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INDIGENOUS SACRED SITES & LANDS: PURSUING PRESERVATION THROUGH COLONIAL CONSTITUTIONAL FRAMEWORKS

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ABSTRACT

Sacred sites and lands are vital to the spiritualities of many Indigenous peoples in Canada. However, colonial conceptions of land ownership, land use, and religion have worked in concert to stifle the preservation of Indigenous sacred sites and lands. This article examines three options, based in the *Constitution Act, 1982*, that Indigenous peoples in Canada may pursue to preserve their sacred sites and lands: the section 35 title option, the section 35 rights option, and the section 2(a) *Charter* option. This paper suggests that the legal frameworks associated with each option perpetuate colonial values, whether it is the dispossession of land, the belief that land is only a commodity, or the superiority of Christianity over Indigenous spiritualities. By constructing legal frameworks that make the preservation of sacred sites and lands so difficult, Indigenous spiritualities are only further oppressed by the Canadian state.

INTRODUCTION

Indigenous spiritualities have long been targeted by the Canadian state, whether through the seizure of sacred lands, the criminalization of spiritual practices, or the persecution of Indigenous spiritual leaders.[1] Additionally, mandatory attendance at residential schools—institutions based on the "assumption that European civilization and Christian religions were superior to Aboriginal culture"—was used to disconnect Indigenous children from their traditional spiritual lands, sites, and practices.[2] The Canadian state has since issued a formal apology to Indigenous peoples, recognizing the economic, political, social, and spiritual harms wrought by residential schools.[3]

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1 Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada," (31 May 2015) 1–2, online (pdf): <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf> [TRC Summary] archived at [https://perma.cc/Z3HS-BU8J].

2 *Ibid* at 4.

3 Government of Canada, "Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system," (11 June 2008), online: <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> archived at [https://perma.cc/2D5X-WAHS].

Despite this formal recognition of wrongdoing and the legalization of Indigenous spiritual practices, colonial ideas persist, and Indigenous spiritualities are still devalued and suppressed. In this article, I discuss the colonial ideas entrenched in the Canadian judiciary, focusing specifically on how three legal frameworks used to interpret constitutional rights—the section 35 Aboriginal title test, the section 35 Aboriginal rights test, and the section 2(a) *Charter* freedom of religion test—impact Indigenous spiritualities.[4]

In Part I, I outline the values held by those who colonized Canada, including their conceptions of land ownership, land use, and religion. In Part II, I briefly summarize the historical uses of the law to suppress Indigenous spiritualities. Part III describes how each of the three aforementioned legal frameworks reflect colonial values and suppress Indigenous spiritualities by making it exceedingly difficult for Indigenous groups to preserve[5] their sacred sites and lands. First, I demonstrate that both of the section 35 frameworks reflect colonial values, whether it is the dispossession of land or the belief that land is only a commodity. Second, using the case study of *Ktunaxa,*[6] I demonstrate that the section 2(a) *Charter* freedom of religion framework reflects colonial conceptions of land use, favours Christian conceptions of religion, and devalues Indigenous spiritualities.[7]

I. THE VALUES OF COLONIALISM & CONCEPTIONS OF RELIGION

A. Dispossession of Land

Europeans viewed the New World as a land rich in resources, ready to be settled by their citizens. However, to fully exploit the resources of the New World and settle a new population, dispossessing Indigenous peoples of their lands was necessary. Two worldviews worked in tandem to justify this dispossession: the Doctrine of Discovery and the philosophy of John Locke.

Under the Doctrine of Discovery, the first European Christian nation to discover non-Christian lands had a pre-emptive right—against all other Christian nations—over the "infidels" and the lands that they occupied.[8] A beneficial right of occupancy, or something resembling legal title, was crystallized upon first landing at the beach and justified based on a perception that Indigenous peoples were spiritually inferior to their Christian counterparts.[9]

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4 Indigenous peoples in Canada may also use section 35 treaty rights to seek constitutional protection of their sacred sites and lands. However, I do not discuss this option in the paper, as treaty rights are not assessed through a uniform legal test—they are assessed depending on the terms of the specific treaty. I discuss the section 35 title framework, section 35 rights framework, and section 2(a) *Charter* framework because courts apply the same legal tests in every rights claim uniformly across Canada.

5 In this paper, I use the word "preserve" or "preservation" to mean the following: (1) keeping sacred sites or lands completely free of construction, occupation, or development by humans (see Ktunaxa Nation, "Qat'muk Declaration," (15 November 2010), online: <http://www.ktunaxa.org/who-we-are/qatmuk-declaration/> [Qat'muk Declaration]), or (2) keeping sacred sites or lands unoccupied by humans, save for when Indigenous peoples travel to them to pray, communicate with gods, visit ancestors, or otherwise engage in other spiritual acts.

6 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54.

7 *Ibid.*

8 Robert N Clinton, Neil J Newton et al, *American Indian Law: Native Nations and the Federal Systems: Cases and Materials* (Newark: LexisNexis, 2005) at 1008.

9 David E Wilkins, "Federal policy, western movement, and consequences for Indigenous people, 1790-1920," in Michael Grossberg, ed, *The Cambridge History of Law in America: Volume II the Long Nineteenth Century (1789-1920)* (Cambridge University Press, 2008) at 210; Matthew Charles Stamford, *The Use of Law in the Destruction of Indigenous Religions in Canada and the United States: A Comparative Perspective* (DPLS, University of Sussex, 2012) [unpublished] at 18 [Stamford].

John Locke also believed that Indigenous peoples were inferior and did not truly own the lands of the New World, but he justified his belief through a different framework. In *Two Treatises of Government*, Locke described Indigenous peoples as hunter-gatherers in a "pre-political state of nature," who lacked government, property, agriculture, and organized commerce.[10] Locke believed that Indigenous peoples did not "labour" over the land, meaning that they did not cultivate and enclose it according to European standards.[11] Without "labour," Indigenous peoples could not claim sovereignty over the land, thus rendering it vacant and ripe for dispossession.[12]

According to the Doctrine of Discovery and the theories of John Locke, Indigenous peoples were morally inferior as non-Christians, and politically and economically inferior because they did not use the land "properly." Indigenous peoples were not worthy of living on or using the lands of the New World. Thus, their forced removal was justified.

B. The Value and Use of Land

In the colonial worldview, land is privately owned, either through cultivation or enclosure.[13] Land is a commodity that is demarcated, purchased, used, and sold in order to accumulate capital. Land that is untouched by humankind, and lacks value as a commodity, is not being "used" properly and is seen as wasted land. Land is dominated by humanity, echoing the Christian creation story in Genesis 1:28 in which God commands for man to "fill the earth and subdue it; and have dominion [...] over every living thing."[14]

Many Indigenous peoples' attitudes toward land starkly contrast with those of the colonizer. In this worldview, the primary value of land is spiritual and not economic, though one may still earn a livelihood from the land.[15] Land does not need to be cultivated, enclosed, or "used" by humans to have value. The value of land is incapable of being appraised in monetary terms.[16] Humans do not dominate the land under this worldview. Instead, there is an acknowledgment that natural resources exist without humanity but that humanity does not exist without those same natural resources.[17]

C. Conceptions of Religion

What it means to follow a religion and what it means to be pious have varied over time and across cultures. During the Reformation in the early 16th century, figures like Huldrych Zwingli and John Calvin played an important role in shifting Western peoples' conceptions of what it meant to be religious.[18] To these figures, religion denoted a state of

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10 John Locke and Peter Laslett, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett, second edition* (Cambridge: University Press, 1970) at 27.

11 Gary Fields, *Enclosure: Palestinian Landscapes in a Historical Mirror* (Oakland: University of California Press, 2017) at 61–2.

12 Blake A Watson, "John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," (2006) 36:2 Seton Hall LR 481 at 489.

13 Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005) at 36–7 [Banner].

14 Genesis 1:28, Revised Standard Version.

15 Natasha Bakht and Lynda Collins, "'The Earth is our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," (2017) University of Ottawa Working Paper No 2012/24 at 8 [Bakht & Collins].

16 Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred," (2014) 64 U Toronto LJ at 84 [Graben].

17 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 20.

18 Jonathan Z Smith, "Religion, Religions, Religious," in Marc C Taylor, ed, *Critical Terms for Religious Studies* 2nd ed, (Chicago: University of Chicago Press, 1998) at 271 [Smith].

mind, and there were no ritual connotations associated with this state of mind.[19] Donald Lopez argues that the shift to belief, rather than ritual, became "the pivot around which Christians have told their own history."[20] From this time on, internalized belief became the defining characteristic of Christianity.[21] In a sense, the Christian God transcended geography. Christians could worship in any church of the same denomination, and as long as their belief was strong, they were considered pious.[22] The location of the house of worship bore "little to no effect on its practical religious […] functions."[23] This shift to internalized belief, largely unconnected to specific locations, allowed European Christians to easily transport their religion across the Atlantic and proselytize it to Indigenous peoples.

For many Indigenous peoples, spirituality is rooted in the land; without the land, internalized belief is irrelevant.[24] The strength of their spiritual connection "is inextricably bound up with certain natural areas held to be sacred."[25] Indigenous spiritualities may require Indigenous groups to maintain stewardship over a sacred site, or perform rituals at these sites.[26] Many Indigenous spiritualities are based in what some scholars term "geopiety," meaning that ceremonies are "conducted in a specific location" and, as a result, these geopious spiritualities "are not easily transportable like the Christian God."[27]

Christians often have a difficult time grasping the importance of sacred sites to Indigenous spiritualities because of what RC Gordon-McCutchan dubs the "edifice complex," where sacred space is viewed "primarily in terms of buildings."[28] The emphasis on buildings as sacred spaces, rather than "unoccupied" or "undeveloped" land, illustrates the relative disconnection of Christianity from natural landscapes and reflects the colonial belief that land must be cultivated and commodified in order to have value. Protestantism and Roman Catholicism have been the dominant religions in Canada's history, both viewing religion through this colonial lens.[29] Because of this, the colonial lens has become the "standard" to which all other religions and spiritualities are compared.

Throughout Canada's history, the belief that the dispossession of Indigenous land is necessary, that land is only a commodity, and that piety is based purely on one's internal belief has helped shape the Canadian legal system. In turn, this system has resulted in the dispossession of Indigenous lands and the suppression of Indigenous spiritualities.

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19 *Ibid*.

20 Donald S Lopez, "Belief Critical Terms for Religious Studies," in Marc C Taylor, ed, *Critical Terms for Religious Studies* 2nd ed, (Chicago: University of Chicago Press, 1998) at 21.

21 Smith, *supra* note 18 at 271.

22 Stamford, *supra* note 9 at 43.

23 Michael Lee Ross, *First Nations Sacred Sites in Canadian Courts* (Vancouver: UBC Press, 2005) at 214 [Ross].

24 *Ibid* at 3.

25 Bakht & Collins, *supra* note 15 at 783.

26 Qat'muk Declaration, *supra* note 5.

27 Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich Publishing Limited, 2015) at 53.

28 Lori G Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion," (2002) 44:1 J Church and State at 144–5 [Beaman].

29 *Ibid* at 138.

II. HISTORICAL SUPPRESSION OF INDIGENOUS SPIRITUALITIES

The connection between Indigenous spiritualities and the land cannot be understated. Anishinaabe Nation Elder Fred Kelly explains that "[t]o take the territorial lands away from a people whose very spirit is so intrinsically connected to Mother Earth was to actually dispossess them of their very soul and being; it was to destroy whole Indigenous nations."[30] In British Columbia, Indigenous peoples were placed on reserves constituting only 0.4 percent of land in the province.[31] This act of dispossession damaged Indigenous peoples' spiritualities, severely restricting their access to sacred sites and areas on non-reserve lands.

In order to leave their assigned reserve and access these sacred sites and lands, many Indigenous peoples had to seek permission from an Indian agent under what is known as the "pass system."[32] If an Indigenous person was found off reserve without a pass, they were "taken into custody by the police and summarily returned to their reserve."[33] When access to sacred sites and lands is denied or is subject to the discretion of government administrators, Indigenous peoples cannot "distribute their spiritual connection to the land," leaving them "with a mere shell of their spiritual relationship with the land."[34]

Working alongside dispossession were schools and laws that preached the supposedly superior European "values of Christianity and acquisitive capitalism."[35] Denominational boarding schools were built, segregating Indigenous children from their traditional cultures and spiritualities.[36] The Potlatch, a redistributive gift-giving ceremony used mostly in British Columbia, was banned from 1884 to 1951.[37] Lawmakers justified this ban by claiming that it destroyed accumulated capital, hindered economic and social progress, and was antithetical to the Protestant work ethic and acquisitive capitalism.[38]

In 1914, the Canadian government criminalized off-reserve dancing "in aboriginal costume" or "inducing or employing any Indian to take part in such dance" without the consent of an Indian agent.[39] Laws were also passed that effectively prevented Indigenous peoples from using the legal system to defend their spiritual practices. In 1927, Parliament barred Indigenous peoples from soliciting funds for their legal claims without a licence.[40]

Simply put, the Canadian state attempted to erase Indigenous cultures and spiritualities by promoting private land ownership, agriculture, and Christianity. While Indigenous spiritualities are no longer criminalized, the historical dispossession of land has forced Indigenous peoples to use the judicial system in an attempt to protect and preserve their sacred sites and lands. However, the judiciary has constructed legal tests imbued with colonial values, making it difficult for Indigenous peoples to have their spiritualities constitutionally protected.

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30 TRC Summary, *supra* note 1 at 225.

31 Nicholas Blomley, "Making Space for Property," (2014) 104:6 Annals of the Association of American Geographers at 1292.

32 Laurie F Barron, "The Indian Pass System in the Canadian West, 1882-1935," (1988) 13:1 Prairie Forum at 26.

33 *Ibid*.

34 Ross, *supra* note 23 at 3.

35 George E Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis, Fortress Press, 1993) at 109.

36 Stamford, *supra* note 9 at 93.

37 *Ibid* at 107.

38 *Ibid* at 108, 112.

39 *Ibid* at 115.

40 *Ibid* at 116.

III. OPTIONS FOR PRESERVING SACRED SITES & LANDS

A. The Section 35 Route

In this section, I first outline the Aboriginal title framework for preserving sacred sites and lands, while also highlighting how aspects of this route are problematic and reflect colonial values; I then repeat this process for the Aboriginal rights framework. Finally, I outline the problematic aspects shared by both frameworks and describe how these common aspects reflect colonial values.

i. Aboriginal Title Framework

To establish Aboriginal title, an Indigenous group must prove that there was sufficient occupation prior to sovereignty, continuity of occupation from pre-sovereignty to the present time, and exclusive occupation at sovereignty.[41] If each of the three aforementioned elements is established, title is recognized and titleholders are granted "the right to use and control the land."[42] Indigenous groups can then "use and control the land" to preserve sacred sites or designate sacred lands. However, preserving Indigenous sacred sites and lands through the section 35 title framework is difficult given the colonial values embedded in the framework itself.

The first element of the section 35 title framework is sufficiency of occupation. This element can be established through a variety of activities:

> [R]anging from the *construction of dwellings* through *cultivation and enclosure of fields* to *regular use* of definite tracts of land for hunting, fishing or otherwise *exploiting its resources*.[43]

A strong presence on or over the land claimed must be evidenced by "acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group."[44]

The test for establishing sufficient occupation requires that courts take into account the Indigenous perspective, yet the descriptions of how to establish sufficient occupation are from a solidly colonial perspective.[45] The "construction of dwellings" is listed as the surest sign of sufficient occupation, echoing the colonial belief that land must be put to productive use, build capital, and be dominated by humankind to be used "properly." The importance of the construction of buildings in the sufficient occupation analysis is irrelevant to many Indigenous groups pursuing title over specific spiritual sites and lands. Given that Indigenous sacred spaces are usually rooted in land, and not buildings, such as in Christianity, it is unlikely an Indigenous group will be able to prove the surest sign of sufficient occupation under the section 35 title framework.[46] Indigenous groups must then point to other signs that they sufficiently occupied the claimed sacred site or lands.

The second strongest ground to prove sufficient occupation is the "cultivation and enclosure of fields."[47] Again, this sign of sufficient occupation is largely useless to an Indigenous group using the section 35 title framework to preserve sacred sites or lands. That is, unless

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41 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 26 [*Tsilhqot'in*].
42 *Ibid* at para 18.
43 *Ibid* at para 37. [emphasis added]
44 *Ibid* at para 38.
45 *Ibid* at para 14.
46 Beaman, *supra* note 28 at para 145.
47 *Tsilhqot'in*, *supra* note 41 at para 37.

an Indigenous group signifies their spiritual connection with the land by cultivating it, or putting a fence around it, they will not be able to prove the second strongest ground of sufficient occupation.

Listing "enclosure and cultivation" also overlaps perfectly with John Locke's colonial theory of land ownership.[48] Lockean theory uses the concepts of "sovereignty" and "labour," while the section 35 title framework uses the analogous concepts of "title" and "cultivation and enclosure." However, both frameworks effectively communicate the same message: an Indigenous group must "labour" over the land (i.e. cultivate and enclose it) to claim sovereignty (i.e. title) over the land. Revering the land spiritually is simply not enough to prove ownership.

At the lowest end on the spectrum of sufficient occupation is the "regular use of definite tracts for hunting, fishing or otherwise exploiting its resources."[49] The words included and omitted in this part of the section 35 title framework also reflect colonial conceptions of land ownership and use. Under this framework, the exploitation of land for food and other resources are acceptable "uses" of land, but the regular use of land for spiritual purposes is absent. In the colonial mindset, the idea of land use and ownership is confined to exploitative activities whereby humans take resources, rather than spiritual guidance, from the Earth.

The second component of the section 35 title framework is continuity of occupation. For continuity of occupation to be established, an "unbroken chain" of continual occupation is not required. I discuss the problematic aspects of the second component in Part IV(a)(iii), as they overlap with those in the section 35 rights framework.

The final requirement is exclusivity of occupation. Here, the Aboriginal group must have "the intention and capacity to retain exclusive control" over the claimed lands.[50]

For an Indigenous group to preserve their sacred sites or lands through the section 35 title framework, they must satisfy a three-part test; however, this is a difficult task given the structure of the legal test. The sufficient occupation component of the framework is particularly challenging. At this stage, Indigenous peoples must express their spiritual beliefs by either dominating the land, "labouring" over it, building structures on it, or exploiting its resources to have a chance of preserving their sacred places under the section 35 title framework.

ii. Aboriginal Rights Framework

For an Indigenous person or group to establish that they have a section 35 Aboriginal right to access an undeveloped sacred site or preserve sacred lands, they must satisfy four steps. First, they must demonstrate that they were acting pursuant to an Aboriginal right.[51] To prove this, the right must first be characterized and a court must determine whether the activity is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" prior to contact with Europeans.[52] Second, a court must determine whether the claimed right "was extinguished prior to the enactment of section 35(1) of the *Constitution Act, 1982*."[53] Third, the Aboriginal claimant must prove

48 Banner, *supra* note 13 at 36–7.
49 *Tsilhqot'in*, *supra* note 41 at para 18.
50 *Ibid* at para 47.
51 *R v Gladstone,* [1996] 2 SCR 723, 200 NR 189 at para 20 [*Gladstone*].
52 *R v Van der Peet*, [1996] 2 SCR 507, [1996] CarswellBC 2309 at para 46 [*Van der Peet*].
53 *Gladstone, supra* note 51 at para 20.

that the government action or legislation produces a prima facie infringement.[54] In the final step, the onus is reversed and the Crown must prove that the infringement was justified.[55]

a. Re-Characterizing Rights

The first problem with the section 35 rights framework occurs during the first stage of the four-step test, where courts have a large amount of discretion. During this stage, litigants characterize their asserted right to spiritual sites or lands, but a court may re-characterize the section 35 right "on terms that are fair to all parties."[56] The process of re-characterization necessitates a compromised solution. However, if an Indigenous group compromises, the sacred site or land in question may be desacralized, thereby preventing future rights claims for the sacred area in question.

For example, imagine an Indigenous group claimed a section 35 right to preserve sacred land—which, to remain sacred, must be undisturbed by humans—and the other party sought to build a ski resort on that land. In this scenario, there are no acceptable compromises between the claimant Indigenous group and the other party that would preserve the sacrality of the land, as *any* development would desecrate it.[57] The claimant group would never pursue the right to access that land in the future, as the site would no longer have spiritual value. The ability of a court to re-characterize a section 35 rights claim not only may prevent future rights claims, but also includes an element of paternalism, preventing litigants from expressing their spirituality in their own terms.

b. Lack of Legal Precedent

Second, though not a problem with the framework itself, courts have not been receptive to section 35 claims seeking to access, use, protect, or preserve off-reserve sacred sites. In fact, though such rights have been asserted, they have never been proven in court.[58] Factors like the length and cost of litigation and the risk of an unfavourable precedent deter Indigenous groups from pursuing such claims.[59] In turn, if an Indigenous group does commence litigation, the colonial values imbued in the section 35 rights framework decrease the likelihood that their claim will succeed. Many of the colonial values of the section 35 rights framework are shared with those of the section 35 title framework.

iii. Problems Common to Both Routes

There are five problems common to both the section 35 title framework, and the section 35 rights framework.

a. Presumption of Non-Existence

The first shared problem is the burden of proof for title and rights claims. Section 35 does not state what party needs to prove or disprove an Aboriginal right or title claim; rather, the test is the product of jurisprudence. The Supreme Court of Canada ("SCC") decided that the Indigenous group asserting the section 35 claim bears the burden of proving

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54 *R v Sparrow*, [1990] 1 SCR 1075, [1990] CarswellBC 105 at paras 67–70 [*Sparrow*].

55 *Gladstone*, *supra* note 51 at para 20.

56 *Lax Kw'alaams Indian Band v Canada (Attorney General)*, [2011] 3 SCC 56 at para 46.

57 See *Ktunaxa*, *supra* note 6 at para 36 for an example of when any development would desecrate sacred lands.

58 See *Hupacasath First Nation v British Columbia (Minister of Forests) et al*, 2005 BCSC 1712, 51 BCLR (4th) 133; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41; *Hiawatha First Nation v Ontario (Minister of the Environment)*, 2007 CarswellOnt 738, 221 OAC 113.

59 Ross, *supra* note 23 at 15.

that they possess an Aboriginal right or title to lands.[60] This test applies regardless of whether the land or site in question is unceded territory. Indigenous rights to sacred sites or ownership of sacred lands are thus presumed to be non-existent; dispossession is the default. Furthermore, Indigenous peoples bear the burden of proving that their rights or title were infringed, rather than the Crown proving an infringement did not occur.[61]

b. Temporal Limitations

The second shared problem is that both section 35 frameworks limit claims to specific time periods based on the arrival of Europeans. First, take the continuity-of-occupation component of the section 35 title framework. Under this component, if evidence of present occupation is used to support a claim of pre-sovereignty occupation, "the present occupation must be rooted in pre-sovereignty times."[62] This presents obvious problems if sites or lands became sacred after sovereignty was established in British Columbia in 1846.[63] Similarly, in the section 35 rights framework, Indigenous groups can only pursue an Aboriginal right to preserve sacred sites and lands that became sacred *prior* to contact with Europeans.[64] Hypothetically, say the Tsilhqot'in people designated a parcel of land as sacred in 1820, a full 200 years ago. They could not pursue the right to preserve this parcel of land under the section 35 rights framework, given that contact occurred in 1793.[65]

The section 35 rights and title frameworks both require some form of continuity from pre-sovereignty or contact times until the present day. While these frameworks allow for practices to evolve from pre- to post-sovereignty or contact times, evidence from pre-sovereignty or contact times is still required for title and rights to be constitutionally recognized.[66] However, Indigenous groups did not stop designating new sacred sites and lands after Europeans arrived or asserted sovereignty. As a result of this requirement, Indigenous groups may only use the section 35 rights and title frameworks to preserve lands they designated as sacred *prior* to the assertion of sovereignty or contact. In effect, this test freezes the number of sacred sites and lands to the number that existed in pre-sovereignty or contact times, rejecting the protection of lands designated as sacred in more recent times.[67]

c. Justification for Infringement Test

The third shared problem is the test for justification of infringement under the section 35 rights and title frameworks. In the section 35 title framework, the Crown must prove:

> [T]hat it discharged its procedural duty to consult and accommodate, that its actions were backed by a *compelling and substantial objective*, and that the governmental action is consistent with the Crown's fiduciary obligation to the group.[68]

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60 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] CarswellBC 2358 at para 143 [*Delgamuukw*].

61 *Sparrow*, *supra* note 54 at paras 67–70; see Kent McNeill, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ 775 for further discussion of the burden structure of the Aboriginal title test.

62 *Tsilhqot'in*, *supra* note 41 at para 46.

63 *Delgamuukw, supra* note 60 at para 145.

64 *Van der Peet, supra* note 52 at para 64.

65 *William v British Columbia*, 2012 BCCA 285, [2012] CarswellBC 1860 at para 262.

66 *Van der Peet, supra* note 52 at para 64.

67 See L'Heureux-Dubé J's dissent in *Van der Peet*, particularly paragraphs 164–179, in which she asserts that it should be possible for Aboriginal rights to arise *after* the assertion of British sovereignty or European contact.

68 *Tsilhqot'in, supra* note 41 at para 77. [emphasis added]

For the fiduciary obligation to be met, the Crown must establish the following:

> [1] [T]hat the incursion is necessary to achieve the government's goal (*rational connection*); [2] that the government go no further than necessary to achieve it (*minimal impairment*); and [3] that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (*proportionality of impact*).[69]

For Aboriginal rights claims, the Crown must prove that there was a "*compelling and substantial purpose* and establish that they are consistent with the Crown's fiduciary duty to the group."[70] If the infringement to a particular right "could reasonably be considered to be as minimal as possible," then it will meet the minimal impairment test as required in the Crown's fiduciary duty.[71]

Three aspects of the infringement framework are problematic for the preservation of Indigenous sacred sites and lands. The first problem is that the "government's goal," or the "compelling and substantial purpose" is almost always based on colonial conceptions of land use and the value of land. In *Delgamuukw*, Chief Justice Lamer listed the kinds of objectives that would be considered "compelling and substantial" enough to justify the infringement of Aboriginal title, including:

> [T]he development of [1] agriculture, [2] forestry, [3] mining, and [4] hydroelectric power, [5] the general economic development of the interior of British Columbia, [6] protection of the environment or [7] endangered species, the [8] building of infrastructure and [9] the settlement of foreign populations to support those aims.[72]

Though the list contains "protection of the environment or endangered species," the seven other listed activities reflect colonial conceptions of land and land use. One activity explicitly endorses dispossession, allowing for the settlement of foreign populations to trump Aboriginal title or rights. Six of the nine activities permit section 35 infringements as long as the land has extractive value or is used in a way that facilitates further economic development. With such a wide scope of infringement-worthy objectives, the first step of the justification framework is essentially ensured. Even if an Indigenous group demarcates a sacred site and proves ownership over it using the settler-imposed section 35, certain colonial ideas—chiefly that unsettled and unexploited land is wasted land—permeate the infringement framework.

The second problem with the infringement framework is the "minimal impairment" component, which essentially bars Indigenous groups from imposing absolute prohibitions. However, this is incongruous with many Indigenous sacred sites and lands whose sacrality depends on absolute prohibitions. For example, the Ktunaxa believe that their sacred, undisturbed mountain, Qat'muk, will be desecrated and its spiritual value destroyed if *any* of its earth is moved.[73] From the Ktunaxa's perspective, even if the amount of earth moved is minimized, the effect of that movement will not be minimally impairing.[74]

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69 *Ibid* at para 87. [emphasis added]

70 *Ibid* at para 18. [emphasis added]

71 *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 at para 110.

72 *Delgamuukw, supra* note 60 at para 165. [emphasis added]

73 *Ktunaxa, supra* note 6 at para 36.

74 In *Ktunaxa*, the Ktunaxa based their claim to preserve Qat'muk in s 2(a) of the *Charter*, rather than s 35. The Ktunaxa did not attempt to preserve Qat'muk through the section 35 rights or title frameworks, perhaps knowing that courts would not accept their absolute prohibition of development on Qat'muk, and perhaps fearing that the court may justify the movement of earth on the basis that the action was "minimally impairing." See Part III(B) for further discussion of the *Ktunaxa* case.

The third problem with the infringement framework is that the proportionality-of-impact component, weighing the objective against the adverse effects, is a subjective exercise, leaving decisions vulnerable to the explicit or implicit values of the almost exclusively non-Indigenous judiciary. As of 2016, no SCC appointees, 0.7 percent of provincial Supreme Court appointees, and 1.3 percent of provincial Court of Appeal appointees were Indigenous.[75] Thus, it is highly improbable that a judge hearing a rights or title case is Indigenous and even more improbable that they are members of the same Indigenous group as the litigant. Given these statistics, the likelihood that the specific "site sacred to the litigating First Nation will also be sacred to the judge" is exceedingly low.[76]

In this balancing exercise, non-Indigenous judges may devalue the severity of the adverse impact in question on Indigenous spiritualities. A judge from a non-Indigenous religious background is less likely to grasp the importance of sacred sites and lands in general and the necessity of continued renewal with those places to the vitality of the Indigenous group's spirituality.[77] Further, they may be more likely to view untouched or uncultivated land as useless, and more likely to value land through a commercial lens, which tends to weigh in favour of the government objective. They may view an accommodation offered by the government as a reasonable trade-off between the Indigenous group's spiritual site or lands and the economic interests of the province or country. Judges make these decisions in the face of immense societal pressure, weighing the economic interests of millions of non-Indigenous people against a site that is sacred to perhaps a few hundred Indigenous peoples; in this utilitarian calculation, the preservation of sacred sites and lands becomes increasingly unlikely.[78]

d. Translating Indigenous Spiritualities

The fourth shared problem is that Indigenous conceptions of land and spirituality do not translate neatly into terms understandable to most lawyers and adjudicators. The perspective of Aboriginal people needs to be taken into account when assessing rights and title claims to spiritual sites and lands.[79] However, Indigenous litigants must perform what Matthew Stamford dubs "a double translation."[80] First, Indigenous litigants must articulate their rights or title claims to sacred sites and lands into Christian religious concepts.[81] Then, they must translate their claims into a form that is "cognizable to the non-aboriginal legal system," which includes articulating their claim in one of Canada's two official languages, English or French.[82] If, by chance, they fit their claim into the Christian religious box and make it cognizable, there is still a risk that a highly unrepresentative judiciary will interpret their translated claims "in ways other than how they were intended."[83]

e. Confidentiality

Briefly, the fifth shared problem of rights and title claims to sacred sites or lands relates to confidentiality. Inherent in many Indigenous spiritualities is an element of secrecy. By

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75 Andrew Griffith, "Diversity among federal and provincial judges," (May 2016), online: *Policy Options,* <http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/> archived at [https://perma.cc/9WWT-FHHV].

76 Ross, *supra* note 23 at para 22.

77 Anita C Pryor, and Gypsy C Bailey, "An Indian Site-Specific Religious Claim Again Trips Over Judeo-Christian Stumbling Blocks (*Lyng v. Northwest Indian Cemetery Protective Association*, 108 S Ct 1319 (1988))" (2018) 5:1 Florida State University J of Land Use and Environmental Law 293 at 317.

78 Graben, *supra* note 16 at 73.

79 *Tsilhqot'in*, *supra* note 41 at para 14.

80 Stamford, *supra* note 9 at 48.

81 *Ibid*.

82 Ross, *supra* note 23 at 16.

83 *Ibid* at 21.

presenting evidence of the location of their sacred site or lands, an Indigenous group may be desacralizing the site.[84] However, for a judge, "the reason why the evidentiary cupboard is bare does not change the fact that it is," and in the Canadian judicial system, evidence is the key to deciding rights and title claims.[85]

Using section 35 to ensure that sacred sites and lands are protected is a monumentally challenging task. Only one Indigenous group has proven title through the section 35 route, and none have proven an Aboriginal right to preserve a sacred site or tract of land. As the next section illustrates, preserving Indigenous sacred sites and lands through the *Charter* is also a difficult task.[86]

B. The Section 2(a) *Charter* Framework

The third framework through which Indigenous groups can attempt to preserve sacred sites and lands is by proving that their section 2(a) *Charter* rights were infringed and that the infringement was not justified under section 1 of the *Charter*.[87] Below, I provide a factual background to the *Ktunaxa* case, describe the section 2(a) test for infringement, and demonstrate that the majority's reasoning reflects colonial conceptions of religion.

i. Facts of *Ktunaxa*

The heart of the case in *Ktunaxa* was whether the Jumbo Glacier Ski Resort development (the "Project") should be built on Qat'muk, a sacred mountain of the Ktunaxa people. The Project was first proposed in 1991.[88] The British Columbian government then consulted with potentially affected Indigenous communities after an agreement could not be reached between the province, the company proposing the development, and Indigenous communities.[89] The Ktunaxa later adopted the position that accommodation was impossible, as "a ski resort with lifts to glacier runs and permanent structures would drive Grizzly Bear Spirit [the "Spirit"] from Qat'muk and irrevocably impair their religious beliefs and practices."[90] The government responded with another offer to accommodate, this time offering to bolster protections for grizzly bear habitat.[91]

During the process, Elder Chris Luke advised the government that Qat'muk was "a life and death matter" and that "any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley's spiritual value."[92] On November 5, 2010, the Ktunaxa issued the Qat'muk Declaration. They emphasized the importance

84 Stamford, *supra* note 9 at 49.

85 *Ibid*.

86 Dwight Newman, in "Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?" Tom Isaac, ed, *Key Developments in Aboriginal Law* (Toronto: ThomsonReuters Canada, 2018) at 6, argues that section 2(a) offers some advantages over the section 35 rights framework for Indigenous groups looking to establish claims over tracts of land. He notes that section 2(a) does not require a practice to be connected to pre-contact practices, and the "logical evolution" of the claim is irrelevant, as long as the belief is sincere.

87 For the purposes of this paper, I do not discuss the impact of section 1 of the *Charter*. But, given that the infringement framework for section 35 contains elements (rational connection, minimal impairment, and proportionality of impact) similar to those applied in a section 1 analysis, one could anticipate that similar problems would arise with the application of section 1 (see Section III(A)(iii)(c)).

88 Dwight Newman, "Implications of the Ktunaxa Nation/Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) at 311.

89 *Ibid*.

90 *Ktunaxa*, *supra* note 6 at para 6.

91 *Ibid* at para 33.

92 *Ibid* at para 36.

of Qat'muk in this document, stating that the Spirit "was born, goes to heal itself, and returns to the spirit world" on the mountain.[93] They also stated that they had a "stewardship obligation and duty" to the Spirit and Qat'muk.[94] In 2014, the Ktunaxa launched court proceedings, arguing that the decision to approve the Project breached their constitutional right to freedom of religion.[95] In 2017, the SCC decided to hear the case.

ii. The Section 2(a) Test

Section 2(a) of the *Charter* states that everyone has the "freedom of conscience and religion."[96] As stated in *R v Big M Drug Mart Ltd* ("*Big M*"), freedom of religion protects

> [T]he right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[97]

Put simply, freedom of religion has two aspects: the freedom to *hold* a religious belief, and the freedom to *manifest* one.[98] The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* both define freedom of religion in this way.[99]

To establish an infringement of their right to freedom of religion, a claimant must first demonstrate that they sincerely believe "in a practice or belief that has a nexus with religion."[100] Second, they must prove that "the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with [their] ability to act in accordance with that practice or belief."[101] At the second stage, the claimant group must demonstrate that the impugned state action is within the scope of section 2(a) by asking whether the state action interfered with the group's freedom to hold a belief, or their freedom to manifest that belief.[102]

The Ktunaxa contended that the Minister of Forests, Lands, and Resources' decision allowing the Project to proceed violated their right to freedom of religion, as protected by section 2(a) of the *Charter*.[103] First, they argued that they had a sincere belief with a nexus to religion.[104] Second, they argued that the Minister's decision interfered, in a manner that was non-trivial or not insubstantial, with their ability to act in accordance with their belief or practice—or, more specifically, that any movement of ground on Qat'muk would permanently drive the Spirit from the mountain thereby removing "the basis of their beliefs and render[ing] their practices futile."[105]

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93 Qat'muk Declaration, *supra* note 5.

94 *Ibid*.

95 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, [2014] CarswellBC 901.

96 *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

97 *Ktunaxa*, *supra* note 6 at para 62.

98 *Ibid* at para 64.

99 *Ibid* at paras 64–5.

100 *Ibid* at para 68.

101 *Ibid*.

102 *Ibid* at para 70.

103 *Ibid* at para 58.

104 *Ibid* at para 69.

105 *Ibid* at para 59.

iii. Colonial Reasoning in *Ktunaxa*

In *Big M*, the SCC found that section 2(a) of the *Charter* prohibits government from giving legislative preference to "any one religion at the expense of those of another."[106] While a preference is not enumerated in the *Constitution Act, 1982*, in effect Christian views of religion are favoured over Indigenous spiritualities. The reasoning in *Ktunaxa* is a prime example of this phenomenon.

In *Ktunaxa*, the majority dismissed the appellant's case and concluded that the claim did "not engage the right to freedom of conscience and religion under section 2(a) of the *Charter*."[107] The majority found that the Ktunaxa satisfied the first part of the section 2(a) test, as their belief in the Spirit and that permanent development on Qat'muk would drive it from the mountain, was sincere.[108] However, the Ktunaxa did not satisfy the second part of the infringement test. The majority held that neither the Ktunaxa's "freedom to *hold* their beliefs, nor their freedom to *manifest* those beliefs [were] infringed by the Minister's decision to approve the [P]roject."[109] The Court's ruling at the second stage of the section 2(a) test reflects colonial conceptions of religion in two broad ways: what is necessary to *hold* a belief, and what constitutes an acceptable *manifestation* of belief.

First, the majority could not comprehend how the Minister's decision would affect the Ktunaxa's ability to *hold* their beliefs. The majority stated that the Ktunaxa were "not seeking protection for the freedom to believe in Grizzly Bear Spirit," but rather, they were seeking to protect the Spirit itself.[110] The majority tried to split the Ktunaxa's freedom to believe in the Spirit and protect the Spirit itself into two, but in doing so, failed to understand that they are inextricably linked to one another. As the Katzie First Nation succinctly stated in their factum as an intervener for *Ktunaxa*, "the spiritual 'belief' and the land are one and the same."[111]

In many Indigenous spiritualities, "sacred sites are needed to distribute [the Indigenous group's] spiritual connection with the land," and without them, belief ceases to exist.[112] If Qat'muk were desecrated, the Ktunaxa's belief would cease to exist.[113] From a Christian viewpoint, this may be difficult to understand because the idea of "killing a god is nonsensical," given that God exists in a perpetual, supernatural state.[114] The Ktunaxa would still have the mental ability to believe in the Spirit, but practically, their belief would be hollow and pointless. In dissent, Justice Moldaver recognized the link between Qat'muk and the ability to hold a belief in the Spirit, writing that the Ktunaxa's beliefs would be rendered "devoid of any spiritual significance" if the Project was to proceed.[115]

Unfortunately, the majority's line of reasoning is not unusual, but just the latest example of a non-Indigenous court misunderstanding Indigenous spiritualities. In Christian

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106 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 58 NR 81 at para 134.

107 *Ktunaxa, supra* note 6 at para 8.

108 *Ibid* at para 69.

109 *Ibid* at para 8. [emphasis added]

110 *Ibid* at para 71.

111 Katzie First Nation, "Factum of the Intervener Katzie First Nation," online (pdf): <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36664/FM060_Intervener_Katzie-First-Nation.pdf> archived at [https://perma.cc/W4T6-WD65].

112 Ross, *supra* note 23 at 3.

113 *Ktunaxa, supra* note 6 at para 36.

114 Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom," (2019) 88 Supreme Court LR (2d) at 219 [Recontextualizing *Ktunaxa*].

115 *Ktunaxa, supra* note 6 at para 118.

denominations, all that is necessary to "hold a belief" is a state of mind.[116] Internalized belief in God is not contingent on sacred sites in Christian theology. A physical manifestation of the faith can be destroyed, as long as the ability to believe in that same faith remains. In other words, the *supernatural* trumps the *natural*. If the Court limits the freedom to hold a belief to an internalized belief in a supernatural being, any spirituality in which the capacity to hold a belief cannot be divorced from the natural world will fail at this step of the section 2(a) test.

Second, the majority unduly restricted the acceptable range of manifestations of religious belief in a manner that reflects colonialist values. The majority stated that the Ktunaxa's claim did not fall within the parameters of the freedom to manifest religious beliefs.[117] Recall that in *Big M*, the freedom to manifest a religious belief was defined as the freedom to *worship*, *practice*, *teach*, and *disseminate* a belief; *preservation* or *stewardship* are not listed as acceptable manifestations.[118] The exclusion of preservation and stewardship reflects the Christian lens of religion, where manifestations of belief do not require interaction with, let alone preservation of, nature.

The Christian lens of the majority was also evident when they stated that the Ktunaxa were not seeking the freedom to "pursue *practices* related to [belief in the Spirit]."[119] In fact, the Ktunaxa were seeking this freedom, but for a practice deemed unworthy by the majority. The Ktunaxa were seeking to preserve Qat'muk, given their stewardship obligation.[120] However, preserving a landscape is not viewed as a "practice" under the Christian framework because it is passive—humankind is not dominating their God-given land by building a church or performing spiritual rituals on it.

The majority in *Ktunaxa* also decided that freedom of worship did not include the protection of the focal point of worship.[121] Excluding the protection of all focal points of worship is formally equal, but substantively unequal in its application because of the different weights attached to sacred sites and lands in Christianity and Indigenous spiritualities. Through the Christian lens, the focal point of worship, the church, is important, but not vital to act in accordance with the Christian religion; internalized belief is the key. In contrast, sacred sites and lands are the "taproots" that feed Indigenous spiritualities.[122]

The importance of the *location* of the point of worship also differs widely. In Christianity, the location of the church is not crucial to the ability to worship. In Indigenous spiritualities, "worship is often site-specific with the spirituality inherent in the geography."[123] The Ktunaxa cannot simply pick another pristine mountain to be the new focal point of worship like a parishioner can go to a different church of the same denomination in another part of town.[124]

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116 Smith, *supra* note 18 at 271.

117 *Ktunaxa, supra* note 6 at para 75.

118 *Ibid* at para 62.

119 *Ibid* at para 71. [emphasis added]

120 Qat'muk Declaration, *supra* note 5.

121 *Ktunaxa*, *supra* note 6 at para 71.

122 Ross, *supra* note 23 at 3.

123 Stamford, *supra* note 9 at 43.

124 Howard Kislowicz and Senwung Luk, in their article "Recontextualizing *Ktunaxa*" at 208 point out that if Protestants or Catholics sought to protect a sacred site like a church or cemetery, it is unlikely they will need to use section 2(a), as they likely own the property on which the church or cemetery sits. These dominant religious groups likely own the land on which their church or cemetery sits because the Crown historically granted land directly to them. On the contrary, land was not willfully granted to Indigenous groups. Instead, land was dispossessed on a large scale, thereby transferring control over sacred sites and lands from Indigenous groups to settlers or the Canadian state.

The majority in *Ktunaxa* mentioned that they were "cognizant of the importance of protecting Indigenous religious beliefs and practices."[125] Despite this statement, the remainder of their decision—which does not protect Indigenous spiritualities and instead affirms that they are inferior under section 2(a)—brings the sincerity of this statement into question.

CONCLUSION

Constitutional rights are the ultimate form of rights recognition in Canada, supreme over both the common law and legislation. Constitutional rights are not easily alterable, unlike rights granted through legislation, which can be amended or reversed depending on the government in power at the time. To have their spiritualities recognized as constitutional rights, Indigenous groups may use the section 35 title, section 35 rights, and section 2(a) rights frameworks. Unfortunately, all of these tools are dull and ineffective mechanisms to protect sacred sites and lands. Only one Indigenous group has ever proved the existence of Aboriginal title under section 35.[126] No Indigenous group has ever proven the existence of an Aboriginal right to preserve sacred sites and lands under section 35, nor have any proven that they possess the right to preserve sacred sites and lands under section 2(a) of the *Charter*.

Each framework forces Indigenous groups to translate their claims into the language of the common law and explain their stories to a judiciary dominated by non-Indigenous people. Difficulties in translation are then compounded by legal frameworks imbued in colonial values, which presume that Indigenous rights and title do not exist, permit governments to override Indigenous interests in the name of resource exploitation, and view spirituality through a narrow, Christian lens. By constructing legal tests that, in effect, prevent the preservation of Indigenous sacred sites and lands at the constitutional level, the Canadian state perpetuates the dispossession of Indigenous land and the subjugation of Indigenous spiritualities.

With the passage of the *Declaration on the Rights of Indigenous Peoples Act*, implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in British Columbia, and a promise from the federal government to do the same, Indigenous peoples may reassess the routes they take to preserve sacred sites and lands. Perhaps they will conclude that, with the passage of the aforementioned legislation, the section 35 and section 2(a) routes are useful tools in the quest to preserve sacred sites and lands.[127] Or perhaps they will conclude that the Canadian constitution is inherently flawed, that using it as a tool of preservation is a fruitless endeavour, and seek alternative methods to preserve their sacred sites and lands.[128]

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125 *Ktunaxa*, *supra* note 6 at para 10.

126 See *Tsilhqot'in*, *supra* note 41.

127 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; John Paul Tasker, "Throne speech promises tax cut, climate action and ban on military-style firearms," (5 December 2019), online: <https://www.cbc.ca/news/politics/liberal-government-throne-speech-1.5385526> archived at [https://perma.cc/XF3X-733G].

128 Since I initially wrote this paper, the Nature Conservancy of Canada, acting on behalf of the Ktunaxa Nation, "negotiated a financial settlement to cancel all the leases and tenures" held by Glacier Resort Ltd., the proponent of the Jumbo Glacier Ski Resort, in the Upper Jumbo Valley (Qat'muk). This final settlement has cleared the way for the development of an Indigenous Protected and Conservation Area—funded by $16.1 million from the federal government and $5 million from various private donors—which would encompass Qat'muk. While this is welcome news, Qat'muk is still not constitutionally protected. But, perhaps this settlement will set a precedent and other Indigenous groups will use similar tactics to preserve and protect their sacred sites and lands, rather than doing so through litigation (see Columbia Valley Pioneer, "Jumbo saga reaches finale," (18 January 2020), online: <https://www.columbiavalleypioneer.com/news/jumbo-saga-reaches-finale/> archived at [https://perma.cc/G7SE-BMEY]).