

# Protection of First Nations Cultural Heritage: Laws, Policy, and Reform

L U K E M C N A M A R A \*

ON sitting down to read this collection – an excellent addition to the consistently high-quality Law and Society Series published by UBC Press – I took the advice offered by Darlene Johnston in the book’s Preface.<sup>1</sup> I read the chapter “Concluding Thoughts and Fundamental Questions” by Michael Asch first, even though it is the last chapter in the collection, and, throughout, kept in mind the questions he posed: “What could be more reasonable than a desire to ensure that you are the custodian of your own cultural heritage? And what could be more unreasonable than holding another people’s cultural heritage, of ongoing significance to them, in your hands?”<sup>2</sup>

Unfortunately, as many of the contributions to this fine collection demonstrate, action based on the simple measure of what would be reasonable in the circumstances has often proved elusive, whether in relation to the repatriation and trade of indigenous cultural heritage (part 1 of the collection), the protection of heritage sites and ancestral remains (part 2), or the recognition of intangible heritage (part 3). Even as dominant non-indigenous legal-political systems in countries such as Canada and Australia have moved, albeit slowly, often grudgingly, and incompletely, towards greater respect for, and accommodation of, the *territorial* property rights of indigenous communities, demands for genuine recognition for *cultural* property rights continue to meet with resistance.

At first glance, it might be assumed that cultural claims would be less affronting to non-indigenous interests than territorial claims or claims to resources; however, in chapter 12, “Looking beyond the Law: Questions about Indigenous Peoples’ Tangible and Intangible Property”, Val Napoleon offers a contrary hypothesis. Having observed that attempts to explain the failure to

---

\* Professor Luke McNamara is Dean of the Faculty of Law at the University of Wollongong, Australia, and a proud University of Manitoba graduate (LLM, 1992).

<sup>1</sup> Darlene Johnston, “Preface: Towards Reconciliation” in Catherine Bell & Robert K. Paterson, eds., *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, vol. 2 (Vancouver: UBC Press, 2009) vii at x.

<sup>2</sup> Michael Asch, “Concluding Thoughts and Fundamental Questions” in Bell & Paterson, *ibid.* 394.

protect indigenous cultural heritage have often focused on the limitations of formal intellectual property law regimes for the protection of indigenous intellectual property and cultural heritage, Napoleon continues:

But look a little more closely. Just beneath the surface, another dynamic becomes discernable. It has to do with the consequences of locating indigenous peoples' tangible and intangible property under the umbrella of 'cultural'. It is by this process that indigenous peoples' property becomes disembodied from its political, social, economic, and legal moorings within their societies. Arguably, it is precisely this displacement of property from that which gives it meaning and coherence that hinders efforts to protect it. Does adding the label 'cultural' to property facilitate its commodification and cause its vulnerability?<sup>3</sup>

The suggestion is, and should be, troubling, particularly when the retention of traditional cultural knowledge remains such a critical front in the struggle of many indigenous communities in Canada and beyond to resist the ongoing impacts of colonisation. As Catherine Bell demonstrates in chapter 1, "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform", local repatriation disputes and negotiations offer an active opportunity for decolonisation if approached in the right way.<sup>4</sup> According to Bell, one of the key elements of a constructive statutory regime for repatriation is the "creation of an interculturally legitimate dispute resolution process".<sup>5</sup> Such a process is possible only if built on a genuine commitment to the empirical fact of legal pluralism: indigenous legal orders are a feature of the Canadian landscape. This reality is often not appreciated, as Bell notes:

When non-aboriginal people consider the existence of aboriginal legal orders, we are inevitably influenced by our understanding of what law is, regardless of our efforts to mitigate against this bias. The tendency may be to look for clearly articulated rules capable of judicial enforcement instead of operating within the social paradigm of the particular group asserting the claim.<sup>6</sup>

The chapters contained in parts 1, 2, and 3 offer keen insights into the inadequacy of the status quo in a variety of contexts, from the repatriation of cultural heritage held by museums to the protection of traditional knowledge and other intangible cultural heritage, and a range of compelling justifications for the need for reform.

The three chapters contained in part 4, "Human Rights and First Nations Law" provide an effective capstone. Drawing on the values embedded in

---

<sup>3</sup> Val Napoleon, "Looking Beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property" in Bell & Paterson, *ibid.* 370 at 371.

<sup>4</sup> Catherine Bell, "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform" in Bell & Paterson, *ibid.* 15.

<sup>5</sup> *Ibid.* at 56.

<sup>6</sup> *Ibid.* at 53.

international human rights law,<sup>7</sup> the historical treatment and continuing relevance of aboriginal customary law in Canada,<sup>8</sup> as well as the context of ‘the larger aboriginal political project’ and the concept of legal pluralism,<sup>9</sup> the combined effect of these contributions is a persuasive case for the sort of normative framework that should guide future policy formation, law reform and decision-making in relation to First Nations cultural heritage. Looking to the past, al Attar et al. note that “many instances of indigenous grievance with respect to the loss and dispossession of cultural property” can be accurately characterised as “instances in which a lack of respect for traditional mores and customary law expressed a lack of respect for the dignity of First Nations peoples and a denial of their rights as peoples.”<sup>10</sup> Looking to the future, Val Napoleon promotes three strategies for handling disputes over First Nations cultural heritage:

(1) re-embedding tangible and intangible property into the aboriginal group’s political project in a public way so that the property is advanced politically as owned, (2) conducting practical customary law research, and (3) developing legal pluralism models that would frame the relationships between aboriginal peoples and the state, and between aboriginal peoples. These are enormous and difficult undertakings, but they are no more difficult than negotiating Western intellectual property law.<sup>11</sup>

Bell and Patterson, and the fourteen other contributing authors are to be applauded, not simply for the quality of the scholarship that is contained in *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, but also for the manner of its production. This collection, and its companion volume, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*,<sup>12</sup> co-edited by Catherine Bell and Val Napoleon, and also published by UBC Press as part of the Law and Society Series, emerged out of a collaboration with First Nations partners from the Hul’qumi’num Treaty Group, the Ktunaxa Kinbasket Tribal Council, the Ganeda (Frog Clan) House of Luuxhon, the Gitanyow Hereditary Chiefs, the Mookakin Cultural Society (Kainai Nation), the Oldman River Cultural Centre (Piikani Nation), the ‘Namgis Nation and the U’mista Cultural Society.<sup>13</sup> It is entirely fitting, therefore, that the central theme to emerge from this collection is that, when it comes to the treatment of First

<sup>7</sup> Mohsen al Attar, Nicole Aylwin, and Rosemary J. Coombe, “Indigenous Cultural Heritage Rights in International Human Rights Law” in Bell & Paterson, *ibid.* 311.

<sup>8</sup> Norman Zlotkin, “From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada” in Bell & Paterson, *ibid.* 343.

<sup>9</sup> Napoleon, *supra* note 3.

<sup>10</sup> al Attar, Aylwin, and Coombe, *supra* note 7 at 336.

<sup>11</sup> Napoleon, *supra* note 3 at 386.

<sup>12</sup> Catherine Bell & Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, vol. 1 (Vancouver: UBC Press, 2008).

<sup>13</sup> “Acknowledgments” in Bell & Paterson, *supra* note 1 xiii.

Nations cultural heritage in the 21<sup>st</sup> century, “the honourable way forward is to respect, not denigrate, cultural differences”.<sup>14</sup>

---

<sup>14</sup> Asch, *supra* note 2 at 408.