

Compendium: Recent Graduate Student Dissertation and Thesis Abstracts

Anonymous

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Compendium

Citation Information

Anonymous. "Compendium: Recent Graduate Student Dissertation and Thesis Abstracts." *Osgoode Hall Law Journal* 42.4 (2004) : 701-718.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol42/iss4/13>

This Compendium is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

COMPENDIUM: RECENT GRADUATE STUDENT DISSERTATION AND THESIS ABSTRACTS

PH.D. DISSERTATIONS

Taxing the Income Generated by Prepayments for
Property or Services: A Legal and
Time Value of Money Analysis Joseph Vincent Frankovic

Land, Fish, and Law: The Legal Geography
of Indian Reserves and Native Fisheries in
British Columbia 1850-1927 Douglas C. Harris

The Unquiet Dead: Humanitarian Intervention,
the Fall of Srebrenica, and Political Will
as a Normative Linchpin Ausma Zehanat Khan

Wigmore and the Historical Aspects of
the Hearsay Rule Frederick W.J. Koch

Law and Social Meaning: Defining Rights and Wrongs
Through Administrative Processing Rosanna Lillian Langer

Legal Reasoning in the Supreme Court of Canada:
An Empirical Study Daved M. Muttart

An Exercise in Futility? A Critical Analysis of
Anti-Organized Crime Measures in the Russian
Federation Alexandra Valerievna Orlova

New-Liberalism, International Trade, and
the Role of Law in Regulating Exploitive
Labour Relations in the Columbian
Flower Industry Olga L. Constanza Sanmiguel-Valderrama

Human Rights and Migrant Domestic Work:
A Comparative Analysis of the Socio-Legal
Status of Filipina Migrant Domestic
Workers in Canada and Hong Kong . . Maria Deanna Pascual Sontos

Legitimacy and Regulation in the Global Economy:

Legal Mediation of Conflicts Between Communities and
Transnational Mining Companies David Szablowski

Ecoviolence and the Law (Supranational Normative

Foundations of Ecocrime) Laura S. Westra

D.JUR DISSERTATION

Paths to the Bench: Judicial Appointments in Manitoba,

1872-1950 Roland Dale Brawn

LL.M. THESES

Patent Rights vs. Patient Rights: Lessons from the

AIDS Drug Case Shanthi Balakrishnan

The Death of Merchantability and Particular Purpose—

a Review, Redefinition, and Reform of the
Implied Terms as to Quality in Sale of Goods Junbo Hao

Section 87 of the Indian Act: Purpose, Problems,

and Solutions Richard William Johnson

A Comparative Analysis of the UN and OAS Failures to Positively

Affect the Human Rights Situation in Peru Gerardo J. Munarriz

Sustainable Utilization of Mineral Resources in

Sub-Saharan Africa: A Comparative Appraisal of
the Mining Regime in Nigeria Ganiu Adeyemi Oke

Towards a Legal History of the Fur Trade: Looking

For Law at York Factory, 1714-1763 Janna Beth Promislow

**TAXING THE INCOME GENERATED BY PREPAYMENTS FOR
PROPERTY OR SERVICES: A LEGAL AND TIME VALUE OF
MONEY ANALYSIS**

BY JOSEPH VINCENT FRANKOVIC, PH.D.

The general theme of this dissertation might be best described as “taxation and the time value of money,” in that it utilizes time value of money principles for the purpose of measuring income and loss for income

positions of taxpayers engaging in prepayment transactions, and illustrates the effect of the deferral of the recognition of income or the acceleration of the deduction of loss in these transactions. The specific subject matter of this analysis is further sub-divided into the categories of conventional prepayments for property or services and prepaid reclamation obligations.

In regards to conventional prepayments for property or services, it is suggested that a “notional loan approach” should apply to the payer of a prepayment. Under this approach, the payer would include in its income imputed interest computed on the amount of prepayment, similar to the current treatment accorded to holders of original issue discount debt obligations. In contrast, under current law, payers are not subject to taxation in this manner and are generally under-taxed. With respect to recipients of prepayments, it is suggested that the treatment under current law—under which a recipient may defer the recognition of all or part of the prepayment to the time of performance—may be warranted as a second best measure of the recipient’s income position. In regards to prepaid reclamation obligations, it is suggested that a “reverse depreciation approach” should apply to taxpayers making these payments, at least to the extent that the reclamation costs reflect negative salvage value. Under this approach, taxpayers obliged to incur reclamation costs would be allowed to deduct their prepayments (the amounts invested currently to fund the payment of the costs) as they were made and to earn tax-exempt income thereon up to the time of reclamation. However, the reverse depreciation approach is not generally warranted for reclamation costs that reflect positive salvage value.

LAND, FISH, AND LAW: THE LEGAL GEOGRAPHY OF INDIAN RESERVES AND NATIVE FISHERIES IN BRITISH COLUMBIA 1850-1927

BY DOUGLAS C. HARRIS, PH.D.

This is a study of the connections between Indian reserves, Native fisheries, and Anglo-Canadian fisheries law in British Columbia from 1850-1927. This period covers the era of Indian reserve allotments when provincial and Dominion governments inscribed a reserve geography on the province that remains largely intact today. It also includes the emergence of an industrial commercial fishery, the introduction of Canadian fisheries law, and the growth of non-Native settlement on the Pacific coast, and it is this configuration that is the focus of this thesis.

Beginning with the first treaties signed on Vancouver Island in the 1850s, this study describes the development of a Native land policy premised upon the denial of Native title and characterized by small,

scattered reserves that were intended to secure village and resource procurement sites. It argues that the reserve geography of British Columbia, imposed upon Native peoples, cannot be understood without recognizing that reserve land was allotted primarily to secure access to the fisheries.

This thesis also describes the legal forms that descended on the Native fisheries, reallocating the resource to other users. It explains the impact of the common law public right to fish, the construction of an Indian food fishery, and the statutory regulation of the commercial fishery. The result was to construct the fishery as an open-access resource, denying Native ownership except to allow a restricted food fishery. The category of food fishing performed the same function as the reserves. It set aside a small portion of the resource, opening the rest to immigrants. In the commercial fishery, although their labour was initially important, the state imposed various laws and implement policies that worked to limit Native peoples opportunities to participate fully. The result was that Native peoples had insufficient access to the one resource from which they might have made built viable reserve-based economies.

The study concludes by suggesting that the process of reserve allotments provides one of the bases for renewed an enhanced Native participation in the fisheries.

THE UNQUIET DEAD: HUMANITARIAN INTERVENTION, THE FALL OF SREBRENICA, AND POLITICAL WILL AS A NORMATIVE LINCHPIN

BY AUSMA ZEHNAT KHAN, PH.D.

This dissertation examines the effect of the fall of Srebrenica on the normative status and customary legal status and customary legal status of humanitarian intervention. By analyzing the implications for the international protection of human rights and international humanitarian law in general, it assesses the impact that geopolitics, domestic considerations and political will have on normative or emerging principles of international law. The central question posed is whether a genuine doctrine of humanitarian intervention exists at international law, and if so, whether it is consistently upheld.

The findings of this thesis indicate a significant discrepancy between scholarly consensus on the normative status of humanitarian intervention and the actual record of state practice. Those who advocate the normative status of the doctrine argue that military intervention in defence of human rights is necessary, because the protection of human rights is an essential component of the international peace and security system. Further,

violation of state sovereignty in this respect is lawful because a fundamental component of state sovereignty is that states derive their legitimacy from popular consent and the protection of human rights. Where states fail to protect their populations, or act against them, traditional notions of sovereignty are trumped and humanitarian intervention becomes a legitimate and lawful response.

Yet, the findings of this thesis demonstrate that where intervention has occurred in the past, the human protection motive has been a pretext that covered reasons of state, or was absent altogether. In addition, there has been an overwhelming lack of intervention where human rights abuses have been at their worst, undercutting the doctrine.

The general practice of states is and has been since the seventeenth century to respect the sovereignty of states by not intervening when governments examine or persecute their own citizens. States prioritize national interest well ahead of any international legal obligations imposed by membership in the United Nations, human rights covenants or customary international law. Without a significant reconfiguring of geopolitical interests—one that conceives of human rights protection as a vital national interest in and of itself—it is unlikely that humanitarian intervention will achieve the status of normative international law.

The single most important factor in realizing the normative status of humanitarian intervention is the feasibility of mobilizing both domestic and international political will respond to human rights crises, such that there is consistent and efficacious implementation of the doctrine. It is precisely because of such events as the fall of Srebrenica that realization of the doctrine is critical: the danger of unwillingness to articulate and stand by conditions and circumstances that require states to intervene is that future Srebrenicas will occur undeterred and with impunity.

WIGMORE AND THE HISTORICAL ASPECTS OF THE HEARSAY RULE

BY FREDERICK W.J. KOCH, PH.D.

In 1904 Dean Wigmore advanced a new theory regarding the *raison d'être* for the hearsay rule which continues to exert a significant influence on English and Canadian hearsay reform. Based on his historical work, Wigmore said that the common law judges of the late seventeenth century developed a single rule excluding hearsay evidence. According to Wigmore, these judges began to exclude hearsay because of a perception that the juries used in common law trials tended to overvalue such evidence in the absence of cross-examination. This overvaluation occurred because these untrained and inexperienced jurors failed to fully appreciate the potential

sources of weakness in testimonial evidence when it was untested by cross-examination.

Although a handful of scholars have challenged certain aspects of Wigmore's historical claims about the rule, his theory regarding the rule's *raison d'être*, especially its linkage to the use of lay juries, continues to exert an important influence over the direction that modern reform of the rule is taking under English and Canadian law. Based on careful examination of historical sources before 1750, this dissertation argues that at different times during the period of 1589 to 1750 different types of hearsay began to be excluded pursuant to the gradual development of seven separate exclusionary rules of evidence. Some of these rules seemed to first emerge in the courts of equity where the triers of fact were professional judges, not lay jurors, thus undermining Wigmore's linkage of the rule of juries. These rules seemed to develop for one of two reasons: (1) the judicially perceived unreliability of certain types of hearsay evidence; and (2) the absence of information perceived as necessary for professional and lay triers of fact to make a proper assessment of the reliability of hearsay evidence. After 1750, these seven rules merged to form the modern hearsay rule.

The argument advanced in the dissertation raises concerns about whether the recent English and Canadian reforms are truly based on the founding principles for the rule. This in turn raises questions about rectitude of decision-making thereby making the argument of both academic and practical relevance.

LAW AND SOCIAL MEANING: DEFINING RIGHTS AND WRONGS THROUGH ADMINISTRATIVE PROCESSING

BY ROSANNA LILLIAN LANGER, PH.D.

Law and policy are implemented in the day-to-day practices of low level officials and intermediaries who function at the interface between social relations and legal meaning and who act as gatekeepers to legal systems. This socio-legal analysis of the complaints process under the *Ontario Human Rights Code* reveals interaction and contest among legal and cultural understandings, the selective inclusion and exclusion of cases through the application of administrative reasoning, and the influences of professional and interest group communities on the perceived legitimacy of the complaint process. It contributes to a small but growing law and society literature that uses multidisciplinary approaches to investigate legal legal regimes in their social contexts.

This dissertation addresses the problem of how legal meaning is derived from social facts. Assertions of rights violations by human rights complainants have multiple dimensions and meanings. Domestic human

rights legislation protects only some of these. The meaning of human rights violations is interpreted further through interactions with legal intermediaries and the application of administrative rules in a highly operationalised work environment. Through encounters among front line agency staff, human rights lawyers and advocates, and potential human rights complainants, meaning, validity and justiciability are explored, challenged, and circumscribed.

This dissertation examines and analyses the social and administrative processes whereby domestic human rights law is accessed, imposed, and interpreted as a means to resolve individual grievances. It explores the roles played by staff and professional intermediaries in shaping, representing, legalizing and excluding human rights violations. It documents how agency staff struggle to reconcile a huge body of claims within expansive standards and restrictive rules. Concurrently, independent human rights lawyers and advocacy organizations challenge the agency to be responsive to a reform agenda that would constitute a radical structural change in provincial human rights administration. The core of this inquiry is how participants' expectations intersect with legal practices and administrative processes to transform experiences into cases. Interview data are examined for the images of social/legal relations they contain, and contextualized through reference to the history of human rights administration in Ontario, and analysis of Canadian case law and Ontario Human Rights Commission administrative policies. Additional contexts that emerged from the research include the professional aspirations of independent advocates and the contested nature of the public interest in the human rights policy consultation and development process. The dissertation concludes that tensions remain between rights enforcement ideals and operational imperatives, between the general (public interest) and the particular (individual complainants), and between perpetuation and change.

LEGAL REASONING IN THE SUPREME COURT OF CANADA: AN EMPIRICAL STUDY

BY DAVED M. MUTTART, PH.D.

Jurisprudence has been notoriously feeble in supporting its philosophical analysis with empirical research. This dissertation makes an initial effort to remedy this deficiency in regard to courts' use of legal reasoning. Systematic sampling of the reasons for judgment rendered by the Supreme Court of Canada provided the basis on which to test several theories of legal reasoning and to document trends in the jurisprudence of the Court.

The Court's jurisprudence is trending towards more expansive and transparent modes of legal reasoning. Part of this trend is a rise in the rate of the overruling of precedents by the Court. While some overruling is necessary to bring the law into line with changing social circumstances, it may be necessary to control this rising rate in order to avoid unnecessarily increasing uncertainty in the law or impairing the efficacy of the legal process. Another strand of this expansive trend involves an increase in constitutional review and other activist tendencies. Under certain circumstances, this increase could disturb Canada's constitutional framework or imperil the Court's legitimacy.

Autonomous legal reasoning may provide one way of constraining and, where appropriate, legitimizing changes to the law and other activism by the Court. Failure to nurture and abide by objective legal reasoning will have the opposite effect. While Hartian positivism continues to be the predominant paradigm with respect to adjudication in Canada, the data indicate robust and persistent trends towards the utilization of principle and non-foundational reasoning by the Supreme Court of Canada.

AN EXERCISE IN FUTILITY? A CRITICAL ANALYSIS OF ANTI-ORGANIZED CRIME MEASURES IN THE RUSSIAN FEDERATION

BY ALEXANDRA VALERIEVNA ORLOVA, PH.D.

This dissertation examines legislative measures undertaken by the Russian government directed against organized crime. It specifically examines governmental measures pursued in two areas reputed to be dominated by organized criminal entities—human trafficking and money laundering.

Chapter I examines the difficulties for effectively dealing with organized criminal entities arising from the lack of a comprehensive definition of “organized crime” and the manipulation of those definitions that do exist. It discusses popular perceptions of “organized crime,” the use—and abuse—of this term by various individual and institutional entities within Russia, as well as certain misconceptions associated with attempts to provide an all-encompassing definition of this phenomenon.

Chapter II examines the effectiveness of the anti-human trafficking measures adopted by the Russian government. It concentrates on the economic, political, and sociological reasons for the increase in this activity in Russia, and examines the individuals and organizations involved in trafficking as well as the methods they use to control the victims of trafficking. It further critically assesses the current state of the law regarding human trafficking.

Chapter III discusses the developments leading to the passage of the anti-money laundering legislation in the Russian Federation and analyzes the effectiveness of current anti-money laundering legislation as a tool for combating organized crime. It critically examines the current international anti-money laundering standards, paying particular attention to the merging of the anti-organized crime and anti-terrorism financing regimes. The Chapter further discusses the implementation of the international anti-money laundering standards in Russia and assesses the effectiveness of such standards in reducing the proliferation of organized criminal entities.

Finally, the dissertation draws some general conclusions regarding the problem of defining organized crime in the twenty-first century, and examines some of the reasons as to why Russia's anti-organized crime measures have thus far failed to curb the spread of organized criminal activities. It then highlights some of the global aspects of the phenomenon that make control of organized crime a challenge for all governments, not just that of the Russian Federation.

NEO-LIBERALISM, INTERNATIONAL TRADE, AND THE ROLE OF LAW IN REGULATING EXPLOITATIVE LABOUR RELATIONS IN THE COLOMBIAN FLOWER INDUSTRY

BY OLGA L. CONSTANZA SANMIGUEL-VALDERRAMA, PH.D.

This dissertation examines the contradictions between the promotion of international trade on the one hand and respect for individual and collective human rights—in particular labour, environmental, and equality rights of women and racialized minorities—on the other hand. The contradictions are examined through a case study where both trade and human rights laws are in open operation: the Colombian Flower Industry (CFI). The research found that the CFI's success as an export industry is based on elite control of land and the state apparatus, which allowed it to secure favourable legislation: neo-liberal inspired trade legal regimes (favorable rules for foreign investment and protection of intellectual property rights), deregulation of the labour market (lowering labour standards and wages), frequent currency devaluations, and preferential tariffs with the United States and the European Union.

On the basis of extensive field work, the dissertation documents how the flower industry's success was gained at the expense of continuous bypassing of constitutionally recognized human rights. CFI working conditions are precarious and over-exploitative: they are underpaid, unstable, unhealthy, and do not accommodate women's roles in the private sphere. Additionally, both new legal statutes that lower previous labour

standards and weakened enforcement of existing standards, aimed to increase the profitability of exports, affect not only the racialized workers of the CFI (women in particular) but also have negative impacts on the entire Columbian labour market. Moreover, since the industry utilizes toxic chemicals and high volumes of water, it has harmed environmental integrity in the regions where it operates.

Furthermore, a closer examination of the geo-political underpinnings that underlie the access of flowers and other non-traditional exports from Columbia to its main market, the United States, points directly to a correlation between market access and the diminished capacity of Columbians to conduct their own internal affairs (for example, the war on illegal drugs), to uphold the political and legal strategies that were designed to resolve its endemic civil war according to the country's Constitution, and protect human rights, in particular those of marginalized and vulnerable communities. The conditionalities for obtaining preferential tariff have exacerbated pre-existing violent social and political conflicts.

HUMAN RIGHTS AND MIGRANT DOMESTIC WORK: A COMPARATIVE ANALYSIS OF THE SOCIO-LEGAL STATUS OF FILIPINA MIGRANT DOMESTIC WORKERS IN CANADA AND HONG KONG

BY MARIA DEANNA PASCUAL SONTOS, PH. D

On a general level, this research project concerns ways in which the domestic and international laws relating to the situation of migrant domestic workers (MDWs) are shaped by broader socio-political and economic factors. More specifically, this dissertation examines the human rights situation of Filipina MDWs who participate in Canada's Live-in Caregiver Program (LCP). It attempts to meet these objectives, in part, by undertaking a limited comparison of these Filipina MDWs and the Filipina MDWs in Hong Kong. The comparison is meant to further test and validate the arguments and proposals presented in this dissertation regarding the socio-legal status of Filipina MDWs under Canada's LCP. This was done through an analysis of existing data on Filipina MDWs, and a consideration of the ways in which the relevant laws and policies in these two jurisdictions affect, create and/or perpetrate the status quo in this area of social life.

The main explanatory theoretical framework that is deployed is the Third World Approaches to International Law or the TWAIL theory. Among the findings of this research is that the ill-treatment of Filipina MDWs in Canada and Hong Kong is sanctioned by migrant domestic worker policies designed to fill the need for cheaper alternatives to state-sponsored childcare and home support services. The ill-treatment does not necessarily

consist solely of physical or psychological abuse, but is also manifested in the systemic exploitation of MDWs from poor, third world countries. This systemic exploitation of MDWs from poor, third world countries such as the Philippines to richer countries of employment, is best explained by a colonial type of extractive relations, the various implications of which are most effectively analyzed using the TWAIL framework.

Thus, the most appropriate remedies to ameliorate the current situation are those which take into careful consideration this extractive relationship and which are geared towards ensuring a more equitable international socio-economic and political scenario among countries of origin and countries of employment in particular and throughout the whole world in general.

LEGITIMACY AND REGULATION IN THE GLOBAL ECONOMY: LEGAL MEDIATION OF CONFLICTS BETWEEN COMMUNITIES AND TRANSNATIONAL MINING COMPANIES

BY DAVID SZABLOWSKI, PH.D.

The globalization of mining investment since the early 1990s has been accompanied by new and volatile conflicts between communities and transnational mining enterprises. Constrained by changes in the global political economy, many states in the Global South are either unwilling or unable to mediate these conflicts effectively. Instead, transnational legal initiatives have been proliferating which purport to address the problem.

This dissertation attempts to understand and map out, with regard to a particular policy arena, the restructuring of legal authority occurring as a result of globalizing economic, social, and political processes. It investigates the dynamic interrelation of law's regulation and legitimation functions and inquires into the meaning of democratic legitimacy in an era of globalization. The study is presented in two parts. First, the dissertation examines the global policy arena dealing with mining and community conflicts and outlines the vigorous struggles emerging from this arena over the shape of appropriate legal processes. Second, it presents a detailed case study concerning the negotiation of relations between a transnational mining enterprise and local community actors in the Andes of Peru.

Both parts of the dissertation highlight the importance of an influential transnational legal regime developed by the World Bank to mediate the social impacts of projects that it assists. Focusing on a key element of this regime—the regulation of “Involuntary Resettlement”—I analyze its regulatory and legitimation strategies through and assessment of their operation in the case study. These strategies sacrifice meaningful local participation in decision-making for expert-controlled processes.

However the case study suggests that the capacity of experts working for mining companies to influence business practice depends upon prevailing business pressures.

Furthermore, regimes in the World Bank model ignore important informal processes that take place between company representatives and community actors. In the case study, local actors and company representatives developed a local legal order that proposed to govern future relations. The case study experience suggests a more productive regulatory model: one in which national and transnational legal regimes aim to facilitate local ordering by fostering the conditions necessary for effective local participation in deliberative decision-making.

ECOVIOLENCE AND THE LAW (SUPRANATIONAL NORMATIVE FOUNDATIONS OF ECOCRIME)

BY LAURA S. WESTRA, PH.D.

After working for about ten years on environmental ethics, particularly on the meaning and the implications of ecological and biological integrity, I became convinced that its converse, ecological disintegrity should be viewed as an attack on life, a form of violence to natural systems' structure and function, hence, to all living things at the macro level, and an assault on human life, and on the natural function of human organisms at the micro level. Ongoing interaction with scientists, ecologists, biologists and epidemiologists informed my conclusions, eventually confirmed by a document produced by the WHO/ECEH Rome Office (Soskolne and Bertollini, 1999). This document, entitled "Ecological Integrity and Sustainable Development: cornerstones of Public Health," brought into focus the work of several years of research and numerous publications, making explicit the connection between disintegrity including various forms of pollution, and its causes, such as hazardous industrial practices, and in general, the results of overconsumption and of the elimination of natural systems. It also emphasized the resulting fatalities, human morbidity, and the alteration, often irreversible, of natural human functions. In so doing, it was foundational for the argument I propose in this work: breaches of environmental regulations, whether domestic or international, are ultimately to be viewed as breaches of human rights law.

Assaults upon humans, whether perpetrated with bare hands or with other instruments of violence, are crimes. If the deprivation of necessary ecological integrity, either by encroachment and manipulation of the wild, or iniquation and pollution of inhabited areas is a present and constant threat to human health and function, ultimately to human life, then that *too* is an assault, therefore a crime that must be viewed, treated,

and punished accordingly. The fact that in present day legal infrastructure it is not so treated represents an additional moral “crime” in itself.

PATHS TO THE BENCH: JUDICIAL APPOINTMENTS IN MANITOBA, 1872-1950

BY ROLAND DALE BRAWN, D.JUR

This thesis is an analysis of the political nature of Canada’s judicial appointment process. In examining how Manitoba lawyers became judges between 1872 and 1950 it advances two principle arguments. One is that the practice of law inculcated in practitioners role expectations, beliefs and attitudes such that from their first days as students through their years at the bar future judges learned to act in acceptable ways. Judicial appointments marked the end of a professional apprenticeship during which candidates for the bench were similarly socialized through common memberships and expectations that each would participate in the affairs of his community. The study concludes that the process of socialization inherent in the practice of law explains the homogeneity of judicial benches generally, and that of Manitoba specifically.

The second argument advanced is that ability alone rarely determined who went to the bench. Just as important were stature, involvement in politics, and a close relationship with an influential mentor. The data suggest the particular path taken depended on a number of factors . Lawyers lacking social status or the assistance of others were required to prove their worth at the bar. Those without professional credentials, on the other hand, went to the bench only if they became well known through participation in civic organizations, politics, or cultural endeavours. The study concludes that although all lawyers divided their time between non-professional and professional activities, having a mentor rather than ability was the best guarantee of a judicial appointment. It also determined that many of Manitoba’s early lawyers spent little time actually practicing law but this had a negligible impact on whether they became a judge, since professional merit was not a criterion for judicial appointments.

The study is also a history of legal profession in Manitoba. Of significance is that it identifies that point in time when a profession dominated by easterners evolved into one led by an indigenous elite, and it concludes that one of the reasons members of the new order established a law school was to socialize their replacements.

PATENT RIGHTS VS. PATIENT RIGHTS: LESSONS FROM THE AIDS DRUG CASE

BY SHANTHI BALAKRISHNAN, LL.M.

Patents and other statutory types of market protections are used to promote scientific research and innovation. The incentive is especially important in research-intensive fields such as pharmaceutical industry. Unfortunately, these same protections often result in higher monopoly pricing once a successful product is brought to market. Usually this consequence is viewed as the necessary evil of an incentive system that encourages costly research and development by promising large rewards to the successful inventor. However, in the case of the HIV/AIDS drugs, the high prices charged by the pharmaceutical companies owning patents on these drugs have led to public outcry and a re-examination of the government incentive systems.

Diseases like HIV/AIDS that are under control in the developed world cause millions of premature deaths in the developing world. The reasons are various, but limited access to life-saving drugs that are widely available in rich countries is an important one. Affordability is one of the factors restricting access, and patent protection is a key factor influencing the affordability of new drugs. This thesis analysis makes particularly alarming the marked strengthening of patent protection in poor countries that will result from implementation of the TRIPS agreement. TRIPS does allow for exceptions in theory, but the safeguard provisions are proving very difficult to operate in practice in the face of legal and other pressures from powerful companies and their governments. While the industry has been yielding to criticism in the last couple of years, the steps taken by the industry so far to provide cheaper life-saving drugs to the people in need remain inadequate in relation to the scale of the crisis in the developing world. The question of AIDS treatment leads to a wider reflection on the balance between public and private interests, between patent rights and the rights of patients, into which this thesis is focused on.

THE DEATH OF MERCHANTABILITY AND PARTICULAR PURPOSE—A REVIEW, REDEFINITION, AND REFORM OF THE IMPLIED TERMS AS TO QUALITY IN SALE OF GOODS

BY JUNBO HAO, LL.M.

This thesis discusses the implied terms as to quality of goods from a historical perspective as well as a standpoint of law and economics. It reviews the origins and developments of the common law in this area and tentatively propounds a more concise, and efficient definition of the

implied terms, which might revolutionarily improve the efficiency of law in this field.

Furthermore, this thesis discusses the economic significance of the implied terms: as a default rule set by law, the implied terms play an important role in information disclosing and saving the total transaction cost of the parties in a contract of sale.

Although the common law conventionally insists that only commercial sellers be required to undertake the responsibility of the implied terms of quality, this thesis contends that private sellers should also be liable for the implied duty as to quality.

SECTION 87 OF THE INDIAN ACT: PURPOSE, PROBLEMS, AND SOLUTIONS

BY RICHARD WILLIAM JOHNSON, LL.M.

The *Indian Act* provides an exemption from taxation to Indians or bands in respect of their real and personal property that is situated on a reserve. The Supreme Court of Canada has declared that the purpose of this tax exemption is to protect Indians from losing their property through the imposition of taxes. This thesis examines the protection rationale behind the tax exemption and argues that the Crown's fiduciary obligation underlies this policy of protection. This means the Crown would be in breach of its fiduciary obligation if it did not provide a tax exemption that exempts Indians from all forms of Canadian taxation in respect of Indian lands and personal property on such lands. Against this background, the interpretation and application of the exemption is examined in order to determine where there are inconsistencies between how the exemption applies in practice and how it ought to apply based on theory.

The main problems in practice are interpretative, as courts are interpreting the exemption narrowly in an effort to prevent perceived abuses. The argument is made that the "connecting factors" analysis that is used to determine whether or not property, including income, is located on a reserve is too ambiguous to be workable approach in the context of taxation. Another main problem is that courts are limiting the exemption by applying the connecting factors analysis in a way that considers whether the property in question is in the commercial mainstream as opposed to integral to reserve life. Some possible solutions to these problems are identified, including the argument that there is an aboriginal right to an exemption from taxation that is constitutionally protected by s. 35(1) of the *Constitution Act, 1982*.

A COMPARATIVE ANALYSIS OF THE UN AND OAS FAILURES TO POSITIVELY AFFECT THE HUMAN RIGHTS SITUATION IN PERU

BY GERARDO J. MUNARRIZ, LL.M.

This thesis examines the effectiveness of the supervisory mechanisms of the United Nations (UN) and the Organization of American States human rights systems in dealing with Peru's widespread and systemic violations of human rights that took place during the 1980s and 1990s. Specifically, it argues that despite the abundant evidence implicating Peruvian state agents in patterned violations, the international community failed to respond to the gravity of the situation. Particularly, the UN human rights treaty-based system and the Inter-American human rights system failed to monitor effectively the implementation and compliance by the Peruvian government of its international and regional human rights obligations. Two main factors contributed to the failure of the international community to respond to the human rights tragedy in Peru: first, the socio-economic status and ethnic identity of the majority of the victims, who were mainly poor and powerless Andean Quechua-speaking indigenous people, considered as second or third-class citizens within Peruvian society; and second, the image (*vener*) of a peruvian democracy engaged in a struggle against "terrorism," which to an important extent, shielded itself in a cloak of "democratic" legitimacy.

SUSTAINABLE UTILIZATION OF MINERAL RESOURCES IN SUB-SAHARAN AFRICA: A COMPARATIVE APPRAISAL OF THE MINING REGIME IN NIGERIA

BY GANIU ADEYEMI OKE, LL.M.

The nature of resources management in Nigeria is such that the natural wealth which fueled development elsewhere would most likely have little effects on the peasants of the resource-rich communities producing the wealth. In Nigeria's extractive sector, the design and implementation of laws and policies as well as actual regulation of the sector is determined by the needs of the ruling elites and their capitalist allies. The current regime of solid minerals regulations in Nigeria is a child of necessity and primarily aims at reversing the existing lopsided, unsustainable trends in natural resources utilization. Attempts are purportedly made under the regime at dousing tension in the oil (resources) sector by diversifying the economic base of the country, focusing on the hitherto moribund mineral sector towards eradication of poverty and socio-economic growth and development of Nigeria. To underscore its commitment to the development

of its solid minerals, the then Federal (Military) Government of Nigeria promulgated the *Minerals and Mining Act* in 1999 as a decree of the military government. The prime target of the law is achieving environmentally friendly and socially sustainable exploitation of mineral resources of the country.

This thesis generally attempts a comparative and critical appraisal of the relevant provisions of the *Act* to ascertain the extent to which it could make the minerals sector both economically viable and environmentally sustainable in Nigeria. For this research objective, the thesis adopts a comparative approach to critical evaluation of the country's solid minerals regime using South Africa and Ghana's minerals regimes as case studies.

While comparative studies of the two countries amplify the shortcomings in the Nigerian mining regime, the thesis also makes specific discoveries on inadequacies of the *Act* on crucial mining sustainability imperatives. Sequel to persistent inability of the country to effectively or equitably utilize its natural resources, the thesis also attempts to unravel the contextual underpinnings of solid minerals utilization in Nigeria. The combined effects of peculiarities of the Nigerian polity, structural and institutional lopsidedness as well as interplay of social, economic and political forces among other externalizations are also identified as intrinsic to sustainable utilization of mineral resources in Nigeria.

Upon its findings, the thesis concludes that the negative and seemingly unsustainable political economy of resources utilization of the country needs to be urgently reversed. Given the multifaceted nature of the issues involved in mining sustainability in the country, this research also recommends that a stable polity, refined institutions as well as amendment of the *Act* to remedy identified shortfalls are better and more realistic ways of sustaining the solid minerals sector of Nigeria.

However, the thesis recognizes that though practical limitations might not be totally overruled in some of its recommendations, the enactment of the mining *Act simpliciter* does not make the mining sector of the country sustainable. Achieving "*environmentally friendly, socially responsible and sustainable minerals exploitation capable of tension reduction, poverty alleviation and/or economic diversification*" in Nigeria must take into consideration the overarching issues involved as illustrated in the arguments severally canvassed in this thesis. The view of the thesis is that only a regime of utilization of solid mineral resources in which exploitation of resources takes into consideration the social, political, religious, traditional, spiritual, cultural and other realities of the local people in the mining communities, and leaves substantial benefits whether financial or otherwise in exchange for actual or anticipated deprivation of natural endowments in the mineral-rich communities would be suitable for Nigeria.

TOWARDS A LEGAL HISTORY OF THE FUR TRADE: LOOKING FOR LAW AT YORK FACTORY, 1714-1763

BY JANNA BETH PROMISLOW, LL.M.

This thesis lays the groundwork for writing a legal history of the fur trade. It begins by presenting an argument that the legal history of the fur trade, and the legal histories of Aboriginal peoples more generally, should be considered part of Canadian legal history. This argument follows in the footsteps of Aboriginal rights theorists, legal historians and fur trade historians who have uncovered the agency of Aboriginal peoples in Canadian constitutional history and Canadian history more generally.

Chapter two tackles the theoretical and methodological issues that are involved in writing a legal history of the fur trade. Specifically, the challenges presented by positivist conceptions of law, the limitations of outsider perspectives in comparative studies of law and culture, and the limitations of outsider perspectives in comparative studies of law and culture, and the limitations of a historical record written exclusively by European traders are addressed. Drawing on insights from legal theory, comparative law, legal pluralism, legal anthropology, and ethnohistory, this chapter ends with the construction of a conceptual and methodological framework through which the legal history of the fur trade can be explored.

Using the framework developed in chapter two, chapters three and four present a case study of fur trade legal normativity in the eighteenth century. Focussing on exchange between Cree and Hudson's Bay Company traders at York Factory between 1714 and 1763, chapter three argues that two distinct patterns developed with respect to exchange with "Trading Indians" and "Home Indians." Chapter four applies the methodology developed in chapter two to identify legal normativity in these patterns. This analysis centres on the idiom of pity, the sense of obligation amongst Cree and English traders created through this idiom and the relationship of this idiom to principles of both charity and generosity. Together, chapters three and four constitute a preliminary sketch of fur trade legal history. The thesis concludes with a summary of the findings and reflections on the directions provided by this thesis towards a legal history of the fur trade.