LAW AND INDIGENOUS RELIGION: THEORIZING A COMPLEX RELATIONSHIP

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Abstract:

This thesis asks what preconditions are necessary to think the relation between law and Indigenous religion without marginalizing perspectives, such as those germane to Indigenous religion, that fall outside law's frame (often figured, erroneously, as 'objective' and 'neutral'). The research grounds itself in the only Supreme Court of Canada case that, to date, has involved Indigenous religious freedoms and s. 2(a) of the *Canadian Charter of Rights and Freedoms* (*Ktunaxa Nation v British Columbia* 2017 SCC) and in the very few lower court decisions that have followed in its not-unproblematic wake. Inspired by several currents of both Indigenous thought and non-Indigenous critical-theoretical work, I advance an approach that imagines law and the stories it tells as deeply entangled, inevitably, with land. Applying this framework to the context of Canadian constitutional law's encounters with Indigenous religion, I argue that for law to understand what is at stake in Indigenous religious freedoms claims, it must transcend its habit of seeing the world in ways that perpetuate a division between objects and beliefs. Law might thereby open to the perspective, prevalent across Indigenous worldviews, that selves and world are not as separable as Canadian constitutional law's current religious freedoms framework suggests.

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Preface: A Story of Encounter between Law and Indigenous Religion, in Treaty 4 Territory.

"Finally, we wish to apologize as well for our past dismissal of many of the riches of Native religious tradition. **We broke some of your peace pipes and we considered some of your sacred practices as pagan and superstitious.** This, too, had its origins in the colonial mentality, our European superiority complex which was grounded in a particular view of history…When Christopher Columbus set sail for the Americas, with the blessing of the Christian Church, Western civilization lacked the insights it needed to appreciate what Columbus met upon the shores of America. The cultural, linguistic, and ethical traditions of Europe were caught up in the naïve belief that they were superior to those found in other parts of the world. Without excusing this superiority, it is necessary to name it. Sincerity alone does not set people above their place in history."

–Statement from the Roman Catholic orders of men and women who worked in residential schools, published in Appendix 4 of "Final Report of the Truth and Reconciliation Commission of Canada: Vol. 1" at p. 386 (emphasis mine).

"Native [peoples] have lived in a post-apocalyptic world since the time of European arrival, having lost most of their land and political autonomy. In addition to being a historical nightmare, this is a continuing religious crisis. An entire people have had their world ruptured with no substantial redress… Looking to the future, if religious freedom for Native peoples is to mean more than protecting beliefs held in private, something more than offering the legal equivalent of ill-fitting hand-me-downs, then a major shift in thinking about democracy relative to Native people will be required."

--Greg Johnson, "Religious Freedom, Direct Action, and Rethinking Foundations" (Berkley Forum, October 21, 2020)[1]

"'Honour' he said as tears rose up in his eyes, 'not like the slaughter that happened to them and to us… the planned genocide of both the Indian people and buffalo. You have seen the PILE OF BONES haven't you?" --Ernest Crow, last of the Piapot tribal hunters[2]

[1] Greg Johnson, "Religious Freedom, Direct Action, and Rethinking Foundations" (Berkley Forum, October 21, 2020) Online at: https://berkleycenter.georgetown.edu/responses/religious-freedom-direct-action-and-rethinking-foundations. Last accessed: 26-05-2022.

[2] I became familiar with this quote from Ernest Crow over the course of many conversations I was fortunate to have with David Westcott, a traditional elder in the Lakota-Cree tradition, my one-time partner and my dear friend. Westcott knew Ernest Crow personally in the late 1980s, when they both lived on the Piapot reserve bordering the Qu'Appelle Valley, in Treaty 4 territory.

Buffalo bones are being loaded in a Canadian Pacific railway car to be shipped to a glue factory. Credit: Library and Archives Canada / PA-066544

This thesis starts on a patch of land governed by Treaty 4, in traditional Nehiyaw (Cree) and Metis territory, in Wascana park, across the street from the Saskatchewan legislature, in present-day Regina.[3] A few blocks from Wascana park stands the site of a Canadian National Railway terminus where, as along many railways throughout the prairies, the bones of thousands of buffalo were once stacked—victims of generations of colonial government policy that resulted in the near-total disappearance, by 1876, of the bison herds (by some estimates 5 to 6 million) that for eons graced the Northern prairies.[4] The government-directed slaughter of the bison had the not accidental effect of starving out many Nehiyaw people who relied on responsible harvest of the bison as a primary food source.[5] The Nehiyaw came to call the site of present-day Regina *oskana kâ-asastêki*, which translates as "Pile of Bones."[6] Not wanting to look bad, as ever, the British renamed the spot 'Regina' in 1903, after the Queen of England. Many Nehiyaw people still call Regina Pile of Bones. The memory of all the slaughtered buffalo does not disappear so easily.

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[3] For a comprehensive, horrifying account of the role that the planned slaughter of the bison over several generations of colonial policy played in the wider initiative to clear the plains for colonial development see: James W. Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).

[4] See: CBC News, 'First baby bison born on ancestral land in more than 150 years: Wanuskewin," April 24, 2020. Online at: https://www.cbc.ca/news/canada/saskatoon/wanuskewin-baby-bison-1.5543754. Last accessed 22-03-2022.

[5] *Ibid.*

[6] See: City of Regina website, online at: https://www.regina.ca/about-regina/regina-history-facts/. Last accessed 08/03/2022.

This patch of land in pile of bones is the site where, in the summer of 2020, Tristen Durocher, a 24-year old Metis man, held a 44-day hunger strike to call attention to the ruling Saskatchewan Party's decision, in late June 2020, to vote down a bill[7] that would have allocated more funds to the rampant problem of youth suicide in the North. Durocher fasted for 44 days, 44 for each of the 44 MLAs who voted down the bill.[8] Durocher's outrage was deeply personal; an accomplished fiddle player, he played at his first funeral for a child lost to suicide when he was just 10 years old. In an interview with the CBC in July 2020, Durocher explained, "as a child I've been in gymnasiums trying to play and console families over the sounds of the echoes of grieving mothers burying their firstborns."[9] That the state would remain neutral in the face of this ongoing tragedy was particularly disconcerting for Durocher; in statements to the press, he bears witness to the pain not only of all these innocent deaths, but also to the state's inaction:

> I've seen too many graves for my young life and I've seen too much indifference and political neutrality and kind of just this really disgusting attitude of not our kids not our problem and that is beyond horrifying… I'm starving in solidarity with our children who are — literally some of them are starving and figuratively they're starving for equality. They're starving for justice, they're starving for belonging, they're starving for their culture and this is my way of saying I love you and I'm starving too.[10]

Durocher began this courageous journey by walking the full 634 km south from his home in the remote Northern community of Buffalo Narrows, near Air Ronge, Saskatchewan (traditional Nehiyaw territory governed by Treaty 6) to Pile of Bones (aka Regina), traditional Nehiyaw, Lakota, Dakota, and Nakota territory, governed by Treaty 4.[11] On an arduous journey that

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[7] CBC News, "Sask. NDP bill focused on suicide prevention defeated by government," June 19, 2020. Online: https://www.cbc.ca/news/canada/saskatchewan/proposed-suicide-prevention-bill-defeated-1.5620451. Last accessed 08-03-2022.

[8] See: CBC News (Jennifer Francis), "Tristen Durocher ends 44 day fast, takes down teepee camp at Wascana Centre," September 13, 2020, Online: https://www.cbc.ca/news/canada/saskatchewan/durocher-ends-44-day-fast-takes-down-teepee-1.5722669. Last accessed 08/03/2022. Suicide amongst native youth is far higher than amongst the general Canadian population, and has been for a long time. According to statistics issued by the Canadian Centre for Suicide prevention, suicide is the leading cause of death for Indigenous people in Canada under the age of 44 (see: Centre for Suicide Prevention website, https://www.suicideinfo.ca/resource-type/statistics/. Last accessed 08/03/2022.) For an account of the extent of the suicide crisis amongst native communities, especially amongst young people, and for a moving analysis of the intersections between this crisis and the ongoing legacy of colonialism, which includes ongoing widespread government neglect of the problem, see: See Tanya Talaga, *All Our Relations: Finding the Path Forward* (Toronto: House of Anansi Press, 2018).

[9] CBC News (Jennifer Francis), "Two men walking across Saskatchewan to raise awareness of Indigenous suicide," July 6, 2020, Online: https://www.cbc.ca/news/canada/saskatchewan/suicide-awareness-indigenous-saskatchewan-1.5638349. Last accessed 08-03-2022.

[10] *Ibid.*

[11] *Ibid.*

included travel through numerous thunderstorms, a growing, diverse assembly of elders and other supporters joined Durocher for stretches of his walk.

Once in Regina, Durocher set up a traditional teepee in Wascana Centre, within eye-shot of the provincial legislature. He surrounded the teepee with dozens of photos of people, many of them children, lost to suicide in recent history, provided to Durocher by their families. Durocher's conducted his fast on the same spot where the "Justice for Our Stolen Children" camp had set up two years earlier, to protest the disproportionate number of Indigenous children in foster care and the related issue of ongoing racial injustice in Saskatchewan.

Photo Credit: The Canadian Press.[12]

While both Durocher's fast and the "Stolen Children" camp sought to raise public awareness about the impacts of racial injustice on Indigenous youth, Durocher's approach was different—he did not characterize his activities as a protest, but rather as a "ceremony in progress." [13] He lit a sacred fire in the middle of the tee pee, which he surrounded with dozens of the images he had received of people lost to suicide. Over the course of his fast, and true to his Metis heritage, he relied on both Indigenous and Christian religious practices in his approach to holding vigil for the innocent dead; a photo taken outside of the Regina courthouse, posted on Durocher's Facebook page, shows Durocher in a pink sweatshirt marked with the word "Jesus," carrying an eagle feather in one hand:

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[12] The Canadian Press, "Saskatchewan Government in Court over teepee protest camp on legislature lawn." September 4, 2020. Online: https://www.aptnnews.ca/national-news/saskatchewan-government-in-court-over-teepee-protest-camp-on-legislature-lawn/. Last accessed 08-03-2022.

[13] CBC News, "Tristen Durocher vows to remain in Wascana Park until planned end of ceremonial fast on Sept. 13" August 11, 2020. Online: https://www.cbc.ca/news/canada/saskatoon/suicide-awareness-hunger-strike-tristen-durocher-1.5681532. Last accessed 08-03-2022.

Tristen Durocher, Regina Court House, after attending court on September 4, 2020. From a Sept. 5, 2020 Facebook post to the public page of "Walking with the Angels," a grassroots organization set up to support Durocher's fast.

Another photo shows Durocher in his ceremonial teepee, with a variety of recognizably *Nehiyaw* medicines around him (sage, sweetgrass, a red print). Behind him, a cross marked with the medicine wheel at its centre rests against one of the tee-pee poles. He sits on a yoga mat:

From an August 18, 2020 Facebook post to the "Walking with the angels" page.

Over the course of Durocher's lengthy fast, flocks of supporters, both Indigenous and not, from all walks of life, including several Christian faith leaders,[14] joined him to mourn the too-many innocent dead. This included many grieving parents and relatives who came from all over the prairies to hold vigil with him, taking comfort in the chance to mourn together at a time when covid had forced many of them to bear the unthinkable in isolation. Chiefs from all over the province joined Durocher on August 11, 2020 voicing support for his cause.[15]

On August 1, 2020, The Provincial Capital Commission (the arm of the Province of Saskatchewan responsible for regulating and overseeing activities in Wascana Park) sent Special Constable Marvin Taylor to post a Notice of Trespass under the Trespass to Property Act.16 The Special Constable used a sledgehammer to drive a stake into the ground, onto which he posted the notice, next to the photos of children and youth lost to suicide that Durocher had placed around the teepee.

Durocher did not vacate the grounds. Five days later, on August 6, the Government of Saskatchewan and the Provincial Capital Commission initiated a joint application, filing for relief under the *The Recovery of Possession of Land Act*.[17] They sought possession of the West lawn where Durocher's teepee was erected, calling for Durocher and members of the "Walking with Our Angels" group (formed to support Durocher's fast) to "vacate and cease occupying the land."[18] This move transpired, of course, on Treaty 4 lands, and involves a man Indigenous to those lands.[19] Durocher again refused to leave. Instead, he filed a Notice of Constitutional Question on August 20, 2021, impugning the constitutionality of the bylaws in question as well as the Notice of Trespass. He contended that these violated his s. 2 (b) religious freedoms, as well as his s. 2 (b) (freedom of expression) and s. 2 (c) (freedom of assembly) rights. Two days

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[14] Inspired by Tristen's fast, on September 10, 2022, a trans denominational group of 18 faith leaders, mostly Christian but also Jewish, Muslim and Baha'is, issued a statement calling on the Government of Saskatchewan to establish an effective suicide prevention strategy. Living Skies Regional Council, "Saskatchewan Faith Leaders Issue Statement on suicide Prevention." Online: https://livingskiesrc.ca/saskatchewan-faith-leaders-issue-statement-on-suicide-prevention/. Last accessed 08-03-2022.

[15] CBC News, "Chiefs, families rally around Tristen Durocher as fast continues to push for suicide prevention," August 11, 2020. Online: https://www.cbc.ca/news/canada/saskatchewan/walking-with-our-angels-event-1.5682515. Last accessed 08-03-2022.

[16] *Saskatchewan v Durocher*, 2020 SKQB 224 at para 7, referencing the Trespass to Property Act, SS 2009, c T-20.2.

[17] *Recovery of Possession of Land Act,* RSS 1978, c R-7.

[18] Connor O'Donovaln, "Saskatchewan government files court application against Tristen Durocher," August 7, 2020, Global News. Online: https://globalnews.ca/news/7257860/saskatchewan-government-files-court-application-tristen-durocher/. Last accessed March 30, 2022. See also: *Durocher*, at para 9.

[19] *Ibid*

before the end of his fast, in September 2020, Saskatchewan Court of the Queen's Bench Justice Graeme Mitchell sided with Durocher against the province, on the grounds that Wascana park bylaws that would have prohibited Durocher from conducting his ceremonial fast constituted a non-justifiable infringement of his s. 2 (a), s. 2 (b), and s. 2 (c) rights.[20] In his analysis at the s. 1 stage, Justice Mitchell cited the Truth and Reconciliation Commission report and Canada's commitment to reconciliation.[21]

In the wake of the Supreme Court of Canada's first—and to date only—decision involving Indigenous religious freedoms under the s. 2 (a) framework, *Ktunaxa* 2017 SCC, many commentators rightly suggested that Canadian constitutional law has serious, possibly insurmountable limits when it comes to protecting Indigenous religious freedoms. [22] *Durocher*, arguably, signals a departure from the jurisprudential tendency established in *Ktunaxa*—an indication that Canadian constitutional law is not entirely incapable of protecting the religious freedoms of Indigenous people. The promising decision in Tristen Durocher's case notwithstanding, deep structural limits remain in Canadian constitutional law. These call for a radical reimagining of what is at stake in Indigenous religious freedoms cases—and of what it will take for Canadian constitutional law to evolve in directions that advance the religious freedoms of Indigenous people.

The *Ktunaxa* decision highlights these limits. But it also reveals that Canadian constitutional law is a fluid, evolving entity, not necessarily closed, as some commentators suggest, to perspectives that would allow for responses (such as Justice Mitchell's in the *Durocher* decision) that advance Indigenous people's religious freedoms claims. In a lengthy, costly court process that started in the B.C. Supreme Court and wended its way up to the Supreme Court of Canada, the Ktunaxa people (native to what is now known as the Eastern Kootenays in the south-east corner of British Columbia) argued that a proposed ski resort development would disturb grizzly bears in the area. Relying in part on the testimony of an elder

[20] *Durocher* at para 49.
[21] *Durocher* at para 47.
[22] See for instance: Michael Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us about Indigenous 'Religion' and Indigenous Rights." (2020) 49 *Studies in Religion/Sciences Religieuses* 1; Howard Kislowicz and Senwung Luk, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom," (2019) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 88; and Nicholas Shrubsole, "The impossibility of Indigenous religious freedom," (November 13, 2017) *Policy Options*. Online at: <https://policyoptions.irpp.org/magazines/november-2017/the-impossibility-of-indigenous-religious-freedom/>. Last accessed 30-03-2022.

who had a vision of the spiritual consequences of this disturbance,[23] the *Ktunaxa* argued that the ski resort would drive the Grizzly Bear Spirit away, thus violating their religious freedoms.[24] As the SCC framed the Ktunaxa's argument, the:

> Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure…would remove the basis of their beliefs and render their practices futile… the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.[25]

A majority of the SCC decided against the Ktunaxa, holding that the decision to approve the ski resort violated "neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs."[26]

In their reasoning, the court relied on a framework developed in preceding s. 2 (a) cases, none of which involved Indigenous religion. This framework defines freedom of religion in a twofold way, as the "freedom to hold religious beliefs and the freedom to manifest those beliefs."[27] Thus, the court determined that the "Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief."[28] The majority held that the proposed ski resort violated neither of these:

> This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2 (*a*) of the *Charter* protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(*a*) beyond the scope recognized in our law.[29]

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[23] Michael Carroll has argued that the court failed to understand the central role that vision plays in Indigenous religion, and hence that the court arguably did not appreciate the significance of the elder's vision. See: Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" *ibid.*

[24] See: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 at para 58-69. (Note that the Ktunaxa also claimed that the proposed resort violated their s. 35 rights to adequate consultation and accommodation.)

[25] *Ktunaxa Nation* at para 60.

[26] *Ibid* at para 8.

[27] See: *R v Big M Drug Mart Ltd.,* 1985 SCC 69 and its holding as adopted in: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 68; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 32; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 40.

[28] *Ktunaxa Nation* at para 70.

[29] *Ibid.*

In applying the narrow framework of "holding or manifesting" a belief, the court entrenched a dualism between beliefs and their objects, and defined the state's duty in a concomitantly dualistic way:

> The state's duty under s. 2(*a*) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship.[30]

In following past precedent to limit the scope of religious freedom to "the freedom to hold" and the "freedom to manifest," and in articulating a strict dividing line between beliefs and their objects, the court bound the Ktunaxa to a test arguably ill-fitting to the nature of Indigenous religion.

Most Indigenous religious traditions[31] do not approach belief and materiality as separate in the way the SCC presumes in *Ktunaxa*, a point several commentators have noted.[32] Rather, they view mind and body, object and belief as entangled in complex webs of creation and rooted, always, in the sacredness of land. This sacredness is coextensive with the beingness of native peoples. In binding the Ktunaxa to a test that presumes belief and its objects to be separate the court, arguably, not only excludes the protection of sacred ceremonial sites from the scope of s. 2 (a). It also entrenches a jurisprudential blindness to what is fundamentally always at stake in Indigenous religious freedoms claims: land and Indigenous people's irrevocable connection to it. (*Ktunaxa*, troublingly, has been interpreted narrowly by lower court judges who have argued that *Ktunaxa* necessarily limits the scope of s. 2 (a) in ways that do not protect land or sacred places.)[33]

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[30] *Ibid.*

[31] I discuss the characteristics of these traditions at some length in Chapter 2, in conversation with Indigenous thinkers.

[32] See for instance: Natasha Bakht & Lynda Collins, "The Earth Is Our Mother: Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62 *McGill LJ* 3; Benjamin L. Berger, "Is State Neutrality Bad for Indigenous Religious Freedom?" in R. Moon, J. Hewitt, and B. Jacobs, eds., *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming); Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" at *supra* note 22; Kislowicz and Luk, "Recontextualizing Ktunaxa" *supra* note 22; and Nicholas Shrubsole, "The impossibility of Indigenous religious freedom," (November 13, 2017) *Policy Options*. Online at: <https://policyoptions.irpp.org/magazines/november-2017/the-impossibility-of-indigenous-religious-freedom/>. Last accessed March 30, 2022.

[33] See for instance *Teal Cedar Products Ltd v Rainforest Flying Squad* 2021 BCSC 605, where BC Supreme Court Justice Frits Verhoeven effectively dismissed (in connection with Pacheedaht elder William Jones' claims that a logging company's injunction against logging protesters would violate his s. 2 (a) religious freedoms to enjoy the old growth in his traditional territory) the possibility that a religious freedoms claim involving sacred sites would

Despite the holding in *Ktunaxa* or its narrow interpretation in a few subsequent lower court decisions, the centrality of land to Indigenous religion is not something Canadian constitutional law is incapable of understanding—nor, I suggest, of protecting under the admittedly restrained apparatus of s. 2 (a). Rather, even the disappointing decision in *Ktunaxa* contains hints of the possibility that s. 2 (a) could, under the right circumstances, transform into an instrument uniquely capable of protecting Indigenous religious freedoms—potentially better equipped than other Indigenous rights frameworks such as s. 35 or the *UN Declaration on the Rights of Indigenous People* (received into Canadian law as of June 21, 2021).[34] I discuss the applications of the approach to Indigenous religion I am advocating for to concrete instances of legal reasoning in s. 2 (a) versus s. 35 of the *Canadian Constitution* or the *UN Declaration on the Rights on Indigenous People* in the conclusion to this thesis. For now I want to flag the seeds of possibility contained in *Ktunaxa*, to give the reader a preliminary taste of the latent potentialities at work in Canadian law that lie in wait as forces for the transformation of extant frameworks past their current limitations. In suggesting that s. 2(a) is not incapable of protecting Indigenous religious freedoms, I am going against the suggestion of some commentators who have argued that the colonial, individual-rights-based nature of the *Charter* makes it necessarily incapable of protecting Indigenous religious freedoms.[35] I do not deny the severe limits of s. 2 (a), but neither do I think it categorically incapable of offering meaningful protection for Indigenous religion, if judges were willing to interpret in ways that reflect a deep understanding of what is at stake in Indigenous religion.

The minority decision in *Ktunaxa*, for instance, shows that some judges, at least, are endowed with a more than trivial comprehension of the centrality of land to Indigenous religion. In writing this decision, Justice Moldaver (with Justice Cote concurring) relied on a far more nuanced reasoning that would have expanded the scope of s. 2 (a) to account for the central role land plays in Indigenous religious traditions:

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ever be successful. Verhoeven cites without further comment or interpretation the holding in *Ktunaxa Nation* that the *Charter* protects the "freedom to worship, but does not protect the spiritual focal point of worship" (*Teal* at para. 71).

[34] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

[35] In a commentary published not long after the *Ktunaxa* decision was released, Nicholas Shrubshole argues that, because of the way the framework of s. 2 (a) first reifies the contingent category of 'belief' as a necessary part of its concept of religion, and then fails to account for differences between Indigenous religious rights and the rights of non-Indigenous persons, it is "impossible" for s. 2 (a) to protect Indigenous Religious freedoms. See: Shrubsole, "The impossibility of Indigenous religious freedom" at *supra* note 22.

> The connection to the physical world, specifically to land, is a central feature of Indigenous religions…In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself. Unlike in Judeo-Christian faiths, for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world. For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with a believer's ability to act in accordance with his or her religious beliefs and practices.[36]

On the basis of this thick understanding of the ways in which the "spiritual realm in the Indigenous context is inextricably linked to the physical world," Justice Moldaver found that the proposed ski resort constituted a *prima facie* violation of the Ktunaxa's religious freedoms. Troublingly, Moldaver ultimately found, under the s. 1 proportionality analysis, that the proposed ski resort constituted a justifiable infringement.[37] However, the minority's conceptualization of the scope of religious freedom as encompassing land shows that the majority's narrow logic of "freedom to manifest or believe" is not the only jurisprudential potentiality at work in the Canadian constitutional framework. This line of reasoning remains in the minor register of Canadian constitutional law for future decisions to take up as need be.

Indeed, in deciding that bylaws that would have prevented Tristen Durocher from erecting a teepee on the lawn of Wascana centre, Justice Mitchell took up this line of reasoning. Against the Attorney General of Sasktachewan's claim that the lawn of Wascana Centre holds no special religious significance for Durocher, Justice Mitchell accepted Durocher's submission in his affidavit that "Wascana Centre is on the traditional lands of Treaty 4 territory, the original lands of the Cree, Ojibwe, Saulteaux, Dakota, Nakota, Lakota, and on the homeland of the Métis Nation" and therefore that it does hold significance for Durocher, a Metis man.38 In accepting this, he cited Moldaver's finding in Ktunaxa that "land, especially land which holds significance for Indigenous people, often plays an integral role in the exercise of Indigenous spirituality."39

Operating clearly within the procedural and doctrinal framework of Canadian law, Justice Mitchell was able to read Durocher's grieving ceremony as religion. Further, In applying the proportionality test under the s. 1 framework, Justice Mitchell appealed to the legacy of

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[36] *Ktunaxa Nation* @ para 127.
[37] *Ibid.*
[38] *Durocher* @ para 31.
[39] *Ibid.*

colonialism as recorded in the 2015 Truth and Reconciliation Commission report, as well as the 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls as necessary context for understanding the relevance of Durocher's fast to the work of reconciliation. On this basis, he decided in Durocher's favour. (The court in Ktunaxa made no mention of the court's duties in light of national commitments to reconciliation, perhaps because the scope of these commitments has taken time to come to national consciousness in the wake of the release of the final TRC report.) It might have been easier for a Canadian judge to identify a legitimate religious freedoms claim when a large piece of real estate was not at stake, as it was in *Ktunaxa*.[40] *Durocher* shows that s. 2 (a) need not be completely blind to claims that arise from Indigenous religious practices; the category of religion, as used by Canadian state-law, might, under the right circumstances, be deployed against the tendencies of state power. Rather, *Durocher* stands, as does the minority decision in Ktunaxa, as an example of the (largely still latent) potential in Canadian constitutional law, even within the limits of the s. 2 (a) framework, to protect Indigenous religious freedoms.

His supportive decision in favour of Durocher's religious freedoms notwithstanding, Justice Mitchell was operating, arguably, within a wider judicial milieu that did not take kindly to efforts to read Durocher's actions as religion. (Many Indigenous thinkers, too, push back on the characterization of Indigenous spiritualities as "religion,"[41] a point I return to in more detail in Chapter 2, where I discuss the problem of naming and defining "Indigenous religion.") The tone of this wider milieu operates, in tandem with the doctrinal limits imposed by the narrow scope the Supreme Court of Canada assigned to freedom of religion in Ktunaxa, to severely restrict Canadian constitutional law's capacity to respond in justice-oriented ways to Indigenous peoples' religious freedoms. When Durocher ended his fast, Justice Mitchell paid an impromptu visit to his camp. Once there, he shook hands with Durocher and received a ceremonial Metis sash from one of Durocher's supporters—two days after rendering judgment in the case, and before he had finished giving full reasons.

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[40] For in depth discussions of the centrality of land to Indigenous Religious Freedoms claims and courts' hesitance to protect land under the s. 2 (a) framework, see: Natasha Bakht & Lynda Collins, "The Earth Is Our Mother: Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62 *McGill LJ* 3; Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" at *supra* note 22; Kislowicz and Senwung Luk, "Recontextualizing Ktunaxa Nation v. British Columbia" *supra* note 22.

[41] See the critique of the term 'religion' as applied to Indigenous spiritualities in: Marc Fonda, "On the Origins and Spread of Pan-Indian Spirituality in Canada" (2016) 45 *Studies in religion* 3 (2016); Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" *supra* note 22.

Justice Graeme Mitchell at Tristen Durocher's teepee, September 13, 2020. Photo: Arthur White Crummey, Regina Leader-Post.[42]

Responding to complaints raised after media reported on Justice Mitchell's appearance at Durocher's camp, the Canadian Judicial Council launched a review into his conduct. The review determined that Justice Mitchell's conduct was "inconsistent with the ethical obligation that all judges are sworn to uphold," namely the "obligation to appear and remain neutral."[43] The Council found, however, that the matter "was not serious enough to possibly warrant his removal."[44] Curiously, in its press release on the matter, the Council refers to Durocher's actions on the lawn of Wascana centre as a "protest camp"[45] even though, in his decision, Justice Mitchell accepted Durocher's characterization of his activities at Wascana Centre as a "ceremony-in-progress," not a protest.[46] That the Canadian Judicial Council would insist on the pejorative "protest camp" and not look to the religious dimensions of Durocher's actions minimizes Durocher's sacrifice. It also overlooks the evidence submitted and accepted in Justice Mitchell's court to the effect that the fast was a religious activity, by virtue of its being conducted by a Metis man on traditional Metis lands. This speaks, arguably, to the Canadian Judicial Council's inability to read Indigenous religion as religion, even when courts under their supervision, obeying evidentiary rules of the Canadian judicial system, do manage, as Justice

[42] Arthur White-Crummey (Regina Leader-Post), "Judge visits Tristen Durocher's teepee in Wascana Centre," September 14, 2020. Online: https://leaderpost.com/news/saskatchewan/judge-visits-tristen-durochers-teepee-in-wascana-centre. Last accessed 30-03-2022.
[43] Canadian Judicial Council, "Canadian Judicial Council completes its review of the matter involving the Honourable Graeme Mitchell," Canadian Judicial Council website, April 13, 2021 press release, https://cjc-ccm.ca/en/news/cjc-completes-review-matter-involving-honourable-graeme-mitchell. Last accessed 30-03-2022.
[44] *Ibid*
[45] *Ibid*
[46] *Durocher* at para 5 and at paras 30-32.

Mitchell's court did, to see ceremonial resistance to unjust state action as religion, not mere "protest."

The Canadian Judicial Council's resistance to Justice Mitchell could be read as a legitimate attempt to defend the principle of neutrality that our common law tradition upholds as a necessary quality of its judges.[47] However, this resistance could also be seen as evidence of the limits of the principle of neutrality when it comes to deciding Indigenous rights cases inside a legal system whose professed commitments to neutrality have, not infrequently, led to the advancement of interests that work decidedly against the religious freedoms of Indigenous peoples. As this thesis unfolds, I return to the problem of neutrality in the face of the legacy of colonialism. I remain grateful to Tristen Durocher for the ways his encounter with Canadian constitutional law highlighted the fraught, complex relations between Indigenous religion and Western law, inspiring the meditation on these relations that follows—complicating the picture, post-*Ktunaxa,* of Canadian constitutional law's capacities and limitations when it comes to advancing the religious freedoms of Indigenous people.

Much has happened since Durocher's fast to further complicate the picture of Indigenous-state relations in Canada; these complications have, inevitably, inflected the meditations around which this thesis unfolds. In the spring of 2021, officials discovered the unmarked graves of 215 children at the site of the former Kamloops residential school. In the weeks and months that followed, more and more bodies in unmarked graves were discovered at former residential school sites across the country. As of this writing, over 4000 bodies have been found.[48] Residential school survivors and their advocates[49] have, of course, been speaking for many years,

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[47] My thoughts on the limits of neutrality in the context of Indigenous religion have benefitted greatly from the discussion in Benjamin L. Berger, "Is State Neutrality Bad for Indigenous Religious Freedom?" in R. Moon, J. Hewitt, and B. Jacobs, eds., *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming). See also: John Borrows, "Is Objectivity Bad for Religious Freedom? The Earth, Religion, Indigenous Peoples and Canadian Constitutionalism" in R. Moon, J. Hewitt, and B. Jacobs, eds., *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming).

[48] For a recent estimate of the number of bodies found at unmarked graves and burial sites across the country, see: CBC News, "Fighting 'denialists' for the truth about unmarked graves and residential schooling," June 3, 2022. Online at https://www.cbc.ca/news/opinion/opinion-residential-schools-unmarked-graves-denialism-1.6474429. Las accessed 09/06/2022. See also: Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: Missing Children and Unmarked Burials," *The Final Report of the Truth and Reconciliaiton Commission, Volume 4* (Montreal & Kingston, McGill-Queen's University Press, 2015).

[49] For instance, Peter Bryce, Chief Medical Officer of the Indian Department, released a report condemning the practices at residential schools in 1922, writing about how Indigenous children in residential schools were forced to live in unsanitary conditions and were regularly denied access to basic medical care. He also wrote about the lack of

very often to deaf ears, to the reality of the magnitude of residential school violence, including the high incidence of deaths, and the schools' complicity in hiding these deaths. The Truth and Reconciliation Commission (TRC) report, released in December 2015, contains extensive testimony from survivors who speak to the rampant abuse and neglect at the schools and to the frequency with which fellow classmates disappeared without explanation. The TRC report estimates that there were upwards of 3213 deaths over the course of the residential schools' history.[50] However, the actual discovery of bodies starting in the spring of 2021 sent a shock-wave through the country, triggering national grief, outrage, and denial.[51]

Not far from where Durocher held his fast, at the site of the former Marieval residential school at the Cowessess reserve east of Regina, 751 bodies were found in unmarked graves in late June 2021.[52] In July of 2021, 182 human remains were discovered near the sight of a Catholic-run residential school in Ktunaxa territory,[53] a fact that may have inflected the *Ktunaxa* decision had it been discovered before that decision was made. How, indeed, ought the law to balance Indigenous religious freedoms in light of the revelation that, in the name of settler religion, so many innocent Indigenous children not only had their traditional religious beliefs

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certainty over the number of deaths at the schools, citing the deficient reports of school officials as cause for this uncertainty. See: Peter Bryce, *The Story of a National Crime: An Appeal for Justice to the Indians of Canada* (James Hope & Sons, Ltd: Ottawa, 1922). The Canadian government did not heed Bryce's warning; Bryce was forced to retire from the Civil Service over his advocacy for Indigenous children at the schools. Residential schools continued to operate, very often with the same inattention to basic health needs Bryce identified, until the final school's closure in 1996.

[50] This total reflects TRC analysis of the Registers of Confirmed Deaths as of November 18, 2014. See: Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: Missing Children and Unmarked Burials," *The Final Report of the Truth and Reconciliation Commission,* Volume 4 (Montreal & Kingston, McGill-Queen's University Press, 2015).

[51] An example of this denial can be seen in Conrad Black's commentaries in the National Post, for instance: Conrad Black, "Canada has been bewitched by charlatans," Jul 03, 2021. Online at: https://nationalpost.com/opinion/conrad-black-canadas-has-been-bewtiched-by-charlatans. Last accessed 31-03-2022. His minimization of residential schools' violence in this article builds on past denunciations of the Truth and Reconciliation Commission report, for instance: Conrad Black, "The truth about truth and reconciliation," *National Post,* March 21, 2021. Online at: https://nationalpost.com/opinion/conrad-black-7. Last accessed 09-06-2022. In this article, as in many of his articles, Conrad Black denounces what he calls the "the rampant but fraudulent truism that this country is rotten with 'systemic racism.'" He argues, in the face of evidence gathered meticulously by the Truth and Reconciliation Commission Report and later corroborated by the discovery of bodies at Kamloops and at schools across the country that "there is no evidence whatsoever that any Canadian authority ever advanced or imposed any policy on Natives or anyone else that was designed to eliminate or shorten lives or truly eliminate their culture." See: Conrad Black, "A serious conversation for a serious country" *National Post,* April 3, 2021. Online at https://nationalpost.com/opinion/conrad-black-a-serious-conversation-for-a-serious-country. Last accessed 09-06-2022.

[52] National Geographic (Brandi Moran), "Residential School Survivors Reflect on a Brutal Legacy: 'That Could've Been Me," June 28, 2022. Online at: https://www.nationalgeographic.com/history/article/residential-school-survivors-reflect-on-brutal-legacy-that-could-have-been-me. Last accessed 09-06-2022.

[53] National Catholic Reporter, "More Graves Found in Canada," (2021) 57 *National Catholic Reporter* 21.

beaten out of them (as the TRC report attests in many places),[54] but were also killed, including via the slow-death of neglect? What added significance might be assigned to the protection of the Grizzly Bear spirit in light of these residential school discoveries?

As news story after news story broke about new discoveries at school sites across the country, I tried to write, groping after an adequate way to frame the law-Indigenous religion encounter on terms that did not do a disservice to the memory of all these innocent dead. I came up against an emptiness in me that would not suffer my disciplinarian demands to just write anyway. I recalled, not infrequently, the memory of the hundreds of thousands of slaughtered buffalo, whose memory opened this thesis, and the way the founding of the Canadian state is never not mixed, in my historical imagination, with so many piles of bones—human and not.

Travel to Treaty 4 territory: Grounding the Thesis Research in Place.

"I have come to understand that research is a ceremony. It is a ceremony that knowingly builds relationship with Knowledge, so that we allow that knowledge to move through us."
--Shawn Wilson, *Research and Reconciliation*[55]

In August of 2021, I travelled to Pile of Bones (aka Regina) from my residence in Victoria, B.C., in Coast Salish territory. I went to assist my friend, the elder David Westcott, with a harvest of sage. The harvest takes place near to a sacred site south of Pile of Bones—a traditional fasting ground since time immemorial, preserved thanks to the generosity of a settler farming family. I hoped to get perspective through direct engagement with this sacred land about how to approach academic work in a way that does not turn away from the massive wound of colonialism that haunts the law-Indigenous religion encounter at every turn.

[54] See: Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliaiton Commission,* (Montreal & Kingston, McGill-Queen's University Press, 2015).
[55] Shawn Wilson, Andrea V. Breen, and Lindsay Dupre, eds, *Research and Reconciliation: Unsettling Ways of Knowing Through Indigenous Relationships* (Canadian Scholars: Toronto & Vancouver, 2019).

The researcher praying at a sacred *Nehiyaw* fasting grounds, south of Pile of Bones, beside ancient Nehiyaw stone effigies, one depicting a human, the other a turtle. August 2021. Treaty 4. Photo credit: David Westcott.

After 4 straight days of sage harvesting—an intense and clarifying experience such as cannot be adequately put into words—I travelled into the City of Regina with Westcott. We stopped at the steps of the Saskatchewan legislature to offer a print and tobacco (traditional offerings in the *Lakota-Nehiyaw* ceremonial traditions to which we belong) at a makeshift altar set up there—as on legislature steps across the country—to commemorate residential school survivors. Next, we walked across the street in the blazing August heat, the air thick with the smoke of summer forest fires raging to the West, to the site of Durocher's fast. The ground where, last summer, Durocher's teepee had stood for 44 days was free of any outwards signs of his ceremony. As we approached the site, two jack rabbits stood at attention, over two feet tall each—a striking sight. We sat on the grass and closed our eyes. We prayed.

It was good to come full circle, a year later, to the land that inspired my thesis in the first place. Coming full circle, I realized that this thesis has been hard to write for a good reason—because it centres around a phenomenon that thrusts one into the territory of the unsayable: the horrific deaths of innocents, many of them children, effected through the action and negligence of the state and facilitated, too often, through the complicity of our laws and legal institutions. The problem around which this thesis centres, then, is one that already takes me beyond my own capacity for thought, into territory I define, provisionally, as religious: space where I am required

to surrender the idea that thinking can take me as far as I need to go. It is from this space that I have endeavoured to write, moving into thought from the zone where thought does not, cannot reach. From that ground, I have tried to do what I can to put my legal scholarship in the service of what truth requires to honour colonialism's too-many innocent dead. Whereas I began my thesis work thinking I might be able to make an argument about what theorizing the law-Indigenous religion encounter ought to entail, the process of deepening into the embodied, felt reality of this difficult subject matter has led me to focus not on answers or claims but on the more fundamental problem of what the preconditions might be for even embarking on scholarship in this fraught space.

This thesis, then, is an attempt to think the law-Indigenous religion encounter otherwise than according to the habits of divisive oversimplification that tend to dominate public—and, too often, academic—discourses around Indigenous-state relations. These lead too readily to claims and answers that leave fundamental suppositions about the very field where the figure of "law" and the figure of "Indigenous people" meet under-interrogated.[56] This attempt originates in a specific impulse: a desire to respect the dignity of those, human and not, whose lives were thwarted by colonialism's narrow, violent, hubristic logic. However, in contrast to many commentators,[57] I do not think that Western law is only ever the agent of colonialism and violence. Rather, I maintain faith in the multiplicity of law, and therefore also in its capacity to transform its character case by case, judge by judge, moment by moment. I believe that law is capable of both more and less than our too-often polarizing discourses suggest.

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[56] Discourses in Indigenous studies in Canada over the last several years have tended to be divided, never neatly, between advocates of reconciliation, who contend that, the violent history of colonialism notwithstanding, Indigenous sovereignty can be reconciled with Canadian nationhood and advocates of resurgence, who see this reconciliation as an impossibility. For a thoughtful complication of the habitual way of framing the Indigenous-state relations problem along lines that favour either resurgence or reconciliation, see: Michael Asch, John Borrows, and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: Toronto University Press, 2018). For a theoretically nuanced look at Indigenous-state relations that acknowledges the deep complexities of both categories (eg 'Indigenous' and 'State') and the myriad ways that Indigeneity is inscribed by practices of state power in ways that make the either/or categorization of 'resurgence' or 'reconciliation' quite obviously over-simplified, see the collection of articles in Audra Simpson and Andrea Smith, eds, *Theorizing Native Studies* (Durham: Duke University Press, 2014).

[57] For compelling, theoretically rich work that makes arguments in favour of the irreconcilability of Canadian state institutions (including law) with Indigenous sovereignty, see: Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus* (Durham: Duke University Press, 2014); Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance*. (Minneapolis: University of Minnesota Press, 2017).

In pointing to colonialism's violence, I do not mean to replicate what David Treuer has called the "tragic narrative" of Indigenous people's history.[58] Though this thesis bears witness to the reality of colonialism's numberless innocent thwarted and dead, it does so from a perspective that also celebrates the myriad ways Indigenous individuals and peoples continue to manifest, even amid the ruins of colonialism, incredible creativity, strength, and beauty, as holy power. Tristen Durocher made manifest this holy power in his sacrifice at Pile of Bones. Countless practitioners of Indigenous religion do this also, in ways both secret and public, with remarkable tenacity every day—keeping alive ceremonial traditions in the face of myriad attempts, historic and ongoing, to erase them.

The ways of seeing that emerge from Indigenous people's religious practices have helped show me how to think beyond the confines of my own conditioning, including the conditioning implicit in even the most critical approaches to legal training. I am thus grateful, beyond measure, for the many elders and wisdom-keepers, human and not, from the traditional Lakota-Cree ceremonial tradition to which I belong. Their lives and sacrifices inspire me at every step. I am grateful, too, for the chance and great spaciousness that Dr. Benjamin Berger and the Osgoode Hall law school community have provided me to think into these hard corners of law's empire, and to contemplate modes of being that permit, from within law itself, a movement past the confines that law has been complicit in creating.

[58] See: David Treuer, *The Heartbeat of Wounded Knee* (New York: Riverhead Books, 2019)

Introduction:

"The conquest of the earth is not a pretty thing when you look into it too much."
--Robert Williams Jr, *The American Indian in Western Legal Thought*[59]

The superior comes to cut my
coarse black hair and it dies upon
the cement matted in vengeance
because the hot blood of warriors
still runs through the
ancestral rivers of my DNA

That night a bear came to salve
their sacred secretions upon my
pagan soul while the body of
Christ sizzled on the savage
tongues of holy shaman

Lunging at my throat the black
robe tore off the bear claws from
my chest and his mistress tied the
British scarf of tyranny about my neck

Adorned in the finest garment of
sheepskin and the scarlet embroidery
of colonial authority I stood
watching from the ivory tower of
civility while the government
stole all the gods and hid them in
the sanctuary of its own terror

And for seven generations the
shaking tent stood still

In the night a bear came to suck
the defiled marrow from my bones
where the foreigners of madness
had deposited a cancer like new
vestments upon my desiccated soul

Now five hundred and two years
have eaten themselves raw inside
the psyche of your subtle and

[59] Robert Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

polite madness like a whey-di-go
who leaves discomforted by the
presence of power while your little
turtle boat waits patiently
upon the shore of Turtle Island

Because I am of the seventh generation

--James Nicholas, *Nehiyaw* artist who, among many other things, was sent to residential school in the 1970s, at the age of 8, against his will.[60]

This thesis looks at the encounter between law and Indigenous religion, on the hunt for ways of thinking the relation between the two that promote clear-seeing, without which law's often-twisted ideas stand little chance of serving the dignity of Indigenous peoples.[61] I start with the view that the experience of law and the experience of religion are events that unfold through time (and, relatedly, in specific spaces)[62] in complex entanglements[63] — not fixed substantive

[60] Text from a 1994 performance (*Taking Off Skins*) made in collaboration with his wife, the Governor General's Award-winning photographer Sandra Semchuk. See: James Nicholas, *Taking Off Skins: Text from performance* (1994), online at "The Medicine Project website," https://themedicineproject.com/sandra-semchuk-james-nicholas.html. Last accessed 13-06-2022. I retain the full caps of the original.

[61] I purposefully try in this thesis to avoid, when possible, relying on the loaded terms "reconciliation," "resurgence," and even "decolonization," though I do resort to this word from time to time. Each of these terms can do—and has done— important work in the task of forging a future less full of gross injustices perpetrated against Indigenous peoples; see for instance the nuanced discussions in the essays collected in Michael Asch, John Borrows, and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: Toronto University Press, 2018). However, I want to distance my work from the political associations these words can carry; I am interested in something more basic than political allegiance to this or that imagined programme organized around trying to right wrongs that, from my perspective, in some very important ways cannot be fixed. What can be done, I suggest, is to greet the future with open-ness, and with a willingness to work for the dignity of those peoples so wronged, historically and currently, by the hubris of European colonization. Openness does not require signing on to the project of reconciliation, resurgence, or even decolonization. It does, however, require a certain humility and a willingness to do the work needed to greet difference in a spirit of curiosity and compassion, which I suggest requires directing attention at underlying, too often unquestioned assumptions about the worlds where law and Indigenous religion meet.

[62] My attention to the spatio-temporal dimensions of law has been honed through many conversations with my colleague and friend Mark Zion, whose theoretically rich work on law, temporality, and geontologies inspires me with its rigour, imagination, and critical depth. See, for instance: Mark Zion, "Making Time for Critique: Canadian 'Right to Shelter' Debates in a Chrono-Political Frame" (2020) 37 *The Windsor yearbook of access to justice* 1.

[63] In thinking about law as a set of experiences unfolding in complex entanglement with other phenomena, I am indebted to the work of William Connolly, especially his work on complexity theory. See: William Connolly, 'Complexity, Agency, and Time', from *A World of Becoming* (Durham: Duke University Press, 2011); William Connolly 'Steps Toward an Ecology of Late Capitalism', from *The Fragility of Things: Self-Organizing Processes, Neoliberal Fantasies, and Democratic Activism* (Durham: Duke University Press, 2013). William Connolly's work on complexity theory and, relatedly, on the politics of becoming imagines the political as a complex force field of incessant change and transformation, wherein elements often excluded from traditional accounts of the political (eg phenomena both human and not human, registered not infrequently at a visceral, not merely cognitive level). On Connolly's account, these complex entanglements on the move in complex force fields drive sudden, unpredictable

things separable in any neat way from other elements of the life of which they are a part. In approaching the law-religion encounter this way, I am inspired by Benjamin Berger's call to see law as a cultural phenomenon, rather than as the neutral arbiter of religion it often understands itself to be.[64]

By framing the law-religion relationship not as "a juridical or technical problem to be addressed through better laws" but rather as an "instance of cross-cultural interaction,"[65] Berger invites reflections, such as the one I undertake here, on the complex ways law frames religious experience—and vice versa. For Berger, the experience of law is understood to be twofold—as both a "peculiar context for framing the experience of phenomena" and as "something that can itself be experienced."[66] I see Indigenous religion likewise. The meeting between law and Indigenous religion, then, is a meeting of two worldviews—never neatly separate or separable from each other—each with capacities to provide both content and frame for a wide range of experiences. That law and religion are not as neatly separable as some analyses suggest is a point Oraby and Sullivan highlight in a recent review article on the state of the field of law and religion,[67] writing that "law and religion have always been indeterminate categories and have always overlapped—and have functioned together thus, even as such indeterminacy and interaction have not always been sufficiently captured by scholars."[68] Narrating this complex encounter of distinct but not indeterminate cultural phenomena is not easy, especially in the context of Indigenous religion, wherein the legacy of colonialism further complicates not only the encounter between Indigenous religion and Western law, but also the language and modes of narration used to frame it. (I consider the problem of naming in more detail in Chapter 2, which considers how to define "law and Indigenous religion.") When it comes to writing about Indigenous religion and law, then, Oraby and Sullivan's call to consider "whether different stories about law and about religion can be told"[69] is particularly apposite.

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shifts in the political field in ways that always escape neat attempts to capture them. In thinking through the connection between law, religion, and complexity, I have also been informed by Connolly's work on secularism. See: William E. Connolly, *Why I am Not a Secularist* (Minneapolis: University of Minnesota Press, 1999).

[64] See: Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

[65] Berger, *Law's Religion* at p. 18.

[66] *Ibid* at p. 23.

[67] Mona Oraby and Winnifred Fallers Sullivan, "Law and Religion: Reimagining the Entanglement of Two Universals" (2020) 16 *Annual Review of Law and Social Sciences* at 257–276.

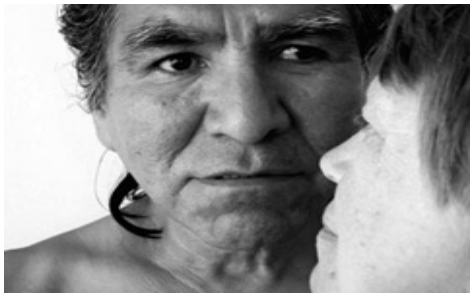
[68] Oraby and Sullivan, "Law and Religion" at p. 267.

[69] *Ibid* at p. 267.

In this quest to find different ways of telling the story of law's entanglement with Indigenous Religion, I am inspired by the lifework of the wonderful Ukrainian-Canadian visual artist Sandra Semchuk. Semchuk was the wife and essential collaborator of the late *Nehiyaw* artist James Nicholas, whose poem about his experience in residential school I transcribe above. Semchuk deploys deeply creative approaches to storytelling, based in personal experience as the settler wife of a full-blood, Cree-speaking man, as a way to "disrupt myths that historically have shaped settler relations to First Nations."[70] At the end of a video made in her honour (after she won the Governor General's Award for Visual and Media Arts in 2018), Semchuk stares at the camera, the bald Prairie of her Treaty 6 homeland opening to an enormous grey sky beyond. She asks:

> How do we come to know across species, as well as across cultures? How do we come to know someone else, without projections?[71]

The kind of thinking I am looking for in this thesis takes seriously this difficult question. The question of how we come to know across difference cuts to the heart of the task of remaking relations between Indigenous peoples and settlers along more loving, more just and, especially, more dignified lines. It speaks, too, to the task required for law to see Indigenous religion on terms other than the ones predefined by law's episteme.



Sandra Semchuk and James Nicholas. Co-operative self-portraits with Madelon Hooykaas.[72]

Inspired by the challenge embedded in Semchuk's question, this thesis has in view a big question: What approaches to thinking about encounters between Indigenous Religion and Canadian constitutional law best promote law's ability to respond to the unique claims of

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[70] See: "The Medicine Project website," https://themedicineproject.com/sandra-semchuk-james-nicholas.html. This website offers an introduction to Semchuk's extensive cross-species collaborative photographic work with bison and with Grizzly bears.

[71] Semchuk, speaking in Canada Council,"Portrait of Sandra Semchuk, 2018 Governor General Award Winner in Visual and Media Arts" at https://www.youtube.com/watch?v=OWK_4kNb-cE&t=248sß. Last accessed 13-06-2022.

[72] Reprinted at: "The Medicine Project website," https://themedicineproject.com/sandra-semchuk-james-nicholas.html.

Indigenous religion in ways that advance the religious freedom, justice interests and, especially, the dignity of Indigenous peoples? Answering this question well requires, as a necessary prerequisite, addressing two related issues: 1) how to adequately conceptualize the challenges that inhere in the meeting between the radically different worldviews and knowledge-production habits of law and Indigenous religion; and 2) how to approach the problem of naming and defining the phenomena I am provisionally referring to as "Indigenous Religion." [73] My research question therefore asks: What preconditions are necessary in order to think the relationship between law and Indigenous religion clearly?

At the core of my research question is a suspicion that the ways we think about encounters between Indigenous religion and Western law inform both 1) the kinds of harms we are able to identify as flowing, or potentially flowing, from these complex encounters, haunted as they always are by the legacy of colonialism; and 2) our ability to intuit possibilities for more just futures that these encounters might generate. As my discussion of the *Ktunaxa* decision in the preface makes clear, I am working with the assumption that Canadian constitutional law's current frameworks do not suffice to enable the shifts needed to respond to Indigenous religious freedoms claims, rooted as these almost always are in a deep sense of the sacredness of land.[74] Clear thinking in the context of law and Indigenous religion requires conceptual and methodological approaches that do not merely replicate the epistemological habits of Western legal thinking. As the holding in *Ktunaxa* evidences, these habits, rooted in a dualism that posits mind (beliefs) as separate from materiality (objects of belief), perpetuate a view of religion at odds with Indigenous ceremonial practices. The approaches I am looking for must, therefore, address two related problems. First, the way legal doctrine that separates objects from belief negates what is at stake in Indigenous religious freedom claims—viz, the thick, rich worldview of Indigenous religion, wherein land, vision, and narrative are entwined in complex entanglements that tend to exceed the analytical frames of Western law—and, indeed, of mainstream Western thinking more generally. Second, the persistent habit of Western law to characterize its episteme as neutral and, in so doing, to maintain and assert the epistemological

[73] See: Rex Ahdar. "Navigating Law and Religion: Familiar Waterways, Rivers Less Travelled and Uncharted Seas," in ed Ahdar, *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar Publishing, 2018) at p. 2 and pp. 6-8.

[74] See, in a general way, Berger's discussion in *Law's Religion* on the limits of legal theoretical and legal-doctrinal approaches to understanding the cross-cultural interaction between law and religion.

dominance of Western legal thinking. This second habit compounds the harms implicit in the first; eg not only does Western law tend to be blind to Indigenous religion, it also tends to characterize that blindness as "neutral" and "objective," which makes challenging law's characterizations of Indigenous religion difficult absent analytical frameworks that chip away at the edges of law's assumptions of neutrality.

This thesis, then, is an attempt to think about the entanglement between Indigenous religion and Canadian constitutional law differently than according to the discursive, doctrinal, procedural, and fact-finding habits that dominate the current normative world of law. These habits too often constrict Indigenous religion's narrative range to the epistemological habits and consequent ontological perspectives that perpetuate Canadian constitutional law's current narrow view of religion. This results in a silencing of Indigenous religion's ways of knowing, narrating, and viewing the world—and of imagining alternative future worlds to the one we have now, full as it is of so much injustice, borne disproportionately by both Indigenous peoples and the natural world. That said, I take seriously the doctrinal and procedural realities of Western law and do not neglect the value of paying close attention to these in thinking the law-Indigenous religion clearly. Close attention to undercurrents at work in the case law reveal a legal world far more fluid—and contingent—than many critical theoretical analyses that disparage Western law wholesale would suggest. As my discussion in the preface shows, the *Durocher* case, for instance, suggests that new worlds do, sometimes, emerge through the birth chamber of the court-room.

Many in the legal field, both in legal academia and in legal practice, have, of course, long been working in directions that support shifts away from the epistemological dominance of mainstream Western legal thought.[75] These shifts have happened not only in legal practice, but

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75 For an indication of the level of intent at play in B.C. to bring Indigenous perspectives into mainstream justice system concerns, see: B.C. Justice Summit, *Tenth Justice Summit: Indigenous Justice, Report of Proceedings* (2018) Online here: https://www.justicebc.ca/app/uploads/sites/11/2019/02/eleventh-summit-report.pdf. Last accessed 14-06-2022. "The Tenth BC Justice Summit marked the first time that justice system leaders and Indigenous peoples have come together with the sole focus of considering the Indigenous experience of the justice system in British Columbia, and was the first Summit in which Indigenous people played a central role in the design and planning of the event. The overall goal of the 2018 Justice Summits is to identify and accelerate real, transformative changes to the justice system in BC that will benefit Indigenous people." (*Report of Proceedings* at p. 3). See also: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 112, where Justice Lamer writes, in the context of aboriginal title but with implications that extend to other Indigenous rights, "As with other aboriginal rights, it [aboriginal title] must be understood by reference to both common law and aboriginal perspectives." Of course, legal practice does not always live up to the ideals expressed in policy papers and judgments.

also through the labour of legal academics working to resurrect Indigenous legal traditions, often by foregrounding the importance of storytelling, of land as a source of law, of the importance of relational modes of understanding, and, relatedly, of Indigenous aesthetics.[76] In trickles here and there, and thanks to the work of many actors positioned across and beyond the legal field, accomplished with great and difficult sacrifices over several generations, Western law's ways of seeing (at least in certain corners) do seem to be shifting in ways that seek to advance the perspectives—and hence also the justice-interests— of Indigenous people.[77] To be sure, these shifts are small, often ambiguous, and easily obscured by the many ways the Canadian legal system continues to do grave injustice to Indigenous peoples—often in the form of an epistemic violence that would subtly insist on the superiority of law's ways of knowing.[78]

Given the reality of a legal world in which, despite the efforts of many over generations, law continues to assert its epistemological dominance over Indigenous perspectives, clear thinking in the context of analyses of law and Indigenous religion requires analytical approaches that work to expose and unseat this dominance. Developing such approaches, in turn, requires the establishment of two prerequisites—preliminary steps on the road to thinking the law-Indigenous religion relation clearly. The first prerequisite is a conceptualization of the field

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[76] For a sense of the scope of work being done in legal academic contexts in Canada to resurrect Indigenous perspectives and to resurrect Indigenous legal orders, see, for instance: John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2020); Hadley Friedland, "Waniska: Reimagining the Future with Indigenous Legal Traditions" (2016) 33:1 Windsor YB Access Just 85; Tracey Lindberg "Engaging Indigenous Legal Knowledge in Canadian Legal Institutions: Four Stories, Four Teachings, Four Tips, and Four Lessons About Indigenous Peoples in the Legal Academy" (2019) 50 *Ottawa Law Rev* 119.
For more on Indigenous aesthetics and its application to legal reasoning, see: Darcy Lindberg, *Miyo Nehiyaw (*Beautiful Creeness): Ceremonial Aesthetics and Nehiyaw Legal Pedagogy" (2018) 16 *Indigenous Law Journal* 1; Jo-Ann Archibald, Jenny Lee-Morgan, and Jason De Santolo, *Decolonizing Research : Indigenous Storywork as Methodology*, ed Archibald, Lee-Morgan, and De Santolo (London: ZED Books, 2019)
I am grateful to Jeffrey Hewitt for bringing to my attention the connections between Indigenous aesthetics and the work I am exploring here; given more time, I would have explored these connections further, as the ways in which scholars such as Lindberg who expound on Indigenous ceremonial as an aesthetic practice that makes worlds other than the ways law does would be another, likely very fruitful, avenue through which to view the difference—and possibilities for meeting—between law and Indigenous religion.

[77] See for instance John Borrows' discussion of the book review by the Honourable Judge Reilly of the Provincial Court of Alberta, wherein Judge Reilly, in Borrows' words, insists "on the ongoing relevance of Indigenous people's own legal systems." Borrows, The Right Relationship at p. 227-228). See also John Reilly, *Bad Law: Rethinking Justice for a Postcolonial Canada* (Calgary: Rocky Mountain Books, 2019).

[78] These shifts must involve more than an uncritical reception into the legal field of state-sponsored reconciliation discourse. I acknowledge, along with many other commentators the gross limitations of Canada's reconciliation discourse, which includes a not-inconsiderable potential for extremely damaging state hypocrisy. (See for instance the excellent, theoretically rich work of Dian Million on the limits of reconciliation discourse: Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Phoenix: University of Arizona Press, 2013).

indicated by the terms "law and Indigenous religion." The second is a working definition of "Indigenous religion." In carrying out these preliminary steps, it is necessary to move beyond the implicit conceptual and methodological approaches of law's world, in order to get at the forces, many of them subterranean, that determine Indigenous religion's encounters with Western constitutional law. These forces, often so subtle as to be nearly invisible, determine the kinds of stories that get told and do not get told about what is at stake in Indigenous religious freedom claims. They determine whether or not, for instance, judges will insist, as a majority of Supreme Court of Canada did in the *Ktunaxa* decision, on applying frameworks that entrench a view of religion that is at odds with Indigenous people's view of land as central to religious experience.

Chapter 1 exposes challenges endemic to the world of law and religion, which challenges relate to the meeting of radically different worldviews and attendant knowledge-production habits. I explore the shape these onto-epistemological challenges take in the unique context of law's encounters with Indigenous religion. In exposing the challenges that inhere in law's encounters with religion more generally, and Indigenous religion specifically, I rely, in part, on legal theorist Robert Cover's work on the "nomos" or "narrative world" of law: the thick, rich, interpretive climate out of which legal meaning emerges. I suggest that if Cover's conceptualization of the nomos is to adequately account for the interplay of phenomena at work in the encounter between law and Indigenous religion, it must be expanded to account for the ways in which Indigenous religion sees land as the primary norm-generating force, and hence does not conceive of narrative as separate from the material world that gives rise to it. Thus, the first prerequisite for clear analysis of the law-Indigenous religion is an expanded conceptualization of the narrative world of "law and Indigenous religion" that does not replicate the division between materiality and narrative at work in much of mainstream Western thinking, including Canadian constitutional jurisprudence in the context of s. 2 (a) religious freedoms claims. Thinking that entrenches false binaries—eg between belief and its objects, between nature and culture, between narrative and materiality—will lead legal analyses to misread Indigenous religion. Expanding the conception of the nomos to include land as a narrative-generating force helps address law's tendency to negate, through its limited episteme, the deep entanglements between land and narrative at the heart of Indigenous religion.

In Chapter 2, I turn to the question of how to think with "Indigenous religion," which I suggest starts with defining this not-unproblematic term. I advocate for an approach to the

problem of definition that does not, even inadvertently, replicate the knowledge-production habits of law—habits I am arguing tend to negate what is at stake in Indigenous religious freedoms while reifying law as epistemologically superior to Indigenous Religion. Rather, my approach to the problem of naming and definition flows from the methodology I endeavour to deploy throughout this thesis. This methodology proceeds from a view of land and culture as deeply entangled and foregrounds storytelling (and the relations it both exposes and makes) as a centrally important form of theorizing. This is in keeping with much of the wisdom of Indigenous thinking, both scholarly and otherwise. Methodologically, this approach signals my desire, throughout this thesis, to question and unseat the presumptive dominance of mainstream Western modes of thinking—modes I do not disparage wholesale (far from it) but whose hegemony I seek to trouble. In defining Indigenous religion, then, I start with the view that there is no single Indigenous religion that can be isolated and defined. Rather, Indigenous religion[79] exists as sets of experiences, never not entangled in the wider nomos in which law and the legacy of colonialism inflects Indigenous people's experiences and identities in too many ways to count. I advocate not for fixed definitions but rather for a tactical fluidity that remains responsive to the on the ground needs of Indigenous people who, for better or worse, sometimes do look to law to protect their religious freedoms.

Methodology

My approach to theorizing law and Indigenous Religion seeks to proceed in ways that honour Indigenous worldviews, specifically the view of land and humans as entangled. A corollary of this methodology is a deep commitment to embodying the material I contemplate through the specificity of my own body and its position in the wider historical narrative of European contact with Turtle Island. My approach—and the answers I come to—are informed, inevitably, by the way my life history and current practices condition my view and my modes of communication. In paying close attention to the relationship between who I am and the approach to research I take, I am inspired by the counsel of many Indigenous thinkers, who, like Shawn Wilson, remind researchers that our own life experience—our personal stories—cannot be

[79] I discuss my decision to use the contested term "Indigenous religion," rather than "spirituality," "worldview," "cosmology" in depth in Chapter 2. Though I use the term "religion" in the singular, this is not to suggest that there is anything like a singular "Indigenous religion." A more accurate usage might be "Indigenous religions," but I have retained the simpler "Indigenous religion," with the caveat that I mean a plurality of phenomena, the complexities of which I expound in Chapter 2.

separated from our scholarship. Further, our scholarship always exists in relationship to the audience who reads it, to their personal histories and stories. As Wilson puts it:

> Indigenous people in Canada recognize that it is important for storytellers to impart their own life and experience into the telling. They also recognize that listeners will filter the story being told through their own experience and thus adapt the information to make it relevant and specific to their life.[80]

I respond to this self-imposed challenge to see the law-Indigenous religion encounter clearly through the specificities of my own positionality as a white-born, white-raised, English-speaking woman—a graduate of a Western law school, with seventeen years of education in Western educational institutions before that. I also respond as a person blessed to have spent many years, between my undergraduate degree and my return to law school later in life in close contact with one iteration of the many, varied, complex, and always-evolving forms of Indigenous religion alive on our planet: a traditional Lakota-Cree ceremonial community. Finally, I respond as a graduate student in a Western legal-academic setting who, as such, filters my way of narrating through the conventions, flexible and growingly open to Indigenous approaches as they are, of the scholarly context in which I write.

I see my subjectivity as comprised not only of my 'positionality' (eg. my history and my ancestry), but, even more so, of the practices that constitute and reconstitute my thinking on a day to day basis. Thus, in trying to see the law-Indigenous religion clearly, I have committed to embodying my scholarship in the specificities of the place and time where I find myself. My commitment to a practice of embodied thinking reflects the core assumptions of this thesis, eg. that thought is not separate or, indeed, separable from the bodies and land that constitute it. This assumption is consonant with the guidance of Indigenous theorists, many of whom have worked extensively over their careers to advocate for more embodied approaches to academic theorizing,[81] ones that take seriously the entanglement between scholarly work and everyday life. Shawn Wilson, again, puts it powerfully and succinctly:

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[80] Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Nova Scotia: Fernwood Press, 2008) at p. 32.

[81] I am inspired especially by the work of Dian Million on the need for embodied theorizing, for instance in Dian Million, "Intense Dreaming: Theories, Narratives, and Our Search for Home" (2011) 35 *American Indian quarterly* 3 at pp. 313–333, and by Shawn Wilson, both of whom ground their work unapologetically in the lived experience of being a body never-not caught-up in the forces that constitute their life-in-time. See: Wilson, *Research is Ceremony* at *supra* note 80.

> In our research ceremony, the sacred nature of not only our grand and noble topics and methodologies need to be upheld, but the seemingly mundane relationships that we hold with our everyday world.[82]

My "research ceremony," directed at the goal of clear-seeing in the context of law and Indigenous religion, has thus involved many practices of embodied relation-building with the material my thesis contemplates, as my story in the preface about travel to Pile of Bones attests. For much of June and July of 2021, for instance, following the discovery, in wave after wave, of the bodies of children in unmarked graves at former residential school sites across Turtle Island, I made a practice of going down to the steps of the legislature in Victoria, B.C. (in Lukwengun territory) almost every day, often late at night once the crowds had dispersed, to sit quietly and observe, paying homage to the innocent dead.

When the first unmarked graves were discovered at the Kamloops school in late May 2021, relatives and family members of residential school survivors began lining the legislature steps, in Victoria and across the country, with hundreds of items placed to commemorate the dead: teddy bears, orange shirts, flowers, handwritten notes of various kinds. On several notes I saw, children had scrawled in crayon the names of their grandparents, and the years they were in residential school. One note listed the names of two grandparents, with the words "they returned from residential school, but they were never the same."

Close-up of mem orial on the steps of the Provincial Legislature of British Columbia in Victoria, B.C. Items were first placed here on May 28, 2021, by people holding vigil for the 215 children whose bodies were found at the Kamloops residential school. Photo: Darren Stone, *The Times Colonist.* July 5, 2021.[83]

[82] Wilson in *Research is Ceremony supra* note 80 at p. 32.

[83] Photo printed in: Victoria Time Colonist-staff, "Criminal Activity in Residential Schools" (June 5, 2021). Online here: https://www.timescolonist.com/opinion/letters/letters-june-5-criminal-activity-in-residential-schools-clarity-in-vaccination-sites-1.24327104. Last accessed 16-06-2022.

Through these and many other practices of engagement in my day to day life over the process of writing this thesis, I have endeavoured to never forget the long legacy of silencing Indigenous religion has suffered, which legacy haunts every encounter between law and Indigenous religion.

The Road Ahead

In parsing through the complexity's of Indigenous religion's encounters with Western law in contemporary times, through both traditional research and writing and through practices of embodied thinking, I have done my best to stay close to the desire with which I opened this introduction—eg. to keep my thinking clear, so that I can see Indigenous Religion without the projections and distortions cast by the limits of law's ways of knowing. In this task, I am inspired by some deceptively simple instructions from Leonard Crow Dog, the Lakota medicine man who became famous after he served as the spiritual intercessor at the 1973 stand-off between American Indian Movement Activists and the US Government at Wounded Knee.[84] Crow Dog asks us to:

> Look at the real reality beneath the sham reality of things and gadgets. Look through the eye in your heart. That's the meaning of Indian religion.[85]

As I have gone through the not infrequently arduous labour of making this thesis, I have kept asking myself: how can I look "beneath the sham reality of gadgets and things?" How can I approach this act of scholarship such that I look with the eye in my heart? This is not to say that seeing with the heart is easy. The modern heart—certainly my own and, I venture to guess, even Leonard Crow Dog's—is mired in labyrinthine networks of abstraction, both chosen and imposed, that cloud the capacity for clear-seeing. Law is part of that abstraction—it inflects our lives in ways often too intimate to allow us to see its operations clearly. This does not absolve us of the responsibility to try. Trying requires a willingness to stay close to the heartbreak that attends the colossal wound of colonization on Turtle Island. Trying also requires training our

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[84] Leonard Crow Dog, Richard Erdoes, *Four Generations of Sioux Medicine Men* (New York: Harper Collins, 1995).

[85] See: Mary Crow Dog, Richard Erdoes, *Lakota Woman* (New York: Grove Press, 1990) at p. 199. These words of Crow Dog's are made possible, in part, because his own father Henry Crow Dog was willing to fend truancy officers off his land with a shotgun when they came to take young Leonard to residential school (where he would have been forced to give up, as he puts it, his "Indian-ness" and to take on the mantle of the Christian religion). See the account of this in: Crow Dog, *Four Generations of Sioux Medicine Men*, *supra* note 55.

eyes on the good that still remains and to the possibilities for a better way forward that may emerge through the airing of all this heartbreak—lest tragedy blind us to the sight of all the Indigenous power, beauty, courage, and goodness that never did and never will submit to the sick logic of colonial power.

Chapter 1: The Nomos of Law and Indigenous Religion

> "we are all part of the same body: humans, non-humans, the elements, the land, the ancestors (those who have been and those who will come again). Colonialism has worked like the (ongoing) severing of an arm; one hand of this body has tried (unsuccessfully) to cut off the arm on the other side, only maiming it. -- Cash Ahenakew, *Towards Scarring Our Collective Soul Wound*[86]

> "the very notion of culture is an artifact created by bracketing Nature off. Cultures – different or universal – do not exist, any more than Nature does. There are only nature-cultures, and these offer the only possible basis for comparison"
>
> --Bruno Latour, "We Have Never Been Modern"[87]

The meeting of law and religion very often involves encounters between radically different worldviews; these worldviews flow from radically different sets of knowledge-production practices. These practices, in turn, inform and inflect differences in worldview. In this way, worldview and knowledge production practice—what we might call ontology and epistemology—inform and condition each other and as such are never separate. Thus we can frame the encounter between law and religion as an encounter between different onto-epistemologies. This Chapter proposes theoretical tools to assist in the task of developing clear-thinking around what is at stake in the meeting between these radically different—though never entirely distinct—onto-epistemologies. I want to make clear from the outset that these tools, while proposed in the specific context of the law-Indigenous religion encounter, nonetheless have applications to analyses of law and religion in general. Indeed, the specific problems that arise in the context of law and Indigenous religion shed light on problems that inevitably attend law's encounters with other worldviews that, like Indigenous religion, are often at odds with law's way of seeing, framing, and narrating the world.

The development of a theoretical apparatus to assist analyses of the law-Indigenous religion encounter is the first of two prerequisites this thesis argues are necessary for clear-seeing in the context of encounters between law and Indigenous religion—for instance in analysing s. 2 (a) religious freedoms claims like the one the Ktunaxa nation brought to the Supreme Court of

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[86] Cash Ahenakew, Towards Scarring Our Collective Soul Wound (booklet) (Musagetes, November 2019) at p. 35. Online here: https://musagetes.ca/document/towards-scarring/. Last accessed March 29, 2022.

[87] Bruno Latour, *We Have Never Been Modern: Essays on Modern Superstition*, trans. Catherine Porter (Cambridge: Harvard University Press, 1993) at p. 104.

Canada in 2017, or the one young Tristen Durocher brought before a Saskatchewan court in 2020 (both discussed in the preface).[88] The next chapter addresses the second prerequisite: the question of how to name and define "Indigenous religion." This question engages, extends, and contextualizes the conceptual tools Chapter 1 proposes.

My conceptualization of the onto-epistemological problems that attend the law and religion encounter is inspired, in part, by Robert Cover's work on what he calls the "nomos" of law: the narrative bedrock out of which legal interpretations emerge. In the nomos, as Cover conceives it, narrative and law are "inseparably related;" legal worlds make stories and stories make legal worlds.[89] As he puts it:

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.
> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose.[90]

Legal interpretation is not separate from the stories that give meaning to the wider world in which law exists. On Cover's view, the field in which law operates is already rich in meaning-giving narratives whose limits and possibilities inform the kinds of stories that are and are not told about what is at stake in Indigenous religious freedoms claims.

Cover's conceptualization of law's nomos is thus extremely helpful in thickening readings of law's encounter with religion, for the way it foregrounds the discursive milieu that informs legal decision-making. His account shows that "law" is always wider than what happens in the courts and is reflected in judicial reasoning; law is both product and source of narratives that make normative worlds, *nomoi*, that both influence and are influenced by judicial decision-making and legal institutions. Reading Cover, we can come to see that law is more than a system of rules or institutions; it is a normative world, a nomos, created out of narrative, wherein legal doctrine and legal institutions interact with wider cultural forces (the ones that create narratives) to produce legal meaning. Thus, Cover's work levels the field wherein law and religion meet, showing that both belong to a common nomos. Paying attention to the elements of the nomos

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[88] See: *Ktunaxa Nation* and *Durocher*.
[89] Robert Cover, "The Supreme Court 1982 Term, Foreword: Nomos and Narrative" (1983-84) 97 *Harvard Law Review* 4 at p. 5.
[90] *Ibid* at pp. 4-5.

that inform the *Durocher* or *Ktunaxa* decisions, for example, might expose an array of competing, often paradoxical narratives that fly below the radar of legal-doctrinal considerations.

When applied to the specific instance of analyses of law and Indigenous religion, Cover's account is problematic. This is because his conceptualization of the nomos does not explicitly include land.[91] Rather, he implicitly replicates the division between narrative and materiality that pertains through much of Western legal thinking. (This division is perpetuated, for instance, in the *Ktunaxa* decision which, as I discuss in the preface, entrenches at a legal-doctrinal level the conceptual separation between "beliefs" and "objects of belief" established in preceding s. 2 (a) religious freedoms, none of which dealt with Indigenous religion.[92]) For Cover, narratives are "the trajectories plotted upon material reality by our imaginations."[93] Cover thus sees narrative imagination and material reality as presumptively distinct—separate even if in close relationship. Land, as part of material reality, receives narrative projections but does not generate them.

Complicating Cover's conceptualization, this chapter posits a view of law's nomos which sees materiality and narrative, nature and culture as intertwined, coextensive phenomena. While Cover acknowledges that narratives are connected to materiality in important ways, he does not explicitly see land as a source for stories, a norm-generating force in its own right. In order to properly situate stories of encounter between law and Indigenous religion, I argue that it is necessary to conceive of the nomos of law and Indigenous religion—its narrative bedrock—broadly, such that land is included as centrally important to world-making. This chapter thus advances a conception of the nomos of law and religion as a zone wherein the story-rich bedrock available for legal interpretation is not confined to textual sources or even to human ones. In this zone, a wide variety of actors, both human and not, exist in complex webs of relations, all contributing to the creation of narratives available to inform analyses of the law- religion encounter (this includes judicial decision-making).

In advocating for an expanded view of the nomos that centres the deep entanglements between land and narrative, this chapter appeals to insights from two sources: Indigenous thought and the interdisciplinary theoretical work in social theory emerging out of science

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[91] To be fair, Cover does not address the question of stories' origins, eg. how the nomos is generated. To suggest that he excludes land as generative of narrative takes us a bit beyond his text. Had he lived to develop his legal thinking further (Cover died at a tragically young age), he might well have addressed the question of how the narrative field of law comes-to-be.
[92] *Ktunaxa Nation* at para 71.
[93] Cover, "Nomos and Narrative" *supra* note 89 at p. 5.

studies known as "new materialism."[94] It is not so much that I wish to correct Cover, but rather to extend his account, in light of recent scholarship in both social theory and native studies, such that the very useful aspects of his legal theory can be retained, while foregrounding in ways that his account does not the norm-generating potential of land. An extensive literature has grown up around Cover's work, contributing to the project of theorizing law as praxis always rooted in the narrative fields out of which legal reasoning emerges.[95] In recent years, legal theory has begun to ask how new materialism might broaden the legal imaginary to include an accounting of the ways in which the more-than-human play into ideas of law and justice.[96] Some of this work has begun the task of putting new materialism and Indigenous scholarship into conversation in the context of legal thinking.[97] To date, however, the literature has not visited the question of how the useful framework Cover laid around how narratives and the norms they generate influence legal reasoning might be thickened and extended by putting this work in conversation with new materialism and Indigenous theory. My work in this chapter contributes this new angle to the field not just of law and Indigenous religion, but of legal theory more generally.

Part I puts insights emerging from new materialism about the entanglements between nature and culture in conversation with Cover's seminal conception of the relationship between

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[94] For a comprehensive review article on the field come to be known as 'New Materialism," see: William Connolly, "The 'New Materialism' and the Fragility of Things" (2013) 3 *Millennium* 41 at p. 399–412.

[95] See for instance: Thom Brooks, "Let a Thousand Nomoi Bloom? Four Problems with Robert Cover's Nomos and Narrative" (2006) 6 *Issues in legal scholarship* 1 at pp. 201–20; Daniel Reifman, "Revisiting Robert Cover's 'Nomos and Narrative': a Semiotic Approach to Law and Narrative in the Bible to Seventeenth Centuries" (2017) *Jewish Law Association Studies* 27 at pp. 73–99; Penelope Pether, "Comparative Constitutional Epics" (2009) 21 *Law and literature* 1 at pp. 106–128; Gal Hertz, "Narratives of Justice: Robert Cover's Moral Creativity" (2020) 14 *Law and humanities* 1 at pp. 3–25; Robert C. Post, "Who's Afraid of Jurispathic Courts? Violence and Public Reason in 'Nomos and Narrative" (2005) 17 *Yale journal of law & the humanities* 1 at 9-. Perry Dane, "The Public, the Private, and the Sacred: Variations on a Theme of 'Nomos and Narrative" (1996) 8 *Cardozo studies in law and literature* 1 at pp.15–64; and Bradley Hays, "Jurispathic Baltimore? Law and Nomoi in The Wire" (2016) 12 *Law, culture and the humanities* 3 at pp. 529–542.

[96] This juncture has been explored, especially, in the context of environmental law. See for instance: Anna Grear, "Re-encountering Environmental Law and its 'Subject' with Haraway and New Materialism" in L Kotzé ed, *Environmental Law and Governance for the Anthropocene* (Portland: Hart Publishing, 2017); and K Anker et al, eds, *From Environmental to Ecological Law* (Routledge, London and New York 2021). For a discussion of connections between new materialism and law more generally, see: Anna Grear et al, *Posthuman Legalities : New Materialism and Law Beyond the Human* (Northampton: Edward Elgar Publishing, 2021).

[97] For a discussion of the ways a group of legal scholars are imagining new materialism as a way to think law beyond the confines of narrow ideas of the human, and of how some of this work engages Indigenous theory and thought as a way to include a wider circle of relations in legal theorizing, see: Emille Boulot, Anna Grear, Joshua Sterlin, and Iván Darío Vargas-Roncancio, "Editorial: Posthuman legalities: New Materialism and law beyond the human" in *Posthuman Legalities*, (Cheltenham, UK: Edward Elgar Publishing, 2021).

nomos, narrative, and law-making power. Part II discusses the problematic ways that non-Indigenous scholars working in the name of new materialism tend to overlook the contributions that Indigenous thinkers make to theorizing nature and culture as deeply entangled. This discussion foregrounds the difficulties that inhere in the meeting between Western academic thought and Indigenous perspectives. These difficulties must be addressed on the road to theorizing the law-Indigenous religion relation clearly and without the shackles of colonizing thought habits. These troubling oversights notwithstanding, I argue for the wisdom of engaging new materialism in widening accounts of law's nomos. New materialism works directly on habits of Western thought (reflected and entrenched in legal thinking and practice) that sustain the problematic division between nature and culture. I argue that it is necessary to transcend this division in order to make conceptual room for Indigenous religious perspectives (which centre the importance of entangled land-human relations to world-making). New materialism is therefore a useful theoretical tool in that it has the capacity to prepare those entrenched in Western legal thinking to understand what is at stake in Indigenous religious freedoms claims.

Part III turns directly to a consideration of Indigenous voices and perspectives on the centrality of land to Indigenous religion. In holding land as the central aspect of religious experience and ceremonial practice, Indigenous religion conceives of the ontological ground of being itself as a relational, entangled space wherein the division law sees between subject and object, nature and culture makes little sense. Part IV remembers that legal doctrine and legal practice do still constitute the nomos in important ways. A focus on seemingly extra-doctrinal questions like the entangled relations between land and vision does not negate the need to focus analysis on concrete instances of encounter between law and Indigenous religion, such as those that occur in courtroom settings in cases like the *Durocher* and *Ktunaxa* decisions.[98] I argue that good theorizing has practical consequences for the protection of Indigenous religious freedoms. I suggest that every act of legal reasoning has a theoretical underpinning, whether acknowledged or not. One's theorizing will either work for or against the overwhelming tendency for law to assert its epistemic dominance, eg by assuming its worldview (its implicit theory) to be neutral. Therefore, I conclude, if one wants to protect Indigenous religious freedoms on the ground, it is

[98] See: Cash Ahenakew's discussion of "entangled relationality" in Ahenakew, *Towards Scarring Our Collective Soul Wound* (booklet) (Guelph: Musagetes, November 2019). Online here: https://musagetes.ca/document/towards-scarring/. Last accessed 29-03-2022.

necessary to focus on what it takes to theorize the law-Indigenous religion encounter in ways that do not replicate law's violence. In the conclusion to this thesis, I discuss some possible consequences of the sort of theorizing I am advocating for judicial reasoning in the context of s. 2(a). There, I suggest that s. 2(a), in spite of its limits, could offer not-trivial protections to Indigenous religious freedoms if the sorts of shifts in the wider nomos of law and Indigenous religion this Chapter advocates were to come to pass.

Part I. Enriching Cover's account of the 'Nomos' to include Land, in Conversation with New Materialism

This section explores how insights from new materialism can work to trouble the division between nature and culture that Cover's concept of the nomos assumes. The next two sections discuss, first (Part II), the limits of new materialism as a lens through which to view Indigenous religion and, second (Part III), the importance of reading insights from new materialism along with perspectives that emerge from Indigenous religion.

New Materialism emerged out of interdisciplinary work in science studies and social theory over the last two decades. It seeks to at once acknowledge and conceptualize the complex entanglements between nature and culture. My reading of new materialism has been influenced, primarily, by the work of Elizabeth Grosz, supplemented by the work of Donna Haraway and Karen Barad. Each of these theorists, in her own way, critically complicates presumptive divisions between discourse and materiality. New materialism exists in conversation with—and is indebted to—the work of other science studies scholars, most notably Bruno Latour. Latour's early work revealed science as a complex social practice and thus troubles the assumptive division Western science draws between subjects and objects.[99] Latour's later work contributed, as an important tributary, to the larger movement in social theory known as post-humanism, of which new materialism is perhaps the most significant stream.[100]

It is beyond the purview of this chapter to either delve into the many important conceptual nuances in new materialism or to survey the not-negligeable differences that pertain between leading new materialism scholars, nor to wade much into the waters of what new materialism offers to legal theory writ large. Rather, this chapter simply signals in a general way

[99] See, especially: Bruno Latour, *We Have Never Been Modern: Essays on Modern Superstition*, trans. Catherine Porter (Cambridge: Harvard University Press, 1993). See also: Bruno Latour, "When Things Strike Back: A Possible Contribution of 'Science Studies' to the Social Sciences" (2000) 51 British Journal of Sociology 1 at pp. 107-23.

[100] See: Bruno Latour, "Agency at the Time of the Anthropocene," (2014) 45 *New Literary History* 1 at pp. 1-18.

how new materialism can contribute to the theoretical project of undoing habits of thinking that pervade much of Western thought (including Western legal thinking) that presume a clear division between nature and culture. New materialism offers a lens through which to see the assumptive division between nature and culture that undergirds much of Western legal thought as anathema to the worldview of Indigenous religion. It thus offers a promising way to theorize the field where law and Indigenous religion meet. Legal theory has begun, in recent history, to engage with new materialism in promising ways. A case in point is Margaret Davies' recent volume, *Law Unlimited: Materialism, Pluralism, and Legal Theory*, which dedicates a chapter to an exploration of the promise new materialism holds for expanding conceptions of what law is beyond the usual subject/object division that pertains throughout much of Western legal theory.[101] The subfield of law and Indigenous religion has yet to engage new materialism;[102] this chapter thus seeks to open conversations up across these disparate but related arenas of knowledge production.

The central concern of new materialism is to expose the irrevocable entanglements between all phenomena, whether 'material' or 'narrative' or belonging to the nebulous realm of the ideal.[103] In the by-now classic statement of Donna Haraway, one of the chief proponents of new materialism, "it matters what stories tell stories;"[104] by this she means that narratives inform materiality, often in ways that explode old stories about the division between nature and culture that pertain through much of mainstream Western thought. Haraway's preoccupation with exposing the deep entanglements between nature and culture comes, in part, from her dawning

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[101] See: Margaret Davies, "A new legal materialism" in Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (New York: Routledge, 2017) at pp. 56-73. See also: Irus Braverman, "Law's Underdog: A Call for More-than-Human Legalities" (2018) 14 *Annual Review of Law and Social Sciences* at 127–144. Braverman articulates the insights post-humanism has to offer a critique of law's human-centrism, arguing that this human centrism is at odds with indigenous epistemologies which, long before the 'post-human turn,' held as sacrosanct a much broader circle of relations, beyond the human.

[102] This is not to say that scholars working in new materialism have not considered the domain of Indigenous spiritualities and ceremonial culture. A case in point is the extensive work of anthropologist and leading new materialism scholar Elizabeth Povinelli whose work has involved extensive field work living among Indigenous peoples in north Australia—as recorded, for instance in: Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002); and Elizabeth A. Povinelli, *Geontologies: A Requiem for Late Liberalism*, (Durham, Duke University Press, 2016).

[103] Elizabeth Grosz, in more recent work, has looked at the connection between new materialism and the ideal. See: Elizabeth Grosz, *The Incorporeal: Ontology, Ethics, and the Limits of Materialism* (La Vergne: Columbia University Press, 2017).

[104] Donna Haraway, "Tentacular Thinking" in *Staying With the Trouble* (London: Duke University Press, 2016) at p. 35.

realization that the presumed divisions between nature and culture that have pertained through much of Western thought (including legal thinking) no longer cohere with realizations emerging from the cutting edge of the biological sciences. Haraway puts the problem thus:

> What happens when human exceptionalism and bounded individualism, those old saws of Western philosophy and political economics, become unthinkable in the best sciences, whether natural or social? (…) What happens when the best biologies of the twenty-first century cannot do their job with bounded individual plus contexts, when organisms plus environments, or genes plus whatever they need, no longer sustain the overflowing richness of biological knowledges, if they ever did?[105]

The answer Haraway gives to these provocative questions, throughout her work, is that we must stop thinking of nature and culture as separate, which uproots a whole host of habits, including the habit, pervasive in Western thought, of figuring legal subjects as separate from the entangled webs of relationality to which they belong.

Elizabeth Grosz, in a work that considers Darwin's account of evolution as a narrative that can fruitfully trouble our habitual view of nature and culture as separate, answers this question of 'what happens' when science cannot sustain the myth of nature's difference from culture in this way:

> Culture cannot be seen as the overcoming of nature, as its ground or mode of mediation, the representational form that, through retrospection, produces the natural as its precondition. According to Darwinian concepts, culture is not different in kind from nature. Culture is not the completion of an inherently incomplete nature (this is to attribute to Man, to the human, and to culture the position of destination of evolution, its telos or fruition, when what Darwin makes clear is that evolution is not directed toward any particular goal.) Culture cannot be viewed as the completion of nature, its culmination or end, but can be seen as the ramifying product and effect of a nature that is ever-prodigious in its techniques of production and selection, and whose scope is capable of infinite and unexpected expansion. Nature and culture can no longer be construed as dichotomous or oppositional terms where nature is understood as the very field on which the cultural elaborates and develops itself.[106]

Culture then, for Grosz, is an expression of an ever-expanding, profligate nature, not a superimposition that signals the end point of a nature figured as separate from culture. On her reading of Darwin, culture is one of many effects of an "ever-prodigious" nature; in light of a careful reading of the foundational texts of modern biology, the dichotomy between nature and culture can no longer be sustained. Karen Barad approaches the problem from a slightly different

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[105] Donna Haraway, "Tentacular Thinking" in *Staying With the Trouble* (London: Duke University Press: 2016), at p. 30.

[106] Grosz, "Darwin and Feminism" in Grosz, *Becoming Undone : Darwinian Reflections on Life, Politics, and Art*. (Durham: Duke University Press, 2011) at p. 44-45.

angle, coming as she does from a physics background. She nonetheless frames the problematic nature/culture split in complementary terms, speaking, as Grosz does, to the deep ways nature inscribes culture and vice versa: "Nature is neither a passive surface awaiting the mark of culture nor the end product of cultural performances."[107] Rather, for Barad, nature-culture is best viewed as a relational network of what she calls "infra-action," wherein matter itself is made through and as relationship.[108]

For Haraway, Grosz and Barad, then, as well as for other new materialists (and other contemporary theorists with related preoccupations),[109] narratives are not separate from the physical world, as Cover implies. Rather, stories and matter, narratives and materiality, unfold in complex entanglements wherein the line between nature and culture is inevitably blurred. Accounting for this entangled view of nature and culture in law's nomos requires expanding our concept of narrative to include the many ways that nature itself writes stories—including stories with legal meaning and import. It also includes seeing the many ways that law, as culture, writes nature, changing the stories nature tells—and is capable of telling. The field of law and Indigenous religion—and indeed law and religion more generally—is one in which nature and culture cannot be construed as separate without negating the very ontological ground of Indigenous religion, wherein the norms that constitute law's world are never-not embedded in the lands where legal interpretation unfolds. New materialism provides a way to expand the conceptualization of the nomos that accounts for these deep entanglements.

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[107] See: Karen Barad, "Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter" (2003) 28 *Gender and Science: New Issues* 3 at p. 827.

[108] See: Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham, Duke University Press, 2007), especially the discussion at pp. 137-141.

[109] William Connolly's work on complexity theory and the visceral register speaks to the need to view the political as a force field of complex entanglements wherein the movements and affects of bodies matter—in this way his work shares many of the same preoccupations as new materialist scholars while not falling completely within their 'camp.' See for instance: William Connolly, 'Complexity, Agency, and Time', from *A World of Becoming* (Durham: Duke University Press, 2011); William Connolly 'Steps Toward an Ecology of Late Capitalism', from *The Fragility of Things: Self-Organizing Processes, Neoliberal Fantasies, and Democratic Activism* (Durham: Duke University Press, 2013). Throughout these texts, Connolly makes the case that, as loosely bound assemblages (not the fixed subjects our ontologies often hold us to be), humans—and indeed groups of humans known as the 'collective'—are, like other systems, far more fluid and susceptible to change than other theoretical models of the human might suggest. This creates both risks and surprising avenues through which to consider possibilities for change. Connolly tends to focus on human dimensions more than new materialism scholars do—the limited scope of this thesis did not permit me room to put his work in dialogue with new materialism but future research might consider how his views on complexity, fragility, and force fields might animate theories of the law-Indigenous religion encounter in conversation with new materialism.

As discussed in the introduction to this chapter, Cover advances a view of the nomos as implicitly separate from "the physical universe of mass, energy, and momentum;" to be sure, on his account, narrative and the physical world co-exist and relate to each other but he figures them as distinct phenomena.[110] Cover is not unique in figuring culture as distinct from nature. This separation between narrative and materiality has, of course, pertained through much of modern Western thought. It is reflected, as I mention above, in how the SCC renders religion in the *Ktunaxa* decision, applying without modification its view of religion developed in preceding s. 2 (a) case law (none of which involved Indigenous religion), eg as entailing a separation between belief and its objects.[111]

Insights emerging from new materialism hold the potential to challenge this fundamental dualism. They can thus contribute to a conceptualization of law's nomos that extends through and beyond text, opening thinking up to the complex ways that matter itself is inscribed by the stories we tell about the world. This includes the stories law tells (or fails to tell). For instance, informed by the insights from new materialism about the entanglement between nature and culture, a judge in a case like Durocher's that unfolds on Treaty 4 territory might consider the continuities between the residential school murders, the mass slaughter of the buffalo and how these relate to the present day problem of how to address the religious freedoms of a young Metis man concerned about the shockingly high rate of suicide among native youth. Justice, in a case like this, might be seen to require addressing the more-than-human elements that comprise the normative world in which a man like Tristen Durocher comes before the law—leading, perhaps, to orders for governments to protect bison breeding grounds as part of the remedy required for ensuring adequate protection for native youth. Or, in a case like the *Ktunaxa* decision, where land-based religious claims are at stake, it could become a new normal operating procedure for judges to travel to the lands where the claims are located[112]—and perhaps to chance an encounter with a Grizzly Bear, whose presence may say more about what justice requires in a given instance than would the most complex legal argument.

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[110] Cover, "Nomos and Narrative" *supra* note 85 at p. 5.
[111] *Ibid* at p. 5.
[112] In the landmark 2014 Aboriginal Title case, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, a B.C. Supreme Court judge did travel to the remote territory of the Tsilhqot'in for a full 14 days of a trial that last 339 days in court. These 14 days the judge spent on the land were considered in-court days, as the judge heard oral testimony on the land from which it arose. Hence this is not an unprecedented suggestion. See: Woodward and Company website, https://www.woodwardandcompany.com/tsilhqotin/. Last accessed 29-03-2022.

In expanding the conception of law's nomos to include land as a centrally constitutive force, I do not mean to disparage Cover. Even nearly 40 years on, 'Nomos and Narrative' has much to teach about the often-neglected relationship between legal interpretation and the story-rich worlds in which those interpretations occur. It has made foundational contributions not only to analyses rooted in law and narrative, but also to the theorization of legal pluralism and relatedly, to theorizations of the violence implicit in legal interpretation.[113] In analyses of the law and Indigenous religion encounter, all these uses of Cover still matter. For instance, in determining which ontological frames will dominate judicial decision making, we need to consider the tension between legal pluralism and the jurispathic function of law—a tension Cover foregrounds with compelling clarity, showing that, no matter how much we might want for legal pluralism to solve conflicts between competing normative views, in the end judges must decide and, in so doing, do violence to some worldviews over others. I return to this consideration in the conclusion to this chapter.

Part II. New Materialism's troubled relations with Indigenous scholarship

New materialism is hardly the only—or most obvious—avenue through which to thicken Cover's account of law's nomos in ways that make room for the worldview of Indigenous religion. Much of the tradition of Western critical theory, stretching back at least as far as Spinoza and through Nietzsche, Bataille, Foucault, and more contemporary theorists, has accomplished, using different conceptual apparatus and methodological approaches, a similar critique of Western modernity's insistence on rendering nature as separate from culture.[114] New materialism is unique, however, in its insistent focus on the relationship between narrative and matter/materiality, as understood through the lens of the physical and biological sciences. It is thus particularly helpful in the development of legal theory that recenters land as a narrative

[113] Robert Cover, "Violence and the Word" (1986) 95 *The Yale law journal* 8 at pp. 1601–1629.
[114] See, for instance, William Connolly's discussion of the current of thought in the Western tradition that celebrates the "visceral register" and hence pushes against the rationalist strains in mainstream Western thinking in Connolly, *Why I am not a Secularist* supra *note* 63. Connolly does not include George Bataille in his discussion of this tradition; to this list of perhaps more common thinkers in the tradition of the visceral (eg stretching from Spinoza through Nietzsche through Foucault), there are many more who could be added. I mention Bataille because his thought has been particularly useful to me personally in helping me undo habits of dissociation from the visceral picked up through years of immersion in the habits of excessive rationalism. See, for instance, George Bataille, *The Accursed Share: an Essay on General Economy* (New York: Zone Books, 1991).

agent. This recentering of land supports the underlying aim of this thesis: eg to open legal thinking up to what is really at stake in the Indigenous religious freedom claims.

The best guide to conceptualizing the field of law and Indigenous religion in ways that do not a priori negate Indigenous ontologies is, of course, not Western social theory but Indigenous thinkers themselves—especially ones with a grounding in ceremonial practices. Indigenous thinkers,[115] both scholarly and otherwise, consistently articulate the importance of seeing nature and culture as coextensive phenomena wherein humans are not figured separate—or indeed separable—from the lands that we not only occupy but that we fundamentally *are*, in that the lands constitute our very subjectivity. I turn to these perspectives in more detail in Part III, below and in Chapter 2.

Before I address in more detail the powerful perspectives and nuances that Indigenous thinkers bring to the question of the entanglement between nature and culture (which I do in the section that follows this one), I want to speak, first, to the arguably troubled relations between new materialism and Indigenous thought. Several Indigenous scholars have brought this trouble to light, criticizing post-humanist scholarship (of which new materialism is a part) for taking up fundamental questions of ontology in ways that replicate much of the insights inherent to Indigenous thought without sufficiently citing, acknowledging, or otherwise engaging with Indigenous scholarship. I defend my argument that new materialism can help theorize the field of law and Indigenous religion in light of these important critiques.

In October 2015, Metis anthropologist Zoe Todd wrote a blog post critiquing the way scholars associated (as new materialism is) with the "ontological turn" persistently fail to cite Indigenous scholars, even though these scholars have long been writing about many of the same

[115] By "Indigenous thinkers" I mean people whose work and thought considers Indigenous issues from Indigenous perspectives; this usually includes work created by persons who identify as Indigenous but not necessarily. It is worth remembering that part of the wound of colonization includes the ways the *Indian Act* and the discourses it set in motion created arguably artificial racialized divisions between peoples, and with them damaging caesura separating "Indigenous" from "not-Indigenous," erasing the complex ways that indigeneity and 'settler-identity' are entwined. I discuss the reality that indigeneity is a fluid category in more detail in Chapter 2. "Indigenous" is, of course, not so fluid a category as to include the shameful, fraudulent, self-serving assertions by several prominent white scholars in recent history that they are "Indigenous." I discuss the complexities of the term "Indigenous" in more depth in Chapter 2. For an insightful, theoretically rich discussion of the ways in which Indigenous identity has been constructed through colonial practice, including colonial legal practice, see: Mark Rifkin, "Making Peoples into Populations: The Racial Limits of Tribal Sovereignty" in Audra Simpson and Andrea Smith, eds, *Theorizing Native Studies* (Durham: Duke University Press, 2014); and Rifkin, "Reproducing the Indian: Racial Birth and Native Geopolitics in A Narrative of the life of Mrs. Mary Jemison and The Last of the Mohicans" in Rifkin, *When Did Indians Become Straight? Kinship, the History of Sexuality, and Native Sovereignty* (Oxford: Oxford University Press, 2011).

things that the "ontological turn" claims to have discovered.[116] This blog post went viral and later became a widely cited article, wherein Todd elaborates her critique, calling for European academics to "reference Indigenous thinkers in a direct, contemporary and meaningful way in European lecture halls."[117] Todd frames her argument in reference to a disappointing lecture she attended in Edinburgh in which the "great Latour"[118] spoke at length about climate and "Gaia" without once referring to Indigenous thinkers on the subject of the earth as a living entity characterized by deeply entangled relations between humans and our others. Todd makes it clear that her critique extends well beyond Latour to include the bulk of scholars concerned with exposing the entanglements between human praxis and the natural world (this would include, of course, new materialism.) Todd writes:

> …my concern here is not really with Latour himself, but with how a Euro-Western audience consumes Latour's argument (and the arguments of others writing and thinking about the climate, ontologies, our shared engagements with the world) without being aware of competing or similar discourses happening outside of the rock-star arenas of Euro-Western thought.[119]

Many Indigenous scholars share in Todd's sentiment, including prominent Inupiat-Inuvialuit legal scholar Gordon Christie, whose critiques of the colonizing tendencies of Western academia I discuss in more detail in Chapter 2, below.[120]

Todd's critique is undeniably apt. Many (if not most) academics trained in the Western tradition, both within and beyond the sub-field of new materialism, have a long way to go before it can be said that our practices of scholarship take seriously the challenges and opportunities posed by Indigenous perspectives. We must read and cite beyond our comfort zones and, especially, be willing to move past the intellectual habits of our training and its attendant knowledge-production habits. This includes moving beyond our implicit canonical texts—even the most ostensibly "critical theoretical" ones—in order to embrace the challenges and

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[116] See: her discussion of this blog post in Zoe Todd, "An Indigenous Feminist's Take On the Ontological Turn: 'Ontology' is Just Another Word for Colonialism" (March 2016) 29 *Journal of Historical Sociology* 1

[117] See: Todd, "An Indigenous Feminist's Take"; see also: Daniel R Quiroga-Villamarín, "Domains of Objects, Rituals of truth: Mapping Intersections between International Legal History and the New Materialisms" (2021) 9 *International politics reviews* 1 at pp. 239–239.

[118] She is referring, of course, to the science studies scholar Bruno Latour, cited above.

[119] Todd, "An Indigenous Feminist's Take" *supra* note 116 at p. 8.

[120] Gordon Christie, "The supersession of Indigenous understandings of justice and morals" (2022) 25 *Critical review of international social and political philosophy* 3 at p. 2.

opportunities for seeing-otherwise coming from Indigenous theory. New materialism's tendency to neglect Indigenous thought does not, however, discount it from being a valuable source for scholarship that aims, as mine does, to honour Indigenous perspectives. New materialism can be an incredibly helpful resource in theorizing the field of law and Indigenous religion, because it engages the division between nature and culture that is constitutive of Western subjectivity (and hence also Western ontologies and epistemologies, including the ones implicit in Western legal thinking) through the scientific discourses that are centrally constitutive of modern Western thought itself. This direct engagement with science as narrative form (as well as explanatory model) allows new materialism to fruitfully trouble the assumed divisions that pertain in Western thought between culture and nature. Hence new materialism can help undo the habits of thought and knowledge-production—and attendant self-divisions—that are deeply engrained in the thinking patterns of those of us reared in Western thought traditions. This includes Western legal thought, which tends to perpetuate the divisions characteristic of Western science (eg nature is separate from culture, objectivity from subjectivity, and reason from its others).

New Materialism as Embodied Methodology

Indigenous thinkers persistently remind scholars to approach the work of research in ways that acknowledge our own, personal, embodied relations with the work we are studying.[121] With this reminder in mind, I want to speak to the ways that new materialism has helped me, a person trained in the habits of Western legal thinking, to undo my deeply-entrenched tendency to see nature and culture, object and belief as separate. Exposure to the work of new materialism has helped me think my relations to nature differently—and not only to think these relations differently, but to embody them differently, too. New materialism has enabled me to feel less separate from the nature which forms me and which I also form. For instance, when I was reading Elizabeth Grosz's *Volatile Bodies* just before the sage harvest I participated in this summer, in Treaty 4 territory near present-day Regina/Pile of Bones (which I describe in the preface).[122] Her text, with its focus on opening awareness to the deep entanglements between bodies, land, and culture, made me notice and relate at a deeply embodied level to features of the Treaty 4 landscape I might otherwise have missed. Under the influence of both her text and the deep wisdom of the sage-harvesting ceremony, I apprehended the entire concert of the natural

[121] See for instance: Wilson, *Research is Ceremony"supra* note 80 and Million, "Intense Dreaming" *supra* note 132.
[122] See for instance: Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (New York: Routledge, 2020).

environment (eg certain trees, the plethora of grasshoppers, and the magnificence of the Prairie sky) in a new way, as related participants, as I was, in the moments that unfolded between and among us, not separate. This, in turn, influenced the way I thought through Tristen Durocher's encounter with Western law and the problem of how to theorize it in ways that did not replicate the epistemic bias of Western legal thinking. For instance, thinking the Durocher encounter through the lens of new materialism made me more deeply attuned to the connection between the slaughter of the bison with which the settler state announced its sovereignty over *Nehiyaw* lands, Durocher's mourning ceremony, and the discovery of bodies, in the spring of 2021, at former residential school sites. In my ethical imagination, the ghosts of the buffalo and the ghosts of the innocent children mingled with the silent power of the sage, a kind of reckoning that blew through and beyond the reach of law's episteme.

I have seen a similar transformation in those Western-trained scholar-colleagues I know who have not only read new materialism, but have taken its insights to heart.[123] The habit of construing some things as "nature" and others as "culture" runs deep in the Western-trained psyche. This habit is not inevitable, nor is it irreversible; there are many avenues for remaking this dualism along different lines. New materialism, in my experience, is one of them—one that seems to work fairly well on at least some people with a Western-trained psyche, perhaps because it is speaking from inside the tradition. Once the "nature/culture" split begins to unravel, whether through the agency of new materialism or one of the many other means available, the people I know become more alive to what is required of them in real time, less stuck in the register of the abstract-theoretical. In terms of on-the-ground implications for the advancement of Indigenous religious freedoms, it may seem that mere "awareness" is not enough to effect the changes that justice so urgently requires. However, I suggest that awareness of the continuities between nature and culture leads to direct, material changes in the lives of people who come to

[123] During the last two years of my law degree, from 2018 to 2020, I ran dance improvisation workshops and gave periodic lectures on dance improvisation for members of the University of Victoria community, from both the law school and from the Cultural, Social, and Political Thought graduate committee. In these workshops and lectures, I connected a practice of embodied dance improvisation to concerns emerging out of contemporary critical theory, including new materialism. These were attended by faculty and graduate students, most of whom had previous dance experience. Overwhelmingly, when people were exposed to new materialism in connection with my invitations to embodiment, I noticed that even highly trained academics would drop out of the habitual patterns of heavy thinking and begin to have deeply embodied realizations. This work was greatly enhanced by the support of Dr. Sara Ramshaw, faculty at the University of Victoria faculty of law, with whom I engaged in directed studies on law and dance improvisation and with whom I was privileged to collaborate many times on projects connecting law, dance, and theoretical approaches to improvisation, including at the 2019 Canadian Law and Society conference.

this awareness—among which is a greater sensitivity to embodied life on the ground and what is required to sustain it, including legal action, law reform, policy change, grassroots organizing, and other actions that advance in more direct ways the justice interests of Indigenous peoples.

My defence of new materialism notwithstanding, I want to make it clear that I regard the Indigenous perspective on the dangers of self-dividing colonial thought habits as uniquely important. Not giving Indigenous theory due attention, as too many working in new materialism tend to, does a disservice not only to Indigenous thinkers but also to the truth. I thus take seriously the calls by Indigenous scholars to centre Indigenous perspectives—and certainly not to omit these when they have much to say on the same subjects about which one is writing. I adopt this call not out of a shallow recognition of "citational politics,"[124] but rather because a truthful uncovering of the nomos of law and Indigenous religion requires deep engagement with the perspectives of those most harmed by law's tendency to assert its episteme as neutral (and hence assumptively dominant). Deep engagement with the claims at stake in Indigenous religious freedoms claims is not possible if one, a priori, circumscribes law's nomos in ways that hide from view the phenomena (eg land) central to Indigenous religious understandings.

PART III. Indigenous Perspectives on land as a norm generating force

At the centre of the entangled view of reality that pertains throughout much of Indigenous thought is a deceptively simple force and concept: land. Land is the heart and soul of Indigenous lifeways, including religion, and it is, as such, essential to account for the unique ways Indigenous peoples both conceive of and relate to land in one's view of the nomos. I return to the question of the centrality of land in more detail in my discussion of how to define Indigenous Religion, in Chapter 2 below. For the purposes of expounding a wider view of law's nomos, however, the signal point is this: that for virtually all Indigenous peoples, the land itself is the fundamental source of norms. The land *is* the nomos, the narrative bedrock, the story-generating power that helps to create both legal worlds and religious ones. The land is an indelible part of who Indigenous people both are and, importantly, are becoming—not separate or separable from their identities as individuals, as peoples, as nations. As Mi'kmaw scholar Bernie Francis and his

[124] Sara Ahmed popularized the phrase "citational politics" in feminist academic circles with the publication of work on her popular blogsite, the aptly named "Feministkilljoys." Todd takes up much of the spirit of Ahmed's critique in her work. See for instance, Sara Ahmed, "Making Feminist Points." *Feministkilljoys* (2013) https://feministkilljoys.com/2013/09/11/making-feminist-points/).

settler collaborator and ally Trudy Sable put it, "the Mi'kmaq sprouted or emerged from the landscape and nowhere else; their cultural memory resides here."[125] 'To sprout from' is a partial translation of the Mi'kmaw term *weji-sqalia'tiek*, which speaks to the "dynamic interrelationship between the Mi'kmaq and their ancestral landscape—a landscape integral to the cultural and spiritual psyche of the people and their language."[126] Haudenosaunee scholar Vera Palmer's elaborates on the land-norm connection by articulating land as the very matrix out of which Indigeneity springs:

> fundamentally and culturally Iroquoia still embraces and endorses the natural world as matrix, mater, and matter—as model and nourishing substance within which tribal experience inheres, endures, and obtains. Attending this Iroquois view is a thick assumption of human coextension with entities of the natural world and with the earth itself, both ontologically and affectively this perspective shapes cultural meaning and endows metaphors with a bias towards material, corporeal references.[127]

Palmer's articulation here, like that of many other Indigenous thinkers, shows that, long before new materialism came to the scholarly table, Indigenous thought knew nature and culture as not separate. On this view, culture is always deeply inflected by nature, and vice versa—because the human world, including humans' proclivity towards the narrative acts of creating meaning and generating metaphors, is not separate from the earth.

Nehiyaw legal scholar Darcy Lindberg, in a similar vein, speaks to the many ways in which Nehiyaw world-understandings centre land as a norm-generating, law-making force, binding relations, both human and not, through the fibre of stories that exceed textual conceptions of what a story is:

> Nêhiyaw law is found in songs, stories, ceremonies, kinship orders, and artistic renderings. The kehteayak (old ones, or more commonly, Elders) carry laws within them, waiting for younger ones' visits to enrich future generations. Nêhiyaw law is written into the land and offers its legal pedagogy, if we are attentive enough to listen to the stories.[128]

Listening to the stories that are written in the land requires conceiving of law's nomos in ways that exceed the implicit dualism inscribed in Canadian constitutional law's current legal thinking—otherwise, legal interpretation will continue to misread what is at stake in Indigenous

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[125] Trudy Sable and Bernard Francis, *The Language of This Land, Mi'kma'ki* (Sydney, NS: Cape Breton University Press, 2012) at p. 17.
[126] Sable and Francis at p.18
[127] Vera Palmer, "The Devil in the Details," in Simpson and Smith, *Theorizing Native Studies* at p. 273.
[128] Darcy Lindberg, *Miyo Nehiyaw (*Beautiful Creeness): Ceremonial Aesthetics and Nehiyaw Legal Pedagogy" (2018) 16 *Indigenous Law Journal* 1at p. 54.

religious freedoms claims, as the court did in *Ktunaxa.* Listening to these stories also requires a deep attunement to the realities of colonialism and the myriad ways its violence marks bodies, both humans and not. The importance of deep, attentive listening becomes clear through deep engagement with the work of Indigenous thinkers, the bulk of whom speak directly to the inextricable ways that colonial violence marks the Indigenous experience—of religion and everything else. Indigenous thinkers are, for better or worse, often far better equipped to speak to the effects of this mutually-entangled violence than are non-Indigenous thinkers, because of the ways Indigenous bodies carry the scars of colonial violence, historical and ongoing. Cash Ahenakew, a scholar from the Ahtahkakoop Cree Nation (as well as a sundancer) articulates the reality of our entangled relations well, in the quote which opened this Chapter. I return to that quote here, because of how clearly it speaks to the ways colonialism itself has worked to negate the reality of those relations:

> we are all part of the same body: humans, non-humans, the elements, the land, the ancestors (those who have been and those who will come again). Colonialism has worked like the (ongoing) severing of an arm; one hand of this body has tried (unsuccessfully) to cut off the arm on the other side, only maiming it.[129]

Ahenakew's viscerally poetic account speaks to the brutal ways colonialism has severed connections between humans and the lands that form us. Land and culture, nature and humans, then, all carry scars that record colonialism's myriad acts of violence. This violence has been accomplished, in part, through the epistemological violence that tends to inhere in mainstream, dominant Western thought habits. The violence that tends to inhere in Western knowledge systems extends, of course, to Western legal apparatus, past and present.[130]

Attempts to broaden the view of law's nomos in ways that account for the lived realities of Indigenous religion must also account for how the ongoing legacy of colonial history has entangled us all in webs of relationship with deep ethical consequences. This history is, of course, not in any way over, nor is its violence. It carries on in the myriad ways that the norms brought to Turtle Island with the colonizers continue to create a normative regime that favours, in too many ways to count, Western worldviews over Indigenous ones. This is the problematic I

[129] Ahenakew, "Scarring Our Collective Soul Wound" *supra* note 98 at p. 29.
[130] See: Robert Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford Univeristy Press, 1990) for a comprehensive overview of the complicity between Western legal doctrine and the project of colonial dominance, which Williams frames as an effort to quell "normative divergence."

articulate in my introduction and around which this thesis continually circles: the ways in which Western legal thinking, as a profoundly powerful ally of Western thought more generally, tends to reproduce itself as dominant (often through the language of "neutrality")[131] over other ways of knowing, including Indigenous religion. As Dian Million puts it:

> it is the nature of Western knowledge claims to either contest or extinguish rival knowledge claims. It is a particular field always in play to achieve a hegemony, to find consent to the truth claims of dominant populations. This has to be imagined carefully, not as stark "power over." However, extinguishing or subjugating other ways of knowing is never devoid of violence.[132]

The perspective of this thesis is that "Western knowledge," including Western legal knowledge, is never a unified entity to which one can point with the sort of clarity that Million performs here, echoing the tendencies of many critical and decolonial scholars. Rather, I am positing that Western knowledge is itself always fluid, always changing, and always far more heterogenous than the claims of its critics might make it seem (indeed, the term "Western" itself ought to be questioned, as this category is not as stable as one might be tempted to think). That said, it ought to be clear by this point in my writing that I do not deny the overwhelming tendency of much of mainstream Western thought, including much of legal thought, to assert dominance over other epistemologies, to the catastrophic detriment of Indigenous peoples and their worldviews.

Chapter 2 engages Indigenous voices in further detail, centering Indigenous epistemologies and the people who articulate them as a way out of an approach to defining Indigenous religion that merely replicates the hegemonic tendencies of Western thought, the foremost tendency of which is to assert nature and culture as separate. For the purposes of this Chapter, this section has served to signal two inter-related points. First, that Indigenous thinkers' perspectives tend overwhelmingly to cohere with the view, coming out of new materialism, that the human and the non-human exist in deeply entangled relations, in an inter-related whole referred to as "land." Second, that this inter-related whole has been severed and maimed by colonialism, not least of all by the colonial tendency to assert epistemic dominance over other worldviews. This has had the effect of silencing perspectives that do not cohere with the assertion, in mainstream Western thought, that nature and culture are distinct—at the cost of

[131] See for instance Berger, "State Neutrality."
[132] Million, Dian Million, "Intense Dreaming: Theories, Narratives, and Our Search for Home" (2011) 35 *American Indian quarterly* 3 at p. 318.

exiling Indigenous knowledge. Welcoming this exiled knowledge into our awareness by listening to Indigenous voices shows us that an intact body of knowledge has *always existed*, whether the colonial thought projects acknowledged it or not, that gave the lie to the presumptive division Western modernity drew between nature and culture. New materialism, by theorizing a way out of this presumptive division, can support the work of opening Western thinking, including Western legal thinking, to the worldview of Indigenous thought, which teaches us, if we could listen, that we are not separate from the worlds we inhabit. The next section discusses how this theoretical work might apply to concrete instances of legal reasoning.

PART IV. The relationship between theory and legal reasoning

A reasonable question to ask in the face of the efforts this chapter has made to theorize the nomos of law and religion is how these theoretical considerations help the Tristen Durochers of the world feel confident that the legal system will be capable of protecting their religious freedoms when it counts. This question is particularly apposite in a post-*Ktunaxa* legal landscape in which confidence in s. 2 (a) as an instrument capable of extending religious freedoms to Indigenous people has been eroded. It might seem that theoretical forays such as those I engage above do not have much to do with the concrete instances of legal reasoning that attend encounters between law and Indigenous Religion, for instance in the *Ktunaxa* or *Durocher* decisions. This section posits on the contrary, that fundamental questions of ontology—how we theorize the ground of being on which law and Indigenous religion unfold—do, in fact, relate intimately to concrete instances of legal reasoning. Further, neglect of these fundamental questions perpetuates the very harms this thesis is concerned to guard against, *viz* that Western law will continue its colonizing tendencies through subtle acts of epistemic violence that negate Indigenous worldviews.

Whether acknowledged or not, theoretical presuppositions always inform the narratives that constitute the normative worlds in which legal interpretation unfolds. If we presume nature and culture to be separate, then narratives (such as those arising from within the experience of people grounded in a view of land as being foundational to human beingness) that challenge that separation will tend not to be minimized or overlooked by those with power to make legal worlds. This will tend to influence legal reasoning along lines that negate the sacredness of land. The right kind of theorizing is a fundamental pre-requisite to the on-the-ground innovations in

legal reasoning needed to advance Indigenous religious freedoms. Admittedly, my orientation in this thesis is decidedly and unapologetically theoretical. That said, I approach theory as a way, ultimately, of working for more just outcomes in the real world—a world in which the bodies of Indigenous persons cry out for justice amid ongoing attempts at the hand of the state and industry to destroy ecosystems whose existence undergirds the Indigenous soul in ways mainstream Western legal reasoning—and its processes—too often fail to capture.

My approach to theory aligns with the view Wendy Brown and Janet Halley espouse of critique, which they see as a crucial tool for exposing the underarticulated discursive practices that organize our lives—and legal worlds—in ways that naturalize assumptions that ought to be questioned if one does want to work for just outcomes. This process of dissecting previously naturalized assumptions, on Brown and Halley's view, does not lead to tidy answers about how law reform should proceed, nor even, necessarily, about how legal reasoning might be affected by a given critical intervention. They write:

> For part of what it means to dissect the discursive practices that organize our lives is to embark on an inquiry whose outcome is unknown, and the process of which will be radically disorienting at times.[133]

In proposing that the nomos of law and Indigenous religion be imagined as ground wherein nature and culture are entangled, not separate, I am suggesting that the disorientation that inevitably attends this reimagining is useful in its own right. This is, first and foremost, because of the potential this disorientation holds to impact the thinking of those who have various degrees of legal decision-making power to determine how Indigenous religious freedoms cases of the future might be decided. This includes judges and the advocates who come before them, neither of whom will have much time for reading legal theory but who were of course at one time law students and lawyers. They therefore necessarily came into contact with the thinking of legal academia, if only because of being subject to the lessons given by law professors. Thinking to the long view, a reconstitution of how we in legal academia theorize law's nomos such that nature and culture are seen as entangled could have an impact on how the judges and lawyers of the future imagine the world to be—and therefore on the possibilities they are capable of imagining for working in directions that, over time, might encompass, within legal reasoning, a wider view of what is at stake in Indigenous religious freedoms cases.

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[133] Wendy Brown and Janet E. Halley, *Left Legalism/left Critique* (Durham: Duke University Press, 2002) at p. 27.

Tending to the thinking practices that constitute a legal field is not in vain, even if this tending does not immediately translate into the sorts of changes in legal reasoning that the justice interests of Indigenous people so urgently require. Western-trained legal thinkers deploying their practices on Turtle Island find ourselves, inevitably and no matter where we run, in a normative field in which it is impossible to ignore the lingering and ongoing effects of colonization. We, all of us, live inside what Cash Ahenekew has called our "collective soul wound."[134] There is no getting around this fact; rather, as Ahenakew puts it, "the only way towards somewhere else is through it."[135] The genocidal project that flowed from and exacerbated this "collective soul wound" would not have been possible without the explicit support of a legal apparatus that, in both theory and in practice, upheld the practices that allowed European powers to enact horrific and irreparable violence on Indigenous peoples lands, worldviews, bodies, and, of course and relatedly, religion.[136] One cannot work in truly decolonizing directions without coming to terms with the ways in which one's own thought-structure, by virtue of one's participation in the Western legal project, is conditioned, in ways often too subtle to notice, by the same mindset that ordered the event whose memory I invoked at the outset of this thesis: the mass slaughter of the buffalo, and consequent forced starvation of the Nehiyaw people, to make way for the West-ward march of the Canadian state. A mindset that sees the buffalo as categorically separate from the human can more easily stomach their mass slaughter than can a mindset that knows, deeply, that the buffalo and the human are no more separate than are so-called beliefs and their so-called objects.

It is worthwhile, if disorienting, to look this truth in the eye. Many of the very modes of thinking that have formed us as Western-trained thinkers participate, in ways it would be irresponsible to overlook, in an ongoing project that keeps Indigenous worldviews subservient to Western ones, with all the real-world consequences this dominance system entails, from the slaughter of the Buffalo many moons ago to the more recent refusal of the Saskatchewan legislature to adequately legislate for suicide prevention on reserve and many sordid points in between. With faith in the value and necessity of this kind of critical disorientation, this chapter

[134] Cash Ahenakew, *Towards Scarring our Collective Soul Wound supra* note 89 at p. 32.
[135] *Ibid* at p.32.
[136] For a comprehensive description of the complicity between Western legal thought and the project of colonization over the long period stretching back to the time of the crusades, see Robert Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

has therefore set itself the task of addressing what I have characterized as a foundational problematic one must come to terms with as a precondition for thinking the law-Indigenous Religion relation clearly—eg that we address law's under-questioned assumption that how it views the world is neutral, and hence a 'natural' or 'universal' perspective, rather than the quite-relative perspectival vantagepoint that many excellent critics shown it to be.

A core feature of the law's assumptively "neutral" perspective is on full display in the separation maintained in the s. 2 (a) jurisprudence between objects and beliefs—a separation whose potential to impose epistemic violence when applied to Indigenous Religion was born out, as I argue above, in the *Ktunaxa* decision. Preventing that epistemic violence in future decisions would require theoretical approaches, such as the one advocated here, that get at the root of the belief/object divide that drove the court to determine that a proposed ski resort would not violate the Ktunaxa's religious freedoms, even though the resort would be erected on land where the Ktunaxa see the Grizzly Bear spirit as dwelling. The object/belief divide expressed in *Ktunaxa* is not some contingent feature of the religious freedoms jurisprudence but rather expresses a fundamental—and indeed arguably constitutive—feature of Western legal thinking more broadly. This thinking, in turn, both expresses and perpetuates tendencies in mainstream Western thought writ-large. These tendencies involve not only the maintenance of a separation between objects and beliefs, but all manner of other caesura as well.

Rebecca Johnson and Ruth Buchanan articulate well the role law plays is upholding Western modernity's various strategies for imposing its mastery of the normative universe by setting up divisions that posit its positionality as superior to the positionalities law seeks (not necessarily consciously) to other. They put it thus:

> Modern law has much at stake in maintaining these boundaries: between male and female, inside and outside, law and violence, civilization and savagery. In our postmodern era, we know that the stability of these modernist categories is largely a chimera. Yet law (…) is one realm in which the rearguard action of shoring up these categorisations takes place.[137]

There is a danger, not always recognized in the critical-theoretical literature, in generalizing to the point of characterizing "modern law" as a single monolithic entity; 'law' is as heterogenous

[137] Rebecca Johnson and Ruth Buchanan, "The Unforgiven Sources of International Law: Nation-building, Violence, and Gender in the West(ern)" in Doris Buss and Ambreena S. Manji, *International Law : Modern Feminist Approaches* (Oxford: Hart Press, 2005).

and mixed as the people who enact it, suffer it, create, and destroy it. While there are no shortage of judges and other law-makers who do little more than police and enforce these boundaries, there are many others who work to expand law's domain beyond the borders some of its upholders would enforce. This thesis aims to critically complicate the view that law has a given essence or tendency that can be identified for all time, because my experience has been that legal practice on the ground moves with far more nuance and complexity than many of its critics allow.

That caveat aside, certain pervasive tendencies in law both can, and ought to be, identified for the purposes of critique—not taking care to identify these tendencies is deeply problematic, especially in the context of Indigenous religious freedoms claims when what is foundationally at stake is the epistemological worth of a worldview that sees the world on terms quite other than law. These pervasive tendencies include, in addition to the problematic belief/object divide I have pointed to repeatedly above, the shoring up of other harmful, world-constricting boundaries Johnson and Buchanan rightly point to—boundaries whereby the "reasonable person" is separated from the unreasonable one, "faith" from "reason," in myriad caesura that both reflect and perpetuate the deeper Western ontological habit of dividing reason from unreason, culture from nature, human from animal, and, relatedly, the civilized from the savage. George Bataille, one of the most brutally astute critics of Western modernity summarizes the problem as such:

> What is the essential meaning of our horror of nature? Not wanting to depend on anything, abandoning the place of our carnal birth, revolting intimately against the fact of dying, generally mistrusting the body, that is, having a deep mistrust of what is accidental, natural, perishable—this appears to be for each one of us the sense of the movement that leads us to represent man independently of filth, of the sexual functions and of death…The line of development from taboos on incest or menstrual blood to the religions of purity and of the soul's immortality is quite clear: it is always a matter of denying the human being's dependence on the natural given, of setting our dignity, our spiritual nature, our detachment, against animal avidity.[138]

For Bataille, modernity is characterized by a movement towards a more and more deeply entrenched aversion to nature, and indeed to the religious domain, both of which he counts among the "totality of the real" from whose horror the modern psyche retreats into the "sleep of reason." Reason holds this totality in abeyance through the various divisions and boundaries

[138] George Bataille, *The Accursed Share:an Essay on General Economy* (New York: Zone Books, 1991) at p. 91.

modernity then posits as "natural" or indicative of "universal truth." The divisions that result speak to the core of the wound colonialism has long inflicted on indigeneity (and, relatedly, that secularism inflicts on the religious mindset), wherein the "native," like belief in the "supernatural," is figured as outside the circle of the reasonable, the civilized, and thus fair game for all manner of neglect and covert ridicule, if not outright violent atrocity.

Thus, a precondition for work on law and indigenous religion that aspires to move against the grain of the colonizing tendencies of Western modernity in a decolonizing way is necessary to expose the dynamic wherein law, in its function as enforcer of Western modernity's boundaries and self-divisions, tends to presume its ontology—and the hierarchical divisions and caesurae that attend it—as dominant. Echoing the central problematic this thesis seeks to address about the need to challenge Western law's epistemic dominance, Anishinaabe legal scholar Aaron Mills has argued that legal systems, even when they pretend to be neutral as Western law generally does, always express—and importantly, are imbedded in—a particular worldview and lifeway. As such, Mills has argued that if one wants to see changes in Western law, it is not sufficient to argue for this or than tweak or innovation in the jurisprudential apparatus with which the legal system does its business. Instead, it is necessary to address the fundamental presuppositions of the worldview and consequent lifeways that undergird that system. My work in this chapter has been directed at this task of addressing the presuppositions that undergird law's worldview and that tend to make it blind to what is at stake in Indigenous religious freedoms claims—as such I do not focus specifically on how this re-ordering of the ways in which we theorize the nomos of law and indigenous religion might affect concrete instances of legal reasoning. This is not out of a neglect for the real world consequences of legal decision-making but rather because the scope of this thesis is necessarily narrow and focused on the *preconditions* for clear thinking in the law-Indigenous religion encounter. One such precondition, I am arguing, is a radical reordering of how we conceive of the very ground from which these encounters spring.

Conclusion—Chapter 1

In the closing line of 'Nomos and Narrative,' Cover writes: "we ought to stop circumscribing the *nomos*; we ought to invite new worlds."[139] By considering land as centrally

[139] Cover, *Nomos and Narrative* at p. 68.

constitutive of the nomos, the new legal worlds one invites are more likely to be open to the wisdom of Indigenous religion, which emphasizes the world-making power of the relations that pertain between land and narrative. This widened conception of the nomos may, in turn, help to address the two fundamental problematics I suggest, in the introduction, attend encounters between law and Indigenous Religion: first, the tendency of Western law to adopt doctrinal perspectives (such as the one the majority adopts in the *Ktunaxa* decision) that presume objects and beliefs to be separate and that therefore do not adequately capture the thick, rich worldview of Indigenous religion, wherein the world and the subjects who think in it are seen as inextricably entangled; and second, the tendency of Western law to characterize its limited episteme as neutral, thus marginalizing approaches to meaning making (such as those emerging from Indigenous religion) that lie outside its epistemic frame.

Western legal apparatus has the potential to be violent not only for what it does—eg for its failures to protect Indigenous rights because it serves the interests of industry, for instance (a point I return to in more detail in the conclusion to this thesis). This chapter has explored the onto-epistemological roots of a more foundational violence that inheres in the way Western legal thinking imagines the world. I have argued, in conversation with both new materialism scholars and Indigenous thinkers, that to theorize the nomos in a way that does not perpetuate the process whereby the contingent, often divisive perspective of legal reasoning is figured as neutral (and hence presumptively dominant) requires moving beyond an ontology that assumes a separation between subjects who believe and the objects they believe in—which separation rests on a more fundamental ontology that sees nature and culture as separate. A useful way to facilitate the process of moving past this divisive ontology, I have argued, is to figure the nomos of law and Indigenous religion as conceptual space that includes the many life-forms, both human and not, that live through and as the land—constituting and constituted elements in a thick nomos of always-emergent meaning making, transmitted through stories and as relations, wherein the human is not privileged over the more-than-human.

The stories that come before the law,[140] on the expanded view of the nomos I have been advocating for in this chapter, then, must be seen to emerge from land (and, relatedly, bodies,

[140] This is a reference to a well-known parable of Franz Kafka's, embedded in his work The Trial, which often gets translated as "Before the Law." See: Franz Kafka, "Before the Law" in the The Trial, trans. Richard Stokes (London: Hesperus Press, 2005).

both human and the more than human). Land, in turn, must be conceived as inevitably entangled with the cultural world where thought is often figured as living. This expanded view of the nomos might well open Western law up to other sources of law, such as the laws Indigenous thinkers consistently remind us emerge from the land itself.[141] Such an opening, though, requires, as a first step, conceiving of law's nomos expansively. New Materialism can provide one avenue through which to achieve a more expansive view of the nomos. But it, too, must be broadened in ways that account for the specific ways in which colonial violence has marked Indigenous lands and bodies—lest new materialism become just one more way of abstracting thought from the painful realities of colonialism's genocidal bent.[142]

The next chapter turns from the ontological problem of how to conceptualize the nomos of law and Indigenous religion to the epistemological/methodological question of how to define "Indigenous religion." It asks how, in cultivating the capacity to listen to this broader scope of law's nomos, we might open our hearts to a multiplicity of voices that can inform us about how we Westerns have been trained to become blind to what is at stake in Indigenous religious claims. We should, I argue, listen attentively to Indigenous voices—as these come to us across the writing of the many excellent Indigenous scholars who, like Cash Ahenakew, Mary Brave Bird, Leonard Crowdog, Darcy Lindberg, Dian Million, Aaron Mills, Shawn Wilson, Vine Deloria, and countless others, have done the hard work of rendering Indigenous experience into terms readable in English. We should, of course, also listen to non-textual sources—to the stories that come to us in chance encounters with people who carry in their DNA and in their hearts the history of conquest and whose being is a living testimony to colonialism's failure to completely quash the spirit of the peoples native to Turtle Island. And we should, too, listen to the more than

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[141] For a discussion of the intimate connection between Nehiyaw legal traditions and the lands out of which—and indeed, as which—those traditions emerge, see: Sylvia McAdams, Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems (Vancouver: Punch Books, UBC Press: 2015).

[142] The classic, germinal articulation in the Western academic context is Vine Deloria's in Deloria, *God is Red: A Native View of Religion* (New York: Putnam, 1973). Deloria argues that native traditions, in contradistinction to Western epistemologies, are based in land and the spatial logic that attends land, as opposed to the temporal logics that attend Western views of history, whereby land is subordinated to other ends. I discuss Deloria's work, and other articulations of the centrality of land from Indigenous thinkers, in more detail in Chapters 1 and 4, below.

[142] John Borrows, for instance, consistently attests to the ongoingness of colonialism in the context of the negation of Indigenous laws and Indigenous constitutionalism, with clear parallels to the context of Indigenous religion; eg. "Colonization *isn't* completed. It isn't reducible to an imagined initial act of settler arrival and Indigenous displacement. It's a relationship of domination that continues settler supremacy and which culminate in the imposition of settler constitutionalism over existing Indigenous constitutionalism." In John Borrows, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at p. 245.

human elements that Indigenous thinkers and scholars of new materialism alike keep reminding us are part of the circle of relations: to the slowness of the turtles whose patience can make our waiting more bearable, to the softness of a momentarily pacified ocean, lapping the shore, undoing the writing on the sand. Its erasures open to us a future that never was determined only by reason or by precedent—a future in which the lives of our prophets write themselves, as surely as Tristen Durocher's sacrifice did, into corners where law's empire does not reach.

Chapter 2: Law and 'Indigenous Religion': Brief Working Definitions

The previous chapter addressed what I have characterized as the first precondition for thinking the law-Indigenous religion in ways that do not replicate the presumptive separation between objects and their beliefs that, to date, has characterized Canadian jurisprudence on Indigenous religious freedoms under the s. 2 (a) framework—viz that we theorize the normative world where law and Indigenous religion meet as a space in which narrative and materiality, stories and land, culture and nature are seen as deeply and inseparably entangled. This chapter turns to the question of how to define and name "Indigenous religion" in a way that coheres with the expanded view of the nomos I expound in Chapter 1. This Chapter thus addresses, from a different angle than the effort made in Chapter 1, the problematic I raised in the introduction—eg law's tendency to espouse an under-questioned ontological view that separates objects from beliefs (as happens, for instance, in the current s. 2 (a) framework in Canadian religious freedoms cases) and then to characterize that separation as neutral, and hence presumptively dominant, thereby doing violence to the ways of seeing implicit in Indigenous religion. My work to conceptualize the nomos of law and Indigenous religion sought to expose the assumptions law naturalizes and to make epistemic room for the ways of seeing inherent to Indigenous religion. In a similar vein, my work to define "Indigenous Religion" seeks to unseat the presumptive epistemological dominance of law's ways of defining terms, in favour of a method that coheres more closely with the knowledge production habits—and, relatedly, the experience and worldview—of Indigenous religion. I do this in service of the view, espoused by the Canadian court system in some places in the years since the 2017 *Ktunaxa* decision, that Indigenous perspectives on matters that implicate Indigenous rights ought to be taken into account along with what one court has called the "Euro-Canadian" perspectives that dominate traditional legal analyses.[143]

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[143] See for instance the Ontario Superior court's decision in *Restoule v Canada (Attorney General)* ONSC 2018 7701, which affirmed the importance of looking at both Anishinaabe and "Euro-Canadian" perspectives (at para 39). It is beyond the purview of this thesis to delve into the important question of how s. 2 (a) cases in the context of Indigenous religious freedoms ought to be read with and against jurisprudence developed in the context of other Indigenous rights, eg under the framework of s. 35. However, the principle affirmed in *Restoule* arguably ought to apply to other contexts where Indigenous rights are being adjudicated, including in cases where s. 2 (a) religious freedoms are at stake.

The work of defining and naming this term is not simple. We name 'Indigenous religion' inside a particular historical moment in which, in addition to the conceptual challenges laid out in Chapter 1, a variety of power-driven forces mediate every level of the law-Indigenous religion encounter. In light of this twofold challenge, the problem of definition and naming can be usefully approached through two questions, addressed at two different but connected audiences. First, what would advocates for Indigenous religious freedoms (including scholars of Indigenous religion) have to come to terms with in order to think-with Indigenous religion? I argue that they must be willing to adopt a certain flexibility and nimble-footedness—a willingness to change terms according to the practical, strategic needs of legal battles in real-time. Second, what would law and the legal decision makers who uphold it have to come to terms with? The answer to this question involves navigating the conceptual challenges Chapter 1 exposed, namely law's tendency to read Indigenous religion within its limited onto-epistemological frame. Given this tendency, law must open to a definition of Indigenous religion that comes not from law's world but from the world sof the people who practice and keep alive Indigenous ceremonial and spiritual traditions. I therefore argue in favour of a definition of Indigenous religion that, as much as possible, belongs not to law's world but to Indigenous religion's.

Part I discusses in a general way what I mean by "law and Indigenous Religion." In dialogue with Berger's work on law and religion, and following the framework I lay out in the introduction to this thesis and expound in Chapter 1, I conceive of both phenomena as species of experience in dynamic interaction with each other. Their interactions can be viewed, to borrow Berger's characterization of the law-religion relation, as a "species of cross-cultural encounter," in which the experience of both has more truth-value than does any abstract theorization of either. This preliminary discussion shows that, in the current moment and given the long history of law's complicity in the suppression of Indigenous lifeways and worldviews, "Indigenous religion" cannot be conceived as ever entirely separate from the legal regimes (including, as Chapter 1 shows, the deeply problematic ontological commitments that characterize those regimes) that have structured its development—not usually for the good. Nor can either term be understood as separate from the lands that hold and inflect both.

Throughout this thesis, I have made the deliberate decision to use the term 'Indigenous religion,' rather than 'sprituality/ies,' 'worldview,' or 'cosmology.' The term 'religion' when

applied to ‘Indigenous is highly contested—and rightly so. Part II explains and defends my use of the term, in dialogue with recent scholarship in religious studies and native studies that likewise addresses this problem. The decision to use the term ‘Indigenous religion’ was, ultimately, a personal decision that reflects the unique positionality of the researcher, made by deploying the methodology that guides this thesis—eg valuing stories as a deep theoretical resource to be used to engage in self-reflexive approaches to research-as-ceremony.

Part III turns from this conceptual apparatus to the problem of how advocates for Indigenous religious freedoms ought to conceive of naming and definitions; this section serves to make clear that my use of the term in this thesis does not mean I advocate for its use across the board in all contexts. I ground the discussion in the real-world context in which the act of calling some phenomena within the entirety of Indigenous experience ‘religion’ and others not unfolds. This context is one in which colonial legal systems frequently misread and misrecognize Indigenous experience; because of this, I caution against the sort of thinking that would mistake law’s categories—religion versus culture, for instance—as pointing towards anything like the essence of Indigenous spiritual life. Rather, advocates for Indigenous religious freedoms should approach law’s categories, including “Indigenous religion,” with a strategic mindset. This requires being comfortable with conceptual fluidity—eg calling similar phenomena ‘religion’ at times, ‘culture’ at others, depending on which approach is most likely to achieve the legal goal in question. Thinking strategically, advocates must be wary of the danger of misrecognition that always attends Indigenous peoples’ encounters with Canadian constitutional law, while being alive to the reality that colonial law sometimes *can* help protect Indigenous religious freedoms.

With this groundwork in place, Part IV advances a decolonizing approach to the problem of definition, deploying a methodology, in conversation with Indigenous theorists, that centres storytelling as a better approach to defining terms than the abstract habits of law’s approaches to definitions. With this approach to the problem of definition in place, in Part V I discuss, in conversation with Indigenous thinkers both academic and not, some of the characteristics of Indigenous religion proper, outside the narrow definitional frames cast by the current legal framework. This discussion addresses the second of the two angles from which this chapter views the problem of definition, namely the problem of how law and legal thinking can open to the perspectives of Indigenous religion, something I suggest is not possible as long as law stays within its limited worldview. In characterising “Indigenous religion,” I discuss both the ‘religion’

part and the 'Indigenous'[144] part, showing how both terms are deeply entangled in complex histories of colonialism, inscribed at many turns by law's habit of rendering the world along its universalizing lines. This discussion serves to underscore the ways the subject matter itself, Indigenous religion, has unfolded in acts of resistance to colonial law, such that it ends up being constituted, in part at least, by the force against which it had, for the sake of its survival, to resist. This is an important perspective to keep front of mind in discussions of Indigenous religion, lest one get caught up in Canadian law's tendency, set for instance in the s. 35 jurisprudence from *R v Van Der Peet* onwards, of characterising Indigenous religion along lines set by an artificial construct of "pre-contact" cultural practice.[145] Ultimately, I conclude that the best approach to definition is to look at the lives of Indigenous people who, like Tristen Durocher and countless others, both recognized and obscure, show by courageous, beautiful example what Indigenous religion may mean, past the bonds of law and its demand for a narrow breed of definitional clarity.

Part I. Law and Indigenous Religion in Dynamic Interaction:

This section lays the framework for defining "law and Indigenous" religion by expanding on a point I raise in this thesis's introduction, in conversation with the work of law and religion scholars, including Benjamin Berger, Mona Oraby, and Winnifred Fallers Sullivan; eg that the two terms, "law" and "religion" must be seen not as discrete entities but rather as sets of experiences that exist in deeply entangled relationship to each other. These experiences unfold on and, indeed, *as* the conceptual space that Chapter 1 mapped: an expanded view of the nomos of law and Indigenous religion that accounts for the deep entanglements that pertain in most Indigenous worldviews between nature and culture, narrative and materiality.

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[144] See, especially, Dian Million's discussion of the ways in which Indigenous identity has been constituted by the *Indian Act* (including by myriad forms of resistance to its logic) in Million, *Therapeutic Nation supra* note 78 and Mark Rifkin's discussion of the contingency of "Indigenous identity," in "Making Peoples into Populations" *supra* note 115. See, also the work of Mi'kmaq legal scholar Pamela Palmater, on the problematic ways the *Indian Act* constructs Indigenous identity, with deeply discriminatory consequences for women and their descendants in Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Vancouver, UBC Press, 2011). See also: P. Paul "The Politics of Legislated Identity: The Effect of Section 6(2) of the Indian Act in the Atlantic Provinces." (Amherst, NS: Atlantic Policy Congress of First Nations Chiefs, 1999) at p. I, where he writes: "What greater intrusion can there be than the arrogance of assuming the right to tell another people of another culture and tradition who is and who is not a member of their community and who can and cannot live on their lands."

[145] See: *R v Van der Peet* 1996 SCC 216. For a discussion of the limitations and internal contradictions of the "pre-contact" discourse in *Van Der Peet,* see: Gordon Christie, *Canadian Law and Indigenous Self-Determination : a Naturalist Analysis* (Toronto: University of Toronto Press, 2019). See especially the discussion in the introduction, at pp. 14-16 and in Chapter 7 ("Characterizing and Defining 'Existing' Aboriginal Rights") at pp. 302-341.

In naming and defining "Indigenous religion," then, I am working with the assumption that "Indigenous religion," in the current historical moment, is never entirely separate or separable from law. This is not only because, given the current framework of Canadian law, Canadian law claims jurisdiction over the adjudication of Indigenous rights, a problem Jill Stauffer usefully frames as the question of 'who gets to decide.'[146] It is also because Indigenous religion and law are deeply entwined in a post-colonial world, in ways that exceed the narrow context of court-based encounters. At multiple sites across the contemporary nomos, Indigenous modes of seeing encounter and are forced to negotiate with the realities of what Million calls "Western narrative and theoretical terrain."[147] Colonial truths inevitably inflect Indigenous ones, reconstituting the latter irrevocably, in countless ways. This is as true of Indigenous religion as it is of any other arena of Indigenous knowledge; Indigenous religion is perpetually reconstituted over the course of the myriad ways its practitioners must, inevitably, interact with and, in many cases, for the sake of survival, resist colonial practices and knowledge systems. All of this unfolds within a normative world I posited, in Chapter 1, ought to be viewed as a space in which culture and nature, discourse and materiality are deeply entwined such that hard and fast distinctions between any phenomena must be seen as only-ever provisional, never fully definable once and for all.

As my discussion of law's nomos in Chapter 1 makes clear, by 'law' I mean not only legal doctrine and the institutional processes through which doctrinal interpretation occurs. I mean, especially, the land-entangled practices, narratives, and imaginaries that comprise law's normative universe, and give context to interpretive acts. My conception of law, then, follows Berger's example, who, as I discuss in the introduction, approaches constitutional law as a "species of culture," distinct but not fundamentally separate from the cultural phenomena, including religion, it in turn renders through its peculiar frames. As I make clear in Chapter 1, I am conceiving, following the wisdom of both Indigenous thought and new materialism, of

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[146] This reframing happens in the context of her discussion of the ways in which Canadian legal norms influence what is and is not considered a proper material for law, grounded in a discussion of the limits of Canadian law's evidentiary requirements, which served to devalue oral testimony in the *Delgamuukw* case. See, for instance, Jill Stauffer, "'You People Talk from Paper': Indigenous Law, Western Legalism, and the Cultural Variability of Law's Materials" (2019 23 *Law, text, culture* at pp. 40–57. For further discussion of the problematic way Canadian law asserts jurisdiction over Indigenous matters, see: Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands?" (2015) 48 *University of British Columbia law review* 3 at 743–. It is beyond the scope of this thesis to delve into the important question of jurisdiction, which must include exposing the contingency of Canadian law's assertion of jurisdiction over Indigenous religious freedoms claims.

[147] See: Million, "Intense Dreaming" *supra* note 132 at p. 320.

'culture' as not separate from nature. Law's culture—its nomos—includes nature and the narratives that, for many adherents of Indigenous religion, emanate from it.

In naming "Indigenous religion" as an object of inquiry, I acknowledge the indeterminacy of the term 'religion' itself and the troubling way, even outside the context of Indigenous religion, that law renders religion along certain narrow lines. Leading critical religious studies scholar Winnifred Fallers Sullivan has argued that religion's indeterminacy makes the court's efforts to define religion as separate from government inevitably messy.[148] Indeed, the messiness that inherently attends law's attempts to maintain the boundary line between law and religion (as the ideology of secularism would seem to require) leads Sullivan to argue that the legal protection of religion is "theoretically incoherent and possibly unconstitutional."[149] Thus, in naming 'religion' as an object of study in the context of law's encounters with it, I am already stepping into troubled waters, wherein caution is in order lest I adopt law's views of religion as unproblematic. (The choice of the term 'religion' as applied to Indigenous ceremonial practice, of course, adds another layer of complexity to the problem—I turn to the problem of naming in Part III, below.)

In a recent review article on the state of the field of law and religion, Sullivan and Oraby advocate for different storytelling about law and religion.[150] This involves two conceptual moves. First, though Oraby and Sullivan acknowledge the deep entanglements between law and religion, they nonetheless recommend "holding the two concepts in abeyance as universals, [which] enables the telling of different stories about their entanglement."[151] Second, they advocate for an analytical process they call "thinking with religion;" this, they suggest, "enables a better understanding of law." I follow Oraby and Sullivan's wisdom on these two points in searching for an appropriate response to the problem of definition. First, I seek to hold the two things as, provisionally, separate for the purpose of analysis—notwithstanding the deep entanglements between the two and the lands that constitute both that my view of the nomos posits. To that end, I focus on defining Indigenous religion, rather than defining "law and Indigenous religion"—even as I acknowledge the deep entanglements between the two. This

[148] See: Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).
[149] *Ibid* at p. 1.
[150] See: Mona Oraby and Winnifred Fallers Sullivan, "Law and Religion: Reimagining the Entanglement of Two Universals" *supra* note 67.
[151] *Ibid* at p. 268.

choice is a reflection of the limited scope of this thesis, and of the fact that many excellent, critical scholars have written extensively on the question of what law is in the context of Indigenous rights.[152] Less work has been done to date on defining Indigenous religion in relationship to law. Second, I seek to define Indigenous religion, as much as possible, through its own frames of reference. I thus listen to Indigenous voices as the primary authority on what Indigenous religion means (rather than, for instance, turning to jurisprudential discussions of Indigenous religion in the context, for instance, of s. 2 (a)). My focus, then, is on thinking "law and Indigenous Religion" with Indigenous Religion, rather than with the frames of reference of law's world.[153]

In approaching the law-religion encounter as sets of experiences in relationship with each other, I am inspired by Berger's call to see law as a cultural phenomenon, rather than as the neutral arbiter of religion it often understands itself to be. Berger's work marks an important turn in law and religion scholarship, for the way it engages phenomenological theory to call attention to the experiential dimensions of law and religion. Berger's central claim is that Canadian constitutional law is not the neutral arbiter of religion, standing aloof from culture, that it often understands itself to be. Rather, law is a species of culture. As a corollary to this central claim, he suggests that the encounter between law and religion ought to be viewed not as "a juridical or technical problem to be addressed through better laws" but rather as an "instance of cross-cultural interaction."[154] For Berger, this cross-cultural interaction is best understood by looking at experience, rather than solely at doctrine or legal theory; [155] he thus heralds a "phenomenological turn" in the study of law and religion, one concerned to address how the

[152] See for instance Gordon Christie, "Problems with Theorizing about the Law" in Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at pp. 214-257.
[153] Chapter 1 helped lay the groundwork for this mode of thinking, by positing a view of the onto-epistemological problems that attend the law-Indigenous religion encounter that coheres with Indigenous worldviews. This Chapter builds on that groundwork by suggesting an approach to the problem of definition that follows from a view of the nomos as a space in which nature and culture, materiality and narrative are deeply entangled.
[154] Berger, "Law and Religion" at p. 18.
[155] Berger's work seeks to foreground the experience of law in ways that certain strands of mainstream analytical legal theory ignore; however, my own perspective is that this very focus on experience is itself a deeply theoretical position (one to which I have a great affinity), if one a bit at odds with analytical legal theory. But analytical legal theory is not the only legal theory; despite its habitual exclusion from foundational courses in jurisprudence, I see phenomenology as a form of deep theory, and hence Berger's call for a "phenomenological turn" in the study of law and religion as a theoretical move.

constitutional rule of law, as culture (expressed in "institutions, commitments and rituals") frames and conditions experience, including the experience of religion.[156]

Berger understands the experience of law as a "peculiar context for framing the experience of phenomena" and as "something that can itself be experienced;" this perspective has framed this thesis's approach from the outset.[157] Berger's work on law and religion is an instructive starting point for thinking about how to define "law and Indigenous religion" without replicating the central danger I have been arguing attends analyses of law and Indigenous religion—eg that law's presumptively 'neutral' worldview will dominate analyses of the law-Indigenous religion encounter, resulting in an epistemic blindness that occludes Indigenous perspectives. His work can thus serve as a guide to thinking about the law-Indigenous religion encounter in ways that make apparent the epistemic violence that occurs whenever law and the people who think with it assume law's perspective to be neutral.

By celebrating analyses rooted in close examination of the experience of law, Berger's work helps thinkers undo the problematic way that Western legal thinking (following much of mainstream Anglo-American Western thinking more generally) values abstract reasoning to the exclusion of other modes of knowledge-production, including attention to the complex, messy realities of local phenomena on the ground. This thus addresses what this thesis has been identifiying as a central problematic—eg the way that Western law, in part by its tendency towards abstraction, entrenches an epistemological separation between object and belief and then asserts that very limited perspective as "neutral" and hence, by implication, epistemologically superior to other ways of construing reality, eg the worldviews of Indigenous religion. As Berger's work attests, experience very frequently frustrates the abstractions of legal-doctrinal or legal-theoretical concerns. Because of this, attention to circumstances on the ground can open thinking up to perspectives that defy the logic of colonialism, dependent as this logic so often is on fidelity to abstractions that reify the universalizing assumptions of Western ontology.

Attention to the particular, to the local, to *experience* matters even at the preliminary step of defining one's subject matter, lest one introduce *a priori* a definition that is abstracted from the lived realities of Indigenous people for whom a primary fact of colonialism is the brutal way Western law colluded with Christian religion in myriad violent attempts to erase Indigenous

[156] Berger, *Law's Religion* at 191.
[157] *Ibid* at p. 23.

religious practices. Berger's work positions law and religion on equal conceptual ground. His work thus invites views of law and Indigenous religion that do not inadvertently replicate the dominance of law's perspective (as can happen, for instance, when indigenous religion is read only ever through the terms of legal discourse.) This is also instructive in the search for definitions—eg it acts as a caution to approach definitions in ways that do not privilege law's approaches to the problem of naming. If we hold law and Indigenous religion as conceptual equals, then we will source both systems as valid ways to approach the problem of naming—favouring, perhaps, Indigenous religion's views to counterbalance the ways in which law's rendering of Indigenous religion tends to dominate legal analyses.

Finally, Berger acknowledges that the experience of law and religion cannot be reduced to the tight box of this or that theoretical framework or narrative account. Instead, he advocates for stories about law and religion that do not aspire to a tidiness at odds with the reality of experience on the ground, both legal and religious:

> In particular, the heart of this book is a critical scepticism about the impulse to use tidy stories about law and religion to hide the abidingly unstable and unruly relationship between religious difference and modern constitutionalism, stories that overwhelmingly depend on the conceit of law's autonomy from culture.[158]

By advocating for a resistance to "tidy stories," Berger's approach can work to undo the colonizing tendency to abstract and universalize. He invites methodologies, such as the ones I advocate in the next section in conversation with Indigenous theory, that work to free the unruliness[159] of Indigenous religion's life from the straitjacket of abstract legal-theoretical and doctrinal approaches and their universalizing tendencies. (Indeed, in the conclusion to *Law's Religion*, Berger suggests the potential his work holds for cross-cultural analyses involving law and Indigenous studies). This, in turn, invites approaches to defining "law and Indigenous religion" that are unafraid to remain a little unresolved, and, as such, to remain true to the life of law and religion on the ground.

[158] Berger, *Law's Religion* at p. 20.
[159] My use of the term "unruly" is inspired by Berger's regular and effective use of the term to describe the nature of the stories that get told about law and religion when we consider the experience of both from the ground up, rather than through the tidy frames of jurisprudence or legal theory.

Part II. The term "Indigenous Religion:" the problem of naming

If we approach law and Indigenous religion as sets of experiences, not concrete universals, it means that no final definition of "law and Indigenous religion" can be arrived at; the stories of encounter that unfold through time themselves constitute and reconstitute the meaning of each and both. That said, some remarks are in order about my decision to use the term "Indigenous religion" to name the complex and varied array of ceremonial practices that are part of the lifeways of the First Peoples of Turtle Island—rather than, for instance "cosmologies," "worldviews," or "spiritualities." Writing about Indigenous phenomena in English (or any other colonial language) is deeply problematic because, for almost all Indigenous cultures, language itself is not separate from the phenomena it names, including land. English is a colonial import, not Indigenous to the lands it occupies. It necessarily always falls short, in ways we English-speakers do not even have language to describe.

That said, if we are to undertake the troubled task of translating a phenomenon like "Indigenous religion" that originated in Indigenous experience and the land-sourced language that constitutes it into English, then we have to face the problem of naming (a key part of the problem of definition) and the complex relations between Indigeneity and the colonial project that attend this problem. It should come as no surprise, then, that the problem of naming haunts scholarship in the emerging field of "law and Indigenous religion." Michael Carroll discusses the problem in the context of the Ktunaxa case, noting, in conversation with Indigenous scholars who have long been articulating it, that separating 'religion' off from the totality of other phenomena within Indigenous experience denies the reality that Indigenous worldviews see inter-relationships between all things—making a "web of connection" model more appropriate than the Western idea that "religion" exists apart from other aspects of life.[160]

Further afield than legal scholarship, scholars who study Indigenous religion disagree about whether the term "Indigenous religion" ought to be used or whether a term less-inflected by Western norms than "religion" might be more appropriate—for instance, "spirituality/ies,"[161]

[160] Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" at *supra* note 23.
[161] "Spirituality" is the work Marc Fonda uses in his excellent, comprehensive study of the phenomenon of inter-tribal spiritual practices in Canada. See: Marc Fonda, "On the Origins and Spread of Pan-Indian Spirituality in Canada" (2016) 45 *Studies in religion* 3 at pp. 309–334.

"cosmology/ies,"[162] "worldviews"[163] or "lifeworlds," [164] or even "law."[165] Religious studies scholar Timothy Fitzgerald argues that the term "religion" is inappropriate as a universal term to name practices that fall outside the Western-European context in which the term 'religion' arose. The problem, as he puts, it is this:

> Instead of studying religion as though it were some objective feature of societies, it should instead be studied as an ideological category, an aspect of modern western ideology, with a specific location in history, including the nineteenth century of European colonization…Religion is really the basis of a modern form of theology, which I will call liberal ecumenical theology, but some attempt has been made to disguise this fact by claiming that religion is a natural and/or a supernatural reality in the nature of things that all human individuals have a capacity for, regardless of their cultural context."[166]

In his study, which focuses on the spiritual practices of India and Japan, Fitzgerald concludes that 'religion' ought not to be used to refer to practices outside the Euro-modern mainstream religions. Canadian religious studies scholar Marc Fonda, in an excellent study on pan-tribal spirituality, follows Fitzgerald's lead and argues that the term "religion" is too heavily inflected with colonial overtones to be of use in the context of Indigenous spirituality. Many excellent scholars, however, still retain the word 'religion' as applied to Indigenous practices.[167] In the

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[162] The word "cosmology" is commonly used by scholars whose work engages with the traditions of peoples Indigenous to middle and south America. See, as a representative example, Marisol de la Cadena and Mario Blaser, eds, *A World of Many Worlds* (Durham: Duke University Press, 2018).

[163] See for instance: Cindy Blackstock et al, "Indigenous Ontology, International Law and the Application of the Convention to the over-Representation of Indigenous Children in Out of Home Care in Canada and Australia (2020)" 110 *Child abuse & neglect* 1.

[164] See for instance: Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61 *McGill Law Journal* 4.

[165] Scholars doing work to, in their words, "revitalize" Indigenous law at the Indigenous Law Research Unit (ILRU) housed at the University of Victoria Faculty of Law have positioned many, if not most, aspects of Indigenous lifeways and worldviews as "law," in an effort to give legitimacy to Indigenous practices and perspectives, without acknowledging the contingent nature of the category 'law' itself. A publication from ILRU released in the spring of 2022 puts it this way: "Indigenous law must be taken seriously as law so that it can do the necessary and hard work of law—collectively solving problems, governing, managing conflict, and creating peace through diversity and difference…Calling Indigenous law a cultural practice or custom instead of law can also undermine it. Imagine calling Canadian law the cultural practices of Canadian society? What is lost by refusing to call Indigenous law—law?" (See: Indigenous Law Research Unit, "Toolkit: Coast Salish Laws relating to child and Caregiver Nurturance and Safety" (March 30, 2022). Online at: https://ilru.ca/toolkit-centres-salish-laws-on-child-caregiver-nurturance-and-safety/?fbclid=IwAR1tUSQhbR2T6gwoBgZTlwlOwaGkQyYG_1GnYMwD-nxLxoUb6lsiEFNJUi0. Last accessed 30-03-2022.) One could ask, equally, what is lost when one needs to call Indigenous practices law in order for them to gain legitimacy in a world where "law" is recognized as more powerful and authoritative than culture, for instance, or religion?

[166] Timothy Fitzgerald, *The Ideology of Religious Studies* (Oxford: Oxford University Press, 2000) at p. 4-5.

[167] Siv-Ellen Kraft, *Indigenous Religion(s) : Local Grounds, Global Networks* (Oxon: Routledge, 2020).

context of discussions involving law and Indigenous practices, the term "Indigenous religion" is most common,[168] though not without its critics.

It is, of course, possible to be critical of the word 'religion' but still retain its use with this critical perspective in mind. In a comprehensive study of the problems and opportunities at stake in using the category "Indigenous religion," James Cox identifies the problem with the word 'religion' as being that it "clearly has been created out of a Western discourse about certain types of practices, beliefs and actions that have strong theological antecedents."[169] In this sense his critique coheres with the ones that Million, Christie, Wilson, and many other Indigenous thinkers make of the discursive categories of Western thought, when they warn against the dangers that Western categories of thinking render the world along certain, limited lines which are then figured as neutral or universal. (As Cox notes, the term "Indigenous" is equally problematic, for the way it, too, has been created out of Western discourses organized around the othering of Indigeneity; I return to the problem with this word in Part IV, below.) Cox nonetheless defends the use of the word "religion" for the way it holds the potential to draw scholarly attention to phenomena that might otherwise be ignored—bringing Indigenous religion into the fold of Religious Studies, for instance, in ways that allow it to be considered as a legitimate, legible form of religious experience alongside other world religions.[170] In the context of law, this question of legitimacy and legibility holds weight, if only because of the protections offered to the category of 'religion' in constitutional law instruments like s. 2 (a). Thus, just as using the term "Indigenous religion" allows for inclusion within Religious Studies, so too does the term allow for inclusion within the discourses and practices of Western law. Of course, inclusion in Western institutions, whether academic or legal, is not unproblematic—I turn to the problems that can attend the effort to become legible to law in Part V, below.

Others have parsed the relative merits of religion versus spirituality or another term far better than the limited scope of this thesis permits me to do here.[171] What I will say is I find none

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[168] See: Michael McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton: Princeton University Press, 2020).
[169] James L. Cox, *From Primitive to Indigenous: The Academic Study of Indigenous Religions* (Abingdon: Taylor & Francis, 2007) at p. 3.
[170] *Ibid.* See especially the discussion at pp. 1-3.
[171] The most nuanced discussions of use of terms that I have found arise in the context of scholarship that considers the practices of the Sami, the people Indigenous to present-day Norway. See: Bjørn Ola Tafjord, "Towards a typology of academic uses of 'Indigenous religion(s)', or, eight (or nine) language games that scholars play with this phrase" in eds Greg Johnson and Siv Ellen Kraft*, Handbook of Indigenous Religion(s)* (Leiden: Brill Press, 2017) at pp. 25–5; Bjørn Ola Tafjord "How talking about Indigenous religion may change things: an example from

of these terms satisfactory; naming Indigenous practices in any language of conquest (eg English) risks replicating within Indigenous knowledges fissures and self-divisions that originate in certain pervasive (and often profoundly life-negating) Western habits of thought—this includes, of course, the habit of separating 'objects' from 'belief' that attends the s. 2 (a) jurisprudence, as I discuss in the introduction and in Chapter 1, above. The cautions that Christie, Million, and other Indigenous scholars sound about the dangers of relying on Western epistemologies to understand and even to name Indigenous phenomena are particularly apposite when it comes to housing a complex, heterogenous array of phenomena under the heading "Indigenous religion."

I want to conclude my discussion of nomenclature by returning to the wisdom with which Shawn Wilson, Dian Million, and other leading Indigenous thinkers instruct us to proceed, if we want our scholarship to serve the long process of decolonization—eg that we acknowledge our own connections to the subject matter, that we listen to stories, that we think-with our whole person throughout the research process. In his very helpful discussion of the merits of using the term "Indigenous religion" to refer to Sami ceremonial practices, the Norwegian religious studies scholar Konsta Kaikkonen advises students to

> face these questions with a reflexivity and a critical approach that acknowledges the complexities, power relations, and problems of essentialism that are involved when defining the phenomena we study. A self-conscious, critical, and precise use of terms is therefore essential when describing both historical and contemporary phenomena that belong to the wide array of *sámi vuoiŋŋalaš árbevierru* [untranslatable Sami word Kaikkonen argues can be best captured by the term 'Indigenous religion][172]

This speaks, from a different angle, to the same self-reflexivity Christie warns us is lacking within much of academic practice—a reflexivity Million argues can be developed if we expand our concept of thinking to include stories, dreams, and a tending to the emotional register. When I engage the question of how to name the phenomena I provisionally call "Indigenous religion" with critical self-reflexivity, I find I come to no final conclusions—other than the observation that the fact that, for academic purposes, we identify some phenomena within the vast and ever-evolving scope of Indigenous experience as "religion," and others as "spirituality" or "law" or

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Talamanca" (2016) *Numen* 63 at pp. 548–75; and Konsta Kaikkonen, "Sámi Indigenous(?) Religion(s)(?)—some Observations and Suggestions Concerning Term Use" (2020) 11 *Religions (Basel, Switzerland)* 9 (2020) at pp. 1–14.

[172] Kaikkonen, "Sámi Indigenous(?) Religion(s)?" at p. 12.

"culture" or "cosmology" says more about us than it does about the phenomena we purport to name.

I have made the clear choice to use the term "Indigenous religion." At one level, the choice is merely stipulative, a way of having a placeholder to refer to an amorphous array of practices that connect Indigenous people to a sense of the transcendent through, and as, profound relations to land. I chose it, too, because I have made the decision to ground my discussion of law and Indigenous religion in the context of Canadian constitutional law and its ready-made framework under s. 2 (a) that names religion as a protected category. However, I have not blindly accepted law's nomenclature for convenience's sake, nor to fall in line with the most common practice in current law and Indigenous religion scholarship. Rather, the word choice reflects something of my own history and predispositions. The decision to use it evolved from my reflections on the way grounded storytelling can inform one's approach to definitions. Ultimately I chose the term 'Indigenous religion' because of how the term has evolved in the lives of those elders who have served the particular ceremonial tradition to which I belonged for many years. My choice of terminology is therefore rooted in the history of struggle for Indigenous religious freedoms that marked the lives of many of the elders whose wisdom I have been blessed to come into close contact with. These elders consistently used the term 'religion' to describe their ceremonial practice, as a way of countering the erasure implicit in white colonial practices bent on characterizing Indigenous ceremonies as *not* religion.[173]

It carries this history with it, one that connects me to the elders whose sacrifices have made it possible for me to benefit in too many ways to count from the blessings of Indigenous ceremonial practice. For me, this word 'religion' is more than just another linguistic constraint white culture uses to confine the fullness of Indigenous lifeways. It is, of course also that. But it

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[173] For a discussion of the illegalization of Indigenous ceremonial practices in the Canadian context, in part through practices that characterized Indigenous ceremonial practice as *not religion*, see: Natasha Bakht & Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777 at 790–91. See also: Michael McNally, *Defend the Sacred supra* note 168 which focuses on the US context but with some reference to Canada's illegalization of ceremonies like the sundance and the potlatch.

carries the resonance of the valiant struggles many Indigenous wisdom keepers have engaged over the last half-century on behalf of the right to relate to the holiness of land and to honour the continuities between the generations across time, adopting whatever language was necessary to keep alive ceremonial traditions in the face of so any threats to their extinction. This fight continues to this day, from *Ktunaxa* through *Durocher* and many points in between—including in the kitchens and bedrooms and back alleys where, far from the public eye, Indigenous people fight to keep the faith in the face of the many ways colonialism has marked their subjectivities, dividing self from self.

Part III. Problem of Recognition and Law's Readings of Indigenous Religion

Part of the way that Indigenous people sometimes keep the faith is through fights that take them into contact with colonial legal systems, as was the case with Tristen Durocher and with the Ktunaxa nation. This section therefore builds on my discussion of the problem of naming by grounding the question of selection of terms in the real-world context of s. 2 (a) cases involving what I am provisionally calling "Indigenous religion." This context is one in which the danger that law will misrecognize Indigenous worldviews is high, and hence where caution is order lest we mistake law's categories—whether religion or culture—as expressing the truth about Indigenous spiritual experience. Rather, I argue that clear-thinking in the context of court-based encounters between law and Indigenous religion require the willingness to think strategically, adopting whichever nomenclature serves the interests of Indigenous litigants. One must avoid the temptation to see the contingent definitional practices adopted for the purposes of on the ground strategizing as revealing anything like the essence of Indigenous religion. To know what Indigenous religion is, apart from what it must disguise itself as being to gain legitimacy before law's gaze, one must listen, as I do in Part VI, to Indigenous perspectives directly, hearing through their words the echoes of a truth law nearly always translates badly.

A rich theoretical tradition in Indigenous and post-colonial studies has evolved over the last two decades around the problem of recognition. This work stands as a warning about the risk of any attempt to render Indigenous religion into the terms of the Western legal apparatus, lest law misread what is at stake in Indigenous religious freedoms claims—as happened, for instance, in the *Ktunaxa* decision. It is beyond the scope of this thesis to delve into the nuances of the problem of recognition, nor to the many important ways scholars ground it in the concrete praxis of Indigenous-state relations. Instead, I offer a simplification of the problem in order to give a

sense of the dangers that attend any attempt to render Indigenous religious experience into the terms and conditions of colonial law. Put simply, the problem of recognition is this: in the move from the more overtly violent and exclusionary practices of the past towards gestures of 'inclusion,' the colonial states effect violence by rendering Indigenous experience into the limited frame of colonial institutions and practices, thereby threatening to erase core aspects of Indigeneity. (In this way, the problem of recognition addresses, at the level of state-Indigenous relations and its impact on Indigenous subjectivities, the core problematic this thesis identifies in the context of theorizing the law-Indigenous religion encounter, eg that law renders its contingent perspectives as neutral and indeed natural, thereby threatening to erase and/or misread core aspects of Indigenous religion that fall outside the frame of law's contingent viewpoint).

Glen Coulthard is perhaps the most widely known of thinkers wrestling with the "problem of recognition" in the Canadian context, though other, less popularized scholars have articulated the problem with skill and nuance.[174] Coulthard's major work, *Red Skin, White Masks* builds on the work of post-colonial theorist Franz Fanon to argue that, in the overtly "well-intentioned' but deeply insidious attempt to recognize Indigenous rights, the colonial state consistently misrecognizes the nature of these rights and thereby also misrecognizes Indigenous subjectivities, which subjectivities it then thwarts into various forms of obedience to its ends.[175] Mohawk scholar Audra Simpson has also worked extensively to expose the problem of

[174] See for instance the work of Nehiyaw scholar and lawyer Sharon Venne who grounds the problem of recognition in the context of how the struggle to implement the UN Declaration on the Rights of Indigenous People resulted in acts of misrecognition as Indigenous people were forced to translate self-understandings into the procedures and practices of Western constitutional law, eg. Irene Watson and Sharon Venne, "Talking up Indigenous Peoples' original intent in a space dominated by state interventions" in ed Elviro Pilitano, *Indigenous Rights in the Age of the UN Declaration* (Cambridge: Cambridge University Press, 2012), at pp. 87-109. For a discussion of the problem of recognition in the context of the practices of self-determination of Indigenous peoples in Latin America, see: Alejandra Gaitán-Barrera & Govand Khalid Azeez. "Beyond recognition: autonomy, the state, and the Mapuche Coordinadora Arauco Malleco", *Latin American and Caribbean Ethnic Studies*, (2018) 1-22 and Joel Wainwright and Joe Bryan. "Cartography, territory, property: postcolonial reflections on indigenous counter-mapping in Nicaragua and Belize" *Cultural Geographies* 16 (2009), 153-178, Audra Simpson offers a complimentary analysis that elaborates a 'politics of refusal' on the basis of the persistent problem of misrecognition, using deep ethnographic studies of the Mohawk as a case in point. As she puts it, "Misrecognition is not just about subject formation; it is also about historical formation. And by refusing to agree to the terms of the state and to be eliminated or assimilated, Mohawks are asserting actual histories and thus legislating interpretive possibilities in contestation— interpretations of treaty, possibilities of movement, electoral practices— not only individual selves. These are contesting systems of legitimacy and acknowledgment." See: Audra Simpson, *Mohawk Interruptus supra* note 57.

[175] Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

recognition.[176] She puts detailed ethnographic analyses grounded in long-term research conducted in Mohawk communities in conversation with critical theoretical perspectives on subject-formation to show how the subjectivities of the Mohawk people are shaped through the minutiae of colonial practice on the ground. Dian Million's work addresses this problem from a different angle and with an eye for critical complexity that defies any categorization, including "problem of recognition" scholar. She shows, for insrance, how the apparently well-meaning efforts of the Truth and Reconciliation Commission report contributed, along with the institution of Western therapeutic intervention in Indigenous communities, to inscribe a colonial "trauma narrative" onto Indigenous experience—in the process negating Indigenous values, narratives, and community practices, all the while appearing to be "doing good."[177]

If one were to take Coulthard's, Simpson's, and Million's views to their natural conclusion, one might arrive at the inevitable opinion that the very effort to protect Indigenous religion through the Canadian legal system (and, by extension, to theorize in ways that suggest, as my analysis does, that Canadian state law can ever help protect Indigenous lifeways) is likely ill-advised. This is because, for Coulthard and the many other rigorous, first-rate thinkers who share his view,[178] Canadian state law persistently misrecognizes Indigenous modes of being and seeing —thus making a certain degree of violence inevitable whenever Indigenous people go to law, or indeed interact with any state institution. I think it necessary to take Coulthard's, Simpson's, and Million's warnings seriously. We must never underestimate the risks that attend Indigenous peoples' engagement with Western legal systems. That said, the view I have been advancing works against the idea that Canadian law is the fixed entity many of its most ardent detractors characterize it as being. If we accept my theorization of law's nomos as a space in which law and land are deeply entangled, as well as my argument in this Chapter that both 'law' and 'religion' are sets of experiences, not concrete things, then the transformative forces that inhere in the complex, unpredictable natural world (of which humans are a part) are available, always, as potential agents for change in the legal system.

To be sure, law's doctrines, procedures, and institutions and, especially, its people tend to resist these changes at all turns. A feature of Western law so obvious it can be forgotten is the

[176] Simpson, *Mohawk Interruptus supra* note 57.
[177] See: Dian Million, *Therapeutic Nation supra* note 78.
[178] Simpson, *Mohawk Interruptus supra* note 57.

fact that most courtrooms lack windows, suggesting an architectural aversion to admitting that the natural world is part of what a courtroom, like all things, fundamentally is. But bodies occupy courtrooms and, being never-not part of nature, these bodies carry thoughts and perspectives influenced from beyond law's attempts, in its abstractions as much as in its courtroom design, to create a universe closed off to nature's chaos and its change. A case like *Durocher* shows that judges sometimes do decide cases in surprising ways that cut against the grain of the old colonial habits. Sometimes, they even go outside, to meet Indigenous people on the land, outside the courtroom and its false pretense that law is separable from the lands where it unfolds.[179] When they do, they run risk, as Justice Mitchell did in *Durocher*, of attracting the censure of the Canadian Judicial Council to do so.[180] Because I am advocating the view that Indigenous religious freedoms can sometimes be advanced even within the limits, conceptual and procedural, of Western law, my perspective is a realist one that says: yes, Indigenous people will and should sometimes go to law to seek protection for their religious freedoms.[181] When they do, their advocates should be ready to both use and drop the term "religion" according to the strategic moves necessary to get as much protection as possible from the law. Thus, the work of defining "Indigenous religion" ought to unfold with this wider context in place—one in which a knack for conceptual fluidity is a necessary skill for defending whatever Indigenous interests one can in court. At the same time, one ought to keep Coulthard's and others' warning about the problem of recognition front-of- mind and be keenly aware of the limits of the court's ability to read Indigenous religion—and the dangers that attend Indigenous peoples, both claimants and wider communities, when these misreadings occur.

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[179] The judge in the landmark decision in *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 spent time hearing testimony on Tsilhqot'in land. See: The Woodward and Company website, https://www.woodwardandcompany.com/tsilhqotin/. Last accessed March 29, 2022.

[180] See my discussion of *Durocher* in the introduction.

[181] In proposing that it might be sometimes wise for Indigenous people to engage with the colonial legal system, in spite of the risks, I am in accord with the perspective Sarah Hunt has on the politics of recognition. She concurs, as I do, that the risks of misrecognition are high whenever Indigenous persons interact with colonial institutions, but argues, as I do, for strategic engagement—she writes in the context of strategic engagement with academic institutions but the point is analogous in the context of enagement with colonial law, through the obstacles in each institutional setting are different. See: Sarah Hunt, "Ontologies of Indigeneity: The Politics of Embodying a Concept" (2014) 21 *Cultural geographies* 1 (2014) at pp. 27–32. She writes: "Yet, strategically, it does not seem that outright rejection of all forms of recognition are politically viable, especially for those of us working in institutions such as universities where we are required to navigate around disciplinary norms. If Indigenous sovereignty can only be attained through self-affirmation, how do we reconcile the inclusion of Indigenous knowledge, and ourselves as Indigenous people, in those dominant institutions?" (at p. 29).

As a case in point of how conceptual fluidity might be necessary when navigating a legal system ill-fitted to the task of recognizing Indigenous religion, I want to briefly consider a recent B.C. Supreme Court case, *Servatius v Alberni School District No. 70*, 2020 BCSC 15. Servatius, an evangelical Christian woman, claimed that the Nanaimo district school board was violating her 9 year old daughter's s. 2 (a) rights when it invited an elder from the Snuneymuxw to conduct a smudging ceremony in the classroom.[182] Defending against the claim, the School board characterized the ceremony as an example of "culture" not "religion." The court agreed with this characterization, citing the long history of repression of Snuneymuxw culture and the Truth and Reconciliation report's professed commitment to cultural protection as part of the work of reconciliation. In this case, characterizing smudging as not religion achieved the goal of protecting the Snuneymuxz people's capacity to share their ceremonial practices with children in public schools, arguably a good result in so far as it works to undo the damage of the many years when public school education was dominated by Christian practices—including at the state-sponsored residential schools. Of course, this case is far from a clear victory. A more sinister reading might suggest that *Alberni School District* exemplifies the court's commitment to keep Indigenous Religion out of 'real' religion.[183]

Alberni School District, read with *Durocher,* shows the need for a flexible, tactically-minded approach to the problem of definition. In the battle-heat of the on the ground realities of struggle for Indigenous religious freedoms, one must be willing to characterize Indigenous activities in the way most likely to win protection in court. Arguably, the very fluidity around the question of how to name Indigenous religion can be a benefit in court-based struggles to defend Indigenous practices and worldviews. That ceremony can be named "religion" in one instance (eg *Durocher*) and "culture" in another (eg *Alberni School District*) is indicative not of a lack of conceptual clarity around what Indigenous religion is or how it should be named. Rather, it highlights the nimble-footedness with which Indigenous people and their allies in the legal system approach the practical problem of how to navigate a legal apparatus that, in the final analysis, was created and continues to be sustained by practices and epistemes quite foreign to Indigenous worldviews. In the final analysis, I refer to the amorphous ceremonial practices and attendant worldviews of Indigenous peoples as 'religion' for stipulative ease, to honor the elders

[182] *Servatius v Alberni School District No. 70* 2020 BCSC 15.
[183] I am grateful for my dialogue with Ben Berger on this point, who raised this possibility to my attention.

of my own religious tradition, and to acknowledge that part of the "religion" in "Indigenous religion" is an acknowledgment of the reality that Indigenous people must frequently filter their understandings through the severe constraints of Western law, in order to gain law's protection—this includes the constraint of seeing 'religion' as separate from other phenomena in the first place, a problem I addressed in Chapter 1.

In the next section, I turn to Indigenous religious practices themselves as described through Indigenous voices. This section shows that Indigenous religion is, like the people and lands that engender it, always changing. It changes, in no small measure, in response to the ongoing challenge posed by colonialism and its continuing legacy—the creativity and courage Tristen Durocher showed in responding to government inaction on the tragic issue of Indigenous youth suicide, far from being an outlier in the realm of Indigenous religion, appears as typical of authentic Indigenous religion, which is inherently responsive to circumstance and hence does not conform, for instance, to the framework of "pre-contact practices" laid out in the s. 35 jurisprudence from *Van der Peet* onwards.

Part IV. A decolonizing approach to the problem of definition

> "Other paths and lessons are open to us when we see better, no matter how unruly that way of understanding may be." –Benjamin Berger, *Law's Religion*[184]

Defining "Indigenous religion" on terms other than those set, implicitly and explicitly, by law's world is a preliminary step towards understanding the relation between law and Indigenous religion in ways that do not merely replicate the relations of coloniality that, for too long, have created conditions of monumental unfreedom for Indigenous Religion. To that end, this section discusses some of the features that must characterize decolonizing approaches to the problem of how to define Indigenous Religion. This methodology builds on the conceptual groundwork established in Chapter 1 (eg conceiving of the nomos of law and Indigenous religion as a complex entanglement of narrative and materiality) to advance, in conversation with Indigenous theory, a land-based, relational, storied approach to the problem of definition.

The legacy of colonialism inflects the relations between law and Indigenous Religion with deeply entrenched patterns of dominance that play out in complex ways and at innumerable

[184] Benjamin Berger, *Law's Religion* at p. 20.

sites, to the detriment of Indigenous peoples, lands, and non-human relatives—a horrific reality to which this thesis endeavours to bear witness from the outset to the conclusion. These are the dominance patterns through which colonial state powers asserted, over the course of a long and brutal colonizing mission justified and backed up by law and legal discourses, their ultimate primacy over Indigenous modes of understanding the world, distributing resources (especially land), and resolving disputes.[185] Western law, in many instances, continues to assert and entrench this dominance in ways that minimize Indigenous self-understandings. Any attempt to define Indigenous religion in ways that remain uncritical of the epistemological limits of law threatens to perpetuate this colonial legacy. Too often, legal academics, even inadvertently, replicate the habits of dominance that entrench Western legal thinking as supreme over other modes of meaning-making. This collusion between legal academics and the dominance habits of law is a problem the Inupiat/Inuvialuit legal scholar Gordon Christie puts in uncompromising terms:

> Arguments within the field of discourse [on the topic of the supersession of historic injustice] overwhelmingly disregard the existence of worlds of Indigenous understandings of land- people relations, of law, and of normativity. We see, for example, that justice is conceptually constrained to what non-Indigenous scholars understand it to be.[186]

Christie echoes the concerns of many other Indigenous scholars concerned, especially over the last two decades, to challenge the epistemological habits of Western academia for the ways they resist and erase Indigenous ways of knowing and making knowledge.[187] As Dian Million puts it, "it is the nature of Western knowledge claims to either contest or extinguish rival knowledge claims."[188]

I am cautious, as I have made clear throughout this thesis, about asserting a single homogenous "Western knowledge" in light of the deeply entangled, fluid relations I see existing between Western worldviews, including law, and other practices of knowledge production, including Indigenous perspectives. In my view, which resonates with the one Berger's work on law and religion propounds, the experience of law (or indeed of 'Western knowledge') on the ground never fits the easy categorization of a homogenized view of "Western law." That said,

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[185] Williams, *The American Indian in Western Legal Thought supra* note 136
[186] See: Christie, "The supersession of Indigenous understandings of justice and morals*"* at p. 2.
[187] See: Wilson, *Research is ceremony supra* note 80.
[188] See: Million, "Intense Dreaming" *supra* note 132 at p. 318.

Christie and Million note pervasive patterns, the existence of which ought not be denied out of a quibble with the need to essentialize 'Western knowledge' for long enough to note its destructive tendency to negate other modes of seeing, including and, in many ways, *especially* Indigenous ones. Million's work foregrounds experience and the complex relations that constitute it, as the primary sight of knowledge production (in this way her work also resonates with Berger's), calling for a nuance and complexity that tends carefully to the life of law and Indigenous religion on the ground. For Million, a large part of what this careful tending to life on the ground requires involves a commitment to self-reflexivity on the part of academic researchers—a reflexivity Christie, for instance, notes is sorely absent from too much of scholarship that addresses Indigenous-state relations.[189]

In advocating for a critical, self-reflective approach to scholarship, Million engages the work of other Indigenous thinkers who have contributed to the long project of "epistemological struggle" to make a place for Indigenous ways of knowing in academia.[190] For Million, this approach keeps these questions at the forefront of knowledge-making activities: "What is our particular experience? What are the relations of our knowing? What and who do our acts of making meaning serve?"[191] In the process of exploring these questions, Million describes a mode of scholarship that, against the grain of the intensely rational bias of mainstream Western academia, includes what she calls "Intense Dreaming," where dreaming means the

> effort to make sense of relations in the worlds we live, dreaming and empathizing intensely our relations with past and present and the future without the boundaries of linear time.[192]

Million is not positing dreaming as existing in opposition to other ways of knowing. Rather she sees "dreaming, theory, narrative, and critical thinking [as] not exclusive of each other,"[193] even though they "form different ways of knowing" whose "necessary boundaries" call for respect.

Widening the circle of accepted scholarly knowledge-production practice is, for Million and many other Native Studies scholars, a necessary part of the practice of decolonizing minds trained in the Western milieu to disparage central practices of Indigenous knowledge production,

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[189] See Million, "Intense Dreaming" *supra* note 132.
[190] Million, "Intense Dreaming" *supra* note 132 at p. 314.
[191] *Ibid* at p. 314.
[192] *Ibid* at pp. 314-315.
[193] *Ibid* at p. 314.

including the central practice of story-telling. Million wants to make it clear that story-telling is not subservient to theorizing. Rather,

> story *is* indigenous theory. If these knowledges are couched in narratives, then narratives are always more than telling stories. Narratives seek inclusion, they seek nooks and crannies of experiences, filling cracks and restoring order. Narratives lay boundaries. Narratives give orphans homes. Narratives both make the links and are the links that have been made…They serve the same function as any "theory" in that they are "practical action. And last but not least, Indigenous narratives are also most often emotionally empowered. They are informed with the affective content of the colonial experience.[194]

A key part of decolonizing approaches to scholarship, then, is to remember stories as a form of knowledge-production that must be taken seriously—not least of all because stories retain something of the affective dimension of the colonial experience, something abstraction misses. I contend that this must apply to all steps of the scholarly enterprise, including the (often preliminary) step of defining one's terms.

Stories, as Million's text above makes clear, do the work of making relations—they seek to include, to set boundaries, to restore, to make homes, to connect. Thus, a decolonizing approach to defining "law" and "Indigenous religion" is one that takes seriously both stories and the relations they make as primary epistemologies—ones that cannot be abandoned in the search for abstract definitions. Centering the practice of story-telling in approaching this definitional problem is one way I can honour the call within Native Studies to bring exiled modes of knowing into the fold of acceptable knowledge. These include stories, dreaming, and a careful tending to the emotional register—modes and sites of knowledge production that can too easily get left out of even well-intentioned accounts of the relations between Indigenous experience and Western colonial practices, including law.

If experience, understood on the view of the nomos I am proposing as an entangled meeting of nature and culture, is the stuff of research, then stories are the method for getting there. As such, rather than offering a final, cut-and-dry definition of "Indigenous religion," I propose that a better approach to definition is one that attends closely to experience on the ground, where the meanings of both law and Indigenous religion unfold and reverberate through the stories of encounter in the lives of Indigenous people who come 'before the law,'[195] both formally and not, to defend their religious freedoms. The definition I offer, then, can be

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[194] *Ibid* at p. 322

[195] This phrase is, of course, a reference to Kafka's parable by the same title, which inspired the writing of this thesis. See: Franz Kafka, "Before the Law" in the *The Trial,* trans. Richard Stokes (London: Hesperus Press, 2005).

understood as an admonition to pay attention to experience, including one's own, and to take seriously the stories that emerge from it. There is no abstract 'Indigenous religion' to be found, only experience. This experience can be best accessed through stories. If we want to read Indigenous religion well, we need to cultivate the capacity to listen to stories—which starts, I argued in Chapter 1, with the willingness to see the narrative world broadly, as a space in which human story is indelibly entangled with stories that arise from the land itself.

The stories that give us an idea of what Indigenous religion is are many and come to us from many sources, including more-than-human ones. On the human side, these can include stories like Tristen Durocher's or the Ktunaxa nation's, which give a feel for the nature of Indigenous Religion from the perspective of its encounter with legal proceedings. However, to get a fuller picture of what Indigenous religion means, it is important to tend to story-telling sources that fly under the radar of court proceedings and the public attention they garner, and that speak to and from the everyday experience of Indigenous religion on the ground. In selecting sources for these stories, care should be taken to include work that is, in Million's words, "emotionally empowered," speaking from beyond the academic register to the "affective dimension" of colonial experience, rather than merely abstract accounts of Indigenous religion.

Personal narrative and memoir can be one good place to look to hear Indigenous voices that foreground the visceral experience of Indigenous religion, and its connections with the wider circle of more-than-human relations. So also can works of Indigenous fiction inspired by the lived realities of Indigenous life under colonialism.[196] In a recent book on law and Indigenous women's writing, Cheryl Suzack makes the point that listening to the personal narratives of Indigenous women, as conveyed through their writing, can be a way of "counter[ing] these [colonial law's] acts of silencing and erasure"—a silencing and erasure that, she notes, disproportionately affect Indigenous women as compared to Indigenous men, because of the ways emotion tends to be the purview of women.[197] Suzack is, of course, not the first to make this claim. Million's seminal 2009 article, "Felt Theory," advocates for "remembering and

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[196] See for instance Louise Erdrich, *The Roundhouse* (New York: Harper, 2012) and Leslie Marmon Silko, *Ceremony* (New York: Penguin House, 1977). I am grateful to Jeffrey Hewitt for pointing me in the direction of these books, both of which look to the embedded relations between Indigenous law, colonial authority.

[197] See: Cheryl Suzack, Indigenous Women's Writing and the Cultural Study of the Law (Toronto: University of Toronto Press: 2017) at pp. 124 to 125. See also: Dian Million, "Felt Theory" 60 *American quarterly* 2 (2008) and Sylvia McAdams, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Vancouver: Punch Books, UBC Press: 2015).

understanding the impact of Canadian First Nation women's first-person and experiential narratives on white, mostly male mainstream academic literature."[198] As Million reminds us, since at least the early 1970s, with the publication of Metis activist Maria Campbell's ground-breaking, deeply personal, emotion-packed *Half-Breed*, Indigenous women have been writing powerful first-hand accounts of their lives under colonialism.[199] When some of these narratives gained popularity in the early 1990s, Million argues that they "exploded the measured 'objective' accounts of Canadian (and U.S.) colonial histories," forcing colonial governments to confront the felt realities of colonialism in ways that helped activate political momentum for gradual changes to Canada's colonial policies.[200] She credits the publication of these first-hand narratives as being part of the force of momentum that led to the establishment, for instance, of the Truth and Reconciliation Commission.[201]

(In conveying the experience of Indigenous religion under colonialism, Indigenous women's voices might similarly "explode" objectivizing tendencies in scholarly accounts, inviting us to feel, as well as think, the relation between law and Indigenous religion. I would add that it is equally important to listen to Indigenous men's, queer, and two-spirit voices, too—women do not have a monopoly on the ability to convey emotion through storytelling.[202]
It is important to remember that these categories "man" and "woman" are themselves colonial constructs, as Indigenous theorist Mark Rifkin's first-rate work on constructions of sexualities under colonialism, for instance, shows.[203] The work of all the genders can and does speak with deep emotion—privileging women as the carriers of "emotion" is itself a thought-habit inflected by colonialism. That said, one of the products of colonialism is that women and feminized persons of all genders were silenced when colonial authorities infected tribal leadership with patriarchal values, normalizing a narrow form of masculinity as the 'neutral' mode of being

[198] Million, "Felt Theory" 60 *American quarterly* 2 (2008) at p. 54.
[199] Marie Campbell, *Half Breed* (Toronto: McLelland & Stewart, 1973).
[200] Million, "Felt Theory" at p. 54.
[201] See: Million's important critique of said commission in *Therapeutic Nation supra* note 78.
[202] See, for instance, the deeply visceral work of 2SQ poet Bobby Ray Belcourt, for instance in Billy Ray Belcourt, for instance in *A History of My Brief Body* (Columbus: Two Dollar Radio Press, 2020). For a nuanced and sensitive account of the construction of a narrow breed of heterosexuality as 'natural' under colonialism, see Mark *When did Indians Become Straight? supra* note 115.
[203] See: Rifkin, *When did Indians Become Straight?* and Rifkin, "Making Peoples into Populations," *supra* note 115.

human.[204] Listening to female voices is one way to reverse the tide of that colonial habit and to foreground perspectives colonialism was complicit in erasing—but women need not be figured, as has become fashionable in too much of contemporary discourse, as somehow more possessed of "emotional" authority than other genders, including men. To do so is to unwittingly reinscribe a colonial logic.)

One such voice is Lakota activist and devoted practitioner of traditional Lakota religion, Mary Brave Bird (formerly Crow Dog). Her 1991 book, *Lakota Woman*[205] quickly became a national best-seller, opening a wide readership to both the brutal realities of life under colonialism, and to the magnificent strength of Indigenous people who, like Brave Bird, manage to hold onto faith in spite of suffering, on a daily basis, hardships few middle-class academics would have the stomach for, myself included.[206] Brave Bird survived residential school and the myriad brutalities of its twisted brand of Christian religion. She discovered Lakota religion as a teenager, in part through her connections with the American Indian Movement and its efforts, in collaboration with traditional spiritual leaders, to revive traditional ceremonial practices in conversation with the needs of native activists. Brave Bird fought her whole life not only for her own survival, but for the survival of her people and their way of life. Her narratives convey the deeply rooted, land-embedded nature of Indigenous identity, Indigenous religion, and the ways the experience of both were inflected by the brutalities of colonial practice, including law. As such, Brave Bird's accounts serve as an indispensable source of stories on Indigenous religion and law. She is able to convey, in a few hard-hitting pages of personal anecdote what even the most complex, thought-out theories of indigeneity tend to miss. Her stories about her own and her relatives' encounters with law offer some of the most astute socio-legal commentary I have encountered.[207]

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[204] See: C.F. Black, C. F. Chapter 8, "The Camp from Turtle Island" in C.F. Black, *Thunderheart The Land Is the Source of the Law : a Dialogic Encounter with Indigenous Jurisprudence* (London: Routledge, 2011) at pp. 121-144.

[205] See: Mary Brave Bird (then Crow Dog) with Richard Erdoes, *Lakota Woman, supra* note 85 and Mary Brave Bird, *Ohitika Woman* (New York: Harper Perennial, 1993).

[206] *Ibid*

[207] Part of what makes them so good is that her stories defy what Million has identified as the "trauma narrative" that has come to dominate Western discourses of indigeneity in recent history (see: Million, *Therapeutic Nation supra* note 78). Though Brave Bird and the friends and relatives she writes about certainly experienced no shortage of colonialism-induced horror and injustice, she never depicts herself or her loved ones as the unfortunate victims in need of yet another program to save them. She and her relatives and the religion they practice come across as both persecuted and strong, beautiful and free and forces to be reckoned with even under the most extreme conditions of subjugation.

Though Brave Bird practiced traditional Lakota religion with a dedication and ferocity matched by few, as a sun dancer, pipe-carrier, sweat lodge leader, and a long-time member of the Native American Church, her accounts undo whatever romanticized notions one might entertain about Indigenous religion. Her stories make it clear that the pictures of Indigenous religion that refract in the white imagination (too often amplified in academic ceremonies featuring a 'token native' who looks the part for long enough to drum in a welcome song) have little to do with the realities of Indigenous religion's lived experiences on the ground. She paints a picture of Indigenous religion that white (and indeed, also, Indigenous) appropriative accounts and institutional romanticization never convey.[208] In her stories, Indigenous religion comes across as always exceeding its external manifestations in this or that ceremonial practice; rather, it emerges as a force that carries indigenous people through the dirt and struggle and messy complexities of fierce, unconquered lives that nonetheless struggle under ongoing colonial oppression:

> There is an old Lakota song that begins: 'To be a man it is difficult, they say.' Well, to be a Native American woman is even harder. I do the dishes and I am changing the diapers. But I'm still fighting. I try to be sincere, try to hold on to the medicine, try to make my kids understand what it means to be Indian….I try to help other women to cope with life. It does not necessarily have to be ceremonial, but just through understanding, and friendship, and support…I will fight to the end of my days—for everything that lives. Mitakuye Oyasin—all my relations.[209]

Indigenous religion, in her stories, comes across not chiefly as a glorious event replete with feathered head-dresses and the heartbeat of the drum (though it is also that, at times); it appears as the force of strength that carries Indigenous people through the worst of times as defenders of life. This strength rises through the land into the hearts of Indigenous people awake to the holy power colonialism did everything it could to suppress, making the impossible somehow possible: to keep the faith amid the forces that make being Indigenous harder than words can say; to keep fighting through the hardships of both colonialism and the mundane drudgery of dirty diapers; to try to hold on to sincerity, kindness, and a sense of one's long-persecuted identity for long enough to show the children how to carry on, not forgetting who they are.

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[208] See especially the descriptions at Brave Bird, *Lakota Woman* at p. 233-241.
[209] Bravebird, *Ohitika Woman* at p. 274.

Decolonizing approaches to defining Indigenous religion would do well to seek out sources—Mary Brave Bird is an excellent one but just one among many[210]—that speak, as she does, to the gritty realities of the lived experience of Indigenous religion. These realities include both the great strength that comes from connection to time-honored practices but also the reality of ongoing struggle against oppressive conditions perpetuated by the colonial state. The inevitability of this struggle makes the strength derived from Indigenous religion all the more necessary, and the need for analyses that advance in decolonizing ways the cause of Indigenous religious freedom all the more urgent.

Part V. What is Indigenous Religion? Some defining characteristics.

This section weaves the material introduced above to at last discuss, in conversation with Indigenous thinkers (both academic and otherwise) a few core characteristics of Indigenous religion—characteristics that have, of course, emerged in my discussion above. In this section I show how the complex history of colonialism marks both the term "Indigenous" and the experience of "Religion." This discussion thus highlights the many ways that Indigenous religion, as sets of ever-changing experiences, has developed along certain lines because of the ways in which its adherents had to resist, for the sake of their survival, the logic of colonial power.

The concept of "Indigenous religion" might make it seem that the religious practices of Indigenous people are homogenous, belying the reality that there is no single "Indigenous religion."[211] This is in part because the term "Indigenous" refers to a broad array of diverse peoples, united under the single moniker "Indigenous" often only by the fact of their shared subjugation under colonialism—whose discourses and practices constructed Indigenous identities as other to whiteness as part of the long project of colonial dominance. In Canada, the project of constructing indigeneity was carried out in large part by the *Indian Act*, whose rules

210 See, for instance, "The Warrior Women Oral History project," which has a rich online collection of interviews on video of women who were integral to the Red Power movement in the 1970s. The voices of these elders and grandmothers tell more than writing can. "The Warrior Women Oral History Project." Online at https://www.warriorwomen.org/videos. Last accessed 31-03-2022.

211 This view is widely acknowledged in the literature and a familiar fact for anyone with even a cursory knowledge of Indigenous ceremonial practice. For a succinct discussion, see for instance Michael McNally, "Defend the Sacred: Native American Religious Freedom" (October 21, 2020) Berkley Forum, *Berkley Center for Religion, Peace, and World Affairs.* Online at: https://berkleycenter.georgetown.edu/responses/religious-freedom-direct-action-and-rethinking-foundations. Last accessed: 26/05/2022.

for determining "Indian" identity by blood quantum bore little relationship to traditional Indigenous practices of determining tribal membership.[212] In more recent history, as the colonial term "Indian" gave way to the language of "Indigeneity," law, too, involved itself, often nefariously, in naming and identifying who does and does not belong under the category "Indigenous."

The term 'Indigenous' evolved as a "specifically named political identity" out of post-World War II human rights initiatives and their attendant discourses.[213] This evolution was far from unproblematic development, as Million addresses in detail in the ground-breaking book *Therapeutic Nation*, which I reference throughout this thesis. In pointing to the contingency of the term "Indigenous," Million traces the ways in which Canada's present-day reconciliation discourse grew up and through labyrinthine and tricky modes of power—modes always ready to change form and to adopt apparently conciliatory language in discursive ploys to disguise ongoing and deeply violence power dynamics at the hand of the state.[214] As Million also acknowledges, in the post-war era Native peoples deployed counter-discourses in order to co-opt the word 'Indigenous' in ways that served their struggle for a liberation defined on their own terms, not on the covertly colonizing terms of liberal rights discourses. As she puts it:

> The rise of Indigenism is not an accident at this historical moment. It is an alternative, active, and mobile set of meanings available in the midst of globalization, diaspora, multiplicity, and 'complexity.' It is an identity that seeks to make lateral moves, bonding a multiplicity in ways that are more powerful than if one located beloved people who sought to fight in its singularity. It is also a language of the heart and cannot be fully expressed in rationalized languages.[215]

The adjective "Indigenous," then, when applied to "religion" is a qualifier bound inextricably to this history of struggle, through which tribal peoples adopted the term "Indigenous" in acts of solidarity with each other, out of resistance to the colonial forces that threatened—and still threaten—their erasure. It is important to keep this fact front of mind, lest the search for "Indigenous religion" become only a hunt for some elusive notion of "pure" or "pre-contact" Indigeneity found in the millennial practices of this or that "original" nation—a danger, I argued above, that can attend analyses informed by the framework of the s. 35 jurisprudence.[216]

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[212] See Rifkin, "Making Peoples into Populations" *supra* note 115 and Palmater, *Beyond Blood supra* note 144.
[213] Million, "Intense Dreaming" *supra* note 132 at p. 329.
[214] *Ibid.*
[215] *Ibid* at p. 13.
[216] See my discussion of *Van Der Peet* at *supra* note 161, above.

Indigenous religion is, of course, bound up in these ancient practices but it cannot be divorced from historical and ongoing struggles to assert Indigeneity in the face of myriad threats of erasure—struggles that Tristen Durocher took up in his effort to give voice to the pain Indigenous youth feel (pain that leads too often to suicide) in the face of the state's refusal to address the conditions that make life unliveable for too many native people.

In addition to the ways in which the very category "Indigenous" has grown up through the contingencies of colonial discourse and Indigenous resistance to it, in contemporary times, Indigenous identity is always entwined, to one degree or another, with the broader culture of which, for better or worse, it is now a part. Hadley Friedland, a white scholar of Indigenous law who for years lived amongst the *Nehiyaw* people, puts the complexity thus:

> Indigenous and non-Indigenous individuals live in inter-relation and inter-dependence at many levels. In reality, our communities are much more fluid, complicated, and intertwined than much of the political rhetoric allows for.[217]

Part of this complexity is such that many Indigenous people, as a result of the pervasiveness over several generations of the residential school experience, of the historic presence of church denominations on reserve lands, and of frequent inter-marriage with non-Indigenous people, practice and, in many cases, are life-long members of Christian faith traditions. Their religious life will often consist entirely of membership in and dedication to a Christian denomination, or may include a combination of traditional practices and Christian religion.[218] The practices of these Indigenous people ought not be dismissed as "not Indigenous," or downgraded relative to practices that white outsiders deem to be "more traditional." This is one reason why the individual-rights focus of s. 2(a) is arguably preferable to the collective-rights-focus of s. 35, provided the conceptual problems I highlight can be overcome. This is because s. 2 (a) is not bound to the 'pre-contact' bias that infects s. 35 in ways that could threaten to downgrade the practices of Indigenous people that are influenced by Christianity over those that appear to be more "traditional."

Indigenous religion, then, includes the many and varied ways Indigenous people practice their connection with the web of creation, including through Christianity. Definitions of Indigenous religion must be sufficiently flexible to account for this. Acknowledging the

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[217] Hadley Friedland, "Waniska: Reimagining the Future with Indigenous Legal Traditions" (2016) 33:1 *Windsor YB Access Just* 85 at p. 91

[218] See: *TRC report, Vol. 1* at p. 226.

complexity that attends the definition of "Indigenous" is necessary in order to undo the romanticism, still prevalent in certain discourses and perpetuated by legal doctrine,[219] that would posit the chimera of a 'pre-contact native.' Indigeneity, for better and often for worse, is not and thus cannot be seen to be ever entirely distinct from the ubiquitous cultural forces that condition subjectivities, Indigenous and not, along lines that conform to the evolving agenda of colonialism and its successor, neo-liberalism.[220]

Those caveats about the amorphousness of this category "Indigenous" aside, there are some well-documented similarities across the religious practices of Indigenous people, the principles of which can be instructive for coming to understand the unique claims of indigenous religion. I have discussed these in Chapter 1, where I showed that for most Indigenous religious traditions, land is held as being inextricably related to culture and to spirit, such that the separation between 'objects' and 'beliefs' that characterizes the s. 2 (a) jurisprudence, and maintained in the *Ktunaxa* decision, actually does ontological violence to the worldview of Indigenous religion. I elaborate on these in further detail here, in order to reinforce the point made in Chapter 1 but from a different angle. The point for the purposes of the question of definition is that one cannot conceive of Indigenous religion without understanding that land is its heart and soul—any more than one can, as I argued in Chapter 1, conceive of the field in which Indigenous religion unfolds (the nomos of law and Indigenous religion) without accounting for the deep entanglements between nature and culture that pertain in Indigenous worldviews and that new materialism might help white and white-trained academics understand.

In testifying to both the important differences across tribal religions and to their similarities, the perspective of the seminal scholar of Indigenous religion, Vine Deloria, is instructive:

> Every Indian tribe has a spiritual heritage that distinguishes them from all other people. Indeed, in the past, recognizing their unique relationship to the world and its creatures, most tribes described themselves as "the people" or "the original people….Many avenues of spiritual expression seem to have been shared by tribes. Many tribes practiced the sun dance, the spirit lodge, the vision quest, the sweat lodge, use of sacred stones, and other rituals with slight variation on format, that originated in the past.[221]

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[219] See my discussion of *Van Der Peet* at *supra* note 161, above.

[220] My conception of the term neoliberalism is informed by the work of William Connolly in, for instance, Connolly, *The Fragility of Things: Self-Organizing Processes, Neoliberal Fantasies, and Democratic Activism* (Durham: Duke University Press, 2013) and by the work of Wendy Brown, for instance in Brown and Halley, *Left Legalism/left Critique* (Durham: Duke University Press, 2002).

[221] Deloria, *The World We Used to Live in* (Golden, Colorado: Fulcrum Publishing, 2006) at p. xxiii.

A set of shared principles both emerge from and form the basis of these common ceremonial traditions. These shared principles derive from the importance of land and loving relations in Indigenous cosmologies. These are formative of an embodied, story-based epistemology that, for thousands of years, has sustained webs of connection between Indigenous peoples and the lands that birthed them (including the many non-human relatives, from stones to animals to birds to spirits and more, who share and make the land with humans). This epistemology militates in favour of a conceptualization of both Indigenous religion and the field it operates in that acknowledges the inextricability of humans and land—humans *are* land for Indigenous religion and any legal conceptualizations, whether of field (Chapter 1) or subject matter (Chapter 2) must honour that foundational starting point.

Indigenous religion evolves over time through the complex network of relations peoples establish and maintain with the web of creation, the entirety of which is encapsulated in the word "land." Land is the totality that both constitutes Indigenous peoples and is their home. Indigenous religion, then, is as fluid and responsive to changing outside circumstances as is Indigenous identity itself—because land changes, always. Though Indigenous religion is not identical to Indigenous identity, the two are entwined. This is only because of Indigenous people's ties to religious practices that pre-date colonialism but also because of the manifold ways colonialism and, more recently, neoliberalism, has forced Indigenous people to reckon, in ways that cannot help but implicate religion, with wreckage, with incommensurable loss, with the ghosts of their innocent dead, human and otherwise. Million, as ever, is instructive on this point:

> I am inhabited by the ghosts of my dead and my devoured and subjectively I cannot ignore them, nor will they be ignored. As an Athabascan woman I know we live in a world filled with spirit and what I do will matter…Our collective history-filled space here is not a void…the space is filled with the emotional resonance of our actions in this place, subsumed when power moves to crush voice, imagination, and spirit.[222]

Indigenous religion, like Indigenous identity itself, rises out of this "history-filled space" where the ghosts of the ancestors still speak, crying out for action that moves against the grain of that power that would silence Indigenous voices, imaginations, and spirits. Tristen Durocher occupied this 'history-filled' space when he set his tee pee up on the grounds of Wascana centre

[222] Million in *Theorizing Native Studies* at p. 32.

to honour the innocent dead and to call on colonial government to respond with compassion to the pain of Indigenous youth. The Ktunaxa, too, occupied this 'history-filled space' when they listened to the voice of one of their elders and visionaries who warned them to pay heed to the needs of the Grizzly Bear spirit, lest the powers-that-be that would prefer ski resorts over sacred ceremony move in to 'crush voice, imagination, and spirit.' And this 'history-filled space' fills us even now, as we wonder what law will do with the knowledge that residential school sites across the country can no longer hide the secret of just how many innocents state and church left dead. The logic of colonialism would have devoured even their memory, had the truth not pushed its way above ground to call us all to task and to remembrance.

Part of the work of remembrance must involve listening to the voices of Indigenous wisdom keepers who remind us that the work of Indigenous religion is never done—though church and state colluded for centuries to conspire for its erasure, still the force of Indigenous religion lives on. It lives on not in the empty performance of so-called 'pre-contact' practices, but rather in the perpetual transformation and becoming of Indigenous subjectivities, which are connected always to land and the ways land, even with all the devastation, continues to transform and to become. Million connects the becoming of land to the becoming of people in a beautiful articulation of the way life, as *potential*, resides in Indigenous peoples and their places, inviting and awaiting transformation, even across the grueling, destructive desert of colonialism. Stories, as repositories of the peoples' experience in particular places, reveal as well as remake the power of land, connecting people and places and the more-than-human across time. As she puts it:

> Indigenous people reached to the life-affirming stories of their enduring experiences in these places, these places that are inhabited by our ghosts, our spirits, the spirits of the potential, the life force itself. They are people transformed, and transforming…it is from this potential, the potential of our proposition for other ways of being and living, that we generate and attach ourselves to our intensely dreamed futures, always becoming.[223]

In order to overcome the habit of thinking "Indigenous religion" as fixed in pre-contact time,[224] scholars of law and Indigenous religion as well as judges deciding cases that implicate Indigenous religion would do well to rely on sources, like Deloria and Million and Crow Dog, who show that land is not only "sacred" to Indigenous peoples. Rather, in addition to being

[223] Million in *Theorizing Native Studies* at p. 40.
[224] For further discussion of the limits of doctrinal habits that look for evidence of pre-contact practices, see: Carroll, "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us" at *supra* note 23.

"sacred," the land's fluid and changing nature is also a primary principle through which Indigenous religion—and hence also Indigenous peoples—evolves, in order to both survive the onslaught of colonialism and neo-liberalism and to remain open to the potential that dwells in the land itself. This potential makes it possible to dream alternate futures than the ones imagined by current realities to embody, in dynamic relations with the land, new modes of becoming. This practice of dreaming new modes of becoming must be counted as an integral to Indigenous religion. Law ought to find ways of protecting these evolving practices, rather than becoming caught in the truth-negating trap of a perpetual hunt for 'pre-contact' practices.

Conclusion—Chapter 2

This chapter has argued that abstract definitions of Indigenous religion will, inevitably, betray the on-the-ground realities of the experience of Indigenous religion—experience that is never-not inflected by the complex, often violent realities of colonialism and its ongoing legacy. This legacy includes a legal apparatus with deep tendencies to misread Indigenous perspectives. Encounters with this apparatus in the context of Indigenous religion, I have been suggesting, will inscribe the experience of Indigenous religion with the self-dividing tendencies of Western modernity unless we evolve ways of thinking-with law and Indigenous religion that make room for the ways of knowing and seeing that inhere in Indigenous religion.

I have suggested, first, that in the effort to define Indigenous religion, we need to see law and Indigenous religion not as concrete universals, but rather as sets of experiences in dynamic interaction with each other—engaged in what Berger, in his work on law and religion, has called "cross cultural encounters." Next, I have argued that the very idea of a definition is a Western construct, an attempt to abstract phenomena from the relational context in which they are never-not embedded. Because of this, I have posited, in conversation with Indigenous theory, that a better approach to the problem of definition is to seek out stories that convey the texture and, importantly, emotional resonance of the experience of Indigenous religion on the ground. Such a methodology helps resolve the problem of naming that inevitably haunts scholarship in this field, by showing that no final term, whether religion or spirituality or cosmology or worldview, ever suffices to capture the richness of Indigenous religious experience. The choice of terms must also reflect the realities of a social world in which Indigenous people do sometimes go to law to protect their religious freedoms; because of this, I suggested the need to remain open about which terms one uses to describe Indigenous ceremonial practice, adopting a strategic mindset

that is willing to call similar phenomena "religion" or "culture" or something else according to which approach is most likely to win support from the court. Finally, I warned, in conversation with Glen Coulthard and other Indigenous thinkers, against the dangers of misrecognition that always attend Indigeneity's encounters with the law. One must be careful lest one take law's readings of Indigenous religion as expressing the truth about phenomena law almost always misreads.

The best way to keep the truth about Indigenous religion front of mind in a world where law often threatens to obscure the truth about Indigenous experience is to listen to the voices of Indigenous thinkers, both scholarly and otherwise, who tell us, through their stories, what Indigenous religion really means. These thinkers tell us that the inextricable relations between humans and land is central to Indigenous religion. They also tell us that Indigenous religion always evolves, in part through its ongoing resistance to colonialism; Indigenous religion, I have argued, can thus never be captured by the illusion of a "pre-contact" practice that is perpetuated by much of the s. 35 jurisprudence. As I bring this Chapter to a close, I want to remember that this evolution happens through the agency of a force Indigenous religion consistently centres, as the thing that connects humans to the wider circle of relations: *love.* Any definition of Indigenous religion that aspires to work in decolonizing ways must account for the centrality of love in Indigenous lifeways and worldviews. Love reminds us to pay attention to ourselves and to each other; it acts as the force capable of bridging the differences that seem to separate us. I want to recall at this point that, in my introduction, I quote Sandra Semchuk's profound question, posed in the context of her work to bridge difference, "How do we come to know across species, as well as across cultures? How do we come to know someone else, without projections?"[225] The answer given to us, overwhelmingly, through the myriad iterations of Indigenous religion, is---love.

Love binds us to the land and to each other in webs of relations. Love is what helps us see clearly, with, as Leonard Crow Dog put it in the quote with which I closed the introduction, "the eyes of the heart." If land is what constitutes the cultural and spiritual psyche of Indigenous people, love (as a force that emanates through and as the land) is what, in the highest and deepest ideals of Indigenous religion, organizes human relations with each other, with the rest of creation

[225] Semchuk, in "Portrait of Sandra Semchuk, 2018 Governor General Award Winner in Visual and Media Arts"

(the animals, the birds, the rocks,[226] the spirits, and more), and with the future. As Nehiyaw scholar and activist Sylvia McAdams puts it in her discussion of *Nehiyaw* legal traditions (traditions which she shows are inextricable from *Nehiyaw* religious traditions):

> The highest accomplishment for any person in the spirit of the warriors is achieving peace for their nation, but an even greater achievement is to create a world of peace for future generations in a manner that sustains a vibration of love that is healing.[227]

Indigenous religion's vision of love is as a force that binds this generation to the next, and to the ones that went before, cradled in the "web of connections,"[228] animated by the life force (Million's "potential"), and all gathered in the circle of relations—a totality to which many Indigenous people refer with the respectful, deeply loving greeting "all my relations."[229]

Love requires an ongoing practice of learning to see clearly—no easy task in a world full of all manner of distractions and delusions, many of them brought to Turtle Island by the white man. Leonard Crow Dog puts the nature of the distractions and delusions brought by the colonizing white man succinctly:

> I also tried to educate the white people. I said, 'Hey, white America, listen to me. Before you came here we had no lawyers, no penitentiaries, no foster homes, no old age homes, no mental institutions, no psychiatric clinics, no taxes, no TV, no telephones. We had no crime or madness or drugs. You call it 'civilization,' but we had a culture long before you came.[230]

In the face of the devastating hardships visited upon his people by the legacy and ongoing oppression of colonial rule, Leonard Crowdog does not, ultimately, disparage white people. As he puts it, he "just wishes there were more of the good ones."[231] If he attempts to educate white people (and he has been criticized for the way he opened Lakota ceremonies up to non-Indigenous people), it is in order to teach them about the love that is the centre of Indigenous

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[226] Darcey Lindberg, "Beautiful Creeness" for a discussion of the Nehiyaw people's relationship with stones, eg. "Rocks are also our relations; we refer to them as our kôhkoms and mosôms…we have an obligation to treat the sweat stones as our *Elder* relatives" (p.57)
[227] McAdams, *Nationhood Interrupted* at p. 94
[228] See Michael Caroll's discussion of the "web of connections" in "What Evicting Grizzly Bear Spirit Does (and Doesn't) Tell Us". See also John Borrows, "Can law love?" in Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press: 2020).
[229] John Borrows consistently centers love in his discussions of Indigenous law. See for instance: John Borrows, "Chapter 1: Nitam-Miigiwewin: Zaagi'idiwin (Gift One: Love) Love: Law and Land in Canada's Indigenous Constitution" in Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019). See also his interview in Tali Folkins, "'Love Needs to Be a Part of Our Action': A Conversation with John Borrows," (2019) 145 *Anglican journal* 5.
[230] Crowdog *Crow Dog: Four Generations of Sioux Medicine Men, supra* note 84 at p. 161
[231] *Ibid* at p. 161.

religion. This love that has the power to undo the deleterious effects of those parts of the white man's "civilization" that cause so much harm.

A 2016 youtube video shows a very old Leonard Crow Dog, in a wheelchair after having suffered several strokes, receiving the apologies of a group of white veterans at the Standing Rock action; the veterans had come as allies to help defend the land against the proposed Dakota Access pipeline.[232] The soldiers weep as they talk about the sins of their forefathers; Crow Dog blesses them with an eagle fan, hugs them, joins them in their tears, and welcomes them home. In the act of searching for definitions, these examples of love-in-action ought to guide us more than anything else. These examples point us towards the grace needed to go forward in the face of devastation, to come home to ourselves and the ways our Western training has conditioned us to neglect the emotional register Dian Million encourages us to see as central to understanding Indigenous experience. They point us to the need to feel and to love and to act from that place, as much as we can. We see a similar spirit of love in action in how Tristen Durocher and his supporters welcomed Justice Mitchell into their sacred ceremony—offering him, the reader might recall from the introduction, a Metis scarf as a sign of thanks-giving for his willingness to deal with Durocher's s. 2 (a) challenge with compassionate understanding of how the legacy of colonialism inflected his case. And we see, of course, also this love in action in Durocher's willingness to suffer for the sake of the relatives and friends whose lives were sacrificed to colonial neglect and, in so doing, to show that love need not lie down at the invisible command of a colonial system that even now has a never-too-subtle death wish for land and by extension for Indigenous peoples.

[232] Oceti Skewin Camp, "Forgiveness Ceremony: Veterans Kneel at Standing Rock" youtube videohttps://www.youtube.com/watch?v=OjotlPIlRqw. Last accessed March 29, 2022.

CONCLUSION: Law and Indigenous Religion from the ground up

"What I mean is that decolonization is not something that can be done with arrogance, anger, or moral weapons pointing to the errors of others in denial of how others are part of us as well. As we harm others, we are harming ourselves and we will not be able to figure our way out of this individually or by focusing only on our communities. We need to consider our responsibilities to everyone and everything, because we are not separate. In this sense, there is no purity and way out (there is no outside). The only way towards somewhere else is through it, like a buffalo in a storm; with our heads down, but with eyes, hearts, flesh, and dreams wide open, without fear of looking at ourselves in the mirror and seeing what has been maimed, what calls for or offers compassion, what shouts for revenge, what has been turned into a weapon, and what yearns for wholeness, for reconnection."

--Dr. Cash Ahenakew, "Towards Scarring our Collective Soul Wound"[233]

"One day I'll give my beloved fiddle away, place it into new hands that will carry it forward into a time which doesn't belong to me. Therefore the fiddle I own is not mine to keep. I just hold it briefly. I'm a temporary custodian of the 92-year-old German Fiddle I play, carrying it gently so its condition is intact for the next heart full of music. My hope is that open palms receive the gift, not white-knuckled closed fists. As a country we will do the same with all that we hold most sacred: pass it on to the next generation. Call it a church. Call it a state. Call it a reserve. Call it a fiddle. Will the gift be received with love, fear, despair, hope? In our shared moment, the choice is ours to hold."

--Tristen Durocher, reflecting in a CBC interview held one year after his fast. [234]

This thesis has proposed that fundamental shifts in law's ways of knowing are required if law is to treat Indigenous religion justly. It is impossible to think the law-Indigenous religion relation without accounting for the unspeakable levels of violence that have, historically and on into the present, attended encounters between the two—to the detriment, almost always, of Indigenous religion. Robert Cover opens his essay "Violence and the Word" with the blunt statement that "legal interpretation takes place in a field of pain and death."[235] The rest of his essay unfolds as a powerful reminder that law is "never just a mental or spiritual act."[236] Rather, "a legal world is built only to the extent that there are commitments that place bodies on the line."[237] This is likely true of all legal worlds, but especially so for the legal world that is built

[233] Cash Ahenakew, "Towards Scarring Our Collective Soul Wound" *supra* note 89.
[234] CBC News, "A lesson on hope: Tristen Durocher reflects one year after his 635km walk and 44-day fast" July 29, 2021. Online at: https://www.cbc.ca/news/canada/saskatchewan/first-person-durocher-lesson-on-hope-1.6120826. Last accessed March 22, 2022.
[235] Cover, "Violence and the Word" *supra* note 113 at p. 1601
[236] *Ibid* at p. 1605.
[237] *Ibid* at p. 1605.

around the encounter between Indigenous religion and state law. As the narrative I have unfolded throughout this thesis shows, Canadian state law, both in the actions it authorizes and in its unconscionable abstention from action, has visited and continues to visit incredible violence on Indigenous peoples.[238] This is not all it does. Canadian law also acts, on occasion, to protect Indigenous people's rights and freedoms—though often in ways too ambiguous to count as definitively "good." Decolonial critiques can miss this in their justifiable insistence on the importance of revealing the violence of colonial law—a violence that mainstream Canadians continue too often to neglect. This neglect is perpetuated every time legal interpretation and legal scholarship gloss over the many ways law is complicit, even at the level of the covert theories that undergird its reasoning, in the ongoing project of colonization.

The exact cost in the lives and bodies and lands of Indigenous people of law's violence escapes the bounds of language. Because of this, there is a real sense in which any 'conclusion' about how to theorize the law-Indigenous religion encounter is impossible—the end of the meditations that have guided this thesis, all of which circle around the spectre of so many piles of innocent bones, is silence. From that silence flows, if we have eyes to see, reverent awe at the courage and power that many Indigenous people, self-declaredly religious and not, have retained in the face of so many attempts at the hand of church, state, and law to erase them. From that awe must emerge, as an ethical imperative, new forms of action aimed at deep solidarity. This action grows, ultimately, not from any theory, no matter how careful, but rather through the ground of legitimate friendship across cultures, made possible through a love that does not insist on seeing the other through the narrow lens of one's own preconditioned perspectives.

That said, I will offer conclusory remarks to offer the reader a chance to digest what I have presented and to reflect on its meaning. In Part I, I discuss possible consequences of the theoretical approach I have advocated for concrete instances of legal reasoning. I suggest, by way of conclusion, that, given the sorts of shifts in the normative field my conceptual approach advocates, s. 2 (a) holds the potential to be a much more useful instrument for the protection of Indigenous religious freedoms than group-rights-focused instruments like s. 35 or the UN Declaration on the Rights of Indigenous Peoples. This is because s. 2 (a) is not bound, as s. 35

[238] For a concise and uncompromising account of the complicity of Canadian state law with the genocidal project to eliminate Indigenous Peoples, see: Pamela Palmater, "Genocide, Indian Policy, and Legislated Elimination of Indians in Canada" (2014) 3 *Aboriginal policy studies* 3.

for instance is, to an attachment to "pre-contact" practices as taking precedence over the evolving practices of creative responsiveness to the realities of the colonial legacy that Chapter 2 showed tend to characterize living Indigenous religion (as opposed to its museum-like chimeras that are often paraded in the public eye as being 'traditional.')

In grounding this argument, Part II introduces a more recent s. 2 (a) case involving a Pacheedat elder, William Jones, whose spiritual interest in the preservation of a holy old growth forest in his traditional territory on the West coast of present-day 'Vancouver Island' conflicted with his band's desire to cooperate with a logging company. This case shows that in a neoliberal era no one, not even self-declaredly 'traditional' First Nations bands, are immune to the temptations (and, in fairness, often the strategically wise necessity) of economic gain. Because of neoliberalism's pervasiveness, even within Indigenous communities, the individual-rights focus of a Charter instrument like s. 2 (a) might, paradoxically, provide protection to Indigenous persons whose spiritual investments in sacred sites run counter to the worldly investments of their fellow tribe members. In Part III, I caution against a too hopeful view of the possibilities that Canadian state law, in the present neoliberal milieu, can offer meaningful protections to Indigenous religious freedoms, because of the heavy investments many actors, including many First Nations band councils, have in economic interests. I nonetheless advocate for a limited degree of hope rooted, ultimately, not in law but in the power of Indigenous religion itself, which moves with a love and a creativity that persistently and against all odds work to make the future liveable for the generations yet to come, human and otherwise.

I started this thesis, in the preface, by drawing a rough map of the landscape of law and Indigenous religion in contemporary Canada. I recounted the story of the 44-day long ceremonial fast and grieving ceremony the young Metis man, Tristen Durocher, launched in the summer of 2020 in a teepee on the lawn of Wascana Park, near the Saskachewan legislature in Pile of Bones (Regina) in Treaty 4 territory—traditional home of the Nehiyaw, the Metis, and the buffalo, among many others. I introduced the reader to the background of Durocher's successful s. 2 (a) challenge to charges the Province of Saskatchewan made alleging that his fast breached the terms of the Wascana Centre bylaws. Durocher was, as the reader will recall, engaging his grieving ceremony in order to draw attention to the ruling Saskatchewan Party's refusal, in late June

2020, to pass legislation that would have allocated more funds to the rampant problem of suicide in the North.[239]

I discussed Durocher's s. 2 (a) claim against the backdrop of the Supreme Court of Canada's (to date) only case involving s. 2 (a) and Indigenous religion, *Ktunaxa Nation.*[240] This discussion highlighted the limits of applying to Indigenous religious freedoms cases, as a majority of the court did in *Ktunaxa,* a framework developed in past cases, none of which involved Indigenous religion. The central problem, as I articulated it, is that the current s. 2 (a) framework insists on the need to separate beliefs from their objects, thus implying a division between minds and the world they inhabit. The ontology inherent in this framework cannot help but misrecognize Indigenous religion, as happened in the *Ktunaxa* decision. This is because, for almost all Indigenous religious traditions, land and peoples, nature and mind, are not separate in the way this framework presumes.

In this discussion, I suggested that the majority's application of a strict object/belief separation is not necessarily an indication that s. 2 (a) is incapable of protecting Indigenous religious freedoms. In making this argument, I noted that the minority decision in *Ktunaxa* acknowledges in a fairly nuanced way the centrality of land to Indigenous religion, and would have granted a *prima facie* acknowledgment that the Ktunaxa's s. 2 (a) religious freedoms would have been infringed by the erection of a ski resort on territory held by the Ktunaxa to be the dwelling place of the Grizzly Bear spirit. The minority decision, I acknowledged, is ultimately disappointing for the way it failed to protect the *Ktunaxa*'s interests under the proportionality test of s. 1. However, the minority decision nonetheless contains hints of how s. 2 (a) might, under the right circumstances, protect Indigenous religious freedoms; as I case in point, I noted that in the *Durocher* decision, Justice Mitchell took up the reasoning in the minority decision in *Ktunaxa* to accept that Durocher's fast implicated religion because it was held on the traditional lands of his people, the Metis. Justice Mitchell extended the potential s. 2 (a) holds to protect Indigenous religious freedoms by grounding his analysis at the s. 1 stage in the need to, as he put it, "nudge" Canada towards reconciliation in light of findings in the Truth and Reconciliation Commission report.[241] *Durocher* arguably stands as a harbinger of this possible jurisprudential

[239] See my discussion of *Durocher* in the introduction.
[240] See my discussion of *Ktunaxa* in the introduction.
[241] *Durocher* at para 47.

future-to-come. It is, at least, an example of a Canadian judge's willingness to take account of the history of colonization in deciding in favour of a Metis man in a s. 2 (a) claim—a claim that pitted him against the Province's interest in denying his rights to practice his traditional ceremonies on his people's traditional lands.

These lands, the preface remembered and the rest of this thesis has endeavoured to never forget, are haunted by the memory of the hundreds of thousands of buffalo whose slaughter the Canadian state ordered to make way for the National railway. This slaughter had the not accidental effect of killing thousands of *Nehiyaw* people who died of starvation brought on by the loss of their traditional food supply, the *paskwâwimostos,* the sacred buffalo.[242] This foundational act of violence inflects the relationship between Indigenous religion and Canadian state law in myriad ways. The unthinkable shock of this original atrocity was made worse for generations of Indigenous people by wave after wave of after-shock the Canadian state delivered and continues to deliver to Indigenous people—from the residential school atrocities (the full extent of which began to come to light with the discoveries of thousands of unmarked graves at residential schools across the country, beginning with the Kamloops school in May 2021) to the persistent, genocidal neglect of the basic needs of children and youth on reserve that Tristen Durocher sought to make visible.[243] The basic ground of the relationship between Indigenous religion and Canadian state law is littered with piles and piles of bones—even as, in sites all over Turtle Island, both public but especially private, the land itself bears witness to the beauty and power of ceremonial traditions that survived on the strength of people committed, as Durocher was, to a faith no genocidal will could extinguish.

My research has tried to pay homage to the innocent dead. Equally, it has endeavoured to resist the dangers of falling into the "trauma narrative" that many Indigenous thinkers warn against, as an expression of yet another colonial will in disguise as a desire to "help."[244] Further, because of the many ways law and the people with its training have participated in silencing Indigenous worldviews and perspectives—even if 'only' through the quiet violence of believing that law is 'neutral' or 'objective'—I have wanted to proceed in ways that honour the call within

[242] See for instance Daschuk, *Clearing the Plains* at *supra* note 3.
[243] Tanya Talaga, *All Our Relations* at *supra* note 8.
[244] See especially million in *Therapeutic Nation supra* note 78 but also Treur, *The Heartbeat of Wounded Knee supra* note *58.*

the rich and growing body of native studies literature to adopt decolonizing methodologies s at every step of what Shawn Wilson has aptly called the "research ceremony."[245]

At the core of my research ceremony, the results of which are recorded in the preceding chapters, is a desire to promote clear-seeing in the context of the law-Indigenous religion encounter. This requires, as a necessary precondition, foundational changes to how Western legal thinking conceptualizes, at the deepest levels of self-and-world-perception, the relationship between law and Indigenous religion. With this precondition in place, more 'practical' considerations could be explored (such as how this change-of-heart might impact concrete instances of legal reasoning, in the context of either s. 2 (a) or more group-rights focused instruments like s. 35 or the *UN Declaration on the Rights of Indigenous Peoples*). It is beyond the scope of this thesis to get much into what these might look like. I retain the hope that, given shifts in the wider nomos of Canadian-Indigenous religion, judicial reasoning could change in ways that make judges more alive to the need to adapt jurisprudence in ways that extend more robust protection to Indigenous people's religious freedoms. Given such shifts, even a relatively limited instrument like s. 2 (a) still could offer not-trivial protections to Indigenous religious freedoms. In many ways, s. 2 (a) may be preferable to s. 35 as an instrument capable of extending at least some protections to the religious freedoms of Indigenous people, because it is not burdened with the court's dubious commitment, established in *R v Vander Peet* and affirmed in later s. 35 jurisprudence to the chimera of "pre-contact" practices as being more worth state protection than the evolving spiritual practices of Indigenous peoples.[246] (In *Van Der Peet,* a majority under the leadership of Chief Justice Lamer found that, in order to be considered an "aboriginal right" under the s. 35 framework, "a practice must have been integral to the 'distinctive culture' of the aboriginal 'culture' in question prior to contact with Europeans.")[247]

In elaborating a working definition of Indigenous religion, Chapter 2 showed that Indigenous religion is an ever-evolving entity—something that becomes clear if we are committed to seeing Indigenous religion as practiced on the ground, rather than as conceptualized in the abstract spaces of jurisprudence or theorized in academic discourses too often out of touch with ceremonial practice in community (and often influenced by

[245] Wilson, *Research is Ceremony supra* note 80.
[246] For a discussion of the limits of the *Van der Peet analyses* and the deleterious consequences of those limits, see: Christie, *Canadian Law and Indigenous Self-Determination*.
[247] See: *R v Van der Peet* at para 46.

jurisprudential practice such that academic discourse reinscribes the primacy of 'pre-contact' practice). Indeed, Indigenous religion, as understood through the voices of those who live it emerged as fundamentally a creative force, not a fixed 'tradition.' It is inspired by tradition, yes, but always open, as Tristen Durocher was, to courageous innovation in response to the ongoing need to find ways to live in hope in the face of the haunting and ongoing legacy of colonialism.

The importance of innovation, creativity, and change in a living approach to Indigenous religion may mean that rights instruments that rely on definitions that search endlessly backwards for 'pre-contact' practices (as is the overwhelming habit in the s. 35 jurisprudence post-*Vander Peet* and in approaches that, unconsciously or not, take their cue from *Van Der Preet*) will often miss the boat on what is most in need of protection in Indigenous religious freedoms cases. What needs protection is not, primarily, this or that fixed approach to ceremony, but rather an always-emergent way of life rooted in a vision of the world as a place in which humans and nature, stories and materiality, vision and life on the ground, are always deeply entwined.

That individual beliefs and practices—as distinct from the "traditions" of a specific First Nation as a whole—can be protected under the s. 2 (a) framework therefore matters a great deal if we are committed to seeing Indigenous religion as a creative force that comes alive in its practitioners in different ways according to circumstance. Tristen Durocher's grieving ceremony, a religious act undertaken to push back on colonial state inaction, could not have existed pre-contact, even if some of its elements (the general form of the tee-pee, the centrality of fasting as a spiritual act, the importance of honouring the dead, the use of traditional medicines like sweetgrass and sage) did pre-date contact. While s. 2 (a) is limited for the way it, to date, has evolved through a jurisprudential framework that sees a necessary separation between objects and belief, this interpretation is not set in stone. Rather, given the right shifts in the normative field of law and Indigenous religion, quite different interpretive possibilities might emerge in the future. These interpretive possibilities might take their cue, for instance, from Justice Mitchell's decision in *Durocher* to foreground the legacy of colonialism as a force that always must influence judicial reasoning in Indigenous rights cases. Given an appreciation of the way nature and culture are seen as deeply entangled in most Indigenous worldviews (an appreciation gained, perhaps, through exposure to new materialism as a way of theorizing nature-culture as a

continuum), future decisions could account for colonialism's effects not just on human subjects, but on the entire circle, human and not, of Indigenous-state relations.

Part I: The Story of William Jones and the Teal Jones logging company

> "And what remains as well, after this somber vision of the human condition and of Justice itself, what rises above the cruelty inherent in rational order (and perhaps simply in Order), is the image of this woman, this mother, this Rizpah Bat Aiah, who, for six months watches over corpses of her sons, together with corpses that are not her sons, to keep from the birds of the air and the beasts of the field, the victims of the implacable justice of men and of God. What remains after so much blood and tears shed in the name of immortal principles is individual sacrifice, which, amidst the dialectical rebounds of justice itself and all its contradictory about-faces, without any hesitation, finds a straight and sure way."
>
> --Emmanuel Levinas, "Toward the Other"[248]

Deep spiritual action, though grounded in tradition, is often undertaken by solitary individuals who participate in what Levinas is naming here as "individual sacrifice." S. 2 (a) protects individual rights in ways other Indigenous rights instruments do not and as such might protect individual Indigenous persons who move in the same spirit as "this mother" Levinas refers to—individuals who engage in solitary acts of remembrance, as Tristen Durocher did, in response to the violence of the state, of the failures of the law—and indeed, of the shortcomings of justice itself.

As this thesis rounds to a close, I want to pause to take another look at life on the ground where law and Indigenous religion meet, in an act of solitary sacrifice made public by virtue of its intersection with pressing issues of Indigenous-state relations. This case involves an 80 year old Pacheedat elder, William Jones. Jones appealed to his s. 2 (a) rights when his band council did not share his spiritual interest in protecting an old growth forest on the West Coast of Vancouver Island from logging.[249] Jones' case shows how s. 2 (a) might help Indigenous persons whose religious freedoms are threatened not only by the state but by their own tribes' interest in welcoming resource-extraction operations on their territory. Such cases are not uncommon. The desire on the part of modernized Indigenous people to share in the wealth of late industrial capitalism very frequently runs up against the desire of traditional ceremonial people (often the minority in Indigenous communities, thanks to a long history of colonial destruction of

[248] Emmanuel Levinas, "Toward the Other," in *Nine Talmudic Readings*, trans. Annette Aronowicz (Bloomington, *Indiana University Press*, 1994) at p. 29.
[249] *Teal Cedar Products Ltd v Rainforest Flying Squad* 2021 BCSC 605

traditional spiritual practices) to preserve sacred sites and the sacred practices that cannot be divorced from the lands they belong to.

William Jones' story therefore grounds the experience of law and Indigenous religion in the messy realities of contemporary settler-Indigenous relations, refracted as these always are through the ongoing legacy of historical suppression of Indigenous religion and, especially, in the contemporary neo-liberal milieu. In this milieu, all people, Indigenous and not, are faced with the temptation to pursue economic motives at the cost, often, of keeping land protected for the generations yet to come. Jones' story shows that, while limited by the precedent *Ktunaxa* arguably sets that s. 2 (a) will not be used to protect Indigenous interests in land, s. 2 (a) may nonetheless (and a bit paradoxically, as it is the product of the *Charter*, arguably a quintessentially liberal, Western legal instrument at odds with many of the community-minded tenets of Indigenous legal orders) provide at least some protection to Indigenous religion.

On April 1st, 2021, Justice Verhoeven of the BC Supreme Court judge heard submissions from the Teal Jones logging company, in support of an application for an injunction that would authorize the RCMP to remove hundreds of protesters blocking logging operations in one of the last stands of old growth forest on the West Coast of what is now known as Vancouver Island, in traditional Pacheedat territory. The group of protesters included William Jones as a leading spokesperson. Jones was backed by an eclectic group of non-Indigenous environmental activists and mostly non-Pacheedat Indigenous people, from nations across Turtle Island. William Jones was one of three named parties on the application. Jones relied on s. 2 (a) of to claim that the old growth forest in question had deep spiritual significance for him as a traditional Pacheedat man and that logging practices would destroy his ability to enjoy the forest as a holy place.[250] The Chief of the Pacheedat nation opposed the protest activities, as the Pacheedat Nation's official public position was that they did not support protest activities in their territory.[251] William Jones thus took a stand against his own tribe for the sake of the sacred forest he wanted to save for generations yet to come. For Jones, the presence of s. 2 (a) offered a possibility that s. 35, for instance, did not: the chance to claim a religious freedoms interest that his tribe did not share.

[250] *Teal Cedar v Rainforest* at paras 61-62.
[251] See: Rochelle Baker, "Pacheedat Nation wants Fairy Creek Blockade to leave" Toronto Star April 15, 2021. Online at: https://www.thestar.com/news/canada/2021/04/15/pacheedaht-nation-wants-fairy-creek-blockade-to-leave.html. Last accessed 17/March/2022.

Justice Verhoeven denied Jones' s. 2 (a) claim.[252] This was not surprising and, under the circumstances, most likely the correct result. The claim itself was a stretch argument (to say the least); the application for the injunction was made by a private actor (eg Teal Jones, the logging company) and the architecture of the Canadian constitution is such that the *Charter* applies only to government actors. To succeed, Jones' claim would have had to be brought up in the context of a different action, for instance, one involving the provincial government as a named party, in connection to the original permits issued to *Teal Jones* for the logging operations. However, that Jones brought this claim provided a pretext (one that might not have arisen otherwise), for two things to come to public attention.

First, William Jone's case gave an opportunity for a B.C. court to highlight, through a narrow reading of the *Ktunaxa* decision, a darker potentiality in the to-date very limited Canadian s. 2 (a) jurisprudence involving Indigenous religion—namely that courts will use *Ktunaxa* to say s. 2 (a) can *never* protect land. This runs counter to the hopeful potentialities this thesis has argued both *Durocher* and the minority decision in *Ktunaxa* signal. *Teal Jones* thus shows the need for continued shifts in the wider normative field that would make judges less hesitant to use s. 2 (a) to protect Indigenous spiritual interests in land. Second, Jones' case gave a platform for Jones to make public statements that offer an incredibly articulate statement about 1) the inextricable links between Indigenous religion and land; and 2) about the specific ways in which the legacy of colonial religious indoctrination, in concert with practices of extraordinary greed that tend to characterize capitalist economic practice, co-conspired to threaten the erasure of Indigenous religion. William Jones' case offers, too, a reminder that the task of protecting Indigenous religion may fall, ultimately, not to law, but to those brave individuals willing, as William Jones was, to take a stand against the state's efforts to destroy sacred sites. If actions like William Jones' were to become an increasing part of public awareness, highlighting the inextricability of human life and the life of the natural world, they could serve to shift the normative milieu where law encounters Indigenous religion such that that, over time, judges may favour s. 2 (a) interpretations that seek, as Justice Mitchell's decision in *Durocher* did, to balance the long and ongoing legacy of colonialism.

The court in *Teal* did not have to comment on Jones' claim beyond finding that the *Charter* did not apply (eg because the injunction did not implicate a government actor.)

[252] *Teal Cedar v Rainforest*

However, in a gesture that arguably reads as aggressively dismissive of the spiritual significance Indigenous religion attaches to land, Justice Verhoeven took the time to effectively dismiss the possibility that a religious freedoms claim involving sacred sights would ever be successful under the s. 2 (a). He cites without further comment or interpretation the holding in *Ktunaxa Nation* that the *Charter* protects the "freedom to worship, but does not protect the spiritual focal point of worship".[253] He implies that this means that s. 2 (a) cannot be used to protect Indigenous people's religious interest in land, effectively analogizing land to "spiritual focal point of worship."

Ktunaxa does not, as Justice Verhoeven seems to suggest, stand for the proposition that s. 2 (a) cannot ever protect sacred sites. To be sure, its holding (as I have discussed at length in this thesis) that beliefs are separate from their objects creates a framework in which it is difficult for future jurisprudence for make room for the episteme of Indigenous religion. If, for instance, the Ktunaxa had centered their claim not on the supernatural entity of the Grizzly Bear itself but rather on, for instance, ceremonial practices tied inextricably to the land where the Grizzly Bear spirit dwells, the court might have decided otherwise. However, Justice Verhoeven's quickness to invoke *Ktunaxa* to dismiss the possibility that s. 2 (a) could be used to defend an Indigenous person's spiritual interest in land indicates the extent of judicial reticence to extend s. 2 (a) to land—a reticence that *Ktunaxa* of course exposed without explicitly saying "s. 2 (a) cannot protect land." Time will tell, as further s. 2 (a) challenges are brought to Canadian courts, whether Justice Verhoeven's narrow interpretation of *Ktunaxa* will dominate future judicial interpretation. His decision stands as both an artefact and a warning of the deep resistance Canadian courts have had to extending s. 2 (a) to Indigenous interests in land. If this resistance is to change in the long run, then the thinking of Canadian judges will have to expand in ways that allow them to account for the fullness of what is at stake in Indigenous people's spiritual commitment to land.

Listening deeply to claimants is one way for this thinking to change. As a legal academic, I can argue all I want about the need for legal reasoning to question its foundational ontological assumptions in ways that allow those of us raised in Western legal traditions to open to the perspectives of Indigenous religion sufficiently that we take seriously the need to protect Indigenous religious freedoms. My words may not reach the ears of the judges who decide these

[253] *Teal Cedar v Rainforest* at para 62, citing *Ktunaxa Nation* at para 71.

cases. However, the lives and stories of s. 2 (a) claimants *do* reach the ears of judges and, through the stories they tell, claimants have a chance to shift the narrative climate out of which judicial interpretation emerges. This can happen not only via the testimony given in court but also through public and media statements claimants make—which inevitably filter into the consciousness of judges, even when they do all they can to be "neutral." Durocher's case was waged, in the first instance, in the public square via intense media and social media presence. William Jones, likewise, enjoyed a high degree of media and social media visibility. His statements, then, can be read as texts that introduce new narratives in the nomos of law and Indigenous religion—ones that support the view that the human and the non-human are deeply entangled.

In a youtube video released by a small grassroots group of environmental activists the day the court heard the *Teal Jones* case, William Jones talks about the spiritual significance of Fairy Creek.[254] In the video, Jones calls the old growth slated for logging a "spiritual forest used for spiritual purposes."[255] He discusses how, for his people, all forests were considered holy, but this one especially so. He recalls being a young man and going deep into the forest slated for logging and engaging in "prayer and meditation" with his uncles. In the video, Jones succinctly speaks to the violence done to Indigenous spiritual practice with the arrival of European religion, and to his own journey back from indoctrination in European religion to a realization of the spiritual significance of nature at the heart of his traditional spirituality:

> All people, particularly Europeans have had their contact with nature and spiritual things transferred to the religions. And the religious people took over our spiritual practices which neglected and persuaded people that our world didn't matter, only the church's mattered and we were trained to listen to the church and I myself included. However, of lately I have been oh realizing that this world is a spiritual place, the whole world, and that in fact we have to reserve places and protect and care for them for our children's needs in their future… And perhaps we will bring our concerns to court to counter Teal Jones' wanting to pillage the last of the old growth.[256]

These few lines cut to the heart of the wound European contact effected on Indigenous spiritualities. Complex social theory could not say it better than Jones does here, in this simple act of storytelling that belies a lifetime's worth of wisdom—and great suffering, too. As Jones

[254] Fairy Creek Protectors, "Full Interview with Bill Jones, Pacheedat Elder and Fairy Creek Protector," youtube video published on April 1, 2021. Online at: https://www.youtube.com/watch?v=Xb2DQ8iH2t0. Last accessed 17-03- 2022.
[255] *Ibid.*
[256] *Ibid.*

puts it, European contact brought with it a particular way of relating to nature as "not-spiritual." Missionaries then imposed this nature-negating religion on Indigenous peoples.

This was, of course, part of a long, ugly mission of conquest in which law and Church worked together to bring native peoples to their knees.[257] Many of the people native to Turtle Island, not unlike William Jones, adopted the Christian religion after it was foisted on them by the missionaries, enforced by the brutal indoctrination of residential schools, and then further entrenched by the shame and peer pressure of family members and friends trained, in some cases over several generations, to hate traditional Indigenous religion, as an affront to the "true" religion of Christianity. The Truth and Reconciliation Commission report makes it clear that resistance to Indigenous religion by Indigenous people themselves is one of the many tragic consequences of colonialism in general, and the residential schools experience in particular. As the Report puts it:

> children who returned home from the residential schools were unable to relate to families who still spoke their traditional languages and practised traditional spirituality. Survivors who wanted to learn the spiritual teachings of their ancestors were criticized and sometimes ostracized by their own family members who were Christian, and by the church. Survivors and their relatives reported that these tensions led to family breakdown—such is the depth of this spiritual conflict. The cumulative effect of the residential schools was to deny First Nations, Inuit, and Metis peoples their spiritual birthright and heritage.[258]

The impacts of this profound act of "spiritual violence" (the TRC report's term) did not end with the experience of residential school; its impact continue to this day, nearly a generation after the last school closed (in 1996):

> Many survivors and their families continue to live in spiritual fear of their own traditions. Such fear is a direct result of the religious beliefs imposed on them by those who ran the residential schools. This long-internalized fear has spanned several generations and is hard to shed. It is exacerbated by the fact that Christian doctrine today still fails to accord full and proper respect for Indigenous spiritual belief systems.[259]

In accounting for what it will take to shift the nomos of law and Indigenous religion in ways that open courts up to what is really at stake in Indigenous religious freedoms cases, it is important to keep front of mind the deeply-entrenched, learned fear many Indigenous peoples have of their "spiritual birthright and heritage" that the TRC speaks to and that William Jones' account

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[257] The ways legal discourses and church discourses worked together to justify the conquest of non-Christian "pagan" peoples is uncompromisingly documented in Williams' *The American Indian in Western Legal Thought*, *supra* note 168.
[258] *TRC Report, Volume 1* at pp. 225-226.
[259] *Ibid* at p. 226.

grounds in the ongoing battles to protect sacred lands and the obstacles that attend the full protection of Indigenous religious freedoms. As the TRC report puts it, "to have a right that you are afraid to exercise is to have no right at all." We, all of us, including judges, have much fear to overcome before we can open to what colonialism has taken from us all, Indigenous and not: a felt sense of the sacredness of land, which sacredness means that we are not separate from the earth we walk on.

I want to make a caveat here, lest my text fall into the trap of disparaging Christianity as necessarily "anti-Indigenous"—a trend that surfaced in popular discourses after the discoveries at Kamloops and other residential schools. Christianity and so-called "traditional" Indigenous religion are not necessarily at odds with each other, though Christianity's long history of myriad attempts to stamp out Indigenous ceremonial practices, often through violent means, cannot be ignored, nor its ongoing effects under-estimated.[260] That said, there are many examples, in the personal lives of many native people, that indicate that Christianity and Indigenous religion can co-exist. Across Turtle Island, many Indigenous people to this day rise in the morning and face the sun in the East, as their ancestors have done from time immemorial. Many of these people enact this ritual with the Bible in one hand and the sacred tobacco in the other, showing that two disparate belief systems can exist inside the same prayer. What endures and binds is the morning sun in the east, the ground underfoot, and the love in the hearts of people who, like William Jones, rise, day after day, to pray for life. It is this love, connected inextricably to the holiness of land and to the rhythms of nature, that is at the heart of Indigenous religion, as I endeavoured to show in Chapter 2.

Part II: Neoliberalism and the pervasiveness of economic motive

In contemporary Canada (and across Turtle Island more generally), the Christian church does not, of course, have the same hold on Indigenous communities that it once had, though the after-affects of generations of religious persecution still linger, as William Jones' account shows, in the lives of native people who still carry a fear of their own religious traditions. In the current

[260] I am familiar with the complexities of Christianity's influence on Indigenous spiritualities through informal conversations held over my many years of involvement with a traditional Lakota-Cree sweatlodge community. For a careful treatment of the complexities of Indigenous-Christianity relations in the Canadian context, see: Tolly Bradford & Chelsea Horton, eds, *Mixed Blessings: Indigenous Encounters with Christianity in Canada* (Vancouver and Toronto: UBC Press, 2016).

climate, the far greater threat to the religious freedoms of peoples for whom land is central to the idea of the sacred comes not from the church but from the pervasive force of acquisitiveness and greed that dominates the current neoliberal milieu, working to normalize exploitative practices within native communities, as everywhere else. Many excellent scholars have spoken to the ways that neoliberalism has infected native communities, undermining communitarian values in favour of mentalities that place economic interests above all else.[261] The way that current governments encourage business interests over other interests is something that Jones highlights with remarkable concision. In the same youtube video discussed above, Jones speaks succinctly not only to the spiritual violence accomplished by European religious conquest, but to the ongoing way that settler-state policy continues to favour commercial interests at the cost of disregarding the spiritual significance of land. Jones suggests that viewing land as sacred not just an Indigenous "belief," but a universal truth that applies to Indigenous and non-Indigenous people alike:

> …well, Mr. Horgan [the premier of B.C.] seems to be giving us a blind eye and looking the other way for the spiritual needs of our children, both white and native or non-First Nations…all people have spiritual needs that are tended to in the forests and we have to realize that our premier Horgan and the prime minister seem to cater more to big business and big interests rather than little interests and little needs of our children…and what they want to do is to take all the remnants and to leave our future naked of any innocence that this world has ever had…"[262]

This means that the nomos of law and Indigenous religion is never not touched by the ongoing reality of brazen economic exploitation carried out at the expense of Indigenous people's well-being in the present, often by governments who disguise their self-interest by colluding with band councils to promote a narrow version of "self-determination" that magnifies on reserve the same patterns of inequality that drive unacceptable inequities in settler culture at large.

Legal interpretation and law-making unfold, inevitably, in the context of this fraught neoliberal normative field. Even hard-won legal victories on behalf of Indigenous rights can

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[261] Gordon Christie's cutting description of the "the special interests that the Canadian state is built around and that it protects, those of a neoliberal-capitalist-extractive complex" speaks uncompromisingly to the dominance of economic motives in the current normative world of law and politics. See: Gordon Christie, "Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges", *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo, ON: Centre for International Governance Innovation, 2018).

[262] Fairy Creek Protectors, "Full Interview with Bill Jones" *supra* note 255.

quickly lose their potential to advance the justice interests of Indigenous peoples, when they are taken up in a normative cultural climate whose values support profiteering over generosity, and short-term gain over a long term vision of what it would take to make the future liveable for the generations yet to come. A case in point was the long-awaited passing of the *UN Declaration on the Rights of Indigenous People* (UNDRIP) into law in the province of British Columbia, effected in December 2019.[263] For decades, starting in 1982, grassroots Indigenous rights activists walked the long road of first convincing the UN to care about the plight of native peoples, then later spending years in negotiations with often-hostile member states over the wording of the eventual declaration, passed only in 2007.[264] Many might be tempted to see the reception of UNDRIP into B.C. law (the first province in Canada to do so) as an unambiguously good thing for Indigenous peoples, a step in the right direction after so much wrong-doing on the part of colonial governments. Certainly, in the context of Indigenous religious freedoms, UNDRIP offers some promise of more robust, culturally sensitive protections than might be offered under s. 2 (a) of the *Charter*.[265]

However, not a month after UNDRIP was passed, the business networking organization "Finding the Path to Shared Prosperity" held an expensive, ticketed gala to celebrate the passing of UNDRIP into law, in a high-end conference centre in downtown Vancouver. The sold-out event attracted 575 participants who gathered to hear "Indigenous leaders and their business partners" discuss what the organization's website proudly announces as "billions of dollars in opportunity" flowing from *UNDRIP*-implementation.[266] The event was attended by many invited

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[263] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44. The purpose of the Act is "to affirm the application of the Declaration to the laws of British Columbia" [s. 2(a)]," "to contribute to the implementation of the Declaration" [s. 2 (b)], and "to support the affirmation of, and develop relationships with, Indigenous governing bodies" [s. 2 (c)].

[264] Of the 144 member nations, only 4 votes against the passing of UNDRIP—the 4 countries with the most land to lose from ceding more power to Indigenous peoples: Australia, Canada, New Zealand and the United States. Canada has yet to ratify the agreement, despite recommendations by the Truth and Reconciliation Commission to do so. For background on the struggle to bring UNDRIP into being, see: James Anaya, *International human rights and indigenous peoples*. (New York: Aspen Publishers, 2009). For a discussion of the ambiguities of UNDRIP and the contested notion of self-determination at the heart of the long struggle to ratify it, see: Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010).

[265] See Articles 11 and 12 of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

[266] A Vancouver Sun headline describing the event announces that UNDRIP implementation in B.C. "throws open the door to 'economic reconciliation on an unprecedented scale,' proclaiming that "the benefits to First Nations that participate in the expanding energy sector in B.C. will be measured in billions of dollars." See: Randy Shore, ""Billion Dollar Boom: UNDRIP Opens the Door to First Nations Partnerships," December 10, 2019, Vancouver Sun. Online at https://vancouversun.com/news/local-news/billion-dollar-boom-undrip-opens-the-door-to-first-nations-partnerships. Last accessed 29-03-2022.

Indigenous guests (leaders from their respective communities, in many cases). It was sponsored, in part, by Enbridge and Alberta Oil and Gas, whose financial contributions enabled the event to hire several Indigenous "elders" to appear in traditional garb to drum in the distinguished guests.[267] This gala shows something of the normative climate into which UNDRIP is received, wherein the right to self-determination entrenched in UNDRIP as the result of the hard-won victories of Indigenous rights activists over decades is interpreted as mostly economic self-determination, translating into policy actions and law-making that advantage unholy alliances between resource-extraction companies and band councils over other ways of interpreting the right to self-determination. Stories about the primacy of economic prosperity as the ultimate feature of the good life, gleaned from the general climate of our neo-liberal moment, make their way inevitably into discourses of self-determination that, once upon a time, had nothing at to do with finding a seat at the table with Big Oil and Gas.[268]

It would be naïve to presume that law could escape the myriad ways neoliberalism inflects the normative world in which legal decision making unfolds. Both the *Ktunaxa* decision and the Enbridge-sponsored UNDRIP gala indicate just how insidious is the economic incentive in our current climate and how easily legal discourses around Indigenous rights can be manipulated to serve a neoliberal agenda. Law, however, is never identical with the neoliberal cultural climate whose values colour its narrative field. Nor does legal decision-making necessarily have to be haunted by centuries of legally-sanctioned and enforced Christian dominance of public life. Rather, law can, occasionally, make reconciliation-oriented decisions that take into account the legacy of colonialism in protecting Indigenous religious freedoms under the s. 2 (a) framework. The *Durocher* decision is a case in point, a potentially hopeful indication of what s. 2 (a) might be capable of in the right circumstances—an instance of a judge

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[267] See the conference website at: "Finding the Path,"https://undrip2020.ca/. Last accessed June 27, 2022.

[268] Those aspects of the current normative climate that favour "economic self-determination" (a goal that dovetails nicely with the economic interests of resource-extraction companies) are not, of course, uncontested. For instance, at around the same time (early 2020) as the UNDRIP ala, the Wet'suwet'en nation's efforts to block the construction of a proposed pipeline through their traditional territory in on the North Coast of what is now known as British Columbia provoked country-wide protests, including blockades that temporarily stopped the operations of the Canadian National Railway. Chris Hannay, "Politics Briefing: Wet'suwet'en protests continue," February 12, 2020, *Globe and Mail.* Online at https://www.theglobeandmail.com/politics/article-politics-briefing-wetsuweten-protests-continue/. Last accessed 27-03-2022.

moving against the grain of the wider cultural milieu to promote, however narrowly, Indigenous religious freedoms.

The nomos of law and Indigenous religion in contemporary Canada is multi-layered, replete with competing commitments and seemingly contradictory ways of figuring the world. The legacy of Christian dominance of Indigenous religion carries on in insidious ways, though the stronger force of colonization, these days, is, arguably, the ubiquitous ideology of neoliberalism, stronger than most religions, and apparent in many facets of Indigenous life. Anytime law interacts with Indigenous rights in the current moment, a complex, often highly polarized range of normative forces are at play, many of them revolving around not particularly veiled battles over access to natural resources, and reactions to exploitative practices that often take on extremist tones under the banner of "decolonization." Thus when courts decide cases involving Indigenous religion, they do so always against the backdrop of this fraught normative milieu. When decisions do seem to favour Indigenous religious freedoms, as in the case of Tristen Durocher, it tends to be when access to land for the purpose of economic gain is not at stake. In such cases, law can more easily make decisions in favour of a limited granting of religious freedoms under s. 2 (a). When land is at stake, as was the case in the *Ktunaxa* decision and again in the *Teal*, courts seem far more reticent to extend robust protections to Indigenous religious freedoms.

The work of this thesis has been to keep asking whether there are ways of thinking about this encounter that lead to something other than the polarized, reactionary responses that tend to characterize Indigenous-settler relations in the current moment. I have argued that two prerequisites are necessary to think this encounter clearly. First, that we conceive of the ground where law and indigenous religion meet in ways that do not replicate the assumptive division Canadian s. 2 (a) jurisprudence maintains between objects and their beliefs; and second, that we define "Indigenous religion" in ways that do not replicate the unquestioned epistemological assumptions of law's world. This thesis, then, has worked to theorize the law and Indigenous religion encounter in ways that open analyses up to the wisdom of Indigenous religion, which requires theoretical models that work to unseat the often-unquestioned worldview of law, a very partial perspective taken too often to be "neutral."

This thesis has argued that in order to make a world where judicial interpretation has the capacity to interpret Indigenous religious claims in ways that meaningfully advance the religious freedoms of Indigenous peoples, now and into the future generations, it is necessary to challenge those aspects of law that participate in the creation of normative frameworks, and hence social worlds, which effectively silence the unique perspectives and epistemic outlook of Indigenous religion. However, there is a danger that focusing on foundational epistemic and ontological questions like the ones that have informed my argument in the body of the thesis (Chapters 1 and 2) can abstract our attention from the real problems of justice that face Indigenous people in their efforts to reclaim the religious freedoms colonialism eroded in too many ways to count. David Graeber has critiqued scholars of the ontological turn (of which new materialism is a part) for failing to consider what he calls the tendency towards 'ontological anarchy' that can attend their analyses. His critique is uniquely valuable as he is, in many respects, well-disposed towards the modes of analyses and discoveries the ontological turn has unearthed—and is himself a contributor to this body of theoretical work.

By 'ontological anarchy,' Graeber means the unwillingness to take an ultimately ethical stand on which view of the world (eg among the range of possible perspectives the ontological turn has shown to be at play) ought to pertain in the many instances where there are real-world political consequences for adopting one worldview over another. As a remedy for this failure, Graeber argues in favour of keeping analytical focus squarely on the consequences of this or that ontological perspective for the people worst positioned in a grossly unequal, violent society. Thus he asks: "The political question (at least for me) is: which is the approach best suited to support those who are trying to challenge those structures of power and authority, and in what ways?"[269] Graeber's question can be fruitfully applied to the questions these thesis has pursued—eg how to conceptualize law and Indigenous religion such that we do not replicate law's tendency to do epistemic violence to Indigenous worldviews. I am with Graeber in that I do not think that staying with ontological questions that, arguably, attend insufficiently to political and ethical consequences takes us as far as we need to go in developing theoretical approaches that can actually do the tough political work we want them to, eg to work for the

[269] David Graeber, "Radical Alterity Is Just Another Way of Saying 'reality': A Reply to Eduardo Viveiros de Castro," (2015) 5 *HAU journal of ethnographic theory* 2 at p. 6. For an elaboration of "ethnographic theory," see: Giovanni da Col and David Graeber, "Foreword: The return of ethnographic theory" (2011) 1 *Hau Journal of Ethnographic Theory* 1 at pp. vi–xxxv.

dignity of those who, like the Indigenous peoples of Turtle Island, are most harmed by the structures of colonialism and neoliberalism that rule our moment and its constitutive histories. At some point, we have to make sure our abstract theorizing still does lead to action—but it remains important, often in ways that so-called 'practical' analyses forget, that we tend to theoretical considerations. This is because action is always informed by theoretical presuppositions, however unconscious these may be. We must therefore take care that the theorizing that informs our decision-making leads to the sorts of actions our ethics want to see done.

Judges, especially, must eventually make decisions, as we all must—however provisional—that affect in material ways the kind of world we are going to live in. These decisions are, too, always informed, however unconsciously, by a theoretical perspective. Those of us positioned in the legal field, whether as lawyers or claimants or legal scholars or members of the nomos-making public, ought to work to make sure the perspective that informs judicial decision-making does not flow from an implicit theoretical standpoint that negates the very ways in which Indigenous religion reads and experiences the world.

Because decision-making is never not informed by deep theoretical presuppositions (however unquestioned these may go), I have taken care throughout this thesis to unpack foundational ontological assumptions that divide law's episteme from Indigenous religion's—in search of something like common ground where the two might meet outside the frame of law's presumption of neutrality. Exactly how judges will or should decide Indigenous religious freedoms claims out into the future is a question that takes us beyond the scope of this thesis, though I do think s. 2 (a), because of its focus on individual rights, might help individual Indigenous people whose religious practices are at odds with tribal practice in ways worth exploring further. It remains to be seen how or if future legal reasoning might be impacted by the call from many quarters (I am of course only one voice among many) to consider how to extend meaningful protection to people whose spiritual practices are ongoingly threatened by both the legacy of colonialism and by a culture-wide tendency to ignore the deep entanglements Indigenous religious traditions see between humans and our non-human others. Indeed, it is a question that cannot be answered in the abstract—but rather one that will be answered, case by case, depending on the specificities of each person who comes before the law and the disposition of the people charged with the grave responsibility of hearing the depth of what is at stake in a given encounter.

What this thesis has done, I hope, is to suggest that the scope of listening, in the case of law-Indigenous religion encounters, should be broader than law generally allows. The scope should include elements that belong to the land—the remembered sound of the hooves of the buffalo, for instance, racing across the plains in innocence before the project of building "Canada" brought about their mass slaughter. And it should include, of course, also human elements, both living and dead—the heartbreaking resonance of so many broken and disappeared lives, audible in imagination when we look at the photos Tristen Durocher assembled outside his tee pee in Pile of Bones or when we stand, shoulder to shoulder, with children who grieve at the steps of the legislature for the grandparents they never had, scratching notes in crayons on cards to the ones already dead. Ontological deliberations ought never to stop us from reading their notes, and taking in the full meaning of the words: "they returned from residential school but were never the same."[270] Those of us charged with lawmaking power, whether as judges or lawyers or legal thinkers or legal subjects, must take seriously the moral responsibility this fact places at our feet. We must submit ourselves to a logic that would allow us to think and be otherwise than the tide of our legal training has taught us to be, lest in the face of a call to be different we remain unchanged.

And unchanged we lawmakers (and we are all that, no matter how powerless we may imagine ouselves to be) will remain so long as our habits of thinking do not change to keep pace with what life is asking of us. Life is asking those of us positioned to contemplate the wound of colonialism to come to terms with the extent of the ongoing atrocities that divorce Indigenous peoples from the lands that constitute them. But life, I want to remember, is also asking us to look beyond legal doctrine, beyond text, beyond human-generated narratives to see stories that rise up through the land itself—stories with the power to lift us out of even the habit of heartbreak. On April 22, 2020, just a few weeks before the Saskatchewan Party voted down the legislation that would have allocated more funds to address the crisis of Indigenous suicide in the North, the first baby bison was born on Treaty 4 land, in the Wanuskewin Heritage Centre just outside of Saskatoon, since before 1876. The baby was a girl. More have followed since. Life makes a way and if we line our hearts up with life, so do we. So then, also, might law.

[270] This is a reference is to a note written in crayon, which looked like it was written by a child, on the steps of the Victoria legislature in June 2021, as part of the memorial set up there, as on legislature steps across the country, in the wake of the Kamloops discoveries.

Baby bison, female, first-born on Wanuskewin land in over 150 years, 2020. Credit: Wanuskewin Heritage Cenrtre, via the CBC.[271]

[271] CBC News, “First baby bison born” at *supra* note 4.

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