"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 groundbreaking 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.

* Natasha Bakht, Associate Professor, Faculty of Law, University of Ottawa. Lynda Collins, Associate Professor, Centre for Environmental Law & Global Sustainability, University of Ottawa, Faculty of Law. We are grateful to Professors David Boyd and Sarah Morales for their insightful comments on earlier versions of this article. We also thank the anonymous peer reviewers for their thoughtful reviews. Finally, our thanks to Vanessa Baker-Murray for her invaluable research assistance.

© Natasha Bakht and Lynda Collins 2017

Citation: (2017) 62:3 McGill LJ 777 — Référence : (2017) 62:3 RD McGill 777
Introduction

I. The Place of Sacred Sites in Indigenous Spirituality

II. Indigenous Religious Rights in Land Internationally

III. The Canadian Context: Religious Persecution of Indigenous Peoples

IV. The Legal Geography of Indigenous Sacred Sites in Canada

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

VI. Case Study: Ktunaxa Nation
   A. Subsection 2(a) Analysis
   B. Justificatory Analysis

Conclusion
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 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 Indigenousity 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:

---


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*]).


Whereas some faiths worship the divine in a building, Indigenous 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 Indigenous 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 Freedoms10 (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 literature12 and jurisprudence13 exists debat-

---

6 Ibid at 92.
7 Ibid at 98.
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.
ing and delineating the environmental rights of Aboriginal peoples under section 35 of the Constitution Act, 1982, 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, 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

---


14 Supra note 2, s 35.

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 multidimensional issue and can probably only be fully understood by those who have lived experience with a particular Indigenous religious tradition in a particular territory. 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:

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.

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-

---

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”).


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—

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 sa-
cred 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 in-
junction to prevent the construction of a tourist resort in a sacred area in
the traditional custodianship of the Ramunangi people.25 One spokesper-
son 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 sa-
cred 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.

22 Catherine J Iorns Magallanes, “Maori Cultural Rights in Aotearoa New Zealand: Pro-
tecting 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
25 See Nemarudi v Tshivhase Development Foundation Trust [2011] (S Afr High Ct, Limp-
popo 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 Afri-
can Cultural Communities” (2015) 18:1 Potchefstroom Electronic LJ 3197 at 3210.
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 and has frequently referenced international norms in environmental cases. 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. In construing the guarantee of freedom of religion in a recent case, the Court has referenced provisions of the *International Covenant on Civil and Political Rights* (ICCPR), the *Universal Declaration of Human Rights* (UDHR), and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. 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.
Indigenous freedom of religion is protected by articles 18 (freedom of religion) and 27 (minority rights) of the ICCPR. 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.” Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to participate in cultural life, which has been interpreted to include “religion or belief systems.” 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.” 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 (UNDRIP). Canada has formally endorsed and expressed its commitment to implementing UNDRIP, 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-

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]).
cess in privacy to their religious and cultural sites.” 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.

The UN Special Rapporteur on the Rights of Indigenous Peoples has explained that “the desecration and lack of access to sacred places inflicts permanent harm on Indigenous peoples for whom these places are essential parts of identity.” 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.” 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.”

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

---

41 UNDRIP, supra note 39, art 12(1) [emphasis added].
42 Ibid, art 25.
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 Indigenous 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.”

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.” 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.” 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.”

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’

---


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/VII.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 (African Charter) in the Endorois 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), 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.”

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.

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.” In our view, it is important to account for historic
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

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.
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 elo-
quently 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?”  

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. 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” by depriving them of their ancestral lan-
guages and religious teachings. Many Indigenous children suffered physi-
cal and sexual abuse in residential schools and all suffered a shattering
loss of culture, spirituality, and community. Many lost their lives. A
Globe and Mail investigation of records in the National Archives revealed
that

[a]s many as half of the Aboriginal children who attended the
early years of residential schools died of tuberculosis, despite repeat-
ed warnings to the federal government that overcrowding, poor sani-
tation and a lack of medical care were creating a toxic breeding
ground for the rapid spread of the disease.

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 Commis-
sion 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
67 See TRC Summary, supra note 65 at 3–4.
68 Bill Curry & Karen Howlett, “Natives Died in Drovers as Ottawa Ignored Warnings:
Tuberculosis Took the Lives of Students for at Least 40 Years”, The Globe and Mail
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

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.residentschoolsettlement.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”. 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. 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. 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. “Indigenous spirituality is often tied to lands, rivers, mountains, forests, and other physical sites.” Moreover, Indigenous peoples have “an understanding of the relatedness, or affiliation, of the human and nonhuman worlds.” This relatedness gives rise to “moral respon-

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.

---

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, N° 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 diciembre 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 Li’l’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:

---

\(^88\) 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).


\(^90\) 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.


\(^96\) 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

---

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 Constitution 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-

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).


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. Internationally, freedom of religion or belief is a universal human right that is enshrined in both the UDHR, and the ICCPR, 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. 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. 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.” Further, religious freedom is closely tied with the Charter’s commitment to religious equality under subsection 15(1). 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.

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,

---

108 Supra note 32, art 18.
109 Supra note 31, arts 18, 29.
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.\textsuperscript{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 \textit{Charter}, including: the right of Jehovah’s Witness parents to deny a blood transfusion that was medically advised for their daughter;\textsuperscript{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;\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 \textit{Charter}.\textsuperscript{120}

The law’s understanding of religion is necessarily cultural\textsuperscript{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-

\textsuperscript{115} \textit{Big M Drug Mart}, supra note 107 at 336.

\textsuperscript{116} See \textit{B(R) v Children’s Aid Society of Metropolitan Toronto}, [1995] 1 SCR 315, 122 DLR (4th) 1 \textit{Children’s Aid Society}. The Court found that, even though the \textit{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 \textit{Charter} (see \textit{ibid} at 322, 382).

\textsuperscript{117} See \textit{Amselem}, supra note 106.

\textsuperscript{118} See \textit{Multani v Commission Scolaire Marguerite-Bourgeois}, 2006 SCC 6, [2006] 1 SCR 256 \textit{[Multani]}.

\textsuperscript{119} Ryder, supra note 105 at 92.

\textsuperscript{120} See \textit{Amselem}, supra note 106 at paras 51–65.

\textsuperscript{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. The Supreme Court of Canada’s analysis of subsection 2(a) supports such a contention: “[R]espect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy.”

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. The inquiry into sincerity must be as limited as possible to ensure only that the “asserted religious belief is in good faith.” 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. “[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. 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

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. 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. The subsection 2(a) test has been described as having a low threshold because it emphasizes subjective belief. 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. 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.” 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.

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.” 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

---

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.
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. 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. 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. The Ktunaxa Nation Council, representing the four Ktunaxa communities in Canada, opposed the building of the ski resort. The land in

---

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. The Ktunaxa have consistently opposed the resort since it was first proposed in 1991. The Ktunaxa maintain that there is no way of building the resort that would eliminate or minimize the impact on their beliefs and practices. 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.

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. 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. Both courts’ analyses relied heavily on a Eurocentric understanding of religion and a misapplication of the subsection 2(a) test. The lower courts’ decisions...
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,” 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.” This characterization, while minimally accurate, does little to get to know the Other. 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. 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. That the lower courts were mired in an understanding of religious freedom that reified dominant conceptualizations of religion was

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.


152 Ibid at 250 [footnote omitted].
evident from many of their comments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{156} Allowing the development of the proposed ski resort within Qat’muk, and specifically

\textsuperscript{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” (\textit{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, \textit{Hutterian Brethren}, and the religious education cases” (\textit{ibid} at para 298). In a similar vein, the British Columbia Court of Appeal distinguished the “religious vitality” implicated in \textit{Ktunaxa Nation} from that involved in \textit{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 \textit{Loyola} because of the “deep linkages between this [religious] belief and its manifestations through communal institutions and traditions” (\textit{Loyola}, supra note 30 at para 60 cited in \textit{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 \textit{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 \textit{Borrows, Indigenous Constitution, supra} note 15 at 248–50; \textit{Beaman, supra} note 129 at 194–200; \textit{Rhodes, supra} note 82 at 17–24).

\textsuperscript{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, \textit{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).

\textsuperscript{155} See \textit{Ktunaxa Nation SC}, supra note 9 at paras 14, 17–18, 108–11, 235, 244, 297; \textit{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>.

\textsuperscript{156} Morales, \textit{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 Ktunaxa would no long-
er receive spiritual guidance, rendering their songs and rituals inconse-
quential. 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 erro-
neously 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 reli-
gious group that, to preserve the communal dimension of its reli-
gious 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 develop-
ment project on the Ktunaxa appears to be a problem for the Court of Ap-
peal, although one of the main purposes of religious freedom is to protect
subjective beliefs. 159 When a state action prevents individuals from ex-
pressing 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 sub-
section 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 en-
tirely 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 in-
substantial. 160 The Court of Appeal did not explicitly conclude in Ktunaxa
Nation whether the interference posed by the resort’s construction would

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. Instead, 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. This approach preserves a broad and liberal understanding of religious freedom. 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. 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.” She characterized “measures which ... disrupt the vitality of religious communities” as “a profound interference with religious freedom.” Building the proposed resort would sever the “deep linkage” 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

---

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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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 \textit{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 \textit{Ktunaxa Nation} to a more generous interpretation of subsection 2(a), keeping in mind the unique Indigenous belief system in question.

\textbf{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 \textit{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

\textsuperscript{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).

\textsuperscript{169} Ross, supra note 8 at 3.

\textsuperscript{170} \textit{Big M Drug Mart}, supra note 107 at 337.
morals and the fundamental rights and freedoms of others." 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.” The holistic manner in which such beliefs are embedded in daily life and preserved and transmitted for future generations must be appreciated. 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-


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.\textsuperscript{174}

Commercial development has been both accepted\textsuperscript{175} and rejected\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{179} As stated by the Supreme Court of Canada in Tsilhqot’in Nation v. British Columbia, “the court must be careful not

\textsuperscript{174} Morales, supra note 15 at 294 [footnote omitted].

\textsuperscript{175} See Gladstone, supra note 13 at para 75; Delgamuukw, supra note 13 at para 161.

\textsuperscript{176} See e.g. Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at paras 1107–08, [2008] 1 CNLR 112.

\textsuperscript{177} See Morales, supra note 15 at 304.

\textsuperscript{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).

to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts.”  

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. 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.

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.” 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.

---

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.
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

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

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.

\footnote{TRC Summary, supra note 65 at 6.}