” and the notion of autonomy be understood in such a scenario? I will not pretend to be able to
answer all of these questions in this study, but I aim to explore them in enough depth to present the socio-legal context, to discuss the relevant law and social policy research, and to frame some of the normative issues which are integral to the discussion.

Zana Lutfiyya, University of Manitoba & Karen Schwartz, University of Manitoba, “Complementary and Contradictory Laws and Practices: Competency and Adults with Intellectual Disabilities in Manitoba”

The organizers of this conference suggest that “law is dynamic. Over the course of time, law changes within and across societies. These changes are influenced by the course that society takes and in turn, society changes based on the dictates of law.” We argue that, for people with intellectual disabilities, laws regarding competency and guardianship, and practice derived from those laws, have remained stubbornly static since Roman times.

This presentation will begin with a history of guardianship laws from Roman times, through early English laws, and then trace Manitoba’s laws. The historical review will end with a discussion of Manitoba’s Vulnerable Persons Living with a Mental Disability Act (1996) (VPA).

Within the modern context, we will examine the presumption of competence described in the preamble of the VPA and in light of human rights legislation such as the United Nations Convention on the Rights of Persons with Disabilities and the Charter of Rights and Freedoms.

Finally, we will move to a discussion of how those presumptions and rights are or are not effectively translated into everyday policies and practices in supporting adults with intellectual disabilities. For example, what are the implications on people’s lives of relying on orders of substitute decision-making? How broad should powers of control be for substitute decision-makers? What is the effect of holding a quasi-judicial hearing process on vulnerable people who may or may not understand the process being undertaken? How successful are service and support agencies in promoting self-determination for the people they serve? And even when a person is legally competent, to what extent can professionals (e.g. lawyers, doctors, bankers) require additional “consent” from third parties?

Rosanna Langer, Laurentian University, "Mental Disorder, Meaning and Social Inequality: Minding the Gap."

To what extent ought we justly hold persons criminally responsible when their conduct was impaired by emotional, mental or behavioural deficits? To what extent does our assignment of criminal responsibility accord with what is known about mental illness? There are a large number of people with mental health issues who come into conflict with the law and are criminally charged. Many of those with mental health difficulties who come into contact with the law, will not be so mentally disordered as to meet the threshold for NCR-MD. For example, those with personality and mood disorders will not often meet the threshold of NCR-MD. Furthermore, their mental health difficulties may be manifested cyclically rather than constantly. However, these people may nevertheless have difficulties in managing their behaviours, and therefore come into conflict with the criminal justice system. In these cases, the mental disorder, if diagnosed, may, at best, be considered so as to mitigate the sentence. Jails and prisons are full of those with mental health issues and the incarcerated population suffering from mental health issues is rising.

The social determinants of health can be significantly linked with the development of mental illness. Despite the enormous deference paid by the justice system to health-care and medical expertise, there is a growing gap between legal and health care professional understandings of mental illness. The criminal justice system continues to problematically foreground individual agency and culpability, while diminishing the role of social, economic, relational and racialized environments on mental health, and the relationships between mental illnesses and diminished responsibility.
2105 – Privacy and Protection: Investigating Case Studies Involving Children and Adults (Room: 206)
Chair: Maura Matesic, York University

Josephine Savarese, St. Thomas University, “Zaynab Khadr for Governor General of Canada”

A blogger who goes by the name Blazing Cat Fur facetiously called for the appointment of a controversial Muslim woman, Zaynab Khadr, to the position of Canada’s Governor General. Several reasons are presented in support of the call including the removal of “at least one and possibly all Khadr’s from the welfare rolls”. In addition, Blazing Cat Fur states that Zaynab could ask one of her “niqab’d relatives” to fill in for her if she was not up to “a round of duties”. After all, queries Blazing Cat Fur, who would know if a substitute acted on proposed Governor General Khadr’s behalf.

In this paper, I discuss this blog entry as well as others posted by Blazing Cat Fur in regard to Zaynab. I use these entries to probe and problematize debates on cyber-bullying. I investigate ways the new federal law imagines “liberal” citizen subjects who deserve law’s protection. As a niqab wearing Muslim woman and the sister of Omar Khadr, Zaynab Khadr exists at the border of the liberal state as “fair game” for on line ridicule.

Mona Pare, University of Ottawa & Tara Collins, Ryerson University, “A Child-Rights Based Approach to Anti-Violence Efforts in Schools”

Growing concern about violence in schools has led to increasing amounts of research on the causes and consequences of bullying, preventive approaches, and liability, as well as to governmental and community responses ranging from anti-bullying legislation to social programs. However, very little attention has been given to human or child rights in research, legislation and policies. This presentation introduces findings of a project that attempts to bridge the gap in the literature and public discourse between research on bullying and child rights. Based on our research on laws and policies targeting violence in school, as well as participatory research unveiling the viewpoints and experiences of young people and key community and government stakeholders, we propose a theoretical child rights-based framework applied to situations of violence in schools. One of the objectives is to develop evaluation tools for anti-violence initiatives, given a lack of evaluation of existing anti-violence efforts. As the presentation will put forth research results while discussing methodology, it will address the following questions: What is the role of child rights in analyzing situations of violence in schools? How does a holistic approach to children based on child rights inform analysis of public responses to violence in schools? How do child rights support the development of a framework and evaluation tools that can be used in situations of violence in schools? The United Nations Convention on the Rights of the Child will be used as the main reference point to discuss child rights as a specific body of human rights, and to assess existing approaches to anti-violence efforts.

Elizabeth Lawson, Robert Gordon University, “Privacy Issues, the Internet, and Child Sexual Exploitation”

Western cultures have developed a norm of privacy and freedom of expression that are embodied in both the common law and national legislation. The Canadian Charter of Rights and Freedoms has embodied such rights in Canada and more recently privacy laws have been adopted. The ground-breaking case of R v Sharpe pitted the right of freedom of expression against the rights of children to be protected from sexual exploitation. This battle has continued in the recent attempt to adopt Bill-C30 which has brought these issues to the fore once again. The rights to privacy and freedom of expression in Scotland have historically been the territory of the common law but more recently legislation has addressed these issues. The current technological revolution has put these rights to the test especially in the area of the sexual exploitation of children via the Internet. Society considers the protection of children to be of great

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importance, however, also has apprehension around the freedoms of individuals, these two issues are often at odds. Issues such as the investigation of computers in order to find evidence, the blocking of web-sites containing sexual images of children, the prosecution of adolescents involved in consensual sexual activity posted online and the production of sexualised material of children other than images of actual children are some of the situations that occur where the traditional legal norms are pitted against the potential harms raised by new technologies. An international legal framework has been developed in order to protect children from sexual exploitation. Both Scotland and Canada have legislated extensively based on this framework. However there is a confluence where these laws come up against long-standing privacy laws. This paper will examine the current legal position and cases involving privacy issues and child sexual exploitation in Scotland and Canada.

10:30 - 10:45  Break (Common Room: 203A and 203B)

10:45 – 12:15  Panel sessions (5 concurrent sessions for CLSA, 1 session for CALT – room: Moot Court)

2201 - Encountering Law in Canadian Crime Films (Room: 308)
Chair: Maura Matesic, York University

Law and society scholarship examines legal encounters in a variety of institutional and informal settings. Over the years, socio-legal scholars have discussed the importance of informal legal encounters in shaping the sensibilities of the general public toward legal issues. Of considerable interest in this line of scholarship are the encounters ordinary people have with representations of law and the justice system in various forms of popular culture. While relatively few will encounter the justice system in a formal setting, large numbers of Canadians are exposed to popular cultural representations of law and justice through social media, literature, film, television, and news media. While considerable research has examined crime and law in the news and in American visual popular culture, there has been little attention from socio-legal scholars to the representation of law, crime, and justice in Canadian films. To be sure, US popular culture casts a long shadow over Canadian society and no doubt influences the way Canadians think about the world. However, there has been considerable growth in Canadian film production since the 1970s which begs critical socio-legal analysis. Just as a number of legal scholars and Criminologists have examined crime, law and justice in Hollywood films (see for example Nicole Rafter 2006), we seek to broaden the discussion by bringing together a panel of socio-legal scholars examining crime and law in Canadian film through a variety of disciplinary lenses. The panel critically interrogates encounters with criminal and civil harms to children, colonial violence, and role of place in the socio-legal imagination.

Pauline Greenhill, University of Winnipeg, “Le Piége d’Issoudun: Motherhood in Crisis”

The first chapter of Betty Friedan’s groundbreaking American feminist treatise The Feminine Mystique (1963) is entitled “The Problem That Has No Name.” In it, Friedan discusses mainly White privileged women in the suburban United States, whose dissatisfaction with their lives leads to unhappiness and sometimes even despair. Though second wave feminism in North America sought to make motherhood a choice, rather than simply an expectation, relatively few heterosexual women relinquished the prospect that they would, in addition to their paid work, also become wives and mothers. Too many White, heterosexual, North American women thought they could have fulfilling careers, devoted husbands who took equal responsibility for domestic work, and brilliant children, without enduring role contradiction and conflict. Rather than solving women’s discontents, and despite their best intentions, second wave liberal feminist solutions to women’s concerns created new issues for overstressed, overworked, and overwhelmed but nevertheless privileged women.
Forty years after Friedan’s work, Quebec actor/writer/director Micheline Lanctôt’s *Le piège d’Issoudun* (English title *The Juniper Tree*, 2003) addresses the inchoate desperation of an early twenty-first century privileged woman. In considering her character Esther’s nameless problem, Lanctôt de(re)composes and incarnates the Grimm version of tale type ATU 720, “The Juniper Tree,” setting the story in suburban Montreal. I explore Lanctôt’s filmed rendition of the tale, addressing the complexities of a culturally tabooed subject—child murder by mothers—along with her filmic reflections on motherhood in crisis. I consider the sociology and psychology literature on maternal filicide, which demonstrates the realism of Esther’s case. Clearly more speculative is my assertion that this literature may shed light on the character’s circumstances, not made explicit in *Issoudun*, but evident in Lanctôt’s other work on mothering, including the TV documentary *Le Mythe de la Bonne Mère* (2006) and the feature *Deux actrices* (1993).

Richard Jochelson, University of Winnipeg, “A History of Violence: A Meditation on Colonial Violence”

David Cronenberg’s critically acclaimed work *A History of Violence* (2005) has been largely heralded as a triumphant film about American values. Even Canadian film scholars have described it as displaying an American ethic of the need to defend the homestead in “true American fashion” (Beaty 2008, 1). Most critical reviews examine the work through the lens of the classic American western genre. However, Beaty argues that Cronenberg is not so much participating in the western genre as he is asking the viewer to adopt a Canadian lens through which to view American violence, which betrays a Canadian desire to consume and be consumed by American cultures of violence (Ibid., 137). This paper will trouble this presumption of the treatment of the film. Drawing on the field of critical security studies as well as historical literature on the nature of colonial violence, this paper will demonstrate that *A History of Violence* can also be viewed as a meditation on actions undertaken to defend the homeland, represented by the protagonist’s violent altercations performed in defence of home life. However, this defence is predicated on the protagonist’s immersion into a family based on false promises, unexplained future contingencies, and a false sense of reciprocity. Thus the protagonist’s actions can be viewed not just as violence for security, but as colonial violence initiated by settler culture in response to situations created by settler deception. From this perspective, *A History of Violence* can be reviewed as a uniquely Canadian film that underscores the inevitable violence that unfolds when immersion of settler culture proceeds by virtue of deception and inures when threats to control over the settler context is disrupted. In this way, *A History of Violence* can be imagined as a meditation on the civilizing process and as an allegory for the process of colonialization.

Steven Kohm, University of Winnipeg, “Citizens of a Different Town: Representing Child Victims in Two Canadian Crime Films”

This essay explores two films centering on crime and justice in contemporary Canadian society. Both films interrogate the causes and consequences of harms against children while questioning the legal and justice systems’ (in)ability to mete out justice. The films also provide spaces for popular cultural encounters with law in Canadian society. *The Sweet Hereafter* (1997) depicts the aftermath of a tragic school bus accident. The film explores the difficulty of assigning blame and touches upon corporate crime and child sexual abuse. *Le Piège d’Issoudun* (*The Juniper Tree*, 2003) deals with the crime of filicide and pivots around representations of child victims and questions the legal responsibility of mothers who kill while impugning the criminal justice system’s response to such tragedies.

I analyze these works as Canadian crime films. Utilizing Rafter’s (2006) template, I interrogate what these films have to say *ideologically* about crime and its relationship to Canadian society. In Rafter’s (2006) analysis, ideology refers to the unconscious myths that society lives by or the “fundamental notions that people hold (usually without much conscious thought) about how the world is structured, what is valuable and unworthy, who is good and who is bad, and which kinds of actions are wrong or right” (p. 9). I find common analytical ground with earlier work on Little Red Riding Hood crime films that utilize the narrative, characters, and imagery of that traditional tale to explore a variety of crimes and in particular, crimes of sexual violence involving children (see for example Kohm and Greenhill 2011, Greenhill and Kohm 2009). Thus, I argue here that both *The Sweet Hereafter* and *Le Piège d’Issoudun* make use of traditional tales in order to examine crimes against children in novel ways that facilitate unique cultural encounters with the law.
Sonia Bookman, University of Manitoba & James Gacek, University of Manitoba, “The Mean Streets of Winnipeg: Place, Urbanity and the Construction of Crime in Film”

While one might expect Winnipeg crime films to reference key stereotypes of the city such as the harsh winter and flat prairie landscape, instead they simultaneously re-imagine the city as a gritty urban space permeated by Jewish and Italian mobsters, racialized street gangs, and various grifters and confidence men out to pull off a big job. *Mob Story* (1989), *Stryker* (2004), *Zeyda and the Hitman* (2004), and *Seven Times Lucky* (2004) construct the city as a space that contains as well as actively produces crime, while ignoring its deeply rooted and longstanding racial and class divisions. Winnipeg crime films generally re-imagine the city as primarily affected by white, male, organized crime and petty conmen motivated by simple greed or the longing for a better life. While *Stryker* does depict aspects of racialized gang life in Winnipeg’s North End, it ultimately fails to link these conditions to a broader critique of the social, economic, and colonial underpinnings of Canadian society.

2202 - Indigenous Peoples and Real Property: Beyond Privatisation (Room: 309)
Chair: Shauna Labman, University of Manitoba

There is a move afoot in Canada towards the privatisation of Aboriginal lands on several fronts. First, is the proposed privatisation of on-reserve property. Second is the reform of matrimonial property on-reserve. The third is a more subtle move towards a culture of privatisation. This includes trends such as individual Indian Act bands negotiating IBAs directly with multinational corporations for resource extraction on their traditional territories as a supplement to, or instead of accessing land claim, treaty negotiation or title litigation with the Crown. This trend also includes individual Indian Act bands participation in, and support of infrastructures such as oil and gas pipelines on their traditional territories which will benefit private corporations, and hopefully the band members themselves.

Ibironke Odumosu-Ayanu, University of Saskatchewan

The paper explores the extent to which real property rights affect the negotiating leverage of host and impacted local communities in their interactions with extractive industry proponents and governments. For indigenous peoples all over the world, land rights have a significant impact on their extractive industry relationships. Using case studies, this paper argues for a novel type of contract structure in order to facilitate local communities’ participation in extractive industry decision-making and critically examines the role of land in negotiating robust participatory contracts.

Sarah Morales, University of Ottawa

From time immemorial, the Hul’qumi’num peoples and their ancestors have lived and prospered as self-sustaining societies inhabiting a traditional territory stretching from southeast Vancouver Island to the Fraser River on the lower mainland of British Columbia. According to the Hul’qumi’num peoples’ creation stories, those they call the “First Ancestors” were the original occupants of their traditional territory. These First Ancestors descended from the sky or emerged from the land or sea at various locations within the Hul’qumi’num traditional territory.

12 Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c. 20.
There are also many intangible cultural landscapes and places that, according to Hul’qumi’num traditions, law and oral history, hold symbolic and sacred significance for the Hul’qumi’num peoples. Cultural landscapes are places where the Hul’qumi’num First Ancestors descended from the sky or where Xeel’s (the “transformer”) marked the land. These cultural landscapes are honoured today by Hul’qumi’num peoples as sacred heritage sites due to their unique spiritual significance.

A growing body of research about social memory argues that landscapes are places of remembrance and that culturally significant landforms may provide a kind of archive where memories can be mentally stored. We believe that these landscapes are also vital to the ‘legal memory’ of Indigenous peoples, specifically Coast Salish peoples, and that without the recognition and preservation of these landscapes, Indigenous legal traditions are in peril.

Angela Cameron, University of Ottawa

Professor Cameron will provide a brief overview of the edited collection, and the place of these papers within it.

Sari Graben, Ryerson University

Indigenous governments in Canada are increasingly authorized to adopt laws that convert communally held lands to individual fee simple. However, Indigenous peoples are also likely to experience rapid social change that may necessitate the adaptation of law to local context. Governments expect to address social dislocation by exercising legislative and regulatory authority over lands, which continue irrespective of ownership. Seeking to examine the reliability of this argument, I analyze whether the legislative reforms of the Nisga’a Nation, one of the first to define its Aboriginal title as an estate in fee simple, are sufficient to address social changes likely to arise from titling.

Val Napoleon, University of Victoria & Emily Snyder, University of Victoria

In this paper we argue that indigenous laws are vital for thinking about, and acting on, matters pertaining to real property on reserve. Too often state property constructs and laws are regarded as the way for responding to property issues that indigenous peoples face. Yet these very constructs work to undermine indigenous legal orders and perpetuate neoliberal and colonial ideologies about property. Through a focus on housing issues on reserve, we engage a larger analysis that examines challenging questions regarding power, property, and law. We theorize property through the lens of indigenous feminist legal theory and also turn our attention to methods for accessing indigenous laws.

2203 - Roundtable: Criminalized Women and the Law and Order Agenda (Room: 206)

Chair: Sonia Lawrence, York University

Women are the fastest growing prison population in Canada and worldwide. This roundtable will centre the experiences of women who are criminalized and imprisoned in Canada and Australia under increasingly punitive policies and practices. Participants will examine the disconnect between legislative and judicial perceptions of the purpose of custodial sentences and the experiences of imprisoned women. They will focus on such issues as mandatory minimum sentences, guilty pleas and women’s access to legal representation, Indigenous women’s resistance within and to imprisonment, solitary confinement, and the lack of meaningful oversight and accountability of imprisonment. Mindful of the documented history of feminist-inspired prison reform efforts having unintentionally contributed to an expansion of the carceral state, participants will consider recent cases (including the inquest into the death of Ashley Smith and the Inglis case, a successful Charter challenge to the cancelling of a mother/baby program in prison) and will discuss the challenges of advocacy and academic work that maintains a fundamental critique of imprisonment itself.

- Emma Cunliffe, University of British Columbia
Elspeth Kaiser-Derrick, University of British Columbia
Debbie Kilroy, Kilroy & Callaghan (Queensland, Australia)
Debra Parkes, University of Manitoba
Kim Pate, University of Ottawa

2204 - Author-meets-Readers Session: “Exploring Disability Identity and Disability rights through Narratives”
(Room: 311)
Authors: Ravi Malhotra, University of Ottawa & Morgan Rowe
Readers: Anne Finger, Independent Scholar
Geoffrey Reaume, York University
Megan Rusciano, University of Ottawa

2205 - The Role of Non-State Actors in International Law-making (Room: 207)
Chair: Umut Ozsu, University of Manitoba

The classic sources of international law outlined in the Statute of the International Court of Justice (treaties, custom, general principles, judicial decisions and the opinions of publicists) are usually interpreted as flowing from a state-centric, positivist vision of the international legal order. In this model, states are the primary agents and subjects of law, and it is their actions, intentions, and opinions which determine the content of that law.

However, as many commentators have observed, with the rise of globalization, weaknesses in this model of the international legal landscape have become increasingly apparent. Specifically, this model has failed to account for the role of non-state actors such as non-governmental organizations (NGOs), transnational corporations (TNCs), international organizations, indigenous peoples and other non-state communities, as well as the role of harmonization and epistemic networks in the creation of transnational legal norms.

A more adequate theory international/transnational law is needed to describe this reality, and with it, a more robust account of the sources of international law today. This panel seeks to contribute to an updated delineation of those sources through case-driven analyses of the categories of customary international law, general principles, and the opinions of publicists. The specific examples to be discussed include the role of amicus briefs presented by NGOs to transnational courts, the role of TNCs in the development of customary international law norms relating to state jurisdiction and environmental standards, and the evolution of the responsibility to protect doctrine.

Annie Bunting, York University
Natalie Oman, UOIT
Sara Seck, University of Western Ontario

12:15 - 1:45  Lunch (provided) (Corridor outside of the Moot Court)
Canadian Law and Society Association –Board Meeting (Room: 204)
CLSA/CALT Joint Graduate Student Lunch (Common Room)
Land use planning conflicts regarding reveal the complexity of contemporary property relations as the protection of ownership rights encounters the range of public interests in privately owned land and resources. Such conflicts arise because, despite powerful norms about the exclusivity of private property ownership, people routinely assert forms of interest in land and resources they do not own. Such claims point to the overlapping interests in privately owned land and resources despite the exclusion of these relationships from the dominant narratives of property law and regulatory frameworks governing land use in Canadian jurisdictions. This paper will argue that such claims present scholars and lawmakers with an important opportunity to rethink the role of people-place relations, which are largely obscured in property law and theory, in the context of global environmental crisis.

This paper will bring relational theory together with emerging environmental perspectives on property to consider disputes about extractive development. Extraction results in a fundamental and irreversible transformation of place, including surface, subsurface and hydrological features in which common interests can be asserted. As a result, disputes about extraction have emerged as a forum in which the physical reality of the land is uniquely exposed and otherwise legally obscured people-place relationships emerge as troublesome actors in land use regulation. These conflicts provide a strategic opportunity to consider how our relationships with physical place can reorient the theory and practice of property ownership and environmental decision-making.

Daniel Huizenga, York University, “Exploring encounters with law in Toronto’s high-rise rental buildings”

Toronto is known as the ‘city of towers’ for having more high-rise buildings than any other city in North America, other than New York. Many of these are apartment buildings, the vast majority of which are over 40 years old. As recent reports from non-governmental organizations (NGO) highlight, the aging high-rise rental buildings are becoming a serious concern for tenants as they have to deal with this decaying infrastructure and largely unresponsive landlords. What is the role of law in this context? How and where do tenants encounter law? I explore these questions by focusing on the materiality of law in spatial and scalar configurations. My paper considers how material objects such as work orders, eviction notices, and visual displays of disrepair in media and NGO reports represent encounters with law that serve to characterize and give form to a unique socio-legal environment. It is out of this environment, I argue, that both tenant’s rights activism and municipal responses to their demands have emerged.

David DesBaillets, Université du Québec à Montréal, “Tanudjaja v. Attorney General - adequate housing”

The case of Tanudjaja v. Attorney General, represents an unprecedented opportunity for Canadian legal scholars to examine the right to adequate housing in the Canadian human rights context. It is the only legal appeal that directly broaches the right to adequate housing under Canadian law, basing its arguments on two key elements contained in the Charter of Rights and Freedoms: section 7 & 15. For Canadian housing rights scholar, therefore, this decision demonstrates the need for a better understanding of the intersection between international public law concerned with housing rights and the Charter. As it does not adequately portray the full extent of the former’s influence on the latter,
in that Justice Lederer of the Ontario Superior Court, failed to address the importance of the interdependence between international legal sources of positive socio-economic rights and the Canadian human rights context.

In this comment, the author develops a critique of the court’s analysis with regards to the relevance of international human rights norms in the context of *Tanudjaja*, by making reference to Charter jurisprudence involving these norms. Specifically, in section II he provides an overview of the case law with respect to the nexus of Canadian and International public law that will place major emphasis on past cases that invoked international human rights law in their interpretation of the Charter. He then contrasts, in section III, the approach in *Tanudjaja* to previous cases that examined the implications of international human right norms for section 7 of the Charter. Finally, in part two of the same section, he analyzes the section 15 jurisprudence, which considered the implications of international human rights norms for the interpretation of the Charter’s equality rights, with the aim of drawing comparisons with the approach taken in *Tanudjaja*.

Benjamin Isitt, University of Victoria, “The Right to Sleep: The Charter, Poor Peoples’ Movements, and Tenting as Political Protest”

For more than a decade, urban tent cities have been a regular feature of British Columbia’s political and legal landscape, as poor peoples’ movements have occupied public space in several cities to challenge neoliberal assaults on social rights and provide spaces of safety, security, and solidarity for marginalized people. Beginning with the “Woodsquat” early in the Gordon Campbell era, tent cities in Vancouver and Victoria have emerged from time to time and given rise to successful Charter challenges to prevailing civic bylaws in the face of legal recognition by the BC Supreme Court of a “right to sleep.” This remains a live and changing area of law, which breaks fresh ground in the regulation of political protest, while demonstrating important continuity with earlier forms of protest, notably labour struggles with the common emphasis on conflicting conceptions of property and enduring questions of class and economic power. As in labour cases, injunctions have been the primary mechanism invoked by property owners in their attempts to defeat tent cities and restore control over occupied urban spaces. In recent years, tent cities have assumed global proportions in relation to the Occupy movement, the Arab Spring, and protests in eastern Europe and Asia. This paper and accompanying multi-media presentation examine the emerging jurisprudence relating to tent cities in British Columbia and legal challenges by poor peoples’ movements to establish the “right to sleep.”

2302 – The Business of Justice Economies (Room: 308)
Chair: Esylit Jones, University of Manitoba

Alex Atanasov, Univeriste Laval, “Judicial Performance Evaluation, A Comparative and Economic Analysis of Judicial Decisions in the area of Enforcement Arbitral Awards”

The 2007 economic crisis demands re-evaluation of the rule of government institutions in the economy. This paper will concentrate on the role of the judiciary in promoting more economically effective rules. These rules are necessity for any society that desires to be economically vibrant.

In order to clearly evaluate the performance of the Canadian judiciary a comparative analysis is necessary. It will allow us to see how the Canadian judicial decisions measure up when compared to decisions rendered by other judiciaries. Thus, this work will make the comparison with three other major jurisdictions: England, France, and the US.

The specific area of scrutiny will be judicial enforcement of arbitral awards. This area of law is the perfect practical laboratory for evaluating the economic performance of different judicial systems. The reason is judges are confronted with the similar task of confirming a final arbitral award. The common ground upon which judges are supposed to base their deference is The New York Convention 1958 as implemented by analogous national legislation (initial similarity).
However, in reality, judges often exercise a form of judicial review over arbitral awards (national divergence). The important question is: how is this judicial review exercised and what are its economic consequences for each society?

The aim of this paper is to examine these economic consequences and to evaluate the performance of national adjudication.

Evaluation of these judicial decisions and adjudicative process that produces them will be based on whether they fulfill the main goal of international arbitration: increased international trade and thus economic growth. Other economic goals will also be considered. Some of the indicators used will be: subjective (simple transfer) /objective (social gain), predictability (economic stability)/unpredictability, individual justice/collective justice (public economic policy).

Lulu Thomas-Hawthorne, University of South Africa, “Places of exploitation: frontiers of change and governance in contractual transactions”

Exploitation is a central concept in Christianity and Marxism. Both recognise exploitation as fundamentally unfair. The immorality and concomitant violation of human dignity have brought it within the ambit of contract law. To contextualise exploitation within the law of contract it is necessary to identify its territory and definitional landscape.

Although it is desirable that a social order should not overly constrain its citizens in the pursuit of their own lives by excessive demands regarding the welfare of others, this does not imply that citizens are entitled to act unjustly towards others. Traditionally the prohibition against exploitation has been addressed at the macro level, namely within the abstract and “a-political” rules of the contractual regime in a free society. Increasing awareness of socio-economic Human Rights has engendered a shift to micro level transactions as realisation dawns that the fictitious equality of democracy conceals exploitation at micro level. The incarnation of Human Rights in public policy has led to a new consciousness that contracts or parts thereof should and could be held unenforceable when exploitative. It is against this background that I situate exploitation within the norm of public policy.

This development within contract will be illustrated by a recent decision concerning a lease concluded in South Africa during the apartheid era. The contract obliged transfer of ownership of the leased property to the State, free of charge, upon termination of the lease. This agreement could prior to the South African Constitution have been enforced in terms of classical contract law. Since all law now derives its force from the Constitution the exploitative term was found to be contrary to public policy and unenforceable. Transformation of exploitation from religion and politics into a contractual concept may well define the direction of contract law.

Anna Lund, University of British Columbia, “Policing Rogue Debtors: Interpreting Abuse in the Canadian Bankruptcy System”

Individuals assign themselves into bankruptcy because they are overburdened with debt. Bankruptcy offers them the opportunity for a fresh start. In most bankruptcies, an individual’s debts will be discharged after a set period of time. Once a debt is discharged, a creditor can no longer enforce it. The enforceability of obligations is a fundamental building block of our legal system and a mechanism that consistently undermines this enforceability could pose a threat to the integrity of the legal system, especially if used by individuals to improperly escape their otherwise valid obligations: in bankruptcy, the spectre of abuse looms large. Canada’s bankruptcy system has developed tools to manage the risk of abuse. This presentation will focus on one of these tools: a process by which some debtors lose their entitlement to a discharge, if a Court is satisfied that they have engaged in a list of proscribed behaviors. Previous research suggested that the list of proscribed behaviours was drafted so broadly that any debtor could be found to have committed a transgression; however, only a small number of debtors are denied discharges under this process. Drawing on a decade of written decisions from bankruptcy court, data from the Office of Superintendent of Bankruptcy and qualitative interviews with bankruptcy trustees, I have examined how law and norms interact in the interpretation of “abuse” and the construction and punishment of “rogue” debtors.
2303 - Roundtable: Creating a National Archive on Indian Residential Schools: Thinking About Acquisition, Privacy, Access and Copyright Issues (Room: 207)

Moderator: Karen Busby, University of Manitoba
Panelists:
- Greg Bak, University of Manitoba
- Ry Moran, National Research Centre
- Camille Callison, University of Manitoba
- Tom McMahon, TRC General Counsel

The Truth and Reconciliation Commission of Canada (TRC) has been charged with creating as complete an archive as it can on Indian residential schools. This archive will be transferred to the National Research Centre for Truth and Reconciliation (NRCTR), which will be located at the University of Manitoba, once the TRC completes its work in 2015. This panel will discuss questions related to the collection of this archive (especially the scope of the federal government’s obligation to collect documents) and to the privacy, access and copyright issues related to the use of the archive once it is transferred to the CTR.

2304 - Advancing Indigenous Legal traditions (Room: 206)
Chair: Neil Vallance

Beverley Jacobs, University of Calgary, “Haudenosaunee Legal Traditions”

I am a PhD student at the University of Calgary. I would like to present a paper at the 2014 CLSA Annual Meeting which focuses on a portion of my doctoral research: Indigenous legal traditions specifically focussing on Haudenosaunee (Iroquois) legal traditions. The paper will include a research methodology called “Kuswentah” (see visual below), which will acknowledge the respectful relationship of Haudenosaunee law and Eurocentric law and the celebration of 400 years of its existence. The presentation will include Haudenosaunee legal traditions of Kuswentah and how it will be utilized in my doctoral dissertation. My dissertation has two parts to it and the research questions are: 1) What are the impacts of industrial development on the wholistic health of the Mohawk Peoples of Akwesasne? 2) How can rights-based law be used to protect the wholistic health of the Mohawk Peoples of Akwesasne? It is in the second part of my dissertation that Kuswentah will be presented to honour Haudenosaunee legal traditions and how they apply in the context of wholistic health and resource development as well as to present complementary Eurocentric laws (including Aboriginal and treaty rights and human rights law to protect Indigenous wholistic health).

Lorraine Weir, University of British Columbia, “The Discursive Production of ‘Oral History’ in Tsilhqot’in Nation v B.C.”

_Tsilhqot’in Nation v B.C._ (BCSC 2007) is often construed as the Indigenous title case which fruitfully engages the Supreme Court of Canada’s instructions in _Delgamuukw_ (1997) to place oral history evidence on “an equal footing with the types of historical evidence that courts are familiar with.” However, careful analysis of the late Judge David Vickers’ decision reveals inconsistency and confusion about oral history which contributes to the appellate court’s dismissal of such evidence and its return to what the Plaintiff described as a "postage stamp" view of title. This paper presents the results of a discourse analysis approach to Vickers’ lengthy judgment, highlighting areas of terminological and conceptual confusion related to oral history and contextualizing the uses Judge Vickers made of testimony by Tsilhqot’in Elders and other expert witnesses concerning oral narrative, "myth" and "legend." The paper concludes that, as John
Borrows has argued, "equal footing" is hard to find given that "what constitutes a fact is largely contingent on the language and culture out of which that information arises." When oral history evidence is uncritically transcribed into "stories," "myths" and "legends," the court begins to lose its footing despite its stated best intentions.

Olivier Courtemanche, Université d’Ottawa, “De L’Ignorance au Rapprochement? Les Modalités d’un Processus Judiciaire Ouvert aux Cultures Juridiques Autochtones”

Les revendications foncières autochtones soulèvent presqu’inévitablement des conflits fonciers entre le titre aborigène sollicité et les titres de propriété privés que possèdent plusieurs non-autochtones sur les territoires revendiqués. À cet égard, les tribunaux canadiens ont développé certains éléments de références normatives qui, par le biais du principe de réconciliation, ont tous pour objectif de partager le territoire entre les communautés autochtones et allochtones. Par le fait même cependant, le droit canadien n’a pour l’instant jamais restitué aux peuples autochtones leurs droits fonciers ancestraux par la reconnaissance d’un titre aborigène sur le territoire. Or en étudiant les revendications foncières ancestrales, les tribunaux ont ignoré la coexistence possible des normes juridiques autochtones et non autochtones concernant les réparations pouvant être offertes, autant dans leur rapport de confrontation que de rapprochement. Inscrite dans les théories du pluralisme juridique, cette présentation a pour objectif d’étudier cette lacune du droit canadien et d’établir un new law research sur la collaboration des cultures juridiques autochtones et non autochtones. Ainsi, la présentation concernera ensuite les modalités d’un tel processus réparateur dialogique au Canada. Il sera avancé que la définition que confèrent les tribunaux au titre aborigène est une piste de solution par laquelle il serait possible d’intégrer des éléments de coutumes juridiques autochtones au processus réparateur judiciaire actuel qui pourraient accroître tant les solutions disponibles pour résoudre ces revendications que la légitimité et l’effectivité des réparations offertes. L’aspect sui generis du titre aborigène et l’aspect générateur de ce dernier seront plus précisément analysés.

Anna Flaminio, University of Toronto, “Indigenous Laws must now be recognized as laws”

The presentation will explore Cree laws as it intersects with the criminal law. The Supreme Court in R. v. Gladue states that judges must consider two principles:

- The unique systemic and background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
- The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

My LL.M thesis explored the first Gladue principle: the duty of justice officials to properly consider the unique social history of criminalized Aboriginal peoples. My SJD dissertation will analyze the second Gladue principle: Indigenous-inspired community diversion programs for urban Indigenous youth.

In the LL.M thesis, I visited with Cree-Métis Knowledge Keeper and author, Maria Campbell, to better understand the Cree law of wahkotowin. Wahkotowin speaks to reciprocal kinship relationships and kinship obligations to each other, to families, communities, and to all of Creation. The LL.M thesis outlined the shattering of wahkotowin through colonial and present-day policies, and proposed a Gladue through wahkotowin approach to properly interview and gather the social history evidence.

The SJD dissertation expands upon the law of wahkotowin, as applied to criminal law, by including the methodology of ki-yo ke-win, or “visiting place.” Visiting places are historical places on the land where relatives gather and wahkotowin is put into practice, through harvesting fish, deer, berries, or coming together for ceremonies, such as fasting or the Sundance ceremony. Wahkotowin and ki-yo ke-win were nearly shattered however as a result of colonial laws. The Sundance prohibition, for example, was a direct affront on wahkotowin, displacing Indigenous peoples from their
connection to their family, community, animal and plant relatives, and the ability to reaffirm kinship alliances and to transmit cultural knowledge.

The dissertation examines Indigenous spaces/places – mainly Aboriginal community justice programs – in an urban context that focus on community healing and mediation processes for Indigenous youth. Through in-depth interviews, I explore whether, and in what ways, urban Indigenous organizations are giving priority to the re-invigoration of kinship relationships, and examine the benefits of culturally safe space for Indigenous youth.

2305 - Environmental Assessment, Territory and Sovereignty (Room: 205)
Chair: Umut Ozsu, University of Manitoba

Since its origins in the 1970s, environmental assessment (EA, also known as environmental impact assessment) has achieved near-universal acceptance as a feature of development planning. However, the large-scale and fluid aspects of natural phenomena, together with the long-distance character of economic relationships, mean that the issues raised by EA often exceed local or national jurisdiction. International lawyers have grappled with this challenge, as have domestic judges and legislators in many countries (including Canada). Likewise, international organizations, NGOs, businesses and business organizations have generated EA-related norms for themselves or for others. At the same time, social and human rights norms are infusing EA processes, sometimes transforming EA into a sustainability assessment or emerging as a separate human rights impact assessment process. What is the significance of this growing body of “transboundary,” “extraterritorial,” “international” or “transnational” EA law? To what extent is this body of law structured by older legal concepts such as sovereignty or property, or does it in fact change the meanings of these concepts? How do EA rules and practices help to shape understandings of environmental and economic issues, both globally and in particular local contexts? Finally, can the design of EA processes help to reallocate the risks associated with environmental destruction or the rewards associated with economic development?

Natasha Affolder, University of British Columbia, “Environmental Assessment and ‘Legal Borrowing’

The global proliferation of environmental assessment requirements presents a highly visible instance of legal transplantation. But it is not just environmental assessment legislation that is the subject of legal transplants. Rather, intricately woven into the practice of environmental assessment is a methodology of comparison. This reliance on comparator projects and comparative experience often proceeds absent any critical reflection on the methodology of comparison being employed. Various non-state actors are central to the practice of spreading norms and ‘best practices’ between projects at both national and transnational levels. This talk offers a critique of ‘transplanting’ in the context of environmental assessment. It then exposes the author’s own experience of ‘legal borrowing’ in advising First Nations and local community groups in the Northwest Territories on best practices of independent environmental monitoring to the challenges posed by putting critique into practice.

Neil Craik, University of Waterloo, “Remedies for Breach of Procedural Obligations in International Law”

In the International Court of Justice decision in the Pulp Mills case, the court made a sharp distinction between substantive and procedural obligations in international law, holding that a breach of a procedural obligation, in this case a failure to adequately consult on transboundary impacts, did not require a remedy beyond a finding of wrongful conduct. The reasoning being that so long as substantive obligations are maintained the wronged state cannot be said to have suffered any compensable damages. This reasoning is underlain by an assumption that breach of process requirements have no effect on substantive outcomes. This paper questions that assumption and explores the relation between process and substance in the context of remedies for breaches of international law.

Derek McKee, Université de Sherbrook, “Canadian Environmental Assessments of Projects Outside Canada”
Since the mid-1990s, Canadian legislation has required the environmental assessment of certain projects outside Canada in which the Canadian government has some degree of involvement. These requirements are conventionally justified either in terms of the prevention and mitigation of environmental harm or in terms of a nondiscrimination principle, mandating equal concern for environmental issues at home and abroad. Objections to these requirements are generally framed in terms of the “sovereignty” of host states. While this “sovereignty” objection is misleading, it does hint at legitimate concerns related to a democratic deficit in transnational environmental lawmaking and administration. This paper evaluates the treatment of projects outside Canada under the Canadian Environmental Assessment Act, 2012 in light of such concerns. It argues that the new legislation’s decreased formality with regard to projects outside Canada could, in principle, be read as responsive to democratic concerns. However, it concludes that dominant practices in this area are likely to favour a managerial model that attempts to sidestep the political dimensions of environmental issues.

Sara Seck, Western University, “Transboundary or Extraterritorial EA? Law, Language and Power”

Environmental issues do not fit neatly within the sovereign territorially-defined borders of the nation-state. Nor are environmental problems neatly slotted into a distinct box separate from their social dimensions, including both current human rights concerns and impacts on future generations. This paper will explore the language used to delineate the spatial, temporal and disciplinary dimensions of environmental and human rights impact assessment in an interconnected world. Specifically, to what extent do understandings of sovereignty and property reflected in common terminology such as “transnational” “transboundary” and “extraterritorial” inhibit the application of domestic law to environmental problems with an international dimension? Do sovereignty and property also inform the distinction between environmental and human rights impacts assessments? Have non-state normative frameworks of environmental and human rights impact assessment emerged to fill this void, and if so, how do they compare with state law? What might a study of environmental assessment processes applied to areas beyond the jurisdiction of any state offer for conceptualizing the power of language in defining the limits of domestic law?

3:15-3:30 Break (Common Room: 203A and 203B)

3:30 – 5:00 Panel sessions (5 concurrent sessions for CLSA, 1 for CALT – room: Moot Court)

2401 - Co-Existing and Contradictory Indigenous Identities and Indigenous Sovereignties (Room: 205)

Chair: Natalie Oman, University of Ontario Institute of Technology

This panel examines law’s encounters in the context of often marginalized indigenous peoples, interrogating ways in which the law establishes co-existing and contradictory frameworks for Indigenous identities and for the forms that Indigenous sovereignties can take. The papers all stem from the research programme of Dwight Newman, Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law, University of Saskatchewan. Professor Newman will more generally participate in and/or chair the session but the papers will be presented by the student co-authors involved in the papers. Aside from Professor Newman, all are students at Saskatchewan, other Michelle Biddulph (who will have recently graduated and be clerking at the Sask CA) and Scarlet Gomez Aguilera who is from Guadalajara though will be on a research internship with Professor Newman at Saskatchewan at the time of the CLSA meeting.]

Julia Kindrachuk & Dwight Newman, University of Saskatchewan, “Philosophical Perspectives on the Legal...
Definition of Indigenous Identity

The UN Declaration on the Rights of Indigenous Peoples extends rights to a number of collective entities whose identities are not prescribed by the Declaration itself. There was no agreement on the definition of an “indigenous people”. International law scholars, organizations, and tribunals have had to engage in various attempts to define who constitutes an indigenous people, with the pertinent factors in contexts like those of Canada, the United States, New Zealand, and Australia differing from those in Latin America and all of these contexts differing from African and Asian contexts where there is much more potential blurring between indigenous peoples and minority populations. In this paper, we examine the significance of this phenomenon in more philosophical terms. We do two things – first, we attempt to show how the concept of an “indigenous people” can have clear meaning without having a univocal definition that applies across all circumstances and settings. Second, we argue that the argument supporting that first point gives grounding for greater protections for rights of minority populations more generally, relating this argument to examples of engagement by the Special Rapporteur on the Rights of Indigenous Peoples with peoples whose indigenous identity was less certain but for whom he has still supported rights claims.

Michell Biddulph & Dwight Newman, University of Saskatchewan, “Indigeneity and Effects of Internationalized Indigenous Rights in Israel”

In the wake of the UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007, an instrument that constitutes certain internal communities within states as distinctive rights-holders with different rights than other minority groups, the well-known political theorist Will Kymlicka has argued that the Declaration will lead more minority groups to try to claim identity as Indigenous in order to receive the legal protections and standing to which the Declaration refers. Some work evidences this tendency, for example in African contexts (Hodgson 2012). A further tangible example of the issue raised by Kymlicka is an increasing rhetoric of Indigenous rights in Israel. Larger works have discussed claims to Indigenous rights by Palestinians and by Bedouin Arabs. There are also claims to Indigenous rights that have been put on behalf of Jewish Israelis. There is an obvious potential for strategic rights discourse in a hotly contested political environment. Our project is not one of engaging with political strategies. Nor is it one of trying to offer moral commentary on the Israeli-Palestinian conflict. However, the stakes present in this context do offer a tremendously interesting example that challenges and tests some intuitions or claims developed in other contexts related to Indigenous rights and their effects, including in conflict environments. In this paper, we will examine the implications of the presence of internationalized Indigenous rights claims in terms of the interaction of law, globalization, and minority nationalism, with our paper making three main claims. First, within a distinctively Israeli local legal culture (Mautner 2011), the putting of Indigenous rights claims based on international law represents another means of internationalizing certain issues, thereby shifting the terrain of a local legal culture. Second, that internationalization of the claims of particular communities may further complicate peace-building initiatives by inserting additional rights claims into political contexts that reduce the possible range of negotiated outcomes. Third, Indigenous rights claims have a complex relationship to other nationalisms, meaning that international Indigenous rights law in this context both constructs and deconstructs relations of various sorts and has complex relations to historical and present-day factual considerations that also illuminate considerations that may affect the shape of Indigenous rights claims in more generalized contexts.


In this paper, we will examine the phenomenon of law’s encounter with resource companies interacting with Indigenous peoples in foreign states. Using the Chevron/Ecuador litigation as a framing device related to how private international law attempts to organize law’s encounters of this sort, we will discuss various case studies of Canadian resource companies (principally mining companies) engaged in resource development in Latin America and how law has assumed different transnational forms in regulating them and may adopt different transnational forms in future. We will argue that the way law regulates these encounters between foreign resource companies and foreign Indigenous peoples has
significant implications for how Indigenous sovereignties coexist with and/or contradict other legal regulation.


This paper will seek to unpack a number of conceptual and practical connections and sometimes tensions between Indigenous economic development and Indigenous sovereignties. Reflecting on developing legal structures for Indigenous economic development in Canadian contexts, the paper will highlight, first, ways in which economic development can provide longer-term support to Indigenous sovereignties. It will discuss, second, ways in which economic development can verge on being a form of sovereignty and ways that treating it as such can reshape dimensions of the structures for economic development. However, also identifying tensions between these concepts, the paper will, third, identify ways in which pursuit of economic development can necessitate different approaches than those embodied within the concepts of sovereignty as commonly described. Ultimately, the paper will interrogate complex relations between concepts and pose the possibility that the economic development necessary for longer-term sovereignty may necessitate complex analyses of choices in relation to certain more intuitive forms of sovereignty.

2402 – Confronting Hate, Race and Law (Room: 206)
Chair: Chuck Reasons, Kwantlen University

Chuck Reasons, Shereen Hassan, Mike Ma, Lisa Monchalin, Christianne Paras & Melinda Bige, Kwantlen University, “Race and Criminal Justice in Canada: An Overview”

This paper will provide an extensive review of literature regarding race and the Canadian criminal justice system. This will include critical analysis of police courts and corrections research and findings. Discussion of the findings will be placed within the context of structural racism, political economy, critical race theory and bias theory.

Timothy Bryan, York University, “Examining the Contradictions of the Enforcement of Hate Crime Laws”

In Ontario, police services boards are required to develop policies to combat hate crime under the Policing Standards Guidelines of the Police Services Act. Additionally, the Ontario Police College provides training to new recruits and detectives on how to identify, investigate, and provide victim assistance in hate crime situations. With the development of the Hate Crime Extremism Investigate Team in the last decade, police services in Ontario now have a forum to coordinate operations, share intelligence and develop proactive measures to combat hate crime. While the enforcement of hate crimes by police is meant to protect vulnerable communities and reflect a wider commitment on the part of police services to diverse communities, some of the provinces largest police services have come under scrutiny for engaging in practices that systemically discriminate against some of the very same communities protected by hate crime laws. Through an analysis of the literature on race and racism, and a historical examination of racism in Canada, this essay critically engages with this contradiction and considers how the problem of hate and the issue of racism more broadly, is conceived and how solutions are institutionalized within a liberal multicultural nation.

Sean Rehaag, York University, “‘I Simply Do Not Believe …’: A case study of credibility determinations in Canadian Refugee Adjudication”

Refugee determinations, in Canada and elsewhere, often turn on a single question: is the refugee claimant telling the truth? While there are other factors that refugee adjudicators must consider -- for example, whether the harm feared by the claimant is covered by the refugee definition and whether a sufficient level of state protection from that feared harm is available -- determining whether the claimant’s story is credible remains central to virtually all refugee hearings.

In light of the central role credibility assessments play in refugee determinations, increased scholarly attention is being
paid to examining how refugee adjudicators assess the credibility of claimants, and whether these assessments are fair and reasonable.

This paper seeks to contribute to the growing body of scholarship in this area by examining several years worth of decisions made by one refugee adjudicator at Canada’s Immigration and Refugee Board. That adjudicator, David McBean, is infamous for having denied all applications for refugee protection he heard during the first three years of his tenure on the IRB, from 2008 to 2010. To explore why McBean denied all applications he heard, written reasons for all of his decisions during the period of the study were obtained from the IRB using an access to information request. These decisions were then reviewed to discern patterns in his reasoning. The central pattern identified is that McBean believed that the majority of claimants whose cases he heard were simply lying -- a finding he typically made based largely on what he identifies as “contradictions” in the claimants’ evidence.

The paper explores this pattern in McBean’s reasoning, with the aim of drawing lessons about credibility assessments in refugee determinations more broadly. While McBean is an outlier in terms of the frequency with which he denies refugee applications, his reasoning is nonetheless instructive because it tracks onto reasoning in many cases decided by other refugee adjudicators. As the paper attempts to demonstrate, this reasoning is deeply problematic.

Chris Albinati, Thompson Rivers University, “Aboriginal Blockades and the Rule of Law: Acknowledging the paradigm of struggle”

Aboriginal blockades are playing a resurging role in the conversation, and conflict, over how lands and natural resources should be used. From the highly visible fight against “fracking” in Mi’kmaq Territory (New Brunswick) to the anticipated confrontation against the Northern Gateway pipeline on Wet’suwet’en Territory (British Columbia), the act of physically occupying land is a tactic that creates economic uncertainty and costs governments and corporations millions of dollars. These actions present a seemingly incorrigible problem for democracy and the rule of law in Canada. As expressive acts they defy the boundary between legitimate dissent and unlawful behaviour. By animating the deeper issues of persistent disparity, they challenge the popularized constitutional notion of reconciliation. For the rule of law, most importantly, Aboriginal blockades draw sharp attention to the fundamental legal fictions upon which Canadian sovereignty is based.

Within the context of a hegemonic colonial state, I argue that Aboriginal peoples are not properly constituted within Canadian law and society. The absence of constitutionality significantly problematizes the legitimacy of litigation and negotiation as proper avenues for defining, and limiting, Aboriginal rights. In the absence of a properly constituted legal order, I argue that non-assimilative reconciliation (decolonization) is impossible and that the rule of law requires us to acknowledge the paradigm of struggle. Within a struggle, Aboriginal blockades and their underlying movements are not acts of civil disobedience or a form of identity politics; they are assertions of indigenous territorial authority by resurging indigenous institutions based on their own democratic and legal orders.

Jan Buterman, University of Alberta, “A Shabby Sort of Citizenship: Trans* Canadians and Passports”

Canada’s Constitution, through the Charter of Rights and Freedoms, affirms that Canadians have the right to vote and the right to “enter, remain in and leave Canada.” Exercising this latter right is dependent upon successfully obtaining a valid passport, something achieved by trans* people only with considerable effort, suggesting that the existence of trans* citizens is disruptive. The resulting citizenship is a shabby sort of citizenship that does not reflect the rights Canadian citizens supposedly hold. Grounded in Actor-Netwok Theory and hermeneutic phenomenology, I will use a series of heuristics developed for interviewing objects to interview a key form required for trans* passport applicants to acquire this documentary evidence of citizenship. How does this form trouble or disrupt narratives of Canadian citizenship? What hierarchies does the form evidence? Does the form affect only trans* Canadians? Does the form privilege some citizens over others, and if so, what does such privileging suggest about Canada’s constitution and statutes connected to notions of citizenship? What implications does this form hold, both locally and globally?
Amar Khoday, University of Manitoba, “Judging Mr. Big”

For years, Canadian police agencies have used a controversial investigative technique to procure confessions from individuals accused of committing serious crimes such as murder. They are called Mr. Big operations. Undercover police officers masquerade as members of criminal organizations seeking to recruit individuals they suspect of having committed such crimes. In exchange for membership and a host of perquisites, an accused must reveal incriminating information about the alleged crime. Undercover police officers use inducements and in some cases threats and aggressive questioning to elicit confessions. Such operations are typically successful. Crown prosecutors are normally successful in introducing these statements into evidence and have obtained guilty verdicts against the accused on the basis of these statements. Over the past decade, several documentary films have been produced on the phenomenon of Mr. Big operations. Most of these have been produced by the Canadian Broadcast Corporation. Unlike the more tolerant approach of the courts to Mr. Big operations (at least until very recently), these documentary films have been more critical about the potential abuses and dangers that can arise from such operations. While academics have written about such dangers as well, these documentary films will likely reach a broader audience and deserve special attention. Drawing from the work of Orit Kamir, I contend that these documentary films engage in two types of endeavours – “cinematic judgment” of Mr. Big operations and the creation of a “cinematic jurisprudence” surrounding such police activities. The paper shall look at how these films do so by examining amongst other things, the (choice of) cases they draw from, and other material they use as evidence to support their judgments about Mr. Big operations.

Ruba Ali Al-Hassani, York University, “The Virtual Civil Society and its Social Conceptualization of State Sovereignty”

Iraqi sovereignty, inclusive of an ethnically and religiously pluralistic society, needs to be located within a much larger and emerging legally sovereign Iraqi state, as recognized by the U.N.S.C. in 2004. Since this recognition, literature on Iraqi sovereignty has focused on the governing bodies, as opposed to the “governed peoples”, thus reducing the latter to either a passive entity largely neglected by warring politicians, or a number of violent parties engaged in sectarian conflict. This literature is based on a restrictive, governance-based construction of sovereignty founded on the “myth of artificiality”. This myth sets the basis for an overly restrictive conceptualization of sovereignty, purely centred on governance and narrow, political terms.

In contrast, social constructionism postulates that a universalized and restrictive definition of governance-based state sovereignty would gloss over the very practices that are vital to the identity construction of a society and a state. Combining social constructionism, discourse analysis and netnography, this study considers sovereignty a layered construct, with both administrative and imaginative components. The administrative component consists of legal, political and strategic dimensions. They are studied through an examination of the 2004 & 2006 Constitution, strategic agreements, and UNSC resolutions.

The second and “social” component is imaginative, consisting of lay understandings of imagined identity, power, and law, as expressed by a virtual civil society. Established over the Internet, the virtual civil society breaks barriers of time and space, and enjoys a type of unprecedented and unrestricted transparency. To understand it, a netnography examines how the online and offline worlds intersect, and evolve, into a productive “engine” of change beyond public discourse – whether social, political, or even legal in nature. It provides an alternative to studying each of the online and offline separately within strict legal and political terms. The performative function of the social conceptualization of sovereignty in terms of social reconciliation and state reconstruction is thus the centre point of this work.

Felipe Braga Albuquerque, Federal University of Ceará/Brazil, “A Critical Analysis of Trivialization of Electoral
Recently, especially over the last couple of decades, changes within the media - in particular within the digital media and social networks - have, on the one hand, given people an almost universal access to information, whilst on the other hand the political maneuverings which take place during election campaigns have been responsible for devaluing the fundamental principles and values of public accountability of this important political activity.

This analysis begins with the observation that the State must be constantly striving to legitimize its performance in promoting a dialogue which has, among others, ideological, educational, informational, political and religious functions, in order to evolve in response to the elasticity of social behavior.

When voters are bombarded with electoral propaganda, there is a flow of information, a priori, which not only provides information about the candidate but also provides a point of references for the people, the parties and journalists to monitor their actions, by this means specifies the rights and duties, and the proposals for the continuation, failure or development of state proceedings, transforming the spectator into an active participant within the political process.

However, in several countries political propaganda which supports the ideal of freedom of expression has been devalued within the public arena. In the name of freedom of expression of ideas, not of discrimination or pluralism, candidates use the political platform for constructing a theater in which not only legitimate issues of information and persuasion are aired, but also those which overstep the boundaries of public morality.

Electoral legislation in Brazil, for example, prohibits immorality in election campaigns. But there is a widespread failure by the political parties to comply with such legislation, so that it has become the norm to trivialize the public arena which was intended for the development of democratic ideals.

In order to build this analysis, information has been drawn from various sources, including books, articles and electronic databases. With particular reference to the Brazilian Legal System, this trivialization of election campaigns has been logically examined in order to establish whether or not it is in violation of the law.

Thus, this study aims to clarify:

(i) The intended purpose of political propaganda.
(ii) The capacity of the electors to make a choice within the election process.
(iii) Whether or not there is legal protection against the trivialization of election campaigning.
(iv) The concept of electioneering.
(v) A critical examination of various instances of the trivialization of electoral propaganda.

2404 – Navigating Issues of International Governance (Room: 309)

Garrett Lecoq, Carleton University, “(Unorthodox) Governance Must Be Defended: Inclusion and Legitimization of Law Through Exclusion”

Does law exclude the governance of individual subjects through disciplinary powers? The general assumption that law, in its exclusion of certain acts, is the only source of governance in society, raises concerns for socio-legal scholarship. Utilizing Ben Golder and Peter Fitzpatrick’s Foucauldian framework, I investigate law as a legitimizing factor for governance through disciplinary powers in postmodern societies. I argue that law, through only intervening against the most severe deviations on society’s extreme margins (such as murder), legitimates the governance of the disciplines throughout the core of society by disguising them as both common place and non-techniques of governance. In this
paper, I engage with the idea that law’s claim to a grand narrative truth about what is legal and what is not, is problematic in postmodernity as it provides a false basis to legitimate governance over recalcitrant subjects. These instances of legitimization are carried throughout capillaries of Foucauldian power relations into many different aspects of society and offer a critical interpretation of the law not just as an expelled tool of premodern exclusion, but also a postmodern tool of inclusion and legitimization through excluding certain acts from its jurisdiction. In deconstructing this area of the law, I suggest an unorthodox interpretation of law—a law which is not mechanical and restrictive, but one that is organic and reflexive. This interpretation proves fruitful for many avenues of socio-legal study including human rights, dialogue theory, and sexuality as alternative avenues to thinking about governance through law in postmodernity.

Erika Arban, University of Ottawa, “Reconsidering the neglected: non-national groups and the accommodation of their claims”

Sub-state nationalism scholarship, whose central focus is the study of sub-state national societies, defines a nation as people who enjoy the same culture, intended as a composition of ideas, signs, associations and ways of behaving and communication (Pinder 2007). Based on this view, all members of a nation share identical or similar linguistic, cultural or religious traits which distinguish them from the rest of the population with whom they share the territory of the state. Because they often conceive of themselves as distinct societies, nations also seek various forms of autonomy and self-government within the host state to ensure their survival (Pinder 2007). They may also aspire to constitutional accommodation through other mechanisms of recognition and representation at the central level (Tierney 2006).

Thanks to its innate elasticity and adaptability to contingent exigencies, federalism (but also other varieties of decentralized or asymmetrical arrangements) has been useful in coping with the internal tensions elicited by this complex reality. This is why a significant body of sub-national literature in the Western world is devoted to the study of multinational federations, with specific attention to Canada (with Quebec), Spain (with Catalonia and the Basque Country) and the United Kingdom (with Scotland).

However, such tensions are not a prerogative of multinational societies or federations only. In fact, in recent years, it has not been infrequent to learn about groups of people (who live in the same fraction of a given state, but who do not qualify as nations in the nuance indicated above) advancing claims for recognition that resemble those made by sub-state national societies. We will refer to these people as "non-national groups." Normally, these claims reveal deep socio-economic fractures which, if not appropriately addressed by central institutions, can lead to profound inequalities and disparities. But sub-state nationalism and federal theories only apply to precise situations, e.g. multinational societies or federations, and are therefore less useful in managing this type of pressures. Actually, scholarship has tended to neglect the cleavages surfaced in mono-national and non-federal (or centralized) states.

Positioned at the intersection of federalism and sub-state nationalism theories, this presentation aspires at investigating how law can accommodate the desires and ambitions of these non-national groups. The point of departure will be the socio-economic cleavages existing in Italy between the North and the South. First, we will illustrate why theories of sub-state nationalism cannot be applied to non-national groups. Next, we will determine whether, and to what extent the claims of these groups can be successfully addressed through mechanisms borrowed from federalism. In the conclusion, we will consider whether other constitutional or political tools could be used in addition to, or as an alternative of, asymmetric schemes. The ultimate objective is to demonstrate that the need to accommodate different realities exists also outside of the conventional dichotomy represented by multinational societies and federations.

Thomas Burelli, University of Ottawa, « La République Française et ses autochtones : Trajectoires juridiques des peuples autochtones dans l’outre-mer français » (French republic, indigenous peoples)

La France apparaît au niveau international comme un bon élève en matière de reconnaissance de droits aux communautés autochtones. En effet, de manière régulière elle participe aux débats et adopte les différents accords internationaux relatifs aux droits des autochtones. La France est ainsi signataire de la Convention sur la Diversité

Cette activité n’est pas surprenante de la part de l’État français dans la mesure où il abrite certaines catégories de citoyens susceptibles d’être qualifiées d’autochtones au regard des critères développés par la doctrine internationale. L’outre-mer français est en effet partie l’héritage de l’expansion coloniale française et si aujourd’hui l’État français ne reconnaît qu’un peuple, le peuple français, il existe dans son outre-mer des communautés dont la présence est, pour certaines, antérieure à l’arrivée des Européens et dont le caractère culturel distinctif a survécu au colonialisme.

Pour autant la reconnaissance et la protection en droit interne de ces communautés tranche avec l’apparente bienveillance internationale de la France. En effet, la reconnaissance des « autochtones de la République » n’est pas homogène et chaque communauté dispose en quelque sorte d’une reconnaissance et d’une protection à la carte.

Dans notre présentation, nous décrirons les différents modèles de reconnaissance des peuples autochtones développés par l’État français en Guyane, en Nouvelle-Calédonie et en Polynésie française. Nous analyserons alors les effets de ces modes de reconnaissance sur l’autonomie et la protection des droits des autochtones, notamment au regard du droit international. Nous pourrons alors conclure que l’attitude de la France ne reflète pas la volonté d’adopter les règles les plus adaptées dans chaque territoire, mais qu’au contraire, elle démontre l’absence d’un projet politique de reconnaissance à l’échelle de ces populations ultramarines.

2405 – Anishinaabe Nibi Innakonigewin (Anishinaabe Water Law) (Room : 308)

- Sherry Copenance, Ojibways of Onigaming
- Darlene Courchene, Sagkeeng First Nation
- Aimée Craft, Attorney, Public Interest Law Centre and Research Affiliate Centre for Human Rights Research, University of Manitoba Faculty of Law

From June 20 to 23, 2013, 11 Anishinaabe Elders from Manitoba and Northwestern Ontario assembled at The Rapids on the Roseau River Anishinabe First Nation reserve to conduct the first gathering aimed at better understanding Anishinaabe Nibi Innakonigewin (Anishinaabe Water Law).

I’m glad that the University of Manitoba is recognizing our voice and recognizing that something needs to be done for the water. I’ve often heard that science is going to ask the Anishinaabe for help. I think that’s happening now. This teaching lodge is the law of that traditional knowledge. (Dennis White Bird)

The research explores Anishinaabe nibi innakonigewin through a legal framework built on the foundations of inaakonigewin (law) centered around relationship and responsibilities, rather than ownership, individualism and rights.

Western law tells us what to do, not what is there. It doesn’t let us make up our own minds about what to do. Western law tells us exactly how to act; Anishinaabe law will not. Anishinaabe law acts as a guide and tells us what is. (Aimée Craft)

The panel members will share the Anishinaabe normative principles explored by the Elders in ceremony and through stories.
Evening of Saturday June 7 – Joint Gala Dinner – Fort Garry Hotel

6:30 - 7:00   Cocktails

7:00 – 8:30   Dinner (awards during dinner)


Sunday June 8 – Canadian Association of Law Teachers (CALT) Program

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