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"The Earth is Our Mother": Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada

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Article abstract

For centuries, the Canadian state engaged in systematic religious persecution of Indigenous peoples through legal prohibitions, coercive residential schooling, and the dispossession and destruction of sacred sites. Though the Canadian government has abandoned the criminalization of Indigenous religious practices and is beginning to come to grips with the devastating legacy of residential schools, it continues to permit the destruction and desecration of Indigenous sacred sites. Sacred sites play a crucial role in most Indigenous cosmologies and communities; they are as necessary to Indigenous religions as human-made places of worship are to other religious traditions. The ongoing case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* represents the first opportunity for the Supreme Court of Canada to consider whether the destruction of an Indigenous sacred site constitutes a violation of freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms*. Building on the ground-breaking work of John Borrows and Sarah Morales, we will argue that Indigenous spiritual traditions have a home in this provision and merit a level of protection equal to that enjoyed by other faith groups in Canada. In general, subsection 2(a) will be infringed by non-trivial state (or state-sponsored) interference with an Indigenous sacred site. Moreover, the approval of commercial or industrial development on an Indigenous sacred site without consent and compensation will generally be unjustifiable under section 1 of the *Charter*. Recognition of these principles would signal respect for the equal religious citizenship of Indigenous Canadians.

"THE EARTH IS OUR MOTHER": FREEDOM OF RELIGION AND THE PRESERVATION OF INDIGENOUS SACRED SITES IN CANADA

*Natasha Bakht and Lynda Collins**

For centuries, the Canadian state engaged in systematic religious persecution of Indigenous peoples through legal prohibitions, coercive residential schooling, and the dispossession and destruction of sacred sites. Though the Canadian government has abandoned the criminalization of Indigenous religious practices and is beginning to come to grips with the devastating legacy of residential schools, it continues to permit the destruction and desecration of Indigenous sacred sites. Sacred sites play a crucial role in most Indigenous cosmologies and communities; they are as necessary to Indigenous religions as human-made places of worship are to other religious traditions. The ongoing case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* represents the first opportunity for the Supreme Court of Canada to consider whether the destruction of an Indigenous sacred site constitutes a violation of freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms*. Building on the ground-breaking work of John Borrows and Sarah Morales, we will argue that Indigenous spiritual traditions have a home in this provision and merit a level of protection equal to that enjoyed by other faith groups in Canada. In general, subsection 2(a) will be infringed by non-trivial state (or state-sponsored) interference with an Indigenous sacred site. Moreover, the approval of commercial or industrial development on an Indigenous sacred site without consent and compensation will generally be unjustifiable under section 1 of the *Charter*. Recognition of these principles would signal respect for the equal religious citizenship of Indigenous Canadians.

Pendant des siècles, l'État canadien a systématiquement participé à la persécution religieuse des peuples autochtones à travers la mise en place d'interdictions juridiques, de pensionnats indiens coercitifs et par la dépossession et la destruction de leurs sites sacrés. Bien que le gouvernement canadien ait abandonné la criminalisation des pratiques religieuses autochtones et qu'il se soit décidé à faire face à l'héritage dévastateur des pensionnats indiens, il continue de permettre la destruction et la profanation des sites autochtones sacrés. Ces lieux sacrés jouent un rôle crucial dans la plupart des cosmologies et communautés autochtones; pour les religions autochtones, ils sont aussi nécessaires que les lieux de culte bâtis par les individus d'autres traditions religieuses. L'affaire en cours *Nation Ktunaxa c. Colombie-Britannique* représente la première occasion pour la Cour Suprême du Canada de se prononcer quant à savoir si la destruction d'un site autochtone sacré constitue une violation de la liberté de religion reconnue par l'article 2(a) de la *Charte canadienne des droits et libertés*. En nous appuyant sur travaux innovateurs de John Borrows et Sarah Morales, nous argumenterons que les traditions spirituelles autochtones sont protégées par une telle disposition et qu'elles méritent un niveau de protection égal à celui conféré aux autres groupes religieux du Canada. En général, l'entrave non négligable de lieux de culte autochtones par l'État (ou par les programmes subventionnés par l'État) constituent une violation de l'article 2(a). De plus, l'approbation sans consentement ni compensation de développements commerciaux et industriels sur des sites sacrés autochtones ne pourra être justifié en vertu de l'article 1. La reconnaissance de ces principes signalerait le respect de la citoyenneté religieuse égale des peuples autochtones au Canada.

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> Tribal territory is important because the Earth is our Mother (and this is not a metaphor: it is real).[1]

Introduction

In Canada, as elsewhere, Indigenous[2] peoples enjoy a unique relationship with their traditional lands and resources. Indeed, this unique relationship with traditional territory has been viewed as a hallmark of Indigeneity around the globe.[3] Despite the enormous diversity among Indigenous societies, one aspect of Indigenous cosmology that appears to transcend cultural and geographic boundaries is the veneration of certain natural areas as sacred sites.[4] This phenomenon gives rise to a unique spiritual vulnerability to "existential harm" resulting from the destruction of sacred sites that form part of the spiritual, psychological and social foundations of many Indigenous individuals and communities.[5]

Historically, this has been a difficult concept for non-Indigenous decision makers to grasp:

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1 Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 78 [footnote omitted].

2 We will use the term "Aboriginal" interchangeably with the term "Indigenous," which is more commonly used in the international literature. In the Canadian context, we understand both terms to include the First Nations, Métis, and Inuit peoples (see Bradford W Morse, "Aboriginal and Treaty Rights in Canada" (2005) 27 SCLR (2d) 499 at 577–81; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(2) [*Constitution Act, 1982*]).

3 See Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals and Recommendations*, vol 5, UN Doc E/CN.4/Sub.2/1986/7/Add.4, 1987 at paras 196–98. See also Benjamin J Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 337 at 340–51.

4 See e.g. Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in the Management of Public Lands and Resources* (Madison: University of Wisconsin Press, 2002) at 28–46; Bas Verschuuren et al, eds, *Sacred Natural Sites: Conserving Nature and Culture* (London: Earthscan, 2010); Anna-Kaisa Salmi, Tiina Äikäs & Sanna Lipkin, "Animating Rituals at Sámi Sacred Sites in Northern Finland" (2011) 11:2 J Social Archaeology 212; Piergiorgio Di Giminiani, "The Contested *Rewe*: Sacred Sites, Misunderstandings, and Ontological Pluralism in Mapuche Land Negotiations" (2013) 19:3 J Royal Anthropological Institute (NS) 527; Kristian Metcalfe, Richard Ffrench-Constant & Ian Gordon, "Sacred Sites as Hotspots for Biodiversity: The Three Sisters Cave Complex in Coastal Kenya" (2009) 44:1 Oryx 118.

5 Bryan Neihart, "*Awas Tingni v. Nicaragua* Reconsidered: Grounding Indigenous Peoples' Land Rights in Religious Freedom" (2013) 42:1 Denv J Intl L & Pol'y 77 at 99.

> Whereas some faiths worship the divine in a building, [I]ndigenous peoples often worship the land as divine.[6]
>
> While it appears that courts comprehend the significance of church buildings, sacrifice, and prayer, they often fail to grasp the sacredness of land for [I]ndigenous peoples.[7]

This lack of understanding has too often led the legislative, administrative, and judicial branches of the Canadian state to fail to protect Indigenous spiritual rights in land.[8] However, the Supreme Court of Canada's decision to grant leave to appeal in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*[9] (*Ktunaxa Nation*) may signal a course change in this regard. In *Ktunaxa Nation,* the Aboriginal claimants challenge a government approval for the development of a massive ski resort on land considered sacred in their spiritual tradition. *Ktunaxa Nation* represents the first opportunity for the Supreme Court of Canada to consider whether the destruction of an Indigenous sacred site constitutes a violation of freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms*[10] (*Charter*).

The appellants in *Ktunaxa Nation* also assert violations of Aboriginal rights under section 35,[11] but we will confine our analysis to the *Charter* claim. A substantial body of literature[12] and jurisprudence[13] exists debat-

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6 *Ibid* at 92.

7 *Ibid* at 98.

8 See e.g. Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005) at 153–70; Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred" (2014) 64:1 UTLJ 64.

9 2015 BCCA 352, 387 DLR (4th) 10 [*Ktunaxa Nation* CA], aff'g 2014 BCSC 568, [2014] 4 CNLR 143 [*Ktunaxa Nation* SC], leave to appeal to SCC granted, 36664 (17 March 2016).

10 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 2 [*Charter*].

11 See *Ktunaxa Nation* SC, *supra* note 9 at para 12; *Ktunaxa Nation* CA, *supra* note 9 at para 2.

12 See e.g. Ross, *supra* note 8 at 13–20; John Lewis & Stephen RJ Sheppard, "First Nations' Spiritual Conceptions of Forests and Forest Management" in DB Tindall, Ronald L Trosper & Pamela Perreault, *Aboriginal Peoples and Forest Lands in Canada* (Vancouver: UBC Press, 2013) 205; James (Sakej) Youngblood Henderson, Marjorie L Benson & Isobel M Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont: Carswell, 2000); Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alta L Rev 959; Monique M Ross & Cheryl Y Sharvit, "Fish Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8" (1998) 36:3 Alta L Rev 645; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy" (1997) 47:4 UTLJ 417; Randy Kapashesit & Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36:3 McGill LJ 925.

ing and delineating the environmental rights of Aboriginal peoples under section 35 of the *Constitution Act, 1982*,[14] including Aboriginal rights to engage in spiritual practices on traditional territories. We do not propose to repeat those arguments here, but rather to focus on the less developed analysis of Indigenous land-based religious rights under subsection 2(a) of the *Charter*. Building on the ground-breaking work of John Borrows and Sarah Morales,[15] we will argue that Indigenous spiritual traditions have a home in this provision and merit a level of protection equal to that enjoyed by other faith groups in Canada. It is our position, that, in general, subsection 2(a) will be infringed by non-trivial state-sponsored interference with an Indigenous sacred site. Moreover, the approval of commercial or industrial development on an Indigenous sacred site without consent and compensation will generally be unjustifiable under section 1.

Part I introduces the importance of sacred sites in Indigenous spirituality as a basis for the ensuing analysis. Part II surveys international legal authority on Indigenous religious rights in land, demonstrating that such rights are widely recognized in the international arena. Part III describes the context surrounding land-based religious freedom claims in Canada, focusing on the history of religious persecution of Aboriginal peoples in this country. Part IV examines existing Indigenous sacred sites jurisprudence in Canada, noting the repeated failures of Canadian courts to understand and protect Indigenous religious rights in land. Part V explains the purpose, content, and interpretation of subsection 2(a), arguing that the provision is broad enough to accommodate (and protect) the spiritual beliefs of Aboriginal peoples. Part VI considers *Ktunaxa Nation* as a

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13 See e.g. *Saanichton Marina Ltd v Tsawout Indian Band* (1989), 57 DLR (4th) 161, (*sub nom Saanichton Marina Ltd v Claxton*) [1989] 5 WWR 82 (BC CA); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation* SCC]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]; *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*]; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

14 *Supra* note 2, s 35.

15 See John Borrows, "Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 161 at 168–77; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 248–59 [Borrows, *Indigenous Constitution*]; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 171–72 [Borrows, *Freedom*]; Sarah Morales, "Qat'muk: *Ktunaxa* and the Religious Freedom of Indigenous Canadians" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 287. See also Neihart, *supra* note 5 at 92–98; Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26:1 Windsor Rev Legal Soc Issues 7 at 44–45.

case study in the application of freedom of religion to Indigenous sacred sites, followed by a brief conclusion.

I. The Place of Sacred Sites in Indigenous Spirituality

The role of land in Indigenous spirituality is a complex and multi-dimensional issue and can probably only be fully understood by those who have lived experience with a particular Indigenous religious tradition in a particular territory.[16] Despite this caution, it is both possible and necessary for legal scholars and jurists to develop a basic literacy in Indigenous land-based spirituality, in order to give effect to the guarantee of freedom of religion for Indigenous citizens.

Indigenous spiritual traditions form part of the broader family of human religions, most of which include some concept of spiritually significant areas, or sacred sites:[17]

> For practitioners of religions throughout the world, certain places are sacred. Well-known examples include Mecca, Jerusalem, and Mt. Calvary, places where religious adherents come to pray, sacrifice, heal, and contemplate. These are locations in the physical world where humans revere, recognize, and experience the supernatural, and try to understand its meaning in their lives. Indigenous peoples, too, have sacred places that are essential to their religions and cultures. For them, the sacred is often part of the natural landscape.[18]

In contrast to the churches and temples that would be familiar to most Canadian judges, Indigenous sacred sites are not just places where religion is practised. Instead, they are often understood to form part of the very fabric of the people at issue, to be home to non-physical (but crucial) members of the community. Celebrated Indigenous scholar Leroy Little Bear explains:

> The Earth cannot be separated from the actual being of Indians. The Earth is where the continuous and/or repetitive process of creation occurs. ... If creation is to continue, then it must be renewed. Renew-

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16 The terms "spiritual" and "religious" (and their derivatives) are used interchangeably herein. "Spirituality" is defined as "the quality or state of being concerned with religion or religious matters" (*Merriam-Webster Dictionary*, 11th ed, *sub verbo* "spirituality").

17 We define "sacred site" as "[a]n area of special spiritual significance to peoples and communities" (Robert Wild & Christopher McLeod, eds, *Sacred Natural Sites: Guidelines for Protected Area Managers* (Gland, Switzerland & Paris, France: IUCN & UNESCO, 2008) at xi). See also Stuart R Butzier & Sarah M Stevenson, "Indigenous Peoples' Rights and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent" (2014) 32:3 J Energy & Natural Resources L 297 at 300–01.

18 Kristen A Carpenter, "A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners" (2005) 52:4 UCLA L Rev 1061 at 1062–63.

> al ceremonies, the telling and retelling of creation stories, the singing and resinging of the songs, are all humans' part in the maintenance of creation. ...
>
> ... Aboriginal philosophy [is thus] holistic and cyclical, ... process-oriented, and firmly grounded in a particular place.[19]

Indigenous legal expert Sarah Morales underlines the legal consequences of Indigenous worldviews:

> [T]hese cosmologies and religions give rise to different understandings of human rights and responsibilities in relation to the natural world and what people are permitted and restricted from doing with it—distinct legal traditions. Oftentimes these legal traditions are based on the belief that ancestors and spirits represent and inhabit the natural world, from the mountains, rivers and other landscape features, to the animal and plant world.[20]

As a result, in many cases, the spiritual wellbeing or "religious vitality" of Indigenous peoples is inextricably bound up with certain natural areas held to be sacred. The decision of a New Zealand court concerning river diversions in Indigenous territory captures this idea well:

> The most damaging effect of [the] diversions on Maori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people "grieving" for the rivers. One needs to understand the culture of the Whanganui River iwi [tribe] to realise how deeply ingrained the saying *ko au te awa, ko te awa, ko au* [I am the river, the river is me] is to those who have connections to the river. ... Their spirituality is their "connectedness" to the river. To take away part of the river ... is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people.[21]

This decision forms part of a substantial body of jurisprudence protecting Maori sacred sites in New Zealand. Though such disputes do not invariably terminate in favour of the claimants, development has repeatedly been prohibited when it would interfere with Maori spiritual relationships to the land. Catherine Magallanes elaborates:

> Cases rejecting such interference have concerned a wide range of matters, including the discharge of sewage effluent into the sea, the location of a road being too close to old burial sites, a television aerial being too close to and thereby interfering with Maori metaphysical relationships with a battle site, and a wind farm being too close to—

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19 Little Bear, *supra* note 1 at 78.

20 Morales, *supra* note 15 at 297 [footnotes omitted].

21 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (18 May 2004), Auckland A067/2004 at para 318 (NZ Env Ct) (available on NZLII) [footnote omitted].

> and interfering with Maori metaphysical relationships with—a mountain of spiritual significance.[22]

Jurisprudence from other nations also recognizes the centrality of sacred sites to Indigenous spirituality. In one case from India, for example, the Supreme Court ordered a state to obtain the consent of the Dongaria Kondh, the local Indigenous population, as a condition for the approval of a bauxite mine in mountains considered sacred by the Dongaria Kondh.[23] Again, the mountains at issue were not merely a locus for the practice of religious rituals or education; instead, they were believed to be the home of the people's deity.[24] Their industrial exploitation would thus pose a threat to the spiritual wellbeing of present and future generations of the Dongaria Kondh. The community unanimously rejected the proposal and the approval was never issued.

In South Africa, the High Court of Limpopo issued an interlocutory injunction to prevent the construction of a tourist resort in a sacred area in the traditional custodianship of the Ramunangi people.[25] One spokesperson for the affected people lamented that used condoms and beer cans had been found at the site of a sacred waterfall, noting that "[p]eople would never do such things in a church. The Constitution respects religious rights. We would never destroy a church. Why are they destroying our sacred sites?"[26]

As Indigenous peoples have posed such questions repeatedly across the years and around the globe, international law has responded. There is substantial international recognition of Indigenous peoples' rights with respect to spiritually significant land, and the applicable international law is highly relevant to Canadian courts adjudicating sacred sites litigation.

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22 Catherine J Iorns Magallanes, "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2015) 21:2 Widener L Rev 273 at 299–300 [footnotes omitted].

23 See *Orissa Mining Corporation v Ministry of Environment & Forest*, (2013) 6 SCC 476, [2013] 6 SCR 881 (India SC).

24 See Mahesh Menon, "India's First Environmental Referendum: How Tribal People Protected the Environment" (2015) 45:7 Environmental L Reporter 10656 at 10657–58.

25 See *Nemarudi v Tshivhase Development Foundation Trust* [2011] (S Afr High Ct, Limpopo Div), cited in MM Ratiba, "'Just Piles of Rocks to Developers but Places of Worship to Native Americans': Exploring the Significance of Earth Jurisprudence for South African Cultural Communities" (2015) 18:1 Potchefstroom Electronic LJ 3197 at 3210.

26 "Sacred Sites Sold Down River", *News 24* (5 March 2011), online: <www.news24.com/Archives/City-Press/Sacred-sites-sold-down-river-20150429>.

II. Indigenous Religious Rights in Land Internationally

When the Supreme Court of Canada considers the novel legal questions arising in *Ktunaxa Nation,* it will almost certainly have regard to pertinent international legal authority. The Court has repeatedly recognized the importance of international human rights law to *Charter* interpretation[27] and has frequently referenced international norms in environmental cases.[28] Indeed, it has held that courts should reject interpretations of domestic law that would violate Canada's international legal obligations in the absence of a clear legislative override.[29] In construing the guarantee of freedom of religion in a recent case,[30] the Court has referenced provisions of the *International Covenant on Civil and Political Rights*[31] (*ICCPR*), the *Universal Declaration of Human Rights*[32] (*UDHR*), and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*.[33] Although *Ktunaxa Nation* takes the Supreme Court of Canada into new jurisprudential territory, the legal issues raised therein have already been elucidated in the arena of international human rights.

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27 See e.g. *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70, [2007] 2 SCR 391; *United States v Burns*, 2001 SCC 7 at para 26, [2001] 1 SCR 283; *R v Brydges*, [1990] 1 SCR 190 at 214–15, [1990] 2 WWR 220. See also William A Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter* (Toronto: Thomson Carswell, 2007); Anne F Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Markham: Butterworths, 1992).

28 See e.g. *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paras 23–24, [2003] 2 SCR 624 (polluter-pay principle); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 31–32, [2001] 2 SCR 241 (precautionary principle); *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 125 DLR (4th) 385 (right to a safe environment). See also Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17:3 J Environmental L & Practice 159.

29 See *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292.

30 See *Loyola High School v Quebec (AG)*, 2015 SCC 12 at paras 65, 96–97, [2015] 1 SCR 613 [*Loyola*].

31 19 December 1966, 999 UNTS 171 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICCPR*].

32 GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

33 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].

Indigenous freedom of religion is protected by articles 18 (freedom of religion) and 27 (minority rights) of the *ICCPR*.[34] The UN Human Rights Committee has specifically observed that the rights protected under article 27 may include "a particular way of life associated with the use of land resources, specially in the case of [I]ndigenous peoples."[35] Article 15 of the *International Covenant on Economic, Social and Cultural Rights*[36] (*ICESCR*) protects the right to participate in cultural life, which has been interpreted to include "religion or belief systems."[37] The Committee on Economic Social and Cultural Rights has opined that this provision requires states to "respect the rights of [I]ndigenous peoples ... to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources."[38] Canada is a party to both the *ICESCR* and the *ICCPR*.

Perhaps most relevant to the issue of sacred sites protection in Canada is the core UN instrument on Indigenous rights: the *United Nations Declaration on the Rights of Indigenous Peoples*[39] (*UNDRIP*). Canada has formally endorsed and expressed its commitment to implementing *UNDRIP*,[40] which is explicit in affirming Indigenous religious rights in land. Article 12 provides that "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies [and] the *right to maintain, protect, and have ac-*

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34 See *ICCPR*, *supra* note 31, arts 18, 27. See also *General Comment No. 23: Article 27 (Rights of Minorities)*, UNHRCOR, 50th Sess, UN Doc CCPR/C/21/Rev.1/Add.5 (1994) at para 6.2 [*General Comment No. 23*].

35 *General Comment No. 23*, *supra* note 34 at para 7. See also *ibid* at para 3.2 ("the rights of individuals protected under [article 27]—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of [I]ndigenous communities constituting a minority" [footnotes omitted]).

36 16 December 1966, 993 UNTS 3 art 15(1)(a) (entered into force 3 January 1976, accession by Canada 19 May 1976).

37 *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 43rd Sess, UN Doc E/C.12/GC/21 (2009) at para 13.

38 *Ibid* at para 49(d). See also Amanda Barratt & Ashimizo Afadameh-Adeyemi, "Indigenous Peoples and the Right to Culture: The Potential Significance for African Indigenous Communities of the Committee on Economic, Social and Cultural Rights' General Comment 21" (2011) 11:2 African Human Rights LJ 560.

39 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*].

40 See Indigenous and Northern Affairs, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: <news.gc.ca/>.

cess in privacy to their religious and cultural sites."[41] Notably, this section acknowledges rights of both use and stewardship. It empowers Indigenous peoples to protect their sacred sites from outside interference that would seriously undermine the religious value of the area in question. Article 25 goes further in this regard, specifically guaranteeing Indigenous peoples' right to protect sacred sites for future generations:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[42]

The UN Special Rapporteur on the Rights of Indigenous Peoples has explained that "[t]he desecration and lack of access to sacred places inflicts permanent harm on [I]ndigenous peoples for whom these places are essential parts of identity."[43] Similarly, in its country report on the United States, the UN Committee on the Elimination of Racial Discrimination "urged" the United States "to pay particular attention to the right to health and cultural rights of [Indigenous] people[s], which may be infringed upon by activities threatening their environment ... or disregarding the spiritual and cultural significance they give to their ancestral lands."[44] The UN Special Rapporteur on the Right to Food has noted in its report on Canada that Indigenous groups "have the right to use natural resources as a means of supporting their cultural integrity through ... religious or spiritual activities."[45]

At the regional level, the inter-American human rights system has been a leader in recognizing Indigenous spiritual rights in land.[46] Both the

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41 *UNDRIP, supra* note 39, art 12(1) [emphasis added].

42 *Ibid*, art 25.

43 *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on the Situation of Indigenous Peoples in the United States of America*, UNHRCOR, 21st Sess, Annex, Agenda Item 3, UN Doc A/HRC/21/47/Add.1 (2012) at para 44.

44 *Report of the Committee on the Elimination of Racial Discrimination,* UNGAOR, 61st Sess, Supp No 18, UN Doc A/61/18 (2006) at para 8.

45 *Report of the Special Rapporteur on the Right to Food on his Mission to Canada, 6 to 16 May 2012*, UNHRCOR, 22nd Sess, Annex, Agenda Item 3, UN Doc A/HRC/22/50/Add.1 (2012) at para 62.

46 See e.g. OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 2010*, OR OEA/Ser.L/V/II/Doc.5, rev. 1 (2011) ("[t]he protection of the right to property over land under Article 21 of the American Convention, has particular importance for [I]ndigenous peoples, since the guarantee of the right to territorial property is a fundamental platform for the development of the [I]ndigenous communities' culture, spiritual life, integrity and economic survival" at para 167 [footnote omitted]).

Inter-American Commission and the Inter-American Court of Human Rights have repeatedly recognized the centrality of land and environment to the spirituality, culture, identity, and integrity of Indigenous peoples. In the pivotal case of *Awas Tingni v. Nicaragua*, for example, the Inter-American Court held that, "[f]or [I]ndigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[47]

In *Saramaka v. Suriname*, the Inter-American Court awarded six hundred thousand American dollars to an Indigenous group for intangible damages caused by environmentally destructive logging that interfered with the group's "spiritual connection" to their territory, resulting in a "denigration of their basic cultural and spiritual values."[48] The court held that this intangible "damage caused to the Saramaka people by these alterations to the very fabric of their society entitles them to a just compensation."[49] Similarly, in its decision upholding Indigenous property rights in *Sarayaku v. Ecuador*, the court paid close attention to the Sarayaku's "profound and special relationship with their ancestral territory, which is not limited to ensuring their subsistence, but rather encompasses their own worldview and cultural and spiritual identity."[50]

The African Commission on Human and Peoples' Rights has likewise addressed the Indigenous connection to land as an aspect of religion protected under the *African (Banjul) Charter on Human and Peoples'*

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47 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79, at para 149, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54 Doc.4 (2002) 675. See also *The Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No 125, at paras 124, 131, *Annual Report of the Inter-American Commission on Human Rights:* 2005, OEA/Ser.L/V/II.124 Doc.5 (2006) 8; *The Plan de Sánchez Massacre v Guatemala* (2004), Inter-Am Ct HR (Ser C) No 116, at para 85, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/III.65 Doc.5 rev.1 (2005) 16.

48 *The Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172, at para 200, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130 Doc.22 rev.1 (2007) 25.

49 *Ibid* at para 200.

50 *The Kichwa Indigenous People of Sarayaku v Ecuador* (2012), Inter-Am Ct HR (Ser C) No 245, at para 155, *Annual Report of the Inter-American Court of Human Rights: 2012*, OEA/Ser.L/V/II.147 Doc.1 (2013) 38. Indeed, the Court engaged deeply with the particular land-based religious beliefs of the Indigenous claimants, mentioning for example that, while the Sarayaku consider the entire territory sacred, the oil exploration had specifically interfered with sites of special spiritual significance, including the sacred forest of Pingulu, where all the "great tree[s] of Lispungu" were destroyed (*ibid* at paras 104, 127, 148–55).

Rights[51] (*African Charter*) in the *Endorois*[52] case. There, the commission found that the forcible removal of the Endorois from their ancestral lands and waters violated their right to freedom of religion under article 8 of the *African Charter* (among other provisions),[53] noting that "religion is often linked to land, cultural beliefs and practices. ... The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois."[54]

With respect to customary international law, the International Law Association has opined that Indigenous land rights constitute

> a prerogative with a primarily spiritual, *i.e.* cultural purpose. ... [T]he right in point is functional to the safeguarding—through ensuring the maintenance of the special link between [I]ndigenous peoples and their traditional lands—of the very distinct cultural identity of [I]ndigenous peoples.[55]

This would seem to suggest a heightened obligation to respect Indigenous land rights as they pertain to sacred sites.

In Canada, the imperative to respect and restore Indigenous spiritual identity is particularly acute, given the history of religious persecution of Indigenous peoples by the Canadian state.

III. The Canadian Context: Religious Persecution of Indigenous Peoples

In its eloquent introduction to the ground-breaking Métis rights decision *Daniels v. Canada*, the Supreme Court of Canada observed: "As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought."[56] In our view, it is important to account for historic

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51 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5, 1520 UNTS 217, 21 ILM 58 (1982) (entered into force 21 October 1986) [*African Charter*].

52 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (25 November 2009), Gambia 276/2003 [*Endorois*].

53 See *African Charter*, supra note 51, art 8. See also Abraham Korir Sing'Oei & Jared Shepherd, "In Land We Trust: The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa" (2010) 16 Buff HRL Rev 57 at 67–69.

54 *Endorois*, *supra* note 52 at para 166.

55 Committee on the Rights of Indigenous Peoples, "Final Report" (2012) International Law Association, Sofia Conference Report at 27, online: <www.ila-hq.org/en/committees/index.cfm/cid/1024>.

56 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 1, [2016] 1 SCR 99.

religious inequities in evaluating the contemporary religious claims of Indigenous peoples.[57]

Claims such as that brought in *Ktunaxa Nation* do not occur against a historical blank slate. Rather, "Indigenous peoples have a long and tragic history of severe persecution in the name of European religions."[58] In particular, Canada has historically violated Indigenous religious rights through the outlawing of religious ceremonies, the operation of residential schools, and the destruction of sacred sites, *inter alia*.

The Canadian government first passed criminal laws prohibiting the ceremonial dancing of First Nations in 1884.[59] Violations carried a prison sentence ranging from a minimum of two to six months.[60] The "Potlatch Law", as it came to be called, remained on the statutes of Canada until the *Indian Act* was revised in 1951.[61] "Outlawing the Potlatch ... effectively destroyed the [relevant First Nations'] traditional government," as the ceremony was used "to make law, confer responsibilities and judge wrongdoing, and make amends for crimes against the community."[62] The significance of the Potlatch to Indigenous traditions, ceremonies, and governance structures was unfortunately incomprehensible to white settlers. Arrests were made under these laws and many Indigenous leaders languished in prisons, escalating harm to the wider community. According to the 1983 *Penner Report*, Indigenous "ceremonial items and symbols of government were seized by [police]" and, in many cases, were never returned.[63] Indigenous leaders reacted with indignation to the unwarranted

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57 See Borrows, *Indigenous Constitution*, *supra* note 15 at 256–57.

58 *Ibid* at 249.

59 See *An Act further to amend "The Indian Act, 1880"*, SC 1884 (46 & 47 Vict), c 27, s 3 [1880 *Indian Act Amendment*] (prohibition of the Potlach); *An Act further to amend the Indian Act,* SC 1895 (57 & 58 Vict), c 35, s 6 [1895 *Indian Act Amendment*] (prohibition of the Sundance). See also Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1999) at 63.

60 See 1880 *Indian Act Amendment*, *supra* note 59, s 3; 1895 *Indian Act Amendment*, *supra* note 59, s 6. See also E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 163.

61 See *The Indian Act*, SC 1951, c 29, s 123(2), repealing *Indian Act*, RSC 1927, c 98, ss 2–186 (s 140 of the 1927 *Indian Act* addressing the Potlach and Sundance prohibitions). See also Titley, *supra* note 60 at 163; Backhouse, *supra* note 59 at 63.

62 Jennie Abell, Elizabeth Sheehy & Natasha Bakht, *Criminal Law & Procedure: Cases, Context, Critique*, 5th ed (Concord, Ont: Captus Press, 2012) at 55.

63 House of Commons, Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government*, 32nd Parl, 1st Sess, No 40 (October 1983) at 13 (Chair: Keith Penner). In some cases, First Nations have been successful in negotiating the repatriation and return of objects and human skeletal remains obtained

interference with their customs and religion. Chief Thunderchild eloquently condemned this policy of repression, asking: "Why has the white man no respect for the religion that was given to us, when we respect the faith of other nations?"[64]

Just as it outlawed Indigenous religious practices, the Canadian state simultaneously sought to exterminate Indigenous spirituality and culture from within, through the devastating system of Indian residential schools. Throughout the 1900s, more than 150,000 Indigenous children were forced to attend Indian residential schools, a network of compulsory boarding schools funded by the Canadian government and administered by Christian churches.[65] Among their many crimes, residential schools perpetrated state-sponsored religious coercion. The policy was to remove children from the influence of their families and culture, and assimilate them into the dominant Canadian culture and religion.

A key goal of the system has been described as cultural genocide or "killing the Indian in the child"[66] by depriving them of their ancestral languages and religious teachings. Many Indigenous children suffered physical and sexual abuse in residential schools and all suffered a shattering loss of culture, spirituality, and community.[67] Many lost their lives. A Globe and Mail investigation of records in the National Archives revealed that

> [a]s many as half of the [A]boriginal children who attended the early years of residential schools died of tuberculosis, despite repeated warnings to the federal government that overcrowding, poor sanitation and a lack of medical care were creating a toxic breeding ground for the rapid spread of the disease.[68]

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through the desecration of Aboriginal burial sites (see Abell, Sheehy & Bakht, *supra* note 62 at 54–55).

64 Chief Thunderchild cited in Edward Ahenakew & Ruth M Buck, *Voices of the Plains Cree* (Regina: Canadian Plains Research Center, 1995) at 47.

65 See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Winnipeg: TRC, 2015) at 3 [*TRC Summary*].

66 Statement by Honourable Stéphane Dion, MP (House of Commons, 11 June 2008) cited in *ibid* at 371. See also Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?" (2016) 62:1 McGill LJ 243.

67 See *TRC Summary*, *supra* note 65 at 3–4.

68 Bill Curry & Karen Howlett, "Natives Died in Droves as Ottawa Ignored Warnings: Tuberculosis Took the Lives of Students for at Least 40 Years", *The Globe and Mail* (24 April 2007) A1.

While most of the 139 Indian residential schools ceased to operate by the mid-1970s, the last federally run school closed in the late 1990s.[69]

Several lawsuits against churches and the federal government for the injuries suffered, including physical and sexual abuse and the loss of culture and language, were initiated in the mid-1990s.[70] The class actions were resolved in 2006 with the *Indian Residential Schools Settlement Agreement*, which is intended to provide compensation to former students and to encourage truth and healing through the Truth and Reconciliation Commission of Canada.[71]

The effect of the residential schools on Canada's Indigenous peoples is still felt today.[72] Residential school survivors suffer from high rates of poverty, suicide, depression, and anxiety disorders; many of the survivors have come into contact with the criminal justice system.[73] The lasting impact of the schools is also manifested in the rate of drug and alcohol abuse among survivors who have turned to substance abuse in an attempt to find relief from the painful memories of the past.[74] The profound trauma inflicted by residential schools[75] has also adversely affected parenting skills such that Indigenous Canadians are suffering across more than one generation.[76]

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69 See *TRC Summary*, *supra* note 65 at 3, 69–70.

70 See e.g. *Blackwater v Plint,* 2005 SCC 58, [2005] 3 SCR 3; *TWNA v Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, (*sub nom A (TWN) v Clarke*) 235 DLR (4th) 13; *M(FS) v Anglican Church of Canada*, 2000 BCCA 432, 98 ACWS (3d) 759; *M(M) v Roman Catholic Church of Canada* (1999), 180 DLR (4th) 737, [2000] 2 WWR 258 (Man QB); *Re Indian Residential Schools,* [2000] 4 CNLR 112, 44 CPC (4th) 328 (Alta QB).

71 See *Indian Residential School Settlement Agreement* (8 May 2006) at 43–49, 53–55, online: <www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>. Many survivors of Indian residential schools have faced obstacles to receiving compensation, because they must prove that they attended the schools and this is often difficult as the schools kept little to no records (see Jason Warick, "Residential School Payments Unable to Compensate for 'Genocidal Practices': Survivor", *National Post* (17 December 2011), online: <www.news.nationalpost.com>).

72 The scope of this article does not permit a full description or analysis of the residential school system. For a more comprehensive account of Indian residential schools and their ongoing impacts, see *TRC Summary*, *supra* note 65.

73 See *ibid* at 132. See also Dr Raymond R Corrado & Dr Irwin M Cohen, *Mental Health Profiles for a Sample of British Columbia's Aboriginal Survivors of the Canadian Residential School System* (Ottawa: Aboriginal Healing Foundation, 2003) at 14; *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 60.

74 See *TRC Summary*, *supra* note 65 at 171–72.

75 See *ibid* at 135–83.

76 See *ibid* at 144.

The legacy of residential schools on Canada's Indigenous peoples has been referred to as a "collective soul wound".[77] Survivors of residential schools (and the broader Indigenous community), however, have courageously spoken out, sought redress, and undertaken a process of individual and collective restoration, often involving a return to traditional spiritual and cultural practices.[78] This resurgence in Indigenous spirituality is a source of hope and healing to survivors and their communities; it functions as a kind of agentic decolonization and forms part of the larger Indigenous resurgence movement.[79] Indigenous religious traditions offer a positive way forward for Indigenous youth and link today's communities to time-honoured traditions and identities of which Indigenous peoples can be proud. Unfortunately, the lack of legal protection for Indigenous sacred sites is an impediment to the full restoration of Indigenous spiritual traditions in Canada.

IV. The Legal Geography of Indigenous Sacred Sites in Canada

Today, the Canadian government continues to marginalize Indigenous religious communities by failing to respect their beliefs with respect to their sacred sites.[80] "Indigenous spirituality is often tied to lands, rivers, mountains, forests, and other physical sites."[81] Moreover, Indigenous peoples have "an understanding of the relatedness, or affiliation, of the human and nonhuman worlds." This relatedness gives rise to "moral respon-

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77 Lloyd Hawkeye Robertson, "The Residential School Experience: Syndrome or Historic Trauma" (2006) 4:1 Pimatisiwin 1 at 10.

78 See e.g. Julian A Robbins & Jonathan Dewar, "Traditional Indigenous Approaches to Healing and the Modern Welfare of Traditional Knowledge, Spirituality and Lands: A Critical Reflection on Practices and Policies Taken from the Canadian Indigenous Example", online: (2011) 2:4 Intl Indigenous Policy J 2 <ir.lib.uwo.ca/iipj/vol2/iss4/2>; Taiaiake Alfred, "Smoke is Still Rising: The Eclipse of Christianity and Resurgence of Indigenous Spirituality among First Nations in Canada" (John Albert Hall Lecture delivered at the University of Victoria Centre for Studies in Religion and Society, 14 February 2013), online: <vimeo.com/66026538>; Chantal Fiola, *Rekindling the Sacred Fire: Métis Ancestry and Anishinaabe Spirituality* (Winnipeg: University of Manitoba Press, 2015).

79 See e.g. Aman Sium & Eric Ritskes, "Speaking Truth to Power: Indigenous Storytelling as an Act of Living Resistance" (2013) 2:1 Decolonization: Indigeneity, Education & Society I; Elaine Coburn, ed, *More Will Sing Their Way to Freedom: Indigenous Resistance and Resurgence* (Halifax: Fernwood, 2015); Leanne Simpson, ed, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring, 2008).

80 See Ross, *supra* note 8 at 6, 153–70.

81 Borrows, *Freedom*, *supra* note 15 at 172.

sibilities and obligations" to and for the natural world.[82] Thus, protecting sacred lands is essential to preserving the freedom of religion of Indigenous communities. As John Rhodes explains, "Sacred site claims arise when the spiritual and interdependent relationship of [Indigenous peoples] with all living things, including land, is threatened by development."[83]

Unlike a number of other jurisdictions,[84] the Canadian government has not passed any specific legislation limiting its actions relative to Indigenous sacred sites. The federal government has also declined to pass laws preventing "corporations, farmers, developers, provinces, and municipalities from undermining Indigenous religious freedoms, particularly in relation to land and resources."[85] Furthermore, ethnocentrism has too often prevented judges from appreciating and thus protecting Indigenous spiritual practices.[86] Historically, "[t]he judiciary's cognitive inability to transcend Western notions of religion dominates sacred site jurisprudence and dictates the outcome of the sacred site cases."[87] The planning, approval, and implementation of settlement and development on Indigenous sacred sites has failed to respect Indigenous religious freedom and has perpetuated a contemporary form of persecution against Indigenous peoples in Canada.

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82 Laurie Anne Whitt et al, "Belonging to Land: Indigenous Knowledge Systems and the Natural World" (2001) 26:2 Okla City UL Rev 701 at 704–05.

83 John Rhodes, "An American Tradition: The Religious Persecution of Native Americans" (1991) 52:1 Mont L Rev 13 at 22.

84 See e.g. *American Indian Religious Freedom Act*, 42 USC § 1996 (2012); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Australia); *An Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands*, s 6.6 (Liberia); *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* (India); *Loi nº 5-2011 du 25 février 2011 portant promotion et protection des droits des populations autochtones*, Journal official de la République démocratique du Congo, (3 March 2011) 315; Republic of Benin, *Setting the Conditions for the Sustainable Management of Sacred Forests in the Republic of Benin*, Interministerial Order, *Nº* 0121/MEHU/MDGLAAT/DC/SGM/DGFRN/SA (16 November 2012). Several nations have actually codified aspects of Indigenous cosmology into national legislation, such as the Constitutions of Ecuador and Bolivia, which recognize the rights of Nature, or "Pacha Mama," and New Zealand, which has accorded legal personality (and Maori co-management) to a former national park (see *Constitución de la República del Ecuador*, Registro oficial nº 449, 2008, arts 71–74; *Ley nº 071: ley de derechos de la Madre Tierra*, Gaceta Oficial de Bolivia, 21 décembre 2010, art 1; *Te Urewera Act 2014* (NZ), 2014/51.

85 Borrows, *Freedom*, *supra* note 15 at 172 [footnote omitted].

86 See Ross, *supra* note 8 at 6, 22–23, 153–70.

87 Rhodes, *supra* note 83 at 46. Some Western notions of religion are also highly secularized and thus further at odds with Indigenous points of view.

The vast majority of Canadian cases involving Indigenous sacred sites are framed under either section 35 or a particular land use planning statute. Further, most decisions involving Indigenous religious rights in land address them only minimally, as part of a longer list of Aboriginal rights or uses of the territory in question.[88] Where claims have relied primarily or solely on spiritual rights, they have generally been unsuccessful.[89] Canadian courts and tribunals have declined to protect Indigenous sacred sites in cases involving the discharge of fish waste in an underground pipe passing through a Penelakut sacred burial ground;[90] the construction of a hydro-electric dam that destroyed a sacred waterfall and surrounding areas (considered to be among the holiest sites for the Poplar Point Ojibway Nation);[91] the construction of a mixed used redevelopment project on islands considered sacred by the Algonquin;[92] and logging activities in sacred watersheds in the traditional territories of the Lil'wat[93] and Tlowitsis-Mumtagila[94] peoples, *inter alia*.[95]

In *Tlowitsis-Mumtagila Band v. Macmillan Bloedel Ltd*,[96] the British Columbia Court of Appeal expressed skepticism about the timing of the religious rights claims despite evidence of past religious persecution:

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88 See e.g. *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, [2015] 7 WWR 82; *Sapotaweyak Cree Nation v Manitoba*, 2015 MBQB 35, 316 Man R (2d) 79; *Ebb and Flow First Nation v Canada (AG)*, 2013 MBQB 104, 290 Man R (2d) 216; *Frontenac Ventures Corp v Ardoch Algonquin First Nation* (2008), 165 ACWS (3d) 155 (available on CanLII) (Ont Sup Ct).

89 See Ross, *supra* note 8 at 48–49. But see *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708, 108 OR (3d) 647; *MacMillan Bloedel Ltd v Mullin*, [1985] 3 WWR 577, 61 BCLR 145 (CA).

90 See *Penelakut First Nations Elders v British Columbia (Regional Waste Manager)* (2004), 6 CELR (3d) 131, 2004 CarswellBC 197 (WL Can) (BC Environmental Appeal Board) [*Penelakut*].

91 See *Poplar Point Ojibway Nation v Ontario* (1991), 29 ACWS (3d) 544, [1991] OJ No 1722 (QL) (Ct J (Gen Div)).

92 See *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456, 51 MPLR (5th) 279.

93 See *Mount Currie Indian Band v International Forest Products Ltd* (1991), 26 ACWS (3d) 263, 1991 CarswellBC 2305 (WL Can) (BCSC).

94 See *Tlowitsis-Mumtagila Band v Macmillan Bloedel Ltd*, [1991] 4 WWR 83, 53 BCLR (2d) 69 (CA).

95 For other examples of unsuccessful sacred sites claims, see *Petahtegoose v Eacom Timber*, 2016 ONSC 2481, 265 ACWS (3d) 276; *Brokenhead Ojibway First Nation v Canada (AG)*, 2009 FC 484, [2009] 3 CNLR 36 [*Brokenhead*]; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2005 BCSC 345, [2005] 2 CNLR 138. But see *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2008 BCSC 1505, [2009] 1 CNLR 30 (holding that the Crown failed to fulfill its duty to consult and accommodate the Hupacasath First Nation).

96 *Supra* note 93.

> The applicants filed [affidavits] to support the position that the watershed contained sacred ground which would be damaged if the injunction was not granted. [The affiants] deposed that they attended residential Anglican schools many years ago and were punished if they spoke Kwakwala. For this and other reasons they had been afraid in the past to speak out about their religious beliefs and cultures.
>
> In my opinion, those affidavits do not offer an explanation for the lateness of the applicants' raising a claim that their right to engage in spiritual practices in the Lower Tsitika Valley Watershed was endangered.[97]

As Michael Lee Ross notes, these observations "showed that the Court of Appeal ... had next to no appreciation for the lasting ill effects of the decades of legislated (and other) suppression of Native cultural [and] religious practice combined with residential schooling."[98]

In another case, the Court wholly misapprehended the nature of the Aboriginal spiritual right at issue. In *Mount Currie Indian Band v. International Forest Products Ltd*,[99] the Lil'wat Nation sought to preclude the construction of a logging road in a wilderness area considered so sacred that, under Lil'wat law, it was generally off-limits to everyone except those engaged in training as medicine people.[100] The Supreme Court of British Columbia denied the Lil'wat's application for an interlocutory injunction to protect the site, holding that "a fair question does not exist to be tried or decided as there is no suggestion in the evidence that the plaintiff is precluded from entering upon the territories ... to roam the area and absorb the spiritual surroundings."[101] The ability to "roam the area" was of course beside the point; the right at issue was in fact the right to exclude others, and in particular industrial users, from a sacred space.

As Ross explains, "First Nations peoples care deeply about their sacred sites. In effect, therefore, Canada's attacks on First Nations sacred sites are attacks on First Nations peoples."[102] Where courts have failed to remedy or prevent such attacks, it is often because they have been unwilling or unable to comprehend the unique Indigenous spiritual beliefs at issue. Claims framed under freedom of religion, subsection 2(a) of the *Charter*, may stand a greater chance of success than claims under section 35 of

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97 *Ibid* at paras 41–42.

98 Ross, *supra* note 8 at 53 [footnote omitted].

99 *Supra* note 93.

100 See *ibid* at 1–4. See also Ross, *supra* note 8 at 53–56.

101 *Ibid* at 8.

102 Ross, *supra* note 8 at 177. For a discussion of the various impacts of sacred sites losses, see generally Graben, *supra* note 8.

the *Consitution Act,* 1982, since subsection 2(a) is specifically concerned with the subjective religious beliefs of claimants. Moreover, violations of *Charter* rights cannot be "saved" by a consultation process; rather they must be substantively justified under section 1.[103]

V. Freedom of Religion in the *Canadian Charter of Rights and Freedoms*

As explained above, the majority of challenges to the desecration of Indigenous sacred sites have proceeded under section 35 of the *Constitution Act, 1982* or specific statutes (e.g., planning or forestry legislation) and they have largely failed.[104] In seeking protection for Indigenous sacred sites under subsection 2(a) of the *Charter*, the *Ktunaxa Nation* case squarely raises the issue of the "equal religious citizenship"[105] of Indigenous Canadians. Subsection 2(a) is the home of religious freedom in Canada's constitution, and is an appropriate lens through which to view the religious entitlements of Indigenous and non-Indigenous Canadians alike. Fortunately, the *Charter*'s guarantee of freedom of religion is eminently capable of accommodating the religious rights of Canada's Indigenous citizens.

Religious freedom is a fundamental freedom under the *Charter* because it is considered a basic right, essential to the functioning of a democracy.[106] It allows individuals and groups to believe and practise what they choose without state intrusion. Protecting freedom of religion en-

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[103] A comprehensive comparative analysis of Indigenous religious rights claims framed under section 35 as opposed to subsection 2(a) is beyond the scope of this article. However, it is noteworthy that past case law suggests that, in some circumstances, consultation with the affected Aboriginal group may preclude a violation of section 35, even where the substantive right is infringed, the Aboriginal group has clearly expressed its opposition to the proposed government action, and the government has nonetheless proceeded with the impugned act. There is no analogous procedural "cure" for a *Charter* violation. See *Sparrow*, *supra* note 13 at 1119; *Delgamuukw*, *supra* note 13 at paras 160–69; *Tsilhqot'in Nation* SCC, *supra* note 13 at paras 77–88. See also Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow, Delgamuukw* and *Haida Nation*" (2005) 23:1 Windsor YB Access Just 17 at 38–42; Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17:1 J Envtl L & Prac 27 at 29–30.

[104] See e.g. *Penelakut, supra* note 90 (appeal under section 44 of the *Waste Management Act*, RSBC 1996, c 482, as repealed by the *Environmental Management Act*, SBC 2003, c 53, s 174); *Brokenhead, supra* note 95 at para 42 (finding that the Crown's duty to consult and accommodate was fulfilled through regulatory processes under the *National Energy Board Act*, RSC 1985, c N-7).

[105] Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Moon, *supra* note 15, 87 at 87.

[106] See e.g. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 1, [2004] 2 SCR 551 [*Amselem*].

sures that all people are treated with dignity and respect, that religious minorities are not the subject of discrimination, that the state remains neutral and impartial when it comes to matters of deeply-held personal beliefs, and that religious belief cannot be preferred to non-belief.[107] Internationally, freedom of religion or belief is a universal human right that is enshrined in both the *UDHR*,[108] and the *ICCPR*,[109] among other key human rights documents.

In Canada, freedom of religion is protected under various human rights codes across the country that prohibit religious discrimination.[110] In Ontario, it is illegal for private actors to erect religious barriers to employment, housing, or services unless it can be demonstrated that accommodating religious beliefs or practices causes undue hardship.[111] Constitutionally, subsection 2(a) of the *Charter* enshrines freedom of religion, "prevent[ing] governments from enforcing laws or policies, absent a compelling justification," which "have the purpose or effect of coercing individuals to abandon sincerely held religious beliefs or practices."[112] Further, religious freedom is closely tied with the *Charter*'s commitment to religious equality under subsection 15(1).[113] The principle of substantive religious equality moves beyond identical treatment on the basis of religion to focus instead on the burdensome effects of the application of facially neutral rules.[114]

In *R. v. Big M Drug Mart Ltd.* (*Big M Drug Mart*), the first religious freedom case to be decided under the *Charter*, Chief Justice Dickson defined the right to freedom of religion as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal,

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107 See *R v Big M Drug Mart*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321 [*Big M Drug Mart*].

108 *Supra* note 32, art 18.

109 *Supra* note 31, arts 18, 29.

110 See e.g. *Human Rights Code*, RSO 1990, c H.19, ss 1–3, 5, 11, 24 [Ontario *Human Rights Code*]; *Human Rights Code*, RSBC 1996, c 210, ss 7(1), 8(1), 9, 10(1), 11, 13–14; *Human Rights Act*, RSNB 2011, c 171, ss 4(1)–(3), 5(1), 5(3), 6(1), 7(1), 8(1), 13.

111 See e.g. Ontario *Human Rights Code*, *supra* note 110, ss 1–3, 5, 11, 24.

112 Ryder, *supra* note 105 at 87.

113 Section 15(1) provides that, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (*Charter*, *supra* note 10, s 15(1)).

114 See e.g. Ryder, *supra* note 105 at 91.

> and the right to manifest religious belief by worship and practice or by teaching and dissemination.[115]

In its early jurisprudence, the Court articulated an expansive conception of religious freedom with a concomitant positive right to accommodation of religious practices. Courts have protected a range of religious rights under subsection 2(a) of the *Charter*, including: the right of Jehovah's Witness parents to deny a blood transfusion that was medically advised for their daughter;[116] the right of condominium owners to build dwellings on their balconies for the Jewish festival of Sukkot in the face of by-laws prohibiting constructions on balconies;[117] and the right of a Sikh boy to wear a kirpan (a dagger with a metal blade) to school despite a school-board prohibition of weapons.[118] Bruce Ryder has defined the Canadian concept of equal religious citizenship as being "founded on recognition that religious belief and affiliation are fundamental aspects of one's identity, closely connected to cultural membership, and often pervade all aspects of a believer's life."[119]

Courts now use a two-prong approach in evaluating infringements of religious freedom. First, a court must assess whether the religious belief is sincerely held. Second, the court must ascertain whether there has been non-trivial interference with the exercise of the right. If both of these prongs are met, the interfering party must demonstrate that the infringement is justified under section 1 of the *Charter*.[120]

The law's understanding of religion is necessarily cultural[121] and ridding it of its biases to include all subjects and their values is not without its hurdles. Religious pluralism in Canada suggests, however, that any legal protection of religious freedom must be one that is inclusive and ro-

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115 *Big M Drug Mart*, *supra* note 107 at 336.

116 See *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 [*Children's Aid Society*]. The Court found that, even though the *Child Welfare Act*'s purpose of protecting children did not infringe the appellants' freedom of religion, the resulting legislative scheme by which the parents were deprived of custody of their child did infringe their freedom to make medical decisions for this child in accordance with their religious beliefs. However, the Court found the infringement to be justified under section 1 of the *Charter* (see *ibid* at 322, 382).

117 See *Amselem*, *supra* note 106.

118 See *Multani v Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

119 Ryder, supra note 105 at 92.

120 See *Amselem*, *supra* note 106 at paras 51–65.

121 See generally Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Can JL & Jur 245 (arguing that "the meeting of law and religion is not a juridical or technical problem but, rather, an instance of cross-cultural encounter" at 246).

bust in its inclusion. Though our understanding of religious freedom originated and developed from certain majoritarian perspectives on what religion is, how it is lived and practised in people's lives, and what constitutes an infringement of religion, the text of subsection 2(a) of the *Charter* is broad enough to incorporate an understanding of protected religious practice that is generous and expansive.[122] The Supreme Court of Canada's analysis of subsection 2(a) supports such a contention:[123] "[R]espect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy."[124]

Accordingly, in demonstrating a violation of religious freedom under subsection 2(a), the perspective of the claimant is paramount. The claimant must first demonstrate a sincere belief in a conviction or practice that has a nexus with religion.[125] The inquiry into sincerity must be as limited as possible to ensure only that the "asserted religious belief is in good faith."[126] The subsection 2(a) inquiry does not adjudicate truth. The practice need not be proven through scripture or dictated by religious leaders nor even practised by others. The Canadian test of sincerity of belief is in keeping with international covenants that protect religious freedom.[127] "[I]nconsistent adherence to a religious practice" does "not necessarily" suggest a lack of sincerity, as the claimant's belief "may change over time," may permit situational exceptions, or the claimant may not always live up to an ideal.[128] This contextual examination of sincerity of belief ensures a wide appreciation of different faiths and different interpretations within a faith, recognizing that religion as imagined may be different from

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122 See *Big M Drug Mart, supra* note 107 at 344.

123 See *Amselem*, *supra* note 106 at para 40. Having said that, there are certainly cases where the courts have had difficulty understanding and appropriately balancing certain religious practices with other interests (see e.g. *R v NS*, 2012 SCC 72 at para 31, [2012] 3 SCR 726; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 73, [2009] 2 SCR 567 [*Wilson Colony*]).

124 *Amselem*, *supra* note 106 at para 1.

125 See *ibid* at paras 51–56, 65. See also *Wilson Colony*, *supra* note 123 at para 32.

126 *Amselem*, *supra* note 106 at para 52.

127 For example, article 18(1) of the *ICCPR* guarantees that "[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching" (*supra* note 31, art 18(1)). This right has been interpreted as protecting "all possible attitudes of the individual toward the world [and] toward society" (Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms" in Louis Henkin, ed, *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 209 at 213).

128 *R v NS*, *supra* note 123 at para 13.

religion as practised.[129] The sincerity of belief criterion will generally be easy to satisfy in cases involving Indigenous sacred sites.

Second, in order to demonstrate a violation under subsection 2(a), the impugned conduct must interfere with the claimant's ability to act in accordance with his or her beliefs in a manner that is more than trivial or insubstantial.[130] The subsection 2(a) test has been described as having a low threshold because it emphasizes subjective belief.[131] This approach is entirely appropriate given that religious freedom is a fundamental right that delineates one's outlook in life and that religious diversity requires thinking about religion's many manifestations on its own terms. In Indigenous sacred sites litigation, this second criterion should be interpreted in accordance with Indigenous worldviews, which situate sacred sites as part and parcel of spiritual practice, belief, and identity.

The protection of religious freedom, however, is not absolute, but subject to reasonable limits under section 1 of the *Charter*.[132] This section permits governments to reasonably limit protected rights where they can prove that, on a balance of probabilities, such limits are "prescribed by law" and "can be demonstrably justified in a free and democratic society."[133] It is at this stage of the analysis that competing rights and interests are considered and balanced. The government must have a justifiable purpose and the means used to limit the *Charter* right must be proportional in their effect.[134]

As Chief Justice Dickson noted in *Big M Drug Mart*, "[f]reedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."[135] There have been cases where religious freedom has been limited on such bases. For example, in *Alberta v. Hutterian Brethren of Wilson Colony*, a small, rural community was of the sincere belief that the

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[129] See Lori G Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation" in Moon, *supra* note 15, 192 at 213–14.

[130] See *Amselem*, *supra* note 106 at paras 57–65. See also *Wilson Colony*, *supra* note 123 at para 32.

[131] See *R v Purewal*, 2014 ONSC 2198 at para 197, 313 CRR (2d) 128.

[132] The Canadian *Charter*'s limitation clause is very similar to those found in other international instruments (compare *Charter*, *supra* note 10, s 1 with e.g. *ECHR*, *supra* note 33, art 9(2)).

[133] *Charter*, *supra* note 10, s 1.

[134] See *R v Oakes*, [1986] 1 SCR 103 at 136–40, 26 DLR (4th) 200. See also *Big M Drug Mart*, *supra* note 107 at 351–53.

[135] *Big M Drug Mart*, *supra* note 107 at 337.

Second Commandment prohibits photographs of its members from being willingly taken. They sought an exemption from the photograph requirement of driver's licenses. The photo requirement was maintained, however, in order to preserve the province's facial recognition data bank aimed at minimizing identity theft.[136] Similarly, in *R. v. NS.*, the right of a Muslim woman to wear a face veil for religious reasons while testifying in court was limited to protect an accused's right to a fair trial.[137] In our view, the destruction of Indigenous sacred sites can be justified only in rare cases, for example those involving the safety, health, or fundamental freedoms of others. Moreover, as we argue below, where Indigenous peoples' rights are concerned, section 1 must be interpreted with the important goal of reconciliation in mind.

Adopting a context-sensitive approach, which respects the unique nature of Indigenous belief systems, it becomes clear that serious state interference with an Indigenous sacred site (e.g., by permitting commercial or industrial activities on the site) will usually violate subsection 2(a). Moreover, given the severe and permanent nature of the harm that accrues from the destruction of sacred sites, it will be difficult for the government to justify such an infringement in the absence of an urgent, overriding public purpose (e.g., the construction of a fire break to prevent the imminent spread of a forest fire, where there is no possible alternate location). Unless full consent is obtained, and compensation paid, governments will have difficulty meeting the requirements of section 1. These arguments will be further developed in the context of the *Ktunaxa Nation* case.

VI. Case Study: *Ktunaxa Nation*

In 2012, the British Columbia Minister of Forests, Lands and Natural Resource Operations approved a Master Development Agreement to build a year-round ski resort on Crown land in southeastern British Columbia.[138] The Ktunaxa Nation Council, representing the four Ktunaxa communities in Canada, opposed the building of the ski resort.[139] The land in

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[136] See *Wilson Colony*, *supra* note 123 at paras 39–104.

[137] In *R v NS*, *supra* note 123, the majority of the Supreme Court of Canada subverted the traditional approach to the justification of limits on freedom of religion under section 1 of the *Charter*. In its framing of the subsection 2(a) analysis, the majority asked: "Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?" (*ibid* at para 9). This formulation forced the witness to justify her decision to wear the niqab when the justificatory burden should have fallen to the government (see Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women" (2015) 24:3 Soc & Leg Stud 419 at 423–26).

[138] See *Ktunaxa Nation* CA, *supra* note 9 at para 1.

[139] See *ibid* at para 7.

question, known by the Ktunaxa as "Qat'muk", is an area of central spiritual significance, where the Grizzly Bear Spirit resides.[140] Qat'muk and the proposed development of the ski resort have been the subject of extensive litigation for the past twenty years.[141] The Ktunaxa have consistently opposed the resort since it was first proposed in 1991.[142] The Ktunaxa maintain that there is no way of building the resort that would eliminate or minimize the impact on their beliefs and practices.[143] If the resort (or any form of permanent overnight human accommodation) is built, the Grizzly Bear Spirit will leave, depriving the Ktunaxa of the spiritual guidance they rely upon and the significance of their rituals. The rituals do not typically take place at Qat'muk; interfering with that territory, however, will deprive the rituals that take place elsewhere of their spiritual meaning.[144]

The Ktunaxa challenged the decision to approve the Master Development Agreement on the basis that building the resort infringes the right to freedom of religion they enjoy under subsection 2(a) of the *Charter*.[145] Both the trial judge and the British Columbia Court of Appeal found that the minister did not violate the Ktunaxa's freedom of religion in approving the agreement to build the proposed ski resort.[146] Both courts' analyses relied heavily on a Eurocentric understanding of religion[147] and a misapplication of the subsection 2(a) test. The lower courts' decisions

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[140] See *Ktunaxa Nation* SC, *supra* note 9 at paras 14, 110, 235; *Ktunaxa Nation* CA, *supra* note 9 at para 9.

[141] See *Ktunaxa Nation* SC, *supra* note 9 at paras 47–111.

[142] At a public meeting on 25 September 1991, the Ktunaxa presented the Minister with a position paper, which asserted that many species of animals and fish in the area of the proposed ski resort, including grizzly bear, "hold a very sacred place within [their] cultural spiritualism" *(Ktunaxa Nation* SC, *supra* note 9 at para 40). Mr. Chris Luke, Sr., a Ktunaxa Elder, publically declared that the proposed resort was incompatible with the sacred nature of the area in 2009, about eighteen years after the negotiations began. The courts expressed some incredulity that Mr. Luke did "not immediately shar[e] [this belief] with other Ktunaxa" and that the Ktunaxa "have a cultural reluctance to share specific spiritual beliefs", although the historic persecution of Indigenous peoples makes such a convention entirely understandable and in keeping with self-preservation (*ibid* at para 107). See also *Ktunaxa Nation* CA, *supra* note 9 at para 31.

[143] See *Ktunaxa Nation* SC, *supra* note 9 at paras 106–11; *Ktunaxa Nation* CA, *supra* note 9 at para 10.

[144] See *Ktunaxa Nation* SC, *supra* note 9 at paras 14, 17–18, 108–111, 235, 244, 297; *Ktunaxa Nation* CA, *supra* note 9 at paras 9, 31, 34.

[145] See *Ktunaxa Nation* SC, *supra* note 9 at para 12; *Ktunaxa Nation* CA, *supra* note 9 at para 2.

[146] See *Ktunaxa Nation* SC, *supra* note 9 at para 326; *Ktunaxa Nation* CA, *supra* note 9 at para 94.

[147] See Borrows, *Indigenous Constitution*, *supra* note 15 at 249.

failed to adequately consider the impact of the Minister's decision from the claimant's perspective, as is required by the subsection 2(a) analysis. Further, the lower courts ignored an Indigenous frame of reference that involves significant interweaving of spirituality with the land.

A. Subsection 2(a) Analysis

The lower courts dedicated little time to considering the subjective importance of the belief at issue to the Ktunaxa. While the trial judge and the Court of Appeal recognized that the Ktunaxa had demonstrated "a sincere spiritual belief that has a clear nexus with religion,"[148] there is little attempt beyond a mere explication of the belief to try to understand the religious perspective of the Ktunaxa. According to the Court of Appeal, the effect of the decision to build the resort is "the loss of meaning produced by the alleged desecration of a sacred site."[149] This characterization, while minimally accurate, does little to *get to know the Other*.[150] It does not engender respect, understanding, or empathy for a community whose Indigenous spiritual practices and beliefs do not look like religions as understood in the common law system.[151] Invoking subsection 2(a) of the *Charter* to protect Indigenous spiritual beliefs "stretch[es] the law beyond [the] cultural context" in which it was formed and continues to be understood.[152] That the lower courts were mired in an understanding of religious freedom that reified dominant conceptualizations of religion was

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[148] *Ktunaxa Nation* CA, *supra* note 9 at para 57. See also See *Ktunaxa Nation* SC, *supra* note 9 at para 275. It is significant that the courts found the Ktunaxa's beliefs to be religious, even though they do not resemble the beliefs and practices of any organized religion. This finding represents an important step away from previous patterns of judicial misunderstanding of Aboriginal religion (see e.g. *Jack and Charlie v The Queen*, [1985] 2 SCR 332 at 346, 21 DLR (4th) 641 (rejecting the Anishinabek accused's freedom of religion defence to the charge of hunting deer out of season)). See also Borrows, *Indigenous Constitution, supra* note 15 at 250–52.

[149] *Ktunaxa Nation* CA, *supra* note 9 at para 61.

[150] See *Multani*, *supra* note 118 at para 37. In *Multani*, the Supreme Court of Canada placed the religious freedom applicant, a young Sikh boy who wanted to wear his kirpan to school, at the forefront. Amazingly, the court described the kirpan not as weapon, but as a religious symbol, though the kirpan is a dagger with a metal blade. The Court's efforts to portray the Sikh religion from the perspective of the applicant and to delve deeply into the narrative (noting, for example, that "the word 'kirpan' comes from 'kirpa', meaning 'mercy' and 'kindness', and 'aan', meaning 'honour'" *ibid* at para 37) has the potential effect of transforming the dominant perspective that is fraught with disbelief or misunderstanding.

[151] *Cf* Borrows, *Indigenous Constitution, supra* note 15 at 252–53.

[152] *Ibid* at 250 [footnote omitted].

evident from many of their comments.[153] While we cannot ignore the origins of our laws or our history of colonialism, we also cannot permit majority Christian traditions or another religious view to be the definitional bias by which we implicitly or explicitly interpret all religious claims.[154] Had the courts below begun their analysis from the perspective of the Ktunaxa, contextualizing their critical relationship to the land, a different analysis would likely have ensued.

As noted above, the Ktunaxa people believe that Qat'muk is a spiritual site of paramount importance where the Grizzly Bear Spirit makes its home.[155] The Grizzly Bear Spirit is a significant source of guidance, strength, protection, and spirituality for the Ktunaxa people. As stated by Morales, "Ktunaxa laws [thus] require the protection of this sacred place for present and future generations and include strict stewardship obligations and duties to the Grizzly Bear Spirit and Qat'muk."[156] Allowing the development of the proposed ski resort within Qat'muk, and specifically

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[153] For example, the trial judge held that "[t]he Ktunaxa do not assert any specific site or defined area within Qat'muk that is used for religious purposes, such as a meeting place, place of worship or ceremonial locale" (*Ktunaxa Nation* SC, *supra* note 9 at para 297). Furthermore, the trial judge noted, "There is no coercion or constraint on what the Ktunaxa can do or must omit from doing, as for example, in the Sunday observance cases, *Hutterian Brethren,* and the religious education cases" (*ibid* at para 298). In a similar vein, the British Columbia Court of Appeal distinguished the "religious vitality" implicated in *Ktunaxa Nation* from that involved in *Loyola* on the basis of the level of interference with others. In the court's opinion, it was possible to conclude that modifying the behaviour of others was acceptable in *Loyola* because of the "deep linkages between this [religious] belief and its manifestations through communal institutions and traditions" (*Loyola*, *supra* note 30 at para 60 cited in *Ktunaxa Nation* CA, *supra* note 9 at para 72). The respect and understanding shown by the court for the Catholic tradition was absent in the Indigenous context. These comments demonstrate that the lower courts in *Ktunaxa Nation* were unable to see religious freedom outside of a worldview that gives primacy to Judeo-Christian beliefs and practices and its discrete links to churches, congregations, and Sunday attendance. They were unable to see that Indigenous spiritual beliefs and practices are an all-pervasive belief system with deep linkages to the land, which will necessarily implicate the rights of others because such religious views are holistic and embedded in daily life (*cf* Borrows, *Indigenous Constitution, supra* note 15 at 248–50; Beaman, *supra* note 129 at 194–200; Rhodes, *supra* note 82 at 17–24).

[154] Benjamin Berger has argued that law's understanding of religion is necessarily cultural and that ridding it of its liberal context to include all subjects and their values is difficult (see Berger, *supra* note 121 at 245–48). We are of the view that overcoming law's cultural bias is possible by emphasizing the broad purpose of religious freedom and the doctrinal flexibility of subsection 2(a).

[155] See *Ktunaxa Nation* SC, *supra* note 9 at paras 14, 17–18, 108–11, 235, 244, 297; *Ktunaxa Nation* CA, *supra* note 9 at paras 9, 31, 34. See also Ktunaxa Nation Executive Council, "Qat'muk Declaration" (15 November 2010), online: <www.ktunaxa.org/wp-content/uploads/Declaration.pdf>.

[156] Morales, *supra* note 15 at 288 [footnote omitted].

the permanent overnight accommodation of humans, would constitute a desecration, which would irreparably harm the Ktunaxa's relationship with the Grizzly Bear Spirit. If the resort were to be constructed, the Grizzly Bear Spirit would leave Qat'muk and the Kutnaxa would no longer receive spiritual guidance, rendering their songs and rituals inconsequential. The Ktunaxa's beliefs surrounding their relationship with the land are consistent with the "defining characteristic of many Indigenous ideologies" emphasizing "the interconnection between the spiritual and physical realms."[157] A deeper analysis of the religious perspective of the Ktunaxa might have permitted the lower courts to come to a different conclusion on the subsection 2(a) infringement. Instead, the courts erroneously focused on the rights of those other than the religious freedom claimant.

The Court of Appeal held that subsection 2(a)

> does not apply to protect the vitality of religious communities where the vitality of the community is predicated on the assertion by a religious group that, to preserve the communal dimension of its religious beliefs, others are required to act or refrain from acting and behave in a manner consistent with a belief that they do not share.[158]

The subjective and abstract nature of the effect of the proposed development project on the Ktunaxa appears to be a problem for the Court of Appeal, although one of the main purposes of religious freedom is to protect subjective beliefs.[159] When a state action prevents individuals from expressing or practising their religious beliefs in a concrete manner, subsection 2(a) is invoked to constrain the state action, regardless of the actors' beliefs. It is therefore bizarre for the Court of Appeal to conclude that subsection 2(a) cannot be used to restrict or restrain the behaviour of those who do not share the Ktunaxa's belief. Indeed, the beliefs of others are entirely irrelevant; it is rather their actions with respect to the claimant that demand scrutiny.

The second step of the subsection 2(a) test requires an interference with the claimant's ability to act in accordance with his or her beliefs. To establish an infringement, this interference cannot be merely trivial or insubstantial.[160] The Court of Appeal did not explicitly conclude in *Ktunaxa Nation* whether the interference posed by the resort's construction would

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[157] *Ibid* at 297.

[158] *Ktunaxa Nation* CA, *supra* note 9 at para 74.

[159] See *Amselem*, *supra* note 106 at para 50.

[160] See *Amselem*, *supra* note 106 at paras 57–65. See also *Wilson Colony*, *supra* note 123 at para 32.

satisfy the more than trivial or insubstantial threshold. Instead, the Court of Appeal focused on the impact that preserving the Ktunaxa's beliefs would have on people outside the Ktunaxa community.[161] This incorrectly places an internal limit on subsection 2(a). Importantly, balancing freedom of religion with competing interests should take place at the section 1 justification stage, after a *prima facie* infringement of the *Charter* right has been established.[162] This approach preserves a broad and liberal understanding of religious freedom.[163] It also ensures that the claimant does not unfairly carry the justificatory burden, when it should be borne by the government.

Had the Court of Appeal explicitly considered the degree of the interference with the Ktunaxa's religious beliefs, it should have found that the resort construction satisfied the more than trivial or insubstantial threshold. The presence of the Grizzly Bear Spirit at Qat'muk is highly important for the Ktunaxa people, and causing the spirit to leave would deprive them of the meaning of a significant aspect of their belief system. There is no alternative for the Ktunaxa. If the ski resort is built, their relationship with the Grizzly Bear Spirit will be destroyed.[164] Moreover, an additional and weighty burden posed by the resort's construction is that the Ktunaxa would be prevented from passing down their spiritual beliefs and practices to future generations. In *Loyola High School v. Quebec (AG)*, Justice Abella held that "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children."[165] She characterized "measures which ... disrupt the vitality of religious communities" as "a profound interference with religious freedom."[166] Building the proposed resort would sever the "deep linkage"[167] between the Ktunaxa's spiritual beliefs and their communal relationship with the physical or natural world for both living and future generations. Any conception of religious vitality among many Indigenous peoples must

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161 See *Ktunaxa Nation* CA, *supra* note 9 at para 73.

162 See *Multani*, *supra* note 118 at para 26. See also *R v NS*, *supra* note 123 at para 56.

163 In *Children's Aid Society*, Justice LaForest noted that "[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion .... [I]t rather opted to balance the competing rights under [section] 1 of the *Charter*" (*supra* note 116 at para 109). Further the Court held that "it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights" (*ibid* at para 110).

164 See *Ktunaxa Nation* SC, *supra* note 9 at paras 106–11; *Ktunaxa Nation* CA, *supra* note 9 at para 10. See also Morales, *supra* note 15 at 288.

165 *Loyola*, *supra* note 30 at para 64.

166 *Ibid* at para 67.

167 *Ktunaxa Nation* CA, *supra* note 9 at para 68.

capture the vital role that the land plays in Indigenous spirituality.[168] As explained by Michael Lee Ross, "[T]o be First Nations is to be in a special relationship with the land, what endangers their sacred sites ultimately puts their existence, survival, and well-being in jeopardy. Their sacred sites are therefore crucial to their existence, survival, and well-being."[169]

The interference with the Ktunaxa Nation's right to freedom of religion under subsection 2(a) in this case is different from typical infringements of religious freedom, insofar as it does not force members of the community "to act in a way contrary to [their] beliefs or ... conscience."[170] However, the analysis of the resort's effect on the Ktunaxa's religious freedom need not focus strictly on the ability to act. Religious rituals necessarily encompass the meaning ascribed to them. To permit individuals to go through the motions of expressing their religious beliefs but deny them what affirms their belief in the ritual's significance is to deny their freedom of religion. Rituals without meaning are no rituals at all. The proposed resort would interfere with the Ktunaxa's ability to practice their beliefs by eliminating the spiritual significance they attach to the Grizzly Bear Spirit's territory. Since the Grizzly Bear Spirit rituals do not take place at Qat'muk, the resort will not prevent the Ktunaxa from performing those rituals; rather, it will prevent the rituals from achieving their intended results in relation to the Grizzly Bear Spirit. A Eurocentric understanding of religious rituals and practices would not appreciate the construction of the resort as a compelling interference with the Ktunaxa's spiritual beliefs because it affects the abstract significance of the practices, and not the ability to perform the practices *per se*. However, Canadian courts must view the situation from the perspective of the Indigenous peoples who hold the beliefs. Such an approach would have led the lower courts in *Ktunaxa Nation* to a more generous interpretation of subsection 2(a), keeping in mind the unique Indigenous belief system in question.

B. Justificatory Analysis

The first question arising under the section 1 analysis is whether the relevant legislative objective is sufficiently important to warrant limiting a constitutional right. In *Ross v. New Brunswick School District No. 15* (*Ross*), the Supreme Court stated that "[f]reedom of religion is subject to such limitations as are necessary to protect public safety, order, health or

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168 We are not suggesting that all Indigenous communities necessarily link their spiritual traditions with the natural landscape, but rather that many do (see e.g. *supra* note 4).

169 Ross, *supra* note 8 at 3.

170 *Big M Drug Mart*, *supra* note 107 at 337.

morals and the fundamental rights and freedoms of others."[171] The limitation in question, the desecration of the sacred territory of Qat'muk, is not proposed to promote any of the aims noted in *Ross*. Preventing the construction of the proposed resort would not pose a threat to non-Indigenous interests sufficient to justify limiting the Ktunaxa's freedom of religion.

The area has been undeveloped for decades, and there is no evidence that prohibiting the construction of this commercial project will adversely affect non-Indigenous individuals in the area. It is notable that any economic interests at stake are mere commercial prospects rather than certainties. Since economic and property interests are not enshrined in the constitution, freedom of religion should arguably be prioritized and afforded greater importance. While the proposed ski resort might promote tourism and create employment in the area, the loss of this opportunity would not amount to an infringement of fundamental rights comparable to the freedom of religion infringement that the Ktunaxa would experience should the project move forward. Indeed, the integrity, spiritual health, and belief system of the Ktunaxa would be in peril should the proposed resort be built. For many Indigenous communities, including the Ktunaxa, relations to the land are not simply a matter of possession and production. For instance, in a submission to the Ipperwash Inquiry, the Chiefs of Ontario affirmed: "Our relationship to the land defines who we are; we are the caretakers of Mother Earth."[172] The holistic manner in which such beliefs are embedded in daily life and preserved and transmitted for future generations must be appreciated.[173] To date, Qat'muk is unoccupied land that the Ktunaxa people have consistently referred to as sacred to them. Moreover, the

> protection of Qat'muk would not result in a complete exclusion of non-Ktunaxa people from the area, and would not force non-Ktunaxa individuals to adhere to or practice Ktunaxa spiritual beliefs. The protection of Ktunaxa spirituality and religious freedom under section 2(a) would simply prevent the development of the pro-

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[171] *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 72, (*sub nom Attis v New Brunswick School District No* 15) 171 NBR (2d) 321.

[172] Chiefs of Ontario, *Final Submission to the Ipperwash Inquiry* (July 2006) part 2 "Executive Summary of Recommendations" at para 76, cited in Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ministry of the Attorney General, 2007) vol 2 at 135. According to John Rhodes, "A consequence of this perception of the interdependency of living things is the Indian notion of stewardship. Native Americans perceive themselves as caretakers of the earth, not as developers" (Rhodes, *supra* note 83 at 19).

[173] For example, John Borrows has noted that "most Anishinabek spiritual expression differs substantially from what many people regard as religious" (Borrows, *Indigenous Constitution*, *supra* note 15 at 253).

> posed resort—a development which could be prevented for a variety of different reasons, including environmental concerns.[174]

Commercial development has been both accepted[175] and rejected[176] by the courts as a pressing and substantial objective sufficient to override a *Charter* right. In *Ktunaxa Nation*, the uninhabited nature of the land, the speculative character of the commercial interests at stake, and the existence of evidence indicating that the economic viability of the project is meager—that is, the project is unlikely to bring financial benefits to the surrounding communities[177]—suggests that a valid government objective does not exist to warrant limiting the Ktunaxa's freedom of religion.

However, because *Ktunaxa Nation* is a judicial review of an administrative decision, the justificatory analysis occurs under an administrative law approach under the *Doré v. Barreau du Québec* framework where the standard of review is reasonableness.[178] One must ask, given the nature of the decision and the statutory and factual contexts, whether the decision reflects a proportionate balancing between the statutory objective and the severity of the interference of the right. At this stage of the analysis, one cannot avoid Canada's history of colonialism in considering whether limits on the *Charter* rights of Indigenous peoples can be demonstrably justified in a free and democratic society. A proportionality analysis involving First Nations requires an approach that prioritizes the Crown's fiduciary obligation toward Canada's Indigenous peoples. In other words, the goal of reconciliation must be at the centre of any analysis under section 1, whether in the administrative law context or under an *R v. Oakes* analysis. This is the only just way to promote measures that remedy historic and systemic violations of Indigenous peoples' rights to religious freedom.

The test for the infringement and scope of Aboriginal rights under section 35 of the *Constitution Act, 1982* urges courts to consider the perspective of Indigenous peoples.[179] As stated by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, "the court must be careful not

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174 Morales, *supra* note 15 at 294 [footnote omitted].

175 See *Gladstone*, *supra* note 13 at para 75; *Delgamuukw*, supra note 13 at para 161.

176 See e.g. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 1107–08, [2008] 1 CNLR 112.

177 See Morales, *supra* note 15 at 304.

178 See *Doré v Barreau du Québec*, 2012 SCC 12 at para 3, [2012] 1 SCR 395. Notably, the Court held that there is "nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection—meaning its guarantees and values—we expect from an *Oakes* analysis" (*ibid* at para 5).

179 See *Van der Peet*, *supra* note 13 at para 49; *Tsilhqot'in Nation* SCC, *supra* note 13 at paras 14, 32, 41. See also Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1.

to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts."[180] Similarly, when considering rights claims under the *Charter* by Indigenous applicants, courts must ensure that the unique perspectives and experiences of Aboriginal peoples are understood and appreciated for what they are. A legal system that does not make a conscious effort to learn Indigenous values will be ill-equipped to protect those values. In our view, courts must overcome the common law's inherent cultural biases when balancing an action's impact on Indigenous spiritual beliefs with the benefits such actions may afford other people.[181] Moreover, Indigenous rights and interests need not be seen as adverse to the interests of all other Canadians—rather, they may be seen as encompassing them.[182]

Building a ski resort on the sacred territory of Qat'muk would not minimally impair the Ktunaxa's religious freedom—it would destroy their religious vitality. Further, the destruction of the Ktunaxa's religious vitality cannot result in a proportionate balancing of the *Charter* right and the purported objective. The alleged benefit derived from the infringement—the contested potential economic growth to the surrounding non-Indigenous communities—would not outweigh the severe adverse effects. The harm suffered by the Ktunaxa is real and significant, and the impact on non-Indigenous people of refraining from building the ski resort is not particularly burdensome. We do not suggest that there would be no impact, but that such restrictions on property interests are more than justified in order to preserve and protect the fundamental rights of the Ktunaxa. As Rhodes asserts, "[T]he judiciary is being asked to comprehend religions that defy Western notions of both religion and, maybe more importantly, land usage."[183] In this case, judicial respect for Indigenous religious beliefs requires the prohibition of government action that would destroy the Ktunaxa's sacred site and the vital link between the land and their spirituality. Thus, *Ktunaxa Nation* is an important starting point for the recognition of Indigenous religious rights in land. With this case, the Supreme Court of Canada has the opportunity to turn a page in Canadian history and open a new era of respectful relationships with Indigenous spiritual traditions.

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[180] *Tsilhqot'in Nation* SCC, *supra* note 13 at para 32.

[181] See e.g. *ibid*; *Van der Peet*, *supra* note 13 at para 162.

[182] See *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on the Situation of Indigenous Peoples in Canada*, UNHRCOR, 27th Sess, Annex, Agenda Item 3, UN Doc A.HRC.27.52.Add.2 (2014) at para 62.

[183] Rhodes, *supra* note 83 at 59.

Conclusion

For centuries, the Canadian state and its precursors adopted a policy of physical dispossession and forced assimilation of Indigenous peoples. Not content to stop at the appropriation of Indigenous lands and resources, the state reached for the very souls of Indigenous Canadians, attacking the spiritual foundations of Indigenous societies and individuals. The cultural genocide committed through residential schools is perhaps the most appalling chapter in this history, but the destruction of Indigenous sacred sites is an equally compelling story. As Canada moves toward a new and more honourable relationship with its Indigenous peoples, the preservation of Indigenous religious rights in land would be a major step forward. This is consistent with the findings of the Truth and Reconciliation Commission, which has observed that

> [d]espite the coercive measures that the government adopted, it failed to achieve its policy goals. Although Aboriginal peoples and cultures have been badly damaged, they continue to exist. Aboriginal people have refused to surrender their identity. ... It is time to commit to a process of reconciliation. By establishing a new and respectful relationship, we restore what must be restored, repair what must be repaired, and return what must be returned.[184]

We have argued that in most cases, freedom of religion requires the prohibition of commercial development on Indigenous sacred sites, in order to respect the deeply-held religious beliefs of Canada's Indigenous citizens. In our view, Canada cannot forge a respectful relationship with Aboriginal peoples while permitting the desecration of their most holy places.

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[184] *TRC Summary*, *supra* note 65 at 6.