



A University of Sussex DPhil thesis

Available online via Sussex Research Online:

<http://sro.sussex.ac.uk/>

This thesis is protected by copyright which belongs to the author.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Please visit Sussex Research Online for more information and further details

“The Use of Law in the Destruction of Indigenous Religions in Canada and the United States: A Comparative Perspective”

Matthew Charles Stamford

Doctor of Philosophy: Law Studies

University of Sussex

May 2012

For my Mother (1928-2009)

“There is no death, only a change of worlds” (Chief Seattle)

PREFACE

A Note on Terminology

When General Robert E. Lee arrived at Appomattox in April 1865 to surrender the remnants of the once mighty Army of Northern Virginia he noticed Ely Parker, a Seneca Indian on General Grant's staff, and remarked, "Good to see one real American here." Parker replied, "We are all Americans here."¹ Although Lee's comment was perhaps aimed at the lack of patriotism displayed by citizens of the North and South, who had been engaged in a fratricidal struggle for four years, it is debateable whether Indians in general, despite Parker's reply, are happy to be described as "Americans".

Deciding on an appropriate term to describe the indigenous peoples of North America is fraught with danger for a white European, even one who remains broadly sympathetic to their concerns and perspectives. Indeed, such use by an alien could be seen as appropriating their inherent right to determine their own descriptive, endorsing the colonialism that led to its use, or attempting to homogenise the many inter-tribal differences. Nevertheless, the term Indian was predominantly used instead of Native American, Native North American or Amerind for a variety of reasons. Firstly, I am reasonably certain that the term "Indian" is not regarded nowadays as a pejorative term as many native scholars themselves use the term. Secondly, many indigenous organizations use the word Indian in the title: National Congress of American Indians and the American Indian Movement. Thirdly, it is used to avoid confusion as both Canadian and U.S. legislation include the term.² Fourthly, Indian activist Russell Means, perhaps tenuously, suggests that Columbus really described Indians not as *Indios* (people of India) but *In Dios* ("in God").³ Fifthly, as suggested above, some Indians reject any descriptive that includes American in the title such as "American Indian" and "Native American." Finally, for clarity, as it is used on both sides of the border.

¹ Bedwell, R. J. (1999). Brink of Destruction : a Quotable History of the Civil War. Nashville, Tenn. ; [Great Britain], Cumberland House. p202

² Pevar, S. L. (2004). The Rights of Indians and Tribes : the Authoritative ACLU Guide to Indian and Tribal Rights. Carbondale, Southern Illinois University Press.p1

³ Zimmerman, L. J. and Molyneaux, B. (1996). Native North America. Boston, Little, Brown.p7

Having said that, the expression “Native American” has been used for variety and differentiation when referring to U.S. Indians, and “First Nations” has been used when describing Canadian Indians. The terms indigenous peoples and aboriginals have been applied to describe all Indians of North America and indeed peoples further afield.⁴

Who is an Indian?

United States

An “ethnological Indian,” who may differ from a “legal Indian,” is a descendant of the inhabitants of North America before the arrival of the European. Indeed, a legal Indian may differ according to the legislation or federal programme. In very general terms, a legal Indian, for federal purposes, is one who has some Indian ancestry and is recognised as Indian by a federally recognised tribe.⁵

Canada

Again, an ethnological Indian would be someone with some ancestry from an original inhabitant of North America. Aboriginal peoples, for the purposes of Section 35(1) of the *Constitution Act* (1982), include, by virtue of Section 35(2), “Indian, Inuit and Metis⁶ peoples of Canada.” The federal apportionment of “Indians and land reserved for Indians,” courtesy of Section 91(24) of the *Constitution Act* 1867, does include the Eskimos of Northern Quebec⁷ and by implication includes all Inuit.⁸ Whether this also includes Metis has not been determined.⁹

⁴ Indigenous itself may bear some explanation. According to a UN study of 1986 “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.” U.N. Subcomm'n on Prevention of Discrimination & Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations FN47 FROM HLRA (2003). "International Law as an Interpretative Force in Federal Indian Law." Harv. L. Rev. **116**: 1751-1773. Professor James Anaya's concise definition of “the term indigenous refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others.” Dannenmaier, E. (2008). "Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine." Wash. UL Rev. **86**: 53-77, 59

⁵ *US v Keys*, 103 F.3d 758, 761 For further discussion of the complexities of the definition please see Anderson, R.T. , Goldberg, C. et al (eds)(2005).pp160-164

⁶ Metis are descendants of mixed marriages between indigenous people and mainly French settlers. (Elliot, D (2000) op.cit., p19

⁷ *Re Eskimos* [1939] S.C.R 104

Indians within the jurisdiction of the *Indian Act* have “Indian status.” In general, they are the descendants of a group recognised by the Canadian government as Indians in 1874,¹⁰ and Indian status is virtually synonymous with membership in one of the approximately 600 Indian bands.¹¹ Indian status is further subdivided into those living on or off reserves. Inuit and Metis do not have “Indian status” for the purposes of the *Indian Act*.¹²

Religious Encumbrance

It is important for any author, who purports to write on religion, to declare his own religious affiliation at the outset. This could best be described by Deloria’s memorable epithet as a “Seven Day Absentist.”¹³ It is submitted that this lack of any religious baggage is perhaps an advantage in providing a more dispassionate and objective viewpoint when discussing the treatment of one religion by another.

Acknowledgements

I am greatly indebted to my benevolent supervisors Dr Richard Vogler and Dr Charlotte Skeet for their patience and wisdom; my Father for his proofreading; and DBT for the company and inspiration. Any errors I may have cunningly sneaked in behind their backs are entirely mine.

⁸ Elliot, D (2000) op.cit., p13

⁹ *Ibid*

¹⁰ Formerly patrilineal but since 1985 and Bill C-31 now Indian women who marry non-Indian men can pass on Indian Status. Please see Elliot, D (2000) op.cit., p16 for further complexity.

¹¹ Elliot, D (2000) op.cit., p14

¹² *ibid* pp18-19

¹³ *ibid* p1

University of Sussex

Matthew Charles Stamford

Doctor of Philosophy: Law Studies

*“The Use of Law in the Destruction of Indigenous Religions in
Canada and the United States: A Comparative Perspective”*

Summary

This thesis will be a historical and comparative treatment of the way law has been applied in both an assimilative and proscriptive manner to destroy Indian religions in the United States and Canada. By producing the first such comparison, it is hoped that the emphasis on different outcomes may promote the cross-border adoption of alternative legal strategies, and ultimately provide something that may have potential as advocacy.

The Nineteenth Century saw attempts by the North American governments, often motivated by revulsion, to homogenise their native populations with illegitimate, often illegal and sometimes un-constitutional laws, aimed at the suppression of their religions. In the Twentieth Century there was less overt proscription but rather an acquisitive attitude to native cultural and sacred artefacts which continues to have a destructive impact on their religious practices. Although there have been sporadic attempts to reverse this treatment by repatriating some of these objects, such gestures have come at little governmental cost. It is the continuing restrictions on Indian prayer at sacred sites, often motivated by opposing commercial interests, which reveal the true extent of the forfeit the governments are prepared to pay.

An essential part of this study will be an investigation into how international legal doctrines that were ultimately derived from Christianity were introduced into North America to deprive the indigenous peoples of their legal rights. International Law on indigenous peoples will then be re-examined in the present era for doctrines that can be re-incorporated in order to reverse this colonisation. The seminal United Nations *Declaration on Indigenous Peoples* (2007), together with other more substantive and binding International Law, will be critically assessed for their potential to bolster domestic law and its ambivalent attitude to Indian religious freedom.

CONTENTS

Title Page

Dedication

Declaration

Preface

Summary

Contents

Case Law

Domestic Legislation and International Law Documents

<u>Introduction</u>	1
Aims	1
Importance	2
Structure	2
Originality/Literature Review	5
Comparative Treatments	5
The Christian Foundations of Indian Law	6
Nineteenth Century Government Policies	8
Spirituality	9
Free Exercise and Sacred Land in the Twentieth Century	10
Limitations and Justification	12
Critical Indigenous Legal Theory: A New Methodology	13

PART I WHEN WORLDS COLLIDE

1	<u>Chapter One: The Doctrine of Discovery and Christian Imperialism</u>	17
	1.1 Introduction	17
	1.2 Origins of the Doctrine of Discovery	18
	1.2.1 Introduction	18
	1.2.2 Papal Bull	19
	1.2.3 International Reaction	20
	1.2.4 Royal Patent	21
	1.2.5 Conquest.	22
	1.2.6 Locke and Agriculturalism	23
	1.3 Crown Attempts to Conciliate the Indians and the French	24
	1.3.1 The Royal Proclamation (1763)	24
	1.3.2 The Quebec Act (1774)	26
	1.4 The Great Republic	27
	1.4.1 Early Indian Policy	27
	1.4.2 Johnson v M'Intosh (1823)	28
	1.4.2.1 Background	28

	1.4.2.2 The Opinion	28
	1.4.2.3 Marshall's Attempts at Containment	30
	1.4.2.4 The Consequences	32
	1.5 Conclusion	33
2	<u>Chapter Two: Christians, Indians and Secular Liberalism</u>	36
	2.1 Introduction	36
	2.2 Church and State in North America	37
	2.3 The Great Spirit	41
	2.4 Church and State in Indian Society	45
	2.5 Indians and Western Legality	47
	2.5.1 Tribal Rights	47
	2.5.2 Indian Religion and Western Jurisprudence	48
	2.6 Conclusion	50
	 <u>PART II: CULTURAL GENOCIDE IN THE LONG NINETEENTH CENTURY</u>	
3	<u>Chapter Three: The Indian within the Nineteenth Century North American Legal Systems</u>	53
	3.1 Introduction	53
	3.2 United States	54
	3.2.1 Indian Treaties	54
	3.2.2 Tribal Sovereignty and the Role of Congress	55
	3.2.3 Plenary Power and the Supreme Court	57
	3.2.4 Indians and Citizenship	59
	3.3 Canada	60
	3.3.1 Ontario and Quebec	60
	3.3.2 The Union of the Two Canadas	61
	3.3.3 Confederation	62
	3.3.4 Indian Treaties	63
	3.4 Conclusion	64
4	<u>Chapter Four: Religious Freedom Jurisprudence in Nineteenth Century North America</u>	66
	4.1 Introduction	66
	4.2 United States	66
	4.2.1 The Establishment Clause	66
	4.2.2 The Free Exercise Clause	69
	4.3 Canada	73
	4.3.1 Pre-Confederation	73
	4.3.2 Confederation	74
	4.3.3 Federalism and Religious Freedom	75
	4.4 Conclusion	76

5	<u>Chapter Five: Legalising Christianity as an Instrument of Assimilation</u>	78
	5.1 Introduction: The Biology of Assimilation	78
	5.2 The United States	80
	5.2.1 Early Policy	80
	5.2.2 The Civilization Fund	80
	5.2.2.1 The First Amendment and the Civilization Fund	81
	5.2.3 The Peace Policy	82
	5.2.3.1 The First Amendment and the Peace Policy	84
	5.2.4 Christianization through Education	87
	5.2.4.1 Compulsory Education	87
	5.2.4.2 The Contract Schools	88
	5.2.4.3 The First Amendment and the Schools	89
	5.3 Canada	90
	5.3.1 Early Policy	90
	5.3.2 Missionaries	91
	5.3.2.1 The Constitutionality of the Missions	92
	5.3.3 Education	93
	5.3.3.1 The Residential School System	93
	5.3.3.2 The Constitutionality of the Schools	95
	5.3.3.3 Indian Treaties and Residential Schools	96
	5.4 Conclusion	97
6	<u>Chapter Six: The Proscription of Indian Religion</u>	99
	6.1 Introduction	99
	6.2 United States	100
	6.2.1 Heathenish Dances and Medicine Men	100
	6.2.2 The Courts of Indian Offenses	101
	6.2.2.1 Legal Analysis	104
	6.3 Canada	106
	6.3.1 The Potlatch and the Tamanawas Dance	107
	6.3.1.1 Legislation	108
	6.3.1.2 The Inveterate Kwakiutl	110
	6.3.2 Other Illegal Dances	113
	6.3.3 Off Reserve Dancing	115
	6.3.4 Legitimacy of the Proscriptions	115
	6.3.5 Legal Analysis	116
	6.4 Conclusion	117

PART III: ACCOMMODATION FROM THE TWENTIETH CENTURY

7	<u>Chapter Seven: The Indians within the Twentieth Century North American Legal Systems</u>	120
	7.1 Introduction	120
	7.2 Aboriginal Title	122
	7.2.1 United States	122
	7.2.2 Canada	123
	7.3 Aboriginal Rights	124

7.3.1 United States	124
7.3.2 Canada	125
7.4 Trust Relationship	128
7.4.1 United States	128
7.4.2 Canada	129
7.5 Equal Protection	131
7.5.1 United States	131
7.5.2 Canada	133
7.6 Conclusion	134
8	<u>Chapter Eight: Religious Freedom in the Twentieth Century and Beyond</u>
8.1 Introduction	136
8.2 United States	136
8.2.1 Free Exercise of Religion	136
8.2.1.1 <i>Employment Division v Smith</i>	138
8.2.1.2 The Religious Freedom Restoration Act 1993	141
8.2.2 Establishment Clause	144
8.3 Canada	145
8.3.1 Pre-Charter Case Law	145
8.3.2 The Canadian Charter of Rights and Freedoms	148
8.3.2.1 Religious Freedom and Section 2(a) of the Canadian Charter	148
8.3.2.2 Establishment Concerns	150
8.4 Conclusion	152
9	<u>Chapter Nine: Sacred Objects</u>
9.1 Introduction	153
9.2 United States	154
9.2.1 Early Legislation	154
9.2.2 Native American Graves Protection and Repatriation Act (1990)	155
9.2.2.1 Main Provisions	156
9.2.3 Litigation and Tribal Law	159
9.2.4 United States Reform	161
9.3 Canada	162
9.3.1 Archaeological Resources	162
9.3.2 National Repatriation Legislation	163
9.3.3 Provincial Repatriation Legislation	164
9.3.4 Litigation and Tribal Law	165
9.3.5 Canadian Reform	167
9.4 Conclusion	170
10	<u>Chapter Ten: Sacred Sites</u>
10.1 Introduction	171
10.2 United States	173
10.2.1 Introduction	173

10.2.2 Case Law	174
10.2.2.1 <i>Lyng</i>	176
10.2.2.2 Post <i>Lyng</i> Case Law	178
10.2.3 Executive Accommodation	179
10.2.3.1 Executive Order 13007	179
10.2.3.2 Case Law on Executive Accommodation	180
10.2.4 Culture or Religion	181
10.2.5 The Religious Land Use and Institutionalized Persons Act 2000	182
10.2.6 Establishing a Property Right	183
10.2.6.1 Easements and Adverse Possession	184
10.2.7 Historic Preservation and Environmental Legislation	186
10.2.8 Treaty Rights	188
10.2.9 Congressional Land Grants	189
10.2.10 A Sacred Site Statute	190
10.2.11 Summary	191
10.3. Canada	192
10.3.1 Introduction	192
10.3.2 Interlocutory Injunctions	193
10.3.3 Judicial Review and the Duty to Consult	197
10.3.4 Section 35 and Section 2(a) of the Constitution Act 1982	198
10.3.5 Heritage and Environmental Legislation	200
10.3.6 Treaty Rights	201
10.3.7 Summary	202
10.4 Conclusion	203
 11 <u>Chapter Eleven: International Law and Indigenous Peoples</u>	 204
11.1 Introduction	204
11.2 The International Labour Organization Conventions 107 and 169	205
11.3 The International Covenant on Civil and Political Rights (1966)	206
11.4 The Inter-American System of Human Rights	208
11.4.1 The Inter-American Commission	208
11.4.2 The Proposed American Declaration on the Rights of Indigenous Peoples	209
11.5 The International Convention on the Elimination of Racial Discrimination 1965	210
11.6 United Nations Declaration on the Rights of Indigenous Peoples (2007)	211
11.6.1 Provisions	212
11.6.2 Influence of the Declaration	214
11.6.3 The Declaration as Customary International Law	216
11.7 Conclusion	219
 <u>Conclusion</u>	 220
 <u>BIBLIOGRAPHY</u>	 227
<u>WEBSITES</u>	259

<u>APPENDICES</u>	260
<u>A) Methods and Methodologies</u>	260
Methods and Challenges	260
Methodologies	262
Historical	262
Anthropology	264
Comparative	266
<u>B) Genocide</u>	267
The Residential Schools as Death Camps	267
International Law on Genocide	269

CASE LAW

Canada

- Adler v. Ontario*, [1996] 3 S.C.R. 809.
- Attorney-General of Ontario v. Attorney-General of Canada : Re Indian Claims*, [1897] A.C. 199 (J.C.P.C.)
- Bear Island Foundation v. Ontario*, (1990) 70 O.R. (2d) 574
- Bolton v. Forest Pest Management Institute* (1985) 66 B.C.L.R. 126
- Bowman v. Secular Society, Limited*, (1917) A.C. 406
- British Columbia (Attorney General) v. Swan* Unreported, B.C.S.C. Rowles J., 20 September, 1989, Vancouver C894361
- Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313
- Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147
- Chabot v. School Commissioners of Lamorandiere*, (1957) Que. Q.B. 707
- Chaput v. Romain*, (1955) S.C.R. 834
- Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3rd) 644; 195 D.L.R. (4th) 135 (C.A.)
- City of Kamloops v. Nielson*[1984] 2 S.C.R. 2
- City of Montreal v. Madden*, (1884) 29 Lower Canada Jurist 134
- Connolly v. Woodrich*, (1867) 17 R.J.R.Q. 75
- Cowan v. Milbourn* (1867) L.R. 2 Exch. 230
- Delgamuukw v. British Columbia*, [1997] 153 D.L.R.
- Dunnet v. Forneri*, (1877) 25 Gr.199
- Ex Parte Ettamass*, (1892) 2 BCR 232
- Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031
- Freitag v. Penetanguishene (Town)*, 47 O.R.3d 301
- Guerin et al. v. The Queen et al*, [1984] 2 S.C.R. 335
- Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511
- Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487
- Hunt v. Halcan Log Services Ltd.*, (1986) 4 C.N.L.R. 63 (S.C.)
- International Forest Products Ltd. v. Pascal* Unreported, B.C.S.C., McKinnon J., 20 November 1986, Prince George 10236/86.
- Johnson v. Jones* (1895), 26 O.R. 109
- Johnstone v. Connolly*, (1869) 17 R.J.R.Q. 266
- Jules v. Harper Ranch Ltd.* [1989] 3 C.N.L.R. 67 (B.C. S.C.)
- Kinsey v. Kinsey*, (1894) 26 O.R. 99
- Kitlakatla Band v. British Columbia*, [2002] 2 S.C.R. 146
- Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357
- M (K.) v.M (H.)* [1992] 3 S.C.R. 6
- MacMillan Bloedel Ltd. v. Mullin* (1985) 2 C.N.L.R. 28 (C.A.)
- McCrady v. Ontario* [1991] O.J. No. 1722 (Ont. Ct. Gen. Div.)
- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (S.C.C.)
- Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911 (Can.).
- Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.)
- Mount Currie Indian Band v. International Forest Products*, [1991] B.C.J. No.703 at 4
- Northcrest v. Amselem*, [2004] 2 S.C.R. 551
- Nowegijick v. The Queen*, [1983] 1 S.C.R. 29
- Ominayak v. Norcen Energy Resources Ltd.*, (1983) 3 C.N.L.R. 83 (Q.B.)
- Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, [2003] 1F.C. 331

Osoyoos Indian Band v. Oliver (Town of), [2001] 3 S.C.R. 746
Onimet v. Bazin, (1912) 3 D.L.R. 593
Pasco v. Canadian National Railway Company (1986) 69 B.C.L.R. 76
Pringle v. Napanee, (1878) 32 U.C.Q.B. 285
Queen v. "Bear's Shin Bone," (1899) 3 C.C.C. 329
Queen v. Drybones, [1970] 1 S.C.R. 282
Queen v. Etchease of the Muscompetung Reserve 1902 (unreported)
R v. Adams, [1996] 3 S.C.R. 101
R v. Drybones, [1970] S.C.R. 282
R v. Francis, [1988] 1 S.C.R. 1025;
R v. Gauthier, (1905) 11 C.C.C. 263
R v. Gonzales, (1962) 32 D.L.R. (2d) (2d) 290
R v. Pamajewon, [1996] 2 S.C.R. 821
R v. Sparrow, [1990] 1 S.C.R. 1075
R v. Van der Peet, [1996] 2 S.C.R. 507
R. v. Big M Drug Mart, [1985] 1 S.C.R. 295
R. v. Gladstone, [1996] 2 S.C.R. 723, 4 C.N.L.R. 65.
R. v. Hape, [2007] 2 S.C.R. 292
R. v. Leach, ex parte Bergsma, [1966] 1 O.R. 106 (Ont. C.A.).
R. v. N.T.C. Smokehouse La, [1996] 2 S.C.R. 672
R. v. Nan-E-Quis-A-Ka, (1889) Carswell NWT 14
R. v. Powley, [1999] 1 C.N.L.R. 153
R. v. Sharpe, [1999] B.C.J. No. 1555
R. v. Sparrow, [1990] 1 S.C.R. 1075
Re Cribbin and the City of Toronto, (1891) 21 O.R. 325
Re Drummond Wren, [1945] 4 D.L.R. 674 (Ont. H.C.)
Re Zylberberg & Director of Educ., [1986] 55 O.R. 2d 749 (Ont. H.C.)
Reference re Alberta Statutes, [1938] S.C.R. 100
Regina v. Chaulk, [1990] S.C.R. 1303
Regina v. Edwards Books and Art, Ltd., [1986] 2 S.C.R. 713
Regina v. Machekequonabe, (1896) 28 O.R. 309
Roberts and Rosetanni v. The Queen, [1963] S.C.R. 651
Roncarelli v. Duplessis, [1959] S.C.R. 1921
RWDSU v. Dolphin Delivery [1986] 2 S.C.R. 573
Saumur v. City of Quebec, [1953] 2 S.C.R. 299
Siska Indian Band v British Columbia [1999] B.C.J. No. 2354 (B.C.S.C.)
St. Catherine's Milling and Lumber Company v. The Queen, [1887] 13 S.C.R. 577
Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550 (Can.)
The King v. Epaphrus Lord Phelps, (1823), 1 Tay. 47.
The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.)
Thlowsits Nation v. MacMillan Bloedel Ltd., 1991] 2 C.N.L.R. 164
Westar Timber Ltd. v. Ryan, (1989) 60 D.L.R. (4th) 453
Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245
Zydelberg v. Sudbury Board of Education, (1988), 52 D.L.R. (4th) 577 (Ont. C.A.)

United States

Access Fund v. United States Department of Agriculture, 499 F.3d 1036 (9th Cir. 2007).
Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999)
Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003)
Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994)
Attakai v. U.S., 746 F. Supp. 1395 (D. Ariz. 1990)
Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981)
Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)
Bd. of Educ. v. Grumet, 512 U.S. 687 (1994)
Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998)
Board of Education of Kityas Joel Village School District v. Grumet, 512 U.S. 687 (1994)
Bolling v. Sharpe, 347 U.S. 497 (1954)
Boos v. Barry, 485 US 312 (1988)
Bowen v. Roy, 476 U.S. 693 (1986)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Bradfield v. Roberts, 175 U.S. 291 (1899)
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).
Cantwell v. Connecticut, 310 U.S. 296 (1940)
Carpenter v. Shaw, 280 U.S. 363 (1930)
Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889)
Charles v. Verbagen, 348 F.3d 601 (7th Cir. 2003)
Cherokee Nation v. Georgia, 30 U.S. (5 Peters.) 1 (1831)
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)
Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989)
Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)
City of Boerne v. Flores, 521 U.S. 507, (1997)
City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y. 125 S.Ct. 1485 (2005)
Clark v. Smith, 38 U.S. (13 Peters) 195 (1839)
Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).
County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Crow v. Gullett, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983)
Cutter v. Wilkinson, 125 S. Ct. 2113 (2005)
Davis v. Beason, 133 U.S. 341 (1889)
De Lima v. Bidwell, 182 U.S. 1 (1901)
Dennis v. Pitner, 106 F.2d 142 (7th Cir. 1939)
Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001)
Dorr v. United States, 195 U.S. 138 (1904)
Downes v. Bidwell, 182 U.S. 244 (1901)
Edwards v. Aguillard, 482 U.S. 578 (1987)
Elk v. Wilkins, 112 U.S. 94 (1884)
Employment Division v. Smith, 494 U.S. 872 (1990)
Engel v. Vitale, 370 U.S. 421 (1962)
Everson v. Board of Education, 330 U.S. 1 (1947)
Filartiga v. Pena-Irala, 630 F.2d. 876 (2d Cir. 1980)
Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810).
Frazee v. Illinois Employment Security Dept., 489 U.S. 829 (1989)
Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Penn. 2002)
Gerhardt v. Lazuroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002)
Golden Eagle v Johnson 493 F.2d 1179 (9th Cir. 1974),
Goldman v. Weinberger, 475 U.S. 503 (1986)

Gonzales v. O Centro Espirito, 126 S. Ct. 1211 (2006).
Goodluck v. Apache County, 417 F. Supp. 13 (D.Ariz. 1975)
Handel v. Artukovic, 601 F. Supp.1421, 1426-28 (C.D. Cal. 1985)
Harjo v. Kleppe 420 F.Supp. 1110 (D.D.C. 1976)
Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993)
Illinois Commerce Comm'n v. ICC, 848 F.2d 1246 (D.C. Cir. 1988)
Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972)
Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823)
Jones v. Meehan, 175 U.S. 1 (1899)
Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001)
Korematsu v. United States, 323 U.S. 214 (1944)
Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919)
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)
Larson v. Valente, 456 U.S. 228 (1982)
Lee v. Weisman, 505 U.S. 577 (1992).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Locke v. Davey, 540 U.S. 712 (2004).
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)
Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).
Lynch v. Donnelly, 465 U.S. 668 (1984).
Lyng v. Northwest Indian Cemetery Association, 485 U.S. 439 (1988)
Marbury v. Madison, 5 U.S. 137 (1803)
Marsh v. Chambers, 463 U.S. 783, (1983)
Martinez v. Santa Clara Pueblo, 540 F. 2d. 1039 (10th Cir. 1976)
Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004)
Minersville School District Board of Education v. Gobitis, 310 U.S. 586 (1940)
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)
Mitchel v. United States, 31 U.S. (6 Pet.) 515
Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)
Montana v. United States, 450 U.S. 544 (1981).
Mormon Church v. United States, 136 U.S. 42 (1889)
Morton v. Mancari, 417 U.S. 535 (1974).
Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999)
N. Cheyenne Tribe v. Martinez, No. Civ. 03-5019 (D.S.D.W.D. May 23, 2003)
Native American Church v. Navajo Tribal Council 272 F.2d 131 (1959)
Natural Arch and Bridge Society v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002), *affirmed by*
No. 02-4099, 98 Fed. Appx. 711 (10th Cir. Mar. 23, 2004).
Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (2008)
New Mexico Ranchers Association v. Interstate Commerce Commission, 850 F.2d 729 (D.C. Cir. 1988)
New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979)
O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003)
O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979)
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)
Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (Sup. Ct. Onondaga County 1899)
People v. David, 549 N.Y.S. 2d 564 (N.Y. City Ct. 1989)
People v. Ruggles, 8 Johns. 290 (1811)
People v. Woody, 394 P.2d 813 (1964)
Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845).
Peyote Way Church of God, inc v Thornbaugh 922 F.2d 1210 (5th Cir. 1991)
Pit River Tribe v. U.S. Forest Service, 469 F.3d 768 (9th Cir. 2006)

Plessy v. Ferguson, 163 U.S. 537 (1896)
Prince v. Massachusetts, 312 U.S. 158 (1944)
Prows v. Volkswagen of Am., Inc., 797 F.2d 129 (3d Cir. 1986).
Quick Bear v. Leupp, 210 U.S. 50 (1907)
Re Eskimos, [1939] S.C.R. 104
Re Grady 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).
Re Heff, 197 U.S. 488 (1905)
Reynolds v. United States, 98 U.S. 145 (1878)
Rice v. Cayetano, 528 U.S. 495 (2000).
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
Schaghticoke Tribe of Indians v. Kent Sch. Corp., 423 F. Supp. 780 (D. Conn. 1976)
Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980),
Sherbert v. Verner, 374 U.S. 398 (1963)
Shoshone Tribe v. United States, 299 U.S. 476 (1937)
Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004)
South Carolina v. Catawba Indian Tribe inc., 476 U.S. 498 (1986)
South Dakota v. Bourland, 508 U.S. 679 (1993).
South Dakota v. Dole, 483 U.S. at 207-08 (1987)
Standing Bear v. Crook, 25 F. 695 (1879)
State v. Big Sheep 243 P. 1067 (Mont. 1926).
State v Blake 695 P.2d 336 (Haw. App. 1985).
State v Soto 21 Or. App. 794, 537 P.2d 142 (1975)
State v Whittingham 504 P.2d 950 (Ariz. Ct. App.)
Stone v. Graham, 449 U.S. 39 (1980)
Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999);
Talton v Mayes 163 U.S. 376 (1896).
Tee-Hit-Ton v. United States, 348 U.S.272 (1955)
Tel-Oren v. Libyan Arab Republic., 726 F.2d 774, 779-80 n. 4 (C.A. D.C. 1984)
Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)
The Cherokee Tobacco, 78 U.S. (11 Wall) 616 (1871)
Three Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cls. 543 (1968)
Toledo v NobelSysco Inc 651 F. Supp. 483 (D.N.D. 1986).
Tulee v. Washington, 315 U.S. 681 (1942)
Turner v. American Baptist Missionary Union, 24 Fed.Cas, 344 (1852)
United States ex rel. Zuni Tribe v. Platt, 730 F. Supp. 318 (1990)
United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946)
United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991)
United States v. Clapox, 34 Fed. Rep. 575 (1888)
United States v. Diaz, 499 F.2d 113 (9th Cir. 1974)
United States v. Fernandez, 35 U.S. (10 Peters) 303 (1836)
United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993)
United States v. Kagama, 118 U.S. 375 (1886)
United States v. Lee, 455 U.S. 252 (1982)
United States v. Lopez, 514 U.S. 549 (1995)
United States v. Mitchell, 463 U.S. 206 (1983)
United States v. Morrison, 529 U.S. 598 (2000)
United States v. Nice, 241 U.S. 591(1916)
United States v. Rogers, 45 U.S. (4 How.) 567 (1846)
United States v. Seeger, 380 U.S. 163 (1965)
United States v. Sioux Nation, 448 U.S. 371 (1980).

United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984)
United States v. Wheeler, 434 U.S. 313 (1978)
United States v. Winans, 198 U.S. 371 (1905)
United States v. Dann, 873 F.2d 1189 (9th Cir.) (1989)
United States v. Santa Fe Pacific Railroad Company, 314 U.S. 339 (1941)
Vidal v. Girard's Executors, 43 U.S. (1 How.) 127 (1844)
Wallace v. Jaffree, 472 U.S. 38 (1985)
Walz v. Tax Commission 397 U.S. 664 (1970)
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)
Whitehorn v State 561 P.2d 539 (Okla. Ct. App. 1977)
Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997)
Wilson v. Block, 708 F.2d 735 (DC Cir.)
Winters v. United States, 207 U.S. 564 (1908)
Winton v. Amos, 255 U.S. 373 (1921)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832)
Xuncax v. Gramajo, 886 F. Supp. 162, 193-94 (D. Mass. 1995)

UK and Commonwealth

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396
Brigid Foley Ltd. v. Elliott, [1982] R.P.C. 433
Bulun Bulun v. R & T Textiles Pty Ltd., (1998) 157 A.L.R. 193
Calvin v. Smith, 7 Eng. Rep. 1,2 S.T. 559 (1608)
Campbell v Hall, 98 E.R. 848 (K.B.) (1774)
Entick v. Carrington, [1765] 19 St Tr 1030
Hoffman La Roche v. Secretary of State for Trade and Industry, [1975] A.C. 295
Mabo v. Queensland, 107 A.L.R. (1992) Australian High Court
Omichund v Barker, 125 E.R. 1310 (Ch. (1744)
St. Catherine's Milling and Lumber Company v. The Queen, (1899) 14 App. Cas. 46 (P.C)
Taylor's Case, (1676) 3 Keb. 607

International

Barcelona Traction (Belgium v. Spain), I.C.J. Reports, 1970
Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L.N/II.117, doc. 1 rev. 1 ¶ 128 (2003)
Lovelace v. Canada, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc A/36/40 (1981).
Mayagna (Sumo) Awas Tingni Community v Nicaragua, R (31 August 2001) Inter-Am Court H R (Ser C) No 79
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits, [1986] I.C.J. Rep. 14.
North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 44 (Feb. 20)
Omniyak v. Canada, U.N. GAOR, 45th Sess., Supp. No. 40, Annex 9, at 27, U.N. Doc. A/45/40 (1990).
Plan de Sanchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 85 (Nov. 19, 2004)
Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007).

DOMESTIC LEGISLATION AND INTERNATIONAL LAW DOCUMENTS

United States

Act of March 2, 1889, 25 Stat. 888

Act of May 8, 1906, 34 Stat. 182

American Indian Religious Freedom Act (AIRFA) 1978 PL 95-341, 92 Stat. 469

Antiquities Act (1906) 16 U.S.C. ss 431-433

Appropriation Act of March 3, 1871, 16 Stat. 544, 566 (25 U.S.C. s71)

Archaeological Resources Protection Act (1979) 16 U.S.C. ss 470aa-470mm

Archaeological Resources Protection Act, 16 U.S.C. s 470hh (1982). 5 U.S.C. s 552 (1982)

Army Appropriation Bill (1870) 16 Stat. 319

Assimilative Crimes Act (ACA) (18 U.S.C. s13)

Civil Rights Act (1964) 42 U.S.C. § 2000e-2(i) (1994).

Civilization Fund Act (1819) 3 Stat. 516

Copyright Act (1976) PL 94-553

El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. s 460uu-47

Executive Order 13007, 61 Fed. Reg. 26,771 (1996)

Freedom of Information Act (1966) PL 89-554

General Allotment Act (1887) 24 Stat. 388

Indian Appropriation Act (1899) 30 Stat. 924

Indian Appropriation Act of 27 May 1878 20 Stat. 63

Indian Appropriation Act of 29 June 1888 25 Stat. 217

Indian Appropriation Act of April 10 1869 16 Stat. 40

Indian Arts and Crafts Act (1990) PL 101-644

Indian Citizenship Act (1924) 43 Stat. 253

Indian Civil Rights Act (1968) 82 Stat. 77-81

Indian Claims Commission Act (1946), PL 79-726

Indian Country Crimes Act (18 U.S.C. s1152)

Indian Reorganization Act (1934) 25 U.S.C. ss461-479

Indian Self-Determination and Education Assistance Act (1975) 88 Stat 2203-2214

Indian Tribal Justice Act (1993) 107 Stat. 2004-2010

Lacey Act (1907) 34 Stat. 1221

Lanham Act (1946) 15 U.S.C. c.22

Major Crimes Act (1885) 23 Stat. 385

National Environmental Policy Act (1969) 42 U.S.C. ss 4321-4347

National Historic Preservation Act (1966) 16 U.S.C. ss 470a to 470w-6

National Museum of the American Indian Act 20 U.S.C. § 80q (2000).

Native American Graves Protection and Repatriation Act (1990) PL 101-601

Northwest Ordinance of (1787) 1 Stat. 50

Public Law 83-280 (18 U.S.C s1162 and 28 U.S.C s1360) 67 Stat. 588

Public Law 93-638 (25 U.S.C ss 450-450n). 88 Stat. 2203

Quiet Title Act 28 U.S.C. s 2409a (2000)

Religious Freedom Restoration Act (1993) 42 U.S.C. s2000bb

Religious Land Use and Institutionalized Persons Act 2000 42 U.S.C. ss 2000cc-5(5)

Rules for Indian Courts April 10 1883

Rules for Indian Courts August 27, 1892 House Executive Document No 1 52d congress 2d sess. Serial 3088 pp28-31

The Defence Appropriation Act (1999) PL 106-79

The Genocide Convention Implementing Act (Proxmire Act) (1988) 18 USC c 50A

The Indian Civil Rights Act (1969) 25 U.S.C. ss 1301-3

The Indian Self-Determination and Education Assistance Act (1975) 25 U.S.C. §§ 450-458 (1994).
Treaty of Medicine Lodge (1867) with the Kiowas, Comanches and Apaches 15 Stat. 581
Treaty with Kansa Tribe, (1846). 9 Stat. 842.
Treaty with the Blackfeet (1865) 14 Stat. 727
Treaty with the Chippewa. (1859) 12 Stat. 1105
Treaty with the Menomonee, (1831) 6, 7 Stat. 342
Treaty with the Oto and Missouri Indians, (1854) 10 Stat. 1038
Treaty with the Seminole, (1866). 14 Stat. 755
Treaty with the Sioux and Arapaho (1868) 15 Stat. 635
United States Constitution 1787
Zuni Indian Tribe Lands Bill (P.L. 98-408; 98 Stat. 1533)

Canada

Act to Amend Certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia S.C. 1874, chapter 21
Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulations Alta Reg. 96/2004
British Columbia Heritage Conservation Act R.S.B.C 1996 c.187
British North America Act 1867 (Constitution Act 1867) 1867 (U.K.) 30 & 31 Vict., c3
Canada Act 1982, (U.K.)
Canada Fair Employment Practices Act S.C. 1952-3 c.19
Canada National Parks Act S.C. 2000 c.32
Canadian Bill of Rights (1960) S.C. c.44
Canadian Charter of Rights and Freedoms ss1-34 of The Constitution Act 1982
Constitution Act 1982 (schedule B to the Canada Act 1982 (U.K.) 1982 c11
Constitutional Act 1791 31 Geo. III, c. 31 (U.K.)
Criminal Code of Canada, 1892, 55-56 Vict. c.29
Criminal Code, R.S.C. 1985, c. C-46
First Nations Sacred Ceremonial Objects Repatriation Act (2000) (Alberta) R.S.A. 2000, c. F-14
Freedom of Worship Act (Quebec) 1851 14 & 15 Vict., c.175
Gradual Civilization Act 1857, 20 Vict., c.26
Gradual Enfranchisement Act 1869, 31 Vict. c.42
Indian Act R.S.C. 1985, c. 1-5,
Indian Act S.C. 1876 c.18
Indian Act S.C. 1876 c. 18
Indian Act S.C. 1951 c.29
Indian Act S.C.1895 c.32
Indian Lands Act S.C. 1860 Chapter 151
Lord's Day Act R.S.C. 1970, c. L-13
Lord's Day Act, R.S.C. 1952, c. 171
Museum Act (Canada) S.C.1990 c3
Museum Act (British Columbia) R.S.B.C.1996 c.326
Nisga'a Final Agreement Act, S.C. 2000, c. 17, s. 1
North West Territories Act S.C. 1875 c.50
Quebec Act 1774

Royal Proclamation 1763

The Ontario Limitations Act S.O. 2002, c. 24

Treaties 1 and 2 Between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions 3 August 1871.

Treaty 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions 3 October 1873.

Treaty 4 Between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice 15 September 1874

Treaty 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions 20 September 1875

Treaty number 6 23 August 1876

Treaty number 7 Between Her Majesty the Queen and the Blackfeet and other Indian tribes 22 September 1877

Union Act 1840 (U.K.), 3 & 4 Vict. c.35

Wanuskewin Heritage Park Act S.S. 1997, c.W-1.3

UK and Commonwealth

Slavery Abolition Act (1833) 3 & 4 Will. IV c. 73

British Museum Act 1963 (U.K.) 1963 c.24

Museum and Galleries Act (UK) 1992 c.44

International Law Documents

American Declaration of the Rights and Duties of Man (1948)

American Convention on Human Rights (1969)

Charter of the Organization of American States (1948)

Convention on the Rights of the Child (1989)

Genocide Convention (1948)

ILO Convention 107: Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957

ILO Convention No. 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989

International Convention on the Elimination of all Forms of Racial Discrimination (1965)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Statute of the International Court of Justice (1945)

UNGA Resolution 47/ 135: The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

UNGA Resolution 61/295: The Declaration on the Rights of Indigenous Peoples (2007)

INTRODUCTION

Aims

This thesis will compare the historical treatment of indigenous religions in Canada and the United States from the Nineteenth Century until the present day. It is hoped that employing a comparative approach will facilitate the cross-border transplantation of successful legal strategies, question the inevitability of each country's jurisprudential approach, and emphasise alternative outcomes.

A broader aim is to demonstrate how law, having been used historically as a sword by the dominant societies against native religious practices, can be operationalised as a shield in the contemporary period. One such example is how the Doctrine of Discovery, derived from Christianity and the European Law of Nations, was incorporated into North American jurisprudence from first contact in order to justify the destruction of indigenous legal rights, and how a contemporary re-incorporation of International Law may help to reverse this process. This may prove optimistic, as there is merely a selective engagement with supra-national law in North America, driven by expediency.

Subsidiary themes include demonstrating that North American Indian Law is founded on a Christian/Infidel dichotomy and that North American religious freedom jurisprudence is tacitly based on, and privileges, a Judaeo-Christian perspective. There will also be an investigation into whether the extent of any accommodation of Indian religion is inversely proportional to the material sacrifice demanded of the dominant society.

More generally, it is hoped that the dissemination of knowledge about Indian religions and the threat posed by the North American governments will foster greater empathy and respect for Indian perspectives and experiences. The crystallisation of two centuries of religious destruction in one text may, it is tentatively suggested, also prompt a greater impetus within Indian societies themselves to codify tribal heritage programmes in order to further safeguard their rich spiritual patrimony.

Importance

Although much of the more flagrant destruction of Indian religious practices ceased in the early Twentieth Century, there remains an ongoing but covert subordination of Indian spirituality, typified by the constant need to explain and secure protection for their unfamiliar religious practices within a society, steeped as it is, in the Judaeo-Christian tradition. For example, Peyote to the Indian worshipper is a sacrament, to the North American governments it is merely an intoxicant. Similarly, sacred Indian objects are regarded as museum curios and universal cultural patrimony by western society, rather than essential elements in the perpetuation of a religion. Furthermore, Indian sacred sites still remain vulnerable within a dominant society which regards the North American geography as inherently secular and, leaving aside sporadic pangs of environmental conscience, available for commercial despoliation.

Due to the relatively recent (2007), but seminal, United Nations *Declaration on Indigenous Peoples*, a re-assessment of how International Law can be recruited to protect indigenous legal rights is also important at this time. Of particular relevance is the, admittedly limited, extent of contemporary international protection accorded indigenous religion, given the fact that supranational law first articulated the legal doctrines that provided the framework for the suppression of their legal rights and religions.

This thesis is based on the view that there remains a basic value in religious tolerance and cultural pluralism as Justice Tobriner memorably remarked in *People v Woody*:

*“The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practised an old religion...”*¹

Structure

This thesis will be divided into three parts. Chapter One, of Part I, will investigate the Christian doctrines which justified the legal subjugation of the indigenous peoples of the North American continent. In particular, how legitimacy and legality were originally derived from Papal Grant, Royal Charter, Christian conquest and Lockean concepts of land tenure. The development of these principles both sides of the border will be explored together with their consolidation by Nineteenth Century case law and their continuing

¹ *People v. Woody*, 394 P.2d 813, 821-822 (1964)

relevance in the present era. The symbiotic relationship between law and religion in the foundational doctrines of Indian Law will thus be demonstrated.²

Having destroyed Indian rights by these legal doctrines, which were derived from Christianity, the Europeans purported to isolate church and state within their own societies. Chapter Two will make a general comparison between the position of religion within the legal systems of Canada and the United States and make an initial assessment whether there has been such a perfect division between the temporal and spiritual. By contrast, Indian societies readily admit the theocratic elements of their governments and this blurring of church and state will be contrasted with the supposed dichotomy in the dominant societies. In addition to the dissonance between the liberal, capitalist and individualistic paradigm and tribal concepts of property ownership, there is also a majoritarian incomprehension of the Indian view of land as being sacred and inalienable. The difficulties that this presents to the Indian litigant within the North American legal systems will be examined.

Part II will then explore the Nineteenth Century in more detail and build on the conceptual foundations of Part I. In particular, Chapter Three will critically chart the development of each country's legal relationship with their Indian populations, exposing the conflict between the recognition of tribal sovereignty and the unilateral imposition of federal jurisdiction. As a precursor to a discussion of the governments' treatment of Indian religions, Chapter Four will compare, in detail, the freedom of religion jurisprudence for the mainstream faiths of each country. Having described the Nineteenth Century legal landscape, Chapter Five will then analyse each country's attempts forcibly to evangelise their Indians by the use of missionaries and compulsory boarding schools. In particular, this treatment will be investigated for violations of Treaties in both countries and also the Free Exercise and Establishment Clauses in the United States.

Following largely unsuccessful attempts to convince the Indians of the undoubted advantages of Christianity as a suitable replacement for their spirituality, the North American governments resorted to a proscription of Indian religious practices. Chapter Six will analyse this devastating process against the prevailing free exercise jurisprudence within each country and assess which jurisdiction has been the most oppressive of Indian spirituality.

² Indian Law is law imposed from without the tribe and consists of legislation, regulations of federal agencies and judicial determinations. It is law *about* Indians in contrast to Tribal Law, which is law created *by* Indians, relating to intra-tribal affairs.

Part III will continue the narrative from the start of the Twentieth Century until the present. Chapter Seven will, like Chapter Three, chart the development of Indian Law within each jurisdiction. In particular, United States' policy, which demonstrated considerable fluctuation in its respect for Indian sovereignty, will be contrasted with the situation of Canadian Indians, who were more consistently marginalised both tribally and individually. Indeed, the actual existence of any aboriginal rights in Canada was unrecognised until the 1970s and the *Calder*³ case. The implications of the constitutionalisation of aboriginal rights in Canada from 1982 will also be explored and contrasted with the United States, where Indian rights are better defined but less entrenched.

Chapter Eight will compare freedom of religion jurisprudence between the two countries from the start of the Twentieth Century. There was increasing free exercise litigation in the United States leading to the seminal case of *Smith*,⁴ which dealt with the religious use of Peyote by Native Americans. The implications of this destructive case will be explored both for Indians and the wider religious community. The United States also purported to rebuild the wall between church and state by introducing a more robust Establishment Clause jurisprudence. By contrast, Canada only recently constitutionalised the freedom of religion (although without an Establishment Clause) in 1982⁵ and the nascent case law will be examined for similarities and differences.

Although there was less overt suppression of Indian religious practices during this period, the attitude shifted from revulsion to acquisition with the determined and systematic appropriation of Indian sacred objects. Chapter Nine will explain how this is equally destructive of Indians' right to the free exercise of their religion and will discuss the attempts to recover such objects. In particular, there will be a comparison between the two countries of both the extent of sacred object alienation and also the effectiveness of subsequent repatriation legislation. The potential for creating an aboriginal right to the possession of all sacred objects, which would enjoy constitutional protection, will also be explored in Canada.

The accommodation of Indian spirituality by the North American governments seems more enthusiastic when it comes at little governmental cost. Chapter Ten will

³ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313

⁴ *Employment Division v. Smith*, 494 U.S. 872 (1990)

⁵ Canadian Charter of Rights and Freedoms ss1-34 of The Constitution Act 1982

investigate these tensions and the extent to which commercial considerations circumscribe the free exercise of U.S. Indians at their sacred sites, many of which, it must be remembered, pre-date the arrival of the Europeans in North America. Although much of the continental United States has been subjected to wholesale extinguishment of Indian title by treaty, Canadian public land has not been the subject of such a comprehensive treaty system and thus remains, at least in theory, encumbered by un-extinguished aboriginal title. This difference explains the strategies pursued, with U.S. Indians relying mainly on the free exercise of religion, whereas Canadian Indians also have the option of asserting aboriginal title to areas on which sacred sites are situated. As an alternative to judicial and executive protection of sacred sites, the chapter will investigate the feasibility of legislative intervention in the shape of a sacred site statute.

This thesis will conclude with the development of International Law on indigenous peoples, in particular how the paradigm gradually shifted from a demand for individual equality and integration within the dominant societies, to a more discrete and tribal existence. The United Nations *Declaration on Indigenous Peoples* (2007) was a significant development and was unique in that it was the product of serious consultation with indigenous peoples themselves. The *Declaration* will be analysed in terms of its legitimacy and the rather ambitious claim that it represents Customary International Law.

Thus we may see how two chapters on International Law, or its earliest manifestation the European Law of Nations, bookend the thesis. The earlier incorporation of the Doctrine of Discovery, discussed in Chapter One, served to deprive the indigenous peoples of their legal rights. Yet the hope that the latter re-incorporation of some International Law precepts will serve to redress some of the injustice may prove illusory. North American enthusiasm for supra-national law depends on its conformity with the domestic agenda. International Treaties, UN Declarations and supervisory bodies that empower indigenous peoples and threaten such an agenda are usually marginalised, deprecated or ignored within North America.

Originality/Literature Review

Comparative Treatments

There has been no comparative treatment between Canada and the United States of either the historical suppression or the modern accommodation of indigenous religious

practice. There are studies of the general history of the Indians in each country by Nichols;⁶ a collection of essays comparing each Constitution;⁷ a study comparing treaty-making policies;⁸ specific articles on the Establishment Clause and lack thereof;⁹ articles comparing general religious freedom;¹⁰ the application of the Doctrine of Discovery in each country;¹¹ the varying interpretation of the fiduciary relationship;¹² general aboriginal policy;¹³ aboriginal civil rights;¹⁴ and articles comparing tribal sovereignty.¹⁵

The Christian Foundations of Indian Law

Similarly, the link between the original incorporation of the Christian Doctrine of Discovery into law and subsequent treatment by that law of Indian religion has not been

⁶ Nichols, R. L. (1998). Indians in the United States and Canada : a Comparative History. Lincoln, University of Nebraska Press.

⁷ McKenna, M. C. (ed) (1993). The Canadian and American Constitutions in Comparative Perspective. Calgary, Alta., Canada, University of Calgary Press

⁸ St. Germain, J. (2001). Indian Treaty-making Policy in the United States and Canada, 1867-1877. Lincoln, University of Nebraska Press.

⁹ Beschle, D. (2001). "Does the Establishment Clause Matter?--Non-Establishment Principles in the United States and Canada." University of Pennsylvania Journal of Constitutional Law 4: 451-492; Albert, R. (2004). "American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective." Marquette Law Review 88: 867-925

¹⁰ Eisgruber, C. and Zeisberg, M. (2006). "Religious Freedom in Canada and the United States." International Journal of Constitutional Law 4(2): 244-268; Beyer, P. (2003). "Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context." Journal for the Scientific Study of Religion 42(3): 333-339; Sedler, R. (1988). "The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and The United States: A Comparative Analysis Case Western Reserve Journal of International Law 20: 577-621; Beaman, L. G. (2003). "The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada." Journal for the Scientific Study of Religion 42(3): 311-325

¹¹ Walters, M. (2005). "The Morality of Aboriginal Law." Queen's Law Journal 31: 470-520

¹² Elliott, D. (1996). "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship." Manitoba Law Journal 24: 137-186.

¹³ Morse, B. (1997). "Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States." St. Thomas Law Review 10: 115-148.; Worthen, K. (1998). "The Grand Experiment: Evaluating Indian Law in the "New World"." Tulsa Journal of Comparative and International Law 5: 299-334, 305.; Johnson, R. (1991). "Fragile Gains: Two Centuries of Canadian and United States Policy toward Indians." Washington Law Review 66: 643-718, 666.; Fleras, A. and Elliott, J. L. (1992). The "Nations Within": Aboriginal-State Relations in Canada, the United States, and New Zealand. Toronto, Oxford University Press.

¹⁴ Cross, J. and Lomond, K. (1993). "The Civil Rights of the Aboriginal Peoples of the United States and Canada." Arizona Journal of International and Comparative Law 10: 253-299, 274.

¹⁵ Wells, M. (1991). "Sparrow and Lone Wolf: Honoring Tribal Rights in Canada and the United States." Washington Law Review 66: 1119-1137.

extensively analysed. Robert Williams' 1990 account of the origins of American Indian Law was radical at the time, based as it was on the revelation of the Christian and feudal origins of American Indian Law.¹⁶ Scholarship on the Doctrine of Discovery and Christian imperialism has been more plentiful in recent times with several important articles. In particular Miller¹⁷ explains how the United States Supreme Court, far from being the originator of the Doctrine in *Johnson v. M'Intosh*,¹⁸ was in fact the last branch of government to adopt it. Furthermore, in common with Newcomb,¹⁹ he suggests the Doctrine as the basis of the Trust Relationship and Plenary Power concept, in preference to a tortuous and dubious constitutional justification. Watson²⁰ questions the "Universal Recognition" of the Doctrine amongst the colonizers, with contemporary dissent from English authors such as Roger Williams, as well as those from other European nations, in particular Spain, France, Holland and Sweden. Worthen²¹ charts the differing evolution of the Doctrine in the United States and Canada, and how the latter failed to soften the doctrine with the emollient of inherent tribal sovereignty that was later recognised in the United States by Marshall in *Worcester v. Georgia*.²² In a recent article, Kades²³ reveals that the foundational case of *Johnson v. M'Intosh* was based on a misapprehension: the land in question was actually two tracts of land 50 miles apart! In addition there have been two 2005 studies: one a historical account of land dispossession from first contact to the turn of the Nineteenth Century;²⁴ the other an in-depth and important treatment of the *Johnson* case, using previously unseen documentation relating to the original purchaser of the land, the Illinois

¹⁶ Williams, R. A. (1990). The American Indian in Western Legal Thought : the Discourses of Conquest. New York, Oxford University Press

¹⁷ Miller, R. (2005). "The Doctrine of Discovery in American Indian Law." Idaho Law Review 42: 1-122.

¹⁸ *Johnson v M'Intosh* 21 U.S. (8 Wheat) 543 (1823)

¹⁹ Newcomb, S. (1992). "The Evidence of Christian Nationalism In Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power." New York University Review of Law & Social Change 20: 303-337

²⁰ Watson, B. (2006). "John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of" Universal Recognition" of the Doctrine of Discovery." Seton Hall Law Review 36(2): 481-549

²¹ Worthen, K. (1998). *op.cit.*, p305.

²² *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832)

²³ Kades, E. (2001). "History and Interpretation of the Great Case of Johnson v. M'Intosh." Law and History Review: 67-116

²⁴ Banner, S. (2007). How the Indians Lost their Land : Law and Power on the Frontier. Cambridge, Mass.; London, Belknap Press of Harvard University Press.

and Wabash Land Company.²⁵ The latter work exposes the ulterior motive of Justice Marshall in relegating the Indian interest in land to something less than a fee simple in order to obliquely favour some unconnected grants of land to his fellow revolutionary war veterans.²⁶

Nineteenth Century Government Policies

There is some literature on the Nineteenth Century religious suppression and Christian evangelism pursued in each country but no explicit comparison between the two countries. In Canada, relatively recent studies include a general treatment by Pettipas of how prairie tribes' religious suppression was linked to Victorian morality;²⁷ the specific targeting of the Potlatch (Giveaway Ceremony) as wasteful and regressive by Cole and Chaikin;²⁸ and the clash between the Christian and Indian worldviews.²⁹ Any United States study of this area is indebted to the works of Francis Paul Prucha. His study of the philanthropic yet misguided motives of the East Coast "Friends of the Indians,"³⁰ and his general history of government policy³¹ remain seminal texts, if a little dated. Other notable contributions include James Mooney's sympathetic and contemporaneous books on the Ghost Dance,³² which incidentally earned him much opprobrium at the time,³³ and Dussias' important recent article linking the Nineteenth Century policy with modern day

²⁵ Robertson, L. G. (2005). Conquest by Law : How the Discovery of America Dispossessed Indigenous Peoples of their Lands. Oxford ; New York, Oxford University Press

²⁶ *ibid* p96

²⁷ Pettipas, K. (1994). Severing the Ties that Bind : Government Repression of Indigenous Religious Ceremonies on the Prairies. Winnipeg, University of Manitoba Press.

²⁸ Cole, D. and Chaikin, I. (1990). An Iron Hand upon the People : The Law against the Potlatch on the Northwest Coast. Vancouver, Seattle, p12.

²⁹ LaViolette, F. E. (1973) The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia [by] Forrest E. LaViolette. [Reprinted with additions, Toronto, Buffalo] University of Toronto Press

³⁰ Prucha, F. P. (1976). American Indian Policy in Crisis : Christian Reformers and the Indian, 1865-1900. Norman, Okla., University of Oklahoma Press.

³¹ Prucha, F. P. (1986). The Great Father : The United States Government and the American Indians. Lincoln [Neb.] ; London, University of Nebraska Press.

³² Mooney, J. (1896). The Ghost-Dance Religion and the Sioux Outbreak of 1890. Washington, Govt. Printing Office; Mooney, J. (1973).; The Ghost-Dance Religion and Wounded Knee. New York,, Dover Publications

³³ Willard, W. (1991). "The First Amendment, Anglo-Conformity and American Indian Religious Freedom." Wicazo Sa Review 7: 25-41.

jurisprudence.³⁴ In particular, Professor Dussias explains how the Establishment Clause was overlooked in the Nineteenth Century, to suit the policy of Christianization by missionaries, yet has emerged as a barrier to the accommodation of native religious practices in the Twentieth Century. Fleeting treatment is afforded to religious suppression in the eminent historian Angie Debo's general history³⁵ and other general works.³⁶

Spirituality

This is not a theological treatise and any description of Indian religious practice is merely to illustrate the divergence with Judaeo-Christian traditions, situate it within the wider frame of culture, and explain the specific tensions with Western legality. Native views that have been consulted include Black Elk,³⁷ Charles Eastman,³⁸ Geronimo,³⁹ Rennard Strickland,⁴⁰ Mary Brave Bird,⁴¹ Wilma Mankiller⁴² and a myriad of other voices embedded in more generic texts. In the works of Black Elk, Geronimo, Brave Bird and Mankiller it is not certain how much of the material is that of the Native American viewpoint or the non-Indian collaborator. Indeed Vecsey has remarked that the celebrated *Black Elk Speaks* has been translated into many languages but not into his mother tongue of Lakota.⁴³ If this were a purely religious project this would be problematic yet, as mentioned above, native

³⁴ Dussias, A. (1997). "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases." Stanford Law Review: 773-852

³⁵ Debo, A. (1970). A History of the Indians of the United States. Norman,, University of Oklahoma Press

³⁶ Feest, C. (2000). The Cultures of Native North Americans. Cologne, Konemann; Josephy, A. M. (1995). 500 Nations : an Illustrated History of North American Indians. New York, Gramercy Books.; Zimmerman, L. J. (1996). Native North America : Belief and Ritual, Spirits of Earth and Sky. London, Duncan Baird Publishers

³⁷ Black Elk, Neihardt, J.G. et al. (2004). Black Elk Speaks : Being the Life Story of a Holy Man of the Oglala Sioux. Lincoln, University of Nebraska Press; Brown, J. E. (1953). The Sacred Pipe. Black Elk's Account of the Seven Rites of the Oglala Sioux. Recorded & edited by Joseph Epes Brown. [With portraits.], pp. xx. 144. University of Oklahoma Press: Norman.

³⁸ Eastman, C. A. (1911). The Soul of the Indian. An Interpretation, pp. xiii. 170. Houghton Mifflin Co.: Boston & New York

³⁹ Geronimo, Barrett, S. M. et al. (1996). Geronimo : His Own Story. New York, Meridian.

⁴⁰ Strickland, R. (1985). "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience." University of Kansas Law Review **34**: 713-755

⁴¹ Brave Bird, M. and Erdoes R. (1990). Lakota Woman. New York, Grove Weidenfeld.; Brave Bird, M. and Erdoes, R. (1993). Ohitika Woman. New York, Grove Press.

⁴² Mankiller, W. P. and Wallis, M. (1993). Mankiller : a Chief and her People. New York, St. Martin's Press.

⁴³ Vecsey, C. (1990). Religion in Native North America. Moscow, Idaho, University of Idaho Press. p148

spirituality will only be treated to the extent that it enables contextualisation, therefore these defects should not be fatal. One interesting perspective was provided by a collection of essays assembled by James Treat that were written by Native American Christians.⁴⁴ These essays emphasised the syncretic elements of native spirituality, which are equally worthy of protection, but which are often overlooked in the primitivist non-Indian projection of Indian religious practices, which fails to see beyond a rigid dichotomy of Indian/non-Indian traditions. A more nuanced view would inquire how each changed and informed the other and would impart greater agency to Indians, rather than merely as objects of acculturation.⁴⁵

Free Exercise and Sacred Land in the Twentieth Century

There is no shortage of United States' studies on the free exercise of Indian religions and the protection of their sacred land. However, many are dated as Indian Law scholarship has been moving from the doctrinal to the empirical, with particular emphasis on the practical vindication of tribal sovereignty, rather than the treatment of the individual Indian within the dominant society.⁴⁶ The books range from the comprehensive⁴⁷ to the specialised.⁴⁸ Among the more significant scholars writing articles are Beaman, who emphasises the tacit Christian hegemony in North America;⁴⁹ Carpenter, who contrasts tribal constitutional religious freedom with majoritarian constitutional jurisprudence;⁵⁰ Ward, who doubts the possibility of accommodation of native religion within the existing

⁴⁴ Treat, J. (1996). Native and Christian : Indigenous Voices on Religious Identity in the United States and Canada. New York ; London, Routledge

⁴⁵ McNally, M. D. (2000). "The Practice of Native American Christianity." Church History 69(4): 834-859, 836,837

⁴⁶ Frickey, P. (2007). "The New Realism: The Next Generation of Scholarship in Federal Indian Law" Conference Transcript the National Congress of American Indian (2006) American Indian Law Review 32: 1-150

⁴⁷ Vecsey, C. (ed) (1991) *op.cit.*; Wunder, J. R.(ed) (1996) Native American Cultural and Religious Freedoms. New York, Garland Pub.

⁴⁸ Long, C. N. (2000). Religious Freedom and Indian Rights : the Case of Oregon v. Smith. Lawrence, University Press of Kansas

⁴⁹ Beaman, L. (2002). "Aboriginal Spirituality and the Legal Construction of Freedom of Religion." Journal of Church and State 44: 135-152; Beaman, L. G. (2003) *op.cit.*,

⁵⁰ Carpenter, K. (2004). "Considering Individual Religious Freedoms under Tribal Constitutional Law." Kansas Journal of Law & Public Policy 14: 561-606

legal framework and proposes substantive sacred site protection legislation;⁵¹ and Rose, who highlights the problem of conflating religion and culture in terms of free exercise protection, and instead proposes a greater reliance on the Trust Responsibility.⁵²

By contrast, the situation in Canada has been less exhaustively treated. Recently published collections of articles on indigenous cultural heritage and the law have provided useful background to the struggle for the repatriation of sacred objects, in particular the uneven nature of provincial laws.⁵³

Two recent studies on aboriginal rights and sacred sites are welcome additions to the Canadian First Nations legal canon but remain exceptional.⁵⁴ Foster and Webber's collection of essays centres around the *Calder* case,⁵⁵ that was a watershed in the common law recognition of aboriginal rights in Canada, which previously had been thought to originate solely from the *Royal Proclamation* 1763. This illustrates the disparity with the United States, where the common law recognition of aboriginal rights occurred in the *Johnson* case, fully 150 years previously. The work by Ross is a thorough legal analysis of nine cases with practical suggestions for First Nations to counter threats to their sacred sites.

Although the relationship between costs to the dominant society and the extent of indigenous religious accommodation has been explored in the United States,⁵⁶ this has not been fully investigated in Canada and there has certainly never been a comparison. In addition, there has been almost no analysis of how legal strategies pursued in one jurisdiction can cross-fertilize the other.

⁵¹ Ward, R. (1992). "Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land, The." *Ecology Law Quarterly* 19: 795-846

⁵² Rose, B. (1999). "A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses." *Virginia Journal of Social Policy & the Law* 7: 103-140, 122.

⁵³ Bell, C. E. and Napoleon, V. (2008). *First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives*. Vancouver, BC, UBC Press; Bell, C. E. and Paterson R. K. (2008). *Protection of First Nations Cultural Heritage : Laws, Policy and Reform*. Vancouver, UBC Press

⁵⁴ Foster, H., Webber, J. H. A. et al. (2007). *Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*. Vancouver, UBC Press.; Ross, M. L. (2005). *First Nations Sacred Sites in Canada's courts*. Vancouver, UBC Press.

⁵⁵ *Calder v Attorney-General of British Columbia*, [1973] S.C.R. 313

⁵⁶ See generally Brown, B. E. (1999). *Religion, Law, and the Land : Native Americans and the Judicial Interpretation of Sacred Land*. Westport, Conn., Greenwood Press; Wunder, J. R. (ed) (1996) *op.cit.*, ; Vecsey, C. (ed) (1991). *Handbook of American Indian Religious Freedom*. New York, Crossroad.

Limitations and Justification

Apart from their geographical proximity, Canada and the United States have been chosen as the comparators as they are both liberal democracies, populated initially largely from the British Isles, with Common Law jurisprudence, written constitutions and federalist governmental structures.⁵⁷ Furthermore, although there is great inter-tribal variation, both countries were inhabited by indigenous populations for millennia pre-contact.⁵⁸ A comparison between the two countries will test the consistent nature of the common law and hopefully engage a creative dialogue between two parallel and adjacent jurisprudences.

Although tribes straddled the border, the Indians themselves recognised differences between the two countries. Indeed, the 49th parallel was known as “The Medicine Line” as it halted the United States’ Army’s pursuit of them into the supposedly more tolerant Canada.⁵⁹ This thesis will examine the extent to which this line still provides succour to the Indians of North America.

There will be no enquiry outside North America, for example into Australasian treatment of indigenous peoples. Such an expansion of the thesis would become limitless as an equally convincing case could be made for an extension to the British Colonies in Africa, or more pertinently a comparison between English-speaking and Spanish-speaking treatment of indigenes in the wider Americas. Such treatments would make fascinating future studies, but space constraints and immediate relevance oblige their exclusion.

This thesis is historically limited in that it spans the treatment of indigenous religion from the middle of the Nineteenth Century to the present day. This period has been chosen as it was the era in which Canadian union and confederation occurred and thus there is essentially a comparison between two complete countries, rather than one country and a collection of disparate provinces. Nevertheless, there is some historical treatment from early colonial times until the War of Independence and the birth of the United States, in order to contextualise the different paths that were subsequently taken north and south of the 49th parallel.

⁵⁷ Eisgruber, C. and Zeisberg, M. (2006) *op.cit.*, p244

⁵⁸ Zimmerman, L. J. (1996) *op.cit.*, p8

⁵⁹ LaDow, B. (2001). The Medicine Line : Life and Death on a North American Borderland. New York, Routledge.

As for Part II and the treatment of the Christianization and proscription of Indian religions, there is necessarily a geographical limitation to the western states and provinces for several reasons. Firstly, virtually all U.S. Indians had been removed from the eastern states by that time. Secondly, although many Canadian Indians remained in the eastern provinces of Canada, they were left largely alone as they had historically been close allies in the struggle for North America, their religious practices did not jar with Victorian morality, and moreover they had embraced European education while admittedly retaining much of their own culture. Thirdly, western tribes first encountered already powerful countries emboldened by population increase and hungry for land and resources, that were reluctant to compromise. Fourthly, as mentioned above, western tribes' self-mutilation and profligate giveaway practices had greater dissonance with the Christian capitalist.

Part III has been limited to Sacred Objects and Sacred Land. Although there could have been a chapter on the relevance of Endangered Species Legislation and impeding access to animals parts such as eagle feathers, that are needed to conduct religious ceremonies, this was omitted because there was insufficient material on Canada to make a comparison. Similarly, the treatment of the religious freedom of Indian prisoners was not dealt with as it has barely been an issue thus far in Canada. Although a dearth of material can of itself be a discovery, this is a comparative thesis and both adjacent mirrors have to at least exist if not necessarily be of the same size. In any case, space constraints mean that some elements must be sacrificed.

Critical Indigenous Legal Theory: A New Methodology

"Indian tribes were here for centuries before the United States came into existence and plan to occupy this land long after the United States is gone."⁶⁰

The thesis will have a perspective I have tentatively coined as Critical Indigenous Legal Theory (CILT) which is an amalgam of Peri-Colonialist study, American Legal Realism, Critical Legal Studies and Critical Race Theory.

CILT recognises that Post-Colonialism is an inappropriate optic, as the departure of the European from the North American continent is not imminent. Peri-Colonialism is perhaps more fitting as the late Twentieth Century self-determination movement largely bypassed Indian nations. This Peri-Colonialism will stress the ongoing effects of colonisation and the colonial and pre-colonial legal doctrines that still operate; one example

⁶⁰ Washburn, K. K. (2006). "Federal Criminal Law and Tribal Self-Determination." North Carolina Law Review 84(4): 779-855, 833.

being the Doctrine of Discovery, which purported to carve up the infidels' continent amongst the Christian nations. This was a European legal prefabricate, which arrived in North America having been settled amongst Europe's potentates in advance, no indigenes having been consulted. This Doctrine was cited by the United States Supreme Court as recently as 2005.⁶¹

The famous Indian scholar Felix Cohen was in the vanguard of American Legal Realism.⁶² A dose of Realism's healthy scepticism and cynicism is necessary when studying Indian Law and a realization that judicial decisions may coincide with executive policy. For example, the erosion of Indian property rights by the Marshall trilogy of cases occurred during the forced relocation policy.⁶³ Similarly, the accommodation of Indian religious practices occurs only to the extent that no material sacrifice is demanded of the dominant culture as witnessed in the sacred site cases on public land.⁶⁴

Critical Legal Studies occasionally extrapolates healthy scepticism into a pathological nihilism.⁶⁵ Although its inter-disciplinary approach and exposure of covert hegemony is particularly relevant when confronting Judaeo-Christian privilege no remedy is offered, merely diagnosis. Instead a disengagement and resignation is suggested, for example, an avoidance of the Supreme Court by Indian litigants for fear of adverse precedent.⁶⁶ This can result in little more than futile handwringing. CILT would adopt the forensic scepticism of CLS while rejecting the disengagement in favour of a more pro-active approach. Of course limited tribal resources preclude incontinent litigation.

Critical Race Theory is also not, by itself, the most appropriate optic. Critical Race Theory is a movement that is both deconstructive, like Critical Legal Studies, but also reconstructive.⁶⁷ However, its ultimate aim is an equality and integration of race which is to be achieved by rooting out any vestige of covert discrimination and tacit privileging on racial grounds. The Indians, in common with other indigenous peoples, seek not equality

⁶¹ In *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.* 125 S.Ct. 1485 (2005) from Miller, R.J. (2005) *op.cit.*, p3

⁶² Cohen, F. (1935). "Transcendental Nonsense and the Functional Approach." *Columbia Law Review* 35: 809-849.

⁶³ Williams, R. A. (2005). *Like a Loaded Weapon : the Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Minneapolis, MN, University of Minnesota Press, pp47-67

⁶⁴ See generally Brown, B.E. (1999) *op.cit.*,

⁶⁵ Macks, R (2009) *op.cit.*, p338

⁶⁶ Williams, R.A. (2005) *op.cit.*, pp161-165

⁶⁷ Bell, D. (1995). "Who's Afraid of Critical Race Theory." *University of Illinois Law Review*: 893-910, 899

but separation, not a final reversal of “separate but equal” but a re-affirmation of the tribal entity and Indian identity as “separate and different.” As Devon Mihesuah remarks, for the Indian “America is not [so much a melting pot] but a “salad bowl”, a country composed of peoples of different ethnicities that can often mix together like the ingredients of a salad but still retain their uniqueness.”⁶⁸ Yet race cannot be completely ignored when stereotypes are perpetuated by sports teams such as the Cleveland Indians, Washington Redskins, Kansas City Chiefs and Atlanta Braves. Such nomenclature as the Washington Blackskins, Atlanta Berserkers, Kansas City Rabbis and Cleveland Polacks would hardly be tolerated.⁶⁹ Furthermore, the judiciary occasionally use overtly racist language for example when justifying the deprivation of aboriginal title: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force...”⁷⁰ CRT’S anti-essentialism is also relevant, particularly when views are claimed to be from the “Indian Voice,” as there is so much inter-tribal variation.⁷¹ The dearth of minority representation in legal institutions is also a perennial concern of CRT: there is a chronic lack of native lawyers in the United States: only 1800 out of a total number of 1m whereas there are 2.6m Indians out of a total population of 300m.⁷²

Critical Race Theory, with its rejection of an “anti-discrimination colour blind approach,” in favour of an anti-subordination race-conscious methodology to equal protection jurisprudence,⁷³ could be extended to the Indian religious context. Whereas an anti-discrimination approach disavows affirmative race and religious conscious remedies, anti-subordination permits them. The formalism of anti-discrimination is agnostic towards religious discrimination whereas the functionalism of anti-subordination takes a more realistic view by recognising that subliminal discrimination occurs, and then attempting to reverse it pro-actively.⁷⁴ Such an approach would recognise that not only do judges view

⁶⁸ Mihesuah, D. A. (1996). American Indians : Stereotypes & Realities. Atlanta, GA, Clarity. p116

⁶⁹Shanley, K. W. (1997). "The Indians America Loves to Love and Read: American Indian Identity and Cultural Appropriation." American Indian Quarterly 21(4): 675-702, 675

⁷⁰ *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955) 289

⁷¹ Wacks, R. (2009). Understanding Jurisprudence : an Introduction to Legal Theory. Oxford, Oxford University Press. p374

⁷² Galanda, G. (2006). "Bar None! The Social Impact of Testing Federal Indian Law." Federal Lawyer 53: 30-33, 33.

⁷³ Soni, V. (2005). "Freedom from Subordination: Race, Religion, and the Struggle for Sacrament." Temple Political & Civil Rights Law Review 15: 33-64, 53.

⁷⁴ Soni, V. (2005) *op.cit.*, p55.

things from a racial perspective but also a Christian or Judaeo-Christian perspective. Levine highlights the methodological lacuna for religious minorities:⁷⁵ whereas Critical Race Theory and feminist jurisprudence highlight minority and oppressed perspectives there is no equivalent for minority religions, Justice Brennan's various dissents in the U.S. Supreme Court being the obvious exceptions. An overly formalistic compliance has prevented courts from appreciating the effects of laws, particularly when viewed from a minority sectarian perspective.⁷⁶ In *Smith* Justice Scalia purported not to inquire into the centrality of Peyote use as the facially neutral criminal law absolved him of such an enquiry. However, such criminalisation was originally inspired by missionary disapproval as being discordant with mainstream society and thus his abdication indirectly privileged the Christian subtext.⁷⁷ Yet the Supreme Court adopted a different approach in the *Lukumi* case,⁷⁸ when the Court saw through the deceptively neutral regulation and adopted an approach that concentrated on effects rather than intent.⁷⁹

Thus CRT is relevant for the individual Indian litigant within religious freedom jurisprudence without losing sight of the fact that it has limited relevance in the tribal context, where discrete treatment, as historical sovereign, is more appropriate. It would acknowledge that Indian religious litigants are perhaps doubly disadvantaged by belonging to a minority race and a minority religion.

In summary, CILT is a methodology that realises the relationship with the dominant society is ultimately peri-colonial and recruits CLS to diagnose the covert manifestations. It rejects the homogenisation of CLT within the tribal context yet extends the anti-subordination approach to minority religion in order to provide a remedy for the Indian religious litigant within the dominant society.

⁷⁵ Levine, S. (1996). "Toward a Religious Minority Voice: A Look at Free Exercise Law through a Religious Minority Perspective." William & Mary Bill of Rights Journal 5: 153-184, 184

⁷⁶ *ibid*

⁷⁷ Soni, V. (2005) *op.cit.*, p54.

⁷⁸ Discussed in Chapter 8

⁷⁹ Soni, V. (2005) *op.cit.*, p57.

PART I

WHEN WORLDS COLLIDE

CHAPTER ONE

1 The Doctrine of Discovery and Christian Imperialism

1.1 Introduction

I shall give to thee the heathen for thine inheritance and the uttermost parts of the earth for thy possession.¹

When the first trickle of Europeans arrived in the New World there were, depending on the different sources, between five and ten million inhabitants who had been established for between ten and twenty-five thousand years.² Before assessing the treatment of the indigenes at the hands of the North American legal systems it is important to enquire how they actually came to be within the immigrants' jurisdictions. In particular, the means by which these recently-arrived strangers claimed land title and sovereignty and how the indigenes became subjects of an imported polity and objects of an imported jurisprudence.

Conquest had traditionally been the most usual means of acquiring land but how could a few tentative and starving immigrants lay claim to such a vast continent by the sword? Was the answer somehow in a divine mandate and a Christian/pagan dichotomy; or perhaps in a hunter-gatherer/agrarian distinction, with its ethnocentric legal concept of land title? This section will explore the extent to which the common denominator of Christianity pervaded all these theories.

The chapter will then move to an explanation of the metropolitan country's early fumbling and ultimately doomed attempts to fashion a satisfactory accommodation between the Crown, the colonists, the French and the natives, and how this precipitated the American Revolution and the subsequent divergent paths of Canada and the United

¹ Psalm 2:8 from Newcomb, S. (1992) *op.cit.*, p 311.

² Nichols, R. L. (1998) *op. cit.*, pXIII

States. Finally, there will be an examination of the seminal case of *Johnson v M'Intosh*³ and Chief Justice Marshall's articulation of the Doctrine of Discovery. This case was precedential in the United States and persuasively quoted in Canada.⁴ Together with the other cases in the Marshall trilogy of the early Nineteenth Century it was foundational in articulating the common law definition of Indian rights. Yet the common law tradition, although shared by both countries, was to reach strikingly differing conclusions as to the extent of such rights.

1.2 Origins of the Doctrine of Discovery

I believe that they would easily be made Christians because it seemed to me that they had no religion. (Christopher Columbus)⁵

1.2.1 Introduction

The Doctrine of Discovery held that the first European/Christian nation that discovered non-Christian lands had an immediate overarching sovereignty over the infidels, together with a pre-emptive right, good against other Christian nations, to acquire the indigenous property interest, such as it was, in the soil.⁶ This property interest ranged from a mere beneficial right of occupancy, with absolute legal title vesting in the discoverer, to something approaching a legal title. The Europeans' rights were held, rather remarkably, to have crystallised on first disembarkation at the beach.⁷

The Doctrine has often been ascribed solely to the judicial creativity of Chief Justice John Marshall in the seminal case of *Johnson v M'Intosh* of 1823.⁸ However, scholars have traced the origins of the Doctrine back to the medieval era and "feudal, ethnocentric, religious and even racial theories."⁹ This initial symbiosis between law and religion laid the

³ *Johnson v M'Intosh* 21 U.S. (8 Wheat) 543 (1823)

⁴ *Guerin v. The Queen*, 2 S.C.R. 335 (1984)

⁵ Inouye, D.K. "Discrimination and Native American Religious Rights" in Wunder, J. R.(ed) (1996) *op.cit.*, p10

⁶ Clinton, R. N., Newton, N. J. et al. (2005) *op.cit.*, p1008

⁷ Wilkins, E. D. (2008). Federal Policy, Western Movement, and Consequences for Indigenous People, 1790-1920. *The Long Nineteenth Century (1789-1920)*. Cambridge, Cambridge University Press. p210

⁸ *Johnson v M'Intosh* 21 U.S. (8 Wheat) 543 (1823)

⁹ Miller, R. (2005) *op.cit.*, p2 and see generally Williams, R. A. (1990) *op.cit.*, p327

foundation for the sovereignty and legal title to much of North America. The religious component, having usefully performed its function, was then carefully quarantined by means of those Free Exercise and Establishment provisions deemed essential to the success of the secular liberal state. Nevertheless, Indians “must accept thatIndian Law will forever rest on the foundation of a subjugating Christian ideology.”¹⁰

1.2.2 Papal Bull

*As for the pope of whom you speak, he must be mad to speak of giving away countries that do not belong to him. As for my faith I will not change it. Your own god, as you tell me, was put to death by the very men he created, But my god still looks down upon his children. (Atahualpa in 1533)*¹¹

The Crusades of the 11th to 13th centuries were based on papal universal jurisdiction and the corresponding Christian’s duty to temporally realise this divine mandate by forcible conversion or extermination.¹² In particular, Pope Innocent IV’s concept of the “just war” was invented to dispossess infidels of their land and *dominium* or sovereignty should they fail to accept the undisputed advantages of Christianity, or violate divine law as understood by the Catholic Church.¹³

The discovery of the New World and the competing claims of two Christian countries, Spain and Portugal, presented a dilemma. Pope Alexander VI crafted a pragmatic compromise with his famous *Inter Caetera II* of 1493 which arbitrarily divided the territories of the American continent by a line one hundred leagues west of the Azores.¹⁴ It purported to convey everything west of this line to Spain and everything east to Portugal. The line was modified by the *Treaty of Tordesillas* (1494) between the two countries to 370 leagues west of the Azores.¹⁵ Alarmed at this rather expansive papal conveyance, the French King Francis I was reputed to have requested “to see Adam’s will to learn how he had partitioned the world.”¹⁶

¹⁰Newcomb, S. (1992). *op.cit.*, p337

¹¹ Rosenstiel, A. (1983). Red & White : Indian Views of the White Man, 1492-1982. New York, Universe Books. p21

¹² Miller, R (2005) *op.cit.*, p8

¹³ *ibid* p9

¹⁴Miller, R (2005) *op.cit.*, p12.

¹⁵ *ibid*

¹⁶ Watson, B. (2006) *op.cit.*, p513

Hispanic invaders, such as De Soto in Florida in 1539, read out the *Requerimento* as a formal prelude to invasion.¹⁷ This purported to be an ultimatum from an alien king and pope and assuaged any guilt that these invaders should feel. If Indians rejected the Lord's word itself, their lives, rights and property were patently forfeit.

This Catholic Doctrine was not without its 16th century Spanish dissenters. De Vitoria argued that the Pope "ha[d] no temporal power over the Indian aborigines or over other unbelievers."¹⁸ Similarly, De Soto exclaimed that "the Pope did not grant, nor could he grant, our King's dominion over these peoples and their affairs because he had no right to it himself."¹⁹ In contrast, Sepulveda believed that Spain "had the right to rule in the New World because Indians have no written law, but barbaric institutions and customs. They do not even have private property"²⁰ To which Las Casas retorted that even though the Indians did not live in civilized society this did not negate their property rights.²¹

1.2.3 International Reaction

*Whatever may be the grounds occupied by international jurists they never forget the policy and interests of their own country. Their business is to give to rapacity and injustice, the most decorous veil which legal ingenuity can weave.*²²

International legal theorists were divided: Vattel supported the papal theory in his famous treatise *The Law of Nations*. He endorsed the Puritans' later purchase of Indian land but regarded it as strictly unnecessary.²³ In contrast, Grotius remarked that: "surely it is a heresy to believe that infidels are not masters of their own property; consequently to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians."²⁴

¹⁷ Josephy, A. M. (1995) *op.cit.*, p140

¹⁸ Watson, B (2006) *op.cit.*, p504

¹⁹ *ibid*

²⁰ *ibid* p508

²¹ *ibid*

²² Sir James Stephen, Legal Adviser to the Colonial Office in 1839 from Haring, S. L. (1998). White Man's Law : Native People in Nineteenth-Century Canadian Jurisprudence. Toronto ; London, University of Toronto Press for the Osgoode Society for Canadian Legal History. p21

²³ *ibid* p512

²⁴ *Mare Liberum* from *ibid* p517

England and France, although not wishing to risk the sanction of excommunication, had lingering doubts about the absolute and comprehensive nature of the papal conveyance. In particular, England tentatively suggested that English explorers should be permitted to claim lands not yet *actually discovered* by another Christian nation.²⁵ Following the split from Rome, Elizabeth I added another refinement: Discovery was merely an inchoate right which must be perfected by actual possession. Otherwise, the English claim was merely “proclamatory or cartographic.”²⁶ Furthermore, the land must be *terra nullius* or vacant land.²⁷ *Terra nullius*, as we shall see, could be land that was literally vacant or land that was used in a manner not approved of by European legal systems, such as a non-agricultural use.²⁸

Thus the Doctrine of Discovery, with or without any possession however tentative, determined which European nations had overarching sovereignty and pre-emptive rights in North America.²⁹

1.2.4 Royal Patent

Although Elizabeth had rejected the papal conveyance, her successors issued Royal Charters that were similar in purpose and audacity in that they conferred dominion and overarching title from “sea to sea.”³⁰ This was based on the medieval feudal system that the King as overlord “was the original proprietor and the true and only source of title.”³¹ Such a mandate derived both from the divine right of kings and the fact that, by virtue of discovery, no other Christian nation had a more valid claim.³²

The legal validity of these charters (or patents) was not universally recognised. Roger Williams criticised this in his *Sinne of the Patents* as a means by which Christian Kings “are invested with right by virtue of their Christianitie to take and give away the lands and

²⁵ Miller, R (2005) *op.cit.*, p17

²⁶ Pagden, A. (2008). Law, Colonization, Legitimation, and the European Background. Early America (1580-1815). Cambridge University Press, Cambridge p19.

²⁷ Miller, R (2005) *op.cit.*, p18

²⁸ *ibid* p19

²⁹ *ibid* p26

³⁰ Watson, B. (2006) *op.cit.*, p523

³¹ *ibid* p525

³² *ibid* p528

Countries of other men.”³³ He felt that *complete* ownership rested with the Indians “from whom alone a valid title could be derived.”³⁴ As for judicial recognition of such sweeping powers *The Mohegan Indians v Connecticut* (1640-1773), which was an unusually protracted case even by Privy Council standards, held that Royal Charters did not *ipso facto* destroy Indian title without purchase.³⁵

Thus the difficulty remained that a Royal Patent, like the Papal Grant, could not be anything other than a naked assertion of power and title over a land that was anything but vacant. Various refinements were therefore advanced which would be consistent with Christian aspirations to title and dominion such as the fiction that the Indians were “conquered” infidels or the ethnocentric notion that they were hunter-gatherers, rather than farmers, and thus had a less than perfect land title.

1.2.5 Conquest.

Edward Coke in *Calvin’s Case* (1608)³⁶ had articulated the legal rule that “all infidels are in law perpetual enemies.... and that when an infidel country is conquered, there being no established law among infidels which a Christian people can recognize, the rules laid down by the King apply.”³⁷ Thus a distinction was drawn between a conquered Christian country, in which the laws would survive although admittedly alterable by the conqueror, and infidel countries when they would lapse without the need for action by the conqueror. Yet there had been nothing that could be reasonably identifiable by an impartial observer as a conquest. Certainly not by these fragile and tentative coastal settlements, which existed largely at the sufferance of the Indian tribes.

In *Omichund v Barker* (1744) Coke’s views were rejected as being “contrary to scripture, common sense and humanity.”³⁸ Similarly in *Campbell v Hall* (1774) Lord Mansfield described *Calvin’s Case* as a ““strange extrajudicial opinion” and a “wholly

³³ *ibid* p498

³⁴ *ibid* p497

³⁵ Zion, J. and Yazzie, R. (1997). "Indigenous Law in North America in the Wake of Conquest." Boston College International and Comparative Law Review 20: 55-84, 65

³⁶ *Calvin v. Smith*, 7 Eng. Rep. 1,2 S.T. 559 (1608)

³⁷ Watson, B. (2006) *op.cit.*, p530

³⁸ *Omichund v Barker* 125 Eng. Rep. 1310, 1312 (Ch. 1744)

groundless challenge” to the principle of the continuity of indigenous laws upon the Crown’s assumption of territorial sovereignty.”³⁹

Nevertheless, this characterisation of North America as “conquered” land and thus part of the King’s demesne led the Crown, via the Metropolitan Parliament, to also assume legislative powers over the colonists. This use of the Crown Prerogative was in contrast to a “settled” colony in which the colonists had an automatic right to English Law, (rather than prerogative legislation) having imported the common law with them, like an enveloping mantle.⁴⁰ Therefore a deprivation of Indian rights by this fictitious conquest simultaneously deprived the colonists of self-government and local autonomy, ultimately characterising their status as “taxation without representation,” with the inevitable consequences.⁴¹

1.2.6 Locke and Agriculturalism

Offend not the poor natives, but as you partake in their land, so make them partakers of your precious faith, as you reap their temporals, so feed them your spirituals. (Puritan preacher John Cotton in 1630)⁴²

As an alternative to the fiction of “conquest” as the operative model for destroying indigenous legal rights, the colonists also articulated another theory based on land use. John Locke, in his seminal *Two Treatises of Government* (1679), concluded that the Indians were in a “pre-political state of nature”⁴³ that was characterised by no system of government, property or organised commerce, but existed merely as a hunter-gatherer community. As such their land was vacant, or *vacuum domicilium*,⁴⁴ and available to the first prepared to cultivate it. Moreover, this lack of agricultural exploitation meant a general lack of recognition of any sovereignty or political rights, founded as these were on a settled land

³⁹ Loftt. 655 at 7444, 98 E.R. 1045 (K.B.) from McHugh, P. (1998). "Common-Law Status of Colonies and Aboriginal Rights: How Lawyers and Historians Treat the Past, The." *Saskatchewan Law Review* 61: 393-429, 406

⁴⁰ *ibid* p407

⁴¹ Pagden, A. (2008). *op.cit.*, p14

⁴² Michaelsen, R “Law and the Limits of Liberty” in Vecsey, C. (ed) (1991). *Handbook of American Indian Religious Freedom*. New York, Crossroad p118.

⁴³ Locke, J. and Laslett, T. P. R. (1970). *Two Treatises of Government. A Critical Edition with an Introduction and Apparatus Criticus* by Peter Laslett ... Second edition. (Reprinted with amendments.), Cambridge: University Press p27

⁴⁴ This meant empty space and was a localised variation of the wider concept of *terra nullius* from Watson, B. (2006) *op.cit.*, p489

base.⁴⁵ Therefore, in common with the “conquered infidel,” a status as a non-agricultural people meant there was no recognition of the continuity of any indigenous laws.

History of course suggests otherwise: the Puritans would have died out in the early 1620s had it not been for the Indians teaching them to place dead fish upside down in cornfields to act as a rudimentary form of fertilizer. Similarly, the *Haudenosaunee* (the Five, later Six nations of the Iroquois Confederacy), had a highly developed system of government. So much so that the United States Senate passed a resolution in 1987 acknowledging their influence on American constitutional development.⁴⁶

There was therefore a reliance on an unholy trinity of Royal Patent, conquest, and a form of natural right deprivation of the soil due to an Indian failure to embrace what were regarded as the inevitable benefits of intensive agriculture. All three concepts rested on Christian Imperialism: Royal Patent rested on the feudal right of a Christian king; Conquest on the differing status of the Christian/infidel conquered; and the Lockean theory bestowed a natural right to the soil only on those who observed the “biblical injunction to subdue the earth.”⁴⁷

1.3 Crown Attempts to Conciliate the Indians and the French

1.3.1 The Royal Proclamation (1763)

The Royal Proclamation, issued on the 7th October 1763 after the recently-concluded Seven Years War, consolidated the relationship with all Indians both allies and adversaries. It has been described as the “Magna Carta” of aboriginal rights⁴⁸ and the “Indian Bill of Rights.”⁴⁹ The preamble states that: “the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting

⁴⁵ Pagden, A. (2008). *op.cit.*, p21

⁴⁶ Concurrent Resolution 76 from Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 4 pp12

⁴⁷ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 4 pp12,57

⁴⁸ Hall J. in *Calder v Attorney-General of British Columbia*, [1973] S.C.R. 313 at 395

⁴⁹ Gwynne J. in *St. Catherines Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577 at 652

Grounds;”⁵⁰ Furthermore, it forbade colonial officials from making further land grants beyond a line north-south from western New York state down through Georgia, and reserved all land west of this line to the Indians until it should be purchased by the Crown. In other words, it created a Crown pre-emption on Indian land purchase, which was a devastating blow to the colonies. This unilateral Crown abrogation of the colonies’ admittedly ambitious and expansive sea to sea charters caused great resentment and was a major contributing factor to the Revolutionary War.⁵¹

As for the Indians’ tribal sovereignty, the language was ambiguous. It discussed Indian nations as being entities “with whom we are connected,” who should not be “molested or disturbed,” yet referred to their lands as “such parts of Our Dominions and Territories” and Indians as “under Our Protection.” *The Report of the Royal Commission on Aboriginal Peoples* suggested that the Proclamation seemed to envisage a “broadly confederal” relationship.⁵²

Subsequent dealing seems to support this theory. At Niagara in 1764 the *Royal Proclamation* was read out and accepted by the Indians, gifts were exchanged and the *Gus Wen Tab* or Two Row Wampum was presented to consecrate the agreement. It envisaged the “simultaneous interaction and separation” of the two communities, yet both were to remain distinct:⁵³

*There are three beads of Wampum separating the two rows and they symbolize two paths or two vessels travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other’s vessel.*⁵⁴

The Crown’s Representative Sir William Johnson’s reaction to a subsequent treaty of 1765, which seemed to completely cede Indian *internal* tribal sovereignty, is significant: “by the present treaty I find they make expressions of subjection which must either have arisen from the ignorance of the interpreter or from some mistake.”⁵⁵ Indeed, as he

⁵⁰ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Appendix D

⁵¹ Wilkins, D. E. and Lomawaima, K. T. (2001). Uneven Ground : American Indian Sovereignty and Federal Law. Norman [Okla.], University of Oklahoma Press p65

⁵² Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 5 pp22-23

⁵³ Borrows, J. (2002). Recovering Canada : The Resurgence of Indigenous Law. Toronto ; Buffalo, University of Toronto Press, p125.

⁵⁴ Williams, R. A. (1990) *op.cit.*, p327.

⁵⁵ Borrows, J (1997) *op.cit.*, p164

remarked two years later, “one who would call the Six Nations our Subjects needs a good army at his back.”⁵⁶

1.3.2 The Quebec Act (1774)

As for the defeated French, the British Crown, by enacting the *Quebec Act* (1774), granted “Free exercise of the Religion of the Church of Rome”⁵⁷ and also relieved the Quebecois from the English Protestant oath to George III, requiring merely an inoffensive oath of allegiance to the monarch as temporal sovereign, omitting any mention of Protestantism.⁵⁸ More controversially, the *Act* extended Quebec’s boundaries south to the Ohio River and west to the Mississippi, severely hampering the expansionist ambitions of the original Thirteen Colonies. This dual policy of land grant and religious toleration was a pragmatic measure designed to ensure that the French Canadians remained loyal in the impending conflagration between the Colonies and the Mother Country. Yet the *Act* was incendiary in itself.⁵⁹ The Thirteen Colonies merely saw expansionism, and what was worse, state-sponsored Catholic expansionism.⁶⁰ As Albert reminds us, “the bitter taste of the Quebec Act remained in the mouths of the drafters of the Bill of Rights when they framed the Establishment Clause fewer than 20 years later.”⁶¹

So we may observe how tolerance of Catholicism, anathema to the Protestant Colonies, and an attempt, albeit disingenuous, to insulate the Indian lands from the encroaching tide of European migration, contributed to the War of Independence, which King George III described as “nothing more than a Presbyterian Rebellion.”⁶² When all this was combined with an ill-advised, if not unreasonable request, that the colonies contribute something to the cost of the recently-completed Seven Years War, by means of the *Stamp Act* (1764), it proved too much for the relationship to endure.⁶³

⁵⁶ Jennings, F., H. (1976) *op.cit.*, p106

⁵⁷ Art V from *ibid* p877

⁵⁸ *ibid* p877

⁵⁹ *ibid* p878

⁶⁰ *ibid* p896

⁶¹ *ibid* p897

⁶² Bourne, R. (2002). *Gods of War, Gods of Peace : How the Meeting of Native and Colonial Religions shaped early America*. New York, Harcourt. p273

⁶³ Miller, R. (2005) *op.cit.*, p31

1.4 The Great Republic

[King George III] has excited domestic insurrections amongst us and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions. (Declaration of Independence)⁶⁴

1.4.1 Early Indian Policy

Despite Jefferson's caustic reproach to the Mother Country and her incitement of the natives in the *Declaration of Independence*, early United States policy mirrored that of the *Royal Proclamation*, with the *Trade and Intercourse Act* of 1790 prohibiting land purchase from the Indians, except by federal treaty, and leaving internal control of Indian affairs as a matter solely for Indians.⁶⁵

After the Louisiana Purchase of 1803 and the War of 1812 had eliminated the French and English as serious rivals to the territorial integrity of the United States, such deference to Indian property rights and sovereignty was regarded as a luxury.⁶⁶ Avaricious settlers, fuelled by the generalised expansionist sentiment, viewed the further presence of Indians as an obstruction and irritant. The stage was set for a legal reconfiguration of Indian rights as a precursor to their removal. As Loesch remarks, the denigration of Indian title and dilution of Indian sovereignty were necessary as the "economic vitality and structure of the United States was at stake."⁶⁷ The fate of the American Indian became perilous in the extreme. As one British Commissioner commented at the signing of the *Treaty of Ghent* in 1815: "I had till I came here no idea of the fixed determinism which prevails in the breast of every American to extirpate the Indians and appropriate their territory."⁶⁸ This was the prevailing sentiment on the eve of the seminal case of *Johnson v M'Intosh*.

⁶⁴ From Wunder, J. (2000). "'Merciless Indian Savages' and the Declaration of Independence: Native Americans Translate the Ecuinnaunuxulgee Document." *American Indian Law Review* 25: 65-92, 65

⁶⁵ Loesch, M. (1993). "The First Americans and the Free Exercise of Religion." *American Indian Law Review* 18: 313-378, 321

⁶⁶ *ibid* p323

⁶⁷ *ibid* p324

⁶⁸ Nichols, R. L. (1998) *op.cit.*, p164

1.4.2 Johnson v M'Intosh (1823)

*They made us many promises, more than I can remember, but they never kept but one; they promised to take our land and they took it. (Red Cloud)*⁶⁹

1.4.2.1 Background

The origins of the case can be traced back 50 years beforehand. In 1773 an enterprising land purchaser obtained a copy of the *Camden-Yorke* opinion of 1757 which concerned land ownership in India. In particular, the opinion held that a Mogul could pass good title to the East India Company *without* prior Crown approval.⁷⁰ Specifically, “the King’s Letters Patent” were not necessary for lands “acquired by treaty or grant from the Mogul or any of the Indian Princes or Governments....the property of the soil [i.e. title to the property] vesting in the Company.”⁷¹ By deleting any reference to “the Mogul” and substituting “the Grantee” for the “East India Company” the document was left with “Indian Princes” which, thanks to Columbus’ navigational error, sufficed in the New World. The date had also been altered to 1772 that is *after* the *Royal Proclamation*. In effect it circumvented the Crown pre-emption right of *The Royal Proclamation*. A certain William Murray obtained this doctored copy and showed it to an unwitting functionary who recorded the deed poll of the sale of a tract of land from the Illinois Indians to Murray’s Illinois and Wabash Company. This land was located at the junction of the Mississippi, Illinois and Ohio rivers.⁷²

1.4.2.2 The Opinion

The case was between Johnson, successor in title to Murray’s Illinois and Wabash Company, and M’Intosh who had purchased the “same” land from the United States in 1818.⁷³ Chief Justice Marshall found the *Royal Proclamation’s* Crown prohibition to be dispositive as to the original private purchase by Johnson’s predecessor, the truth having been discovered about the *Camden-Yorke* opinion and its application solely to the sub-

⁶⁹ Brown, D. A. (1971). Bury My Heart at Wounded Knee; an Indian History of the American West. New York,, Holt p449.

⁷⁰ Robertson, L. G. (2005) *op.cit.*, p7

⁷¹ *ibid*

⁷² *ibid* p8

⁷³ Wilkins, D.E. and Lomawaima, K.T. (2001) *op.cit.*, p53

continental Indians.⁷⁴ This should have been the end of the matter except that Marshall saw fit to indulge in effusive *dicta*, the reason for which had nothing to do with Indians yet it is they who have borne the consequences.⁷⁵ He quite inappropriately discussed the unrelated question of the exact *nature* of Indian title in the absence of a live issue and thus without argument, and most significantly, without any representation from the group who would be most intimately affected by it.

Marshall explained that “Discovery gave title to the government by whose subjects or by whose authority, it was made against all other European governments, which title might be consummated by possession.”⁷⁶ This was the classic statement of the pre-emptive nature of the European discoverer against other European nations. As for the Indians, “their rights were in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired...[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own free will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.”⁷⁷ Yet Marshall went further: “however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”⁷⁸ Thus by judicial alchemy *Calvin’s case*,⁷⁹ and the fiction of conquest, was now operative apparently to sweep away the sovereignty, legal title to land, and law of the “conquered” infidel. Discovery did not confer an inchoate right, to be perfected by conquest or purchase, it was complete *ab initio*.

It is not clear why Marshall suddenly adopted conquest as the model. He rejected the Lockean rationale: “We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts

⁷⁴ Robertson, L.G. (2005) *op.cit.*, p116

⁷⁵ *ibid* p75

⁷⁶ *Johnson v M’Intosh*, 21 U.S. (8 Wheat.) 543, 572-573 (1823)

⁷⁷ *ibid* p573

⁷⁸ *ibid* p591

⁷⁹ See text accompanying *Calvin v. Smith op.cit.*,

of the conqueror cannot deny.”⁸⁰ Banner suggests that this reframing of the issue transformed it into a *political* question which was thus insulated from judicial scrutiny.⁸¹ At no stage did Marshall suggest that the Indian property right was not compensable, which would have been the case if a complete physical conquest had occurred, it was merely framed thus to circumvent judicial scrutiny.

Chief Justice Marshall’s justification for this loss of sovereignty and destruction of property rights could have come from the mouth of a medieval pope or king: “the character and religion of [the continent’s] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity.”⁸²

As Deloria and Wilkins remark, the culture and religion of the Indians were judged too inferior to justify a full retention of their legal rights, yet they were not completely without virtue. They were deemed capable of receiving in exchange the Good News of the “Conqueror’s” religion.⁸³

1.4.2.3 Marshall’s Attempts at Containment

Marshall seemed to retreat from the more extreme elements of the Doctrine in later cases. In *Worcester v Georgia*⁸⁴ he held that a Royal Charter could not be converted by the Doctrine of Discovery into a fee title or claim to sovereignty by a state in the absence of purchase, and thus Georgia could not impose any of its criminal law on Cherokee lands. He ridiculed the “extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by [the royal charters] to govern the people, or occupy the lands from sea to sea.”⁸⁵ On the contrary, the charters “were well understood to convey the title which, according to the

⁸⁰ Clinton, R.N., Newton, N.J. et al (2005) *op.cit.*, p58

⁸¹ Banner, S. (2007) *op.cit.*, p185

⁸² *Johnson v McIntosh op.cit.*, p572

⁸³ Deloria, V. and Wilkins, D.E. (1999). Tribes, Treaties, and Constitutional Tribulations. Austin, University of Texas Press p83

⁸⁴ *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, (1832)

⁸⁵ *ibid* p545

common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell.”⁸⁶

Thus in *Worcester* Marshall had reformulated the right from an immediate fee simple subject to an Indian occupancy right into the more reasonable, but still doctrinally suspect, pre-emptive but contingent right to a fee simple in the future; the present fee simple remaining with the Indians.⁸⁷ In both cases the Indian interest, whatever its extent, had to be extinguished by purchase subject to Indian consent. Of course the pre-emptive and exclusive purchase mandate of the Indian property interest, whether beneficial or a fee simple, eliminated competition as a practical real estate matter so the land could be bought for cents on the dollar.

In the third case of the Trilogy, *Cherokee Nation v Georgia*,⁸⁸ Marshall first characterised the Indian tribes as “domestic dependent nations” and introduced the Trust Power which imposed a type of fiduciary paternalistic duty on the Federal Government in its dealing with tribes whose “relation to the United States resembles that of a ward to his guardian.”⁸⁹ This tempered the seemingly absolute nature of the discoverer’s power and echoed the “papal bulls which placed guardianship duties on Spain and Portugal to convert indigenous peoples.”⁹⁰

After Marshall’s death the new Chief Justice Roger Taney reintroduced the more extreme *Johnson* formula of conquest in the case of *United States v Rogers*.⁹¹ This case occurred towards the end of the removal era when tribes were ethnically cleansed from eastern states. *Realpolitik* dictated that the Supreme Court meekly acquiesced in this policy. Taney also explicitly re-iterated the “political question” concept of Indian rights: “it is a question for the law-making and political department of the government and not the judicial.”⁹²

⁸⁶ *ibid*

⁸⁷ Banner, S. (2007) *op.cit.*, p163

⁸⁸ *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters.) 1 (1831)

⁸⁹ *ibid* p17. Discussed more fully in Chapter 3.

⁹⁰ Miller, R. (2005) *op.cit.*, p107

⁹¹ *United States v Rogers* 45 U.S. (4 How). 567 (1846)

⁹² *ibid* p572 quoted in Wilkins, D.E. (2008) *op.cit.*, p221

As for tribal sovereignty, the *Worcester* case held that the laws of Georgia “could have no force” within the Cherokee nation.⁹³ This was a superficially attractive recognition of inherent tribal sovereignty yet this was only good against the states as successors of the individual colonies. An overarching sovereignty still remained in the federal government as successor to the Crown as discoverer, or as feudal overlord. *Worcester’s* recognition of inherent tribal sovereignty had only two express limitations: the federal government had a pre-emptive right of purchase of their interest in land and they could not treat with foreign powers.⁹⁴ Yet whatever immediate and practical limitations were recognised at the time, the federal government was recognised as having a *de jure* overarching sovereignty. It was merely dormant. Thus whether the doctrine is the more extreme *M’Intosh-Rogers* line of cases or the more moderate *Worcester* version, an ultimate overarching sovereignty rests with the federal government.

1.4.2.4 The Consequences

Indians regard the Doctrine of Discovery as the “separate but equal”⁹⁵ and the “Koromatsu”⁹⁶ of Indian Law jurisprudence.⁹⁷ It distinguished between paramount Christian rights and subordinate heathen rights.⁹⁸ As Miller concludes, the title to most real estate on the North American continent can be ascribed to this doctrine.⁹⁹

In Canada, as Walters reminds us, the Doctrine was followed without the *Worcester* recognition of inherent tribal sovereignty as a mitigation to the over-arching federal sovereignty.¹⁰⁰ The Crown, according to the Privy Council in the case of *St. Catherine’s Milling and Lumber Co. v. R* (1888),¹⁰¹ had a “substantial and paramount estate” over all territories and the Indian land interest was a “personal and usufructuary right” which was a

⁹³ *Worcester v. Georgia op.cit.*, p561

⁹⁴ Canby, W. C. (2004) *op.cit.*, p74

⁹⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896) upholding constitutionality of separate train accommodation for whites and blacks.

⁹⁶ *Korematsu v. United States*, 323 U.S. 214 (1944) rejecting challenge to Congress’ power to exclude those of Japanese descent from the West Coast during World War II

⁹⁷ Watson, B (2006) *op.cit.*, p485

⁹⁸ Newcomb, S. (1992) *op.cit.*, p304

⁹⁹ Miller, R. (2005) *op.cit.*, p3

¹⁰⁰ Walters, M. (2005) *op.cit.*, p508

¹⁰¹ *St. Catherine’s Milling and Lumber Company v. The Queen* (1899) 14 App. Cas. 46 (P.C)

“mere burden” on this estate.¹⁰² These Indian property rights were held to have been created solely by the *Royal Proclamation*.¹⁰³ It would take until a 1973 case to suggest that aboriginal property rights could have arisen at Common Law, fully 150 years after such a recognition in the United States in the Marshall trilogy.¹⁰⁴ As we shall see in later chapters the Canadian government, from the point of confederation onwards, asserted its power to legislate unilaterally for all aspects of internal tribal life.

The Doctrine of Discovery has never been explicitly disclaimed and still forms part of the North American indigenous jurisprudence. As Borrows opines, the illegal and illegitimate assertion of sovereignty violates the Rule of Law.¹⁰⁵ It is merely exertion of power. The Indians were originally dispossessed of vast tracts of land and their sovereignty diluted by the Doctrine’s religious mandate and this outrage is perpetuated by its calcification as temporal legal doctrine. In particular, when federal property rights that are directly derived from the Doctrine are mobilised to prevent Indian use of public land for religious practice this would seem “cruelly surreal”¹⁰⁶

1.5 Conclusion

There was general if not universal agreement within Catholic countries as to the Pope’s competence to apportion both land title to the globe and its concomitant sovereignty to Catholics. However there emerged, following the Reformation, Protestant dissent and murmurings from the nascent discipline of International Law which suggested that discovery had to be accompanied by occupation, however nominal and tentative.¹⁰⁷

There was a general European consensus as to the diminished rights of the Indians, whether their land was being conveyed by papal decree or monarchical patent, and whether the justification was due to a Christian/infidel distinction, or failure to embrace what was regarded as the Christian’s inevitable destiny as a small holding farmer. Physical conquest as a justification for any diminishment of rights was patently absurd, yet this seemed to be the

¹⁰² Monahan, P. (2006) *Constitutional Law*. Toronto, Irwin Law p440.

¹⁰³ *St. Catherine’s Milling and Lumber Company v. The Queen* (1899) 14 App. Cas. 46 at 54 (P.C)

¹⁰⁴ *Calder v Attorney-General of British Columbia*, [1973] S.C.R. 313.

¹⁰⁵ Borrows, J. (2002) *op.cit.*, p113

¹⁰⁶ Justice Brennan’s phrase from *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439 (1988) 467

¹⁰⁷ Pagden, A. (2008) *op.cit.*, p19

alternative paradigm adopted in the early colonial period and periodically re-iterated. According to *Campbell v Hall*,¹⁰⁸ this should have ensured the continuity of indigenous laws until altered by the metropolitan parliament and simultaneously deprived the colonists of automatic representation in the mother parliament and immunity from metropolitan taxation.¹⁰⁹ Only half the prescription was followed: the Colonists were indeed taxed and deprived of such representation and subsequently rebelled, whereas the Indians' existing laws were held to be, if not exactly non-existent, then certainly marginal.

The *Royal Proclamation* was an attempt to regularise frontier relations between the Indians and land acquisitive settlers. It established a Crown pre-emption of Indian land purchase with an ambivalent recognition of Indian internal sovereignty.¹¹⁰ As for the exact nature of the Indian land interest, this was not defined pre-Revolution.

The Great Republic initially pursued a conciliatory policy with the Indian tribes due as much to pragmatic military necessity as to benevolence. Gradually, with increased population and the removal of other European nations as rival factors on the continent, the relationship became more unilateral and coercive. It was within the context of westward migration and the federal policy of tribal removal that Chief Justice Marshall articulated the United States version of the Doctrine of Discovery and its legal implications.

The Marshall Trilogy attempted to define the exact nature of the Indian land tenure at Common Law. It varied from a mere beneficial right of occupancy to a fully-fledged fee title in the United States.¹¹¹ Marshall flirted with the concept of conquest and furthermore insulated this from judicial scrutiny as a political question.¹¹² According to him, the relationship ultimately derived from a patriarchal Christian condescension over an infidel and helpless ward. This model of incompetence was selective: the Indian was not deemed so incompetent as to be incapable of ceding land.

In Canada the case of *St Catherine's Milling*¹¹³ established no such common law land tenure. Instead, Indian land rights were in the nature of a personal usufruct which had

¹⁰⁸ *Campbell v Hall*, 98 E.R. 848 (K.B.) (1774)

¹⁰⁹ Monahan, P. (2006)*op.cit.*, p34

¹¹⁰ Wilkins, D. E. and Lomawaima, K. T. (2001)*op.cit.*, p65

¹¹¹ Banner, S. (2007)*op.cit.*, p163

¹¹² Clinton, R. N., N. J. Newton, et al. (2005) *op.cit.*, p58.

¹¹³ *St. Catherine's Milling and Lumber Company v. The Queen* (1899) 14 App. Cas. 46 (P.C)

arisen solely by virtue of the *Royal Proclamation*.¹¹⁴ In both countries the land interest was alienable subject to a Crown/Federal pre-emption which, by removing competition and effective negotiation, naturally reduced the value of the real estate.

Other Indian rights varied: in the United States the Marshall trilogy established a common law right (and corresponding limitation) to internal tribal sovereignty independent of the *Royal Proclamation*, yet in Canada such common law recognition had to wait 150 years for recognition.¹¹⁵ In both countries an overarching sovereignty rested with the central government. The exercise of this sovereignty differed markedly between the two countries and will be examined in more detail in later chapters.

The Doctrine of Discovery was articulated in an era when Law and Christianity were symbiotic if not inseparable. The supposed subsequent secularization of law should not disguise the fact that this Doctrine is not so much the product of an original secular law of European nations, or even International law, but merely Christian dogma speciously legitimised as law. The irony is that the Indian, who makes no pretence of a separation between law and religion, must engage with American jurisprudence to combat such Christian tenets disingenuously disguised as temporal law. The next chapter will discuss the subsequent positioning of law and spirituality within the different societies and the inevitable conflict that ensues.

¹¹⁴ Monahan, P. (2006)*op.cit.*, p440

¹¹⁵ *Calder v Attorney-General of British Columbia*, [1973] S.C.R. 313

CHAPTER TWO

2 Christians, Indians and Secular Liberalism

2.1 Introduction

Many of the first immigrants from Europe arrived in North America fleeing from religious persecution. Despite accepting the religious mandate of the Doctrine of Discovery to deprive the indigenes of legal rights they decided that between themselves religion should, as far as possible, be removed as a public controversy from civil society. To this end, Canadian tolerance of Catholics by various legislative acknowledgements of their rights was aimed to keep the French loyal and quiescent. The United States went further by simultaneously constitutionalising the free exercise and disestablishment of religion.¹ Canada would only constitutionally grant “freedom of conscience and religion”² 200 years later with the Canadian *Charter of Rights and Freedoms* of 1982. This chapter will investigate, in general terms, the philosophy behind these separations and protections; later chapters will assess the actual contemporary jurisprudence within each era.

The major differences between Indian spirituality and Judaeo-Christian belief systems will also be introduced, together with their differing places within the respective societies. In particular, the extent to which spirituality in Indian societies is inseparable from all culture and the difficulties this presents for the non-Indian optic. The relevance of an oral and secretive culture without scripture will also be explored, in terms of its credibility as religion, and moreover its evidential validity within the non-Indian legal culture.

The communal nature of Indian tribal society and in particular landholding contrasts with the liberal, individualist and capitalist systems. To what extent has the relentless western acquisitive society conflicted with Indian society and what effect has this had on Indian religious practices? The implications of the differing emphasis on balancing individual and group (tribal) rights with those of the liberal mainstream society will also be highlighted.

¹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” (*First Amendment to the United States Constitution*) <http://www.usconstitution.net/const.html> [Accessed 27 September 2010]

² *The Canadian Charter of Rights and Freedoms* of 1982 grants “freedom of conscience and religion” Constitution Act 1982 Part I s2 (a)

The Indian understanding of the relationship between law and religion and the extent to which theocratic elements overtly prevail within tribal society will then be compared with non-Indian society. This also has implications *between* the legal cultures which will be discussed in the context of treaties.

Having thus described the differences between Indian and non-Indian societies, in terms of both law and religion, this chapter will conclude with an enquiry into the theoretical difficulties the Indian religious litigant faces when obliged to engage with the western legal systems. In particular, how this can be all too predictable from the mutual incomprehension of the two cultures that has been described above.

2.2 Church and State in North America

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." (First Amendment to the United States Constitution)³

"The First Amendment was designed to keep Christians from killing each other." (Vine Deloria Jr.)⁴

Two diametrically opposed groups united behind the drafting of the Freedom of Religion clauses in the First Amendment to the United States Constitution. The religious rationalists, such as Jefferson, Madison and Paine were sceptical of dogma, priests, revelation and churches and wanted *government free from religion*.⁵ The evangelicals, having sought sanctuary from state coercion in Europe, rejected hierarchical and established religion in favour of their own charismatic and parochial formulas. Their main concern was *freeing religion from government*.⁶ Both groups agreed that a "wall of separation" between church and state was the best means of accomplishing this.⁷ They just differed "from which side the bricks should be added."⁸

³ <http://www.usconstitution.net/const.html> [accessed 20 September 2009]

⁴ Deloria, V. (1995). Red Earth, White Lies : Native Americans and the Myth of Scientific Fact. New York ; London, Scribner, p27.

⁵ Rose, B. (1999) *op.cit.*, p122

⁶ *ibid*

⁷ Sanchez, V. (1997). "All Roads are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence." Hastings Women's Law Journal 8: 31-78,38.

⁸ Beaver, R. P. (1966). Church, State, and the American Indians ... Two and a Half Centuries of Partnership in Mission between Protestant Churches and Government, Saint Louis: Concordia Publishing House.p3

This conflict was due in part to a recognition of the competing commands of law and religion, or in McLachlin's phrase, the "dialectic of normative commitments."⁹ Both prescribe standards against which to gauge behaviour, with "religion's blame and redemption correspond[ing] with law's liability and responsibility."¹⁰ This dilemma was recognised during the Enlightenment, and ultimately settled in favour of the secular and so the "primacy of faith in the public sphere [was denied]. Religious faith can be comforting, it can be inspiring, it can be sustaining; but the Enlightenment denied that it could govern."¹¹ Whereas temporal government remains negotiable and ultimately removable, spiritual authority was power without accountability. The Drafters of the *United States Constitution*, being slightly more sympathetic to the spiritual dilemma, decided to hedge: they incorporated the Enlightenment-inspired Establishment Clause with the compensatory Free Exercise Clause as a sop to the Evangelical lobby.¹²

By contrast, the more recent Canadian *Charter of Rights and Freedoms* of 1982 grants "freedom of conscience and religion"¹³ with no mention of an Establishment Clause. Canada's historical lack of an Establishment Clause was due to a pragmatic compromise at Confederation in 1867 which constitutionalised the continuance of territory-sponsored denominational schools that existed at the time.¹⁴ The later introduction of such a clause in the 1982 *Canadian Charter of Rights and Freedoms* would have denied this history and so was omitted.¹⁵

A further constitutional difference is that God is specifically mentioned in the preamble to the Canadian Charter: "Canada is founded upon principles that recognise the supremacy of God;"¹⁶ moreover the G is capitalized. Horwitz points out this technical

⁹ McLachlin, B. "Freedom of Religion and the Rule of Law: A Canadian Perspective in Farrow, D. (2004). *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*. Montréal, McGill-Queen's University Press ; Chesham : Combined Academic [distributor].p21

¹⁰ Terrell, T. (2005). "Confronting the Legal Meaning of Religious Faith: Wringing Universal Values Out of Pluralism Itself." *Emory Law Journal* 54: 337-355, 340

¹¹ Sherry, S. (1997). "Religion and the Public Square: Making Democracy Safe for Religious Minorities." *DePaul Law Review* 47: 499-517, 511

¹² "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

¹³ *Constitution Act* 1982 Part I s2 (a)

¹⁴ Albert, R. (2004) *op.cit.*, p879

¹⁵ Eisgruber, C. and Zeisberg, M. (2006) *op.cit.*, p244

¹⁶ Pangle, T.L. "The Accommodation of Religion: A Tocquevillian Perspective" McKenna, M. C. (ed) (1993) *op.cit.*, p5

privileging of monotheism and an incongruity with the later freedom of religion.¹⁷ The American Constitution has no reference to God, either capitalized or not. Furthermore, Canada's Head of State is the Queen whose nominal title is "Defender of the Faith"¹⁸ which Patrick describes as merely "Ceremonial Deism."¹⁹ The American Head of State, the President, has no such honorific although rarely misses an opportunity to invoke the Lord's blessing on his country.

Nominally both countries' religious jurisprudence is based on secular liberalism, with a temporal rather than spiritual command regarded as more legitimate. Within this frame "religion [is] regarded merely as a hobby."²⁰ On the one hand the liberal will vigorously defend the religious adherent's beliefs but ultimately regard them as a choice, rather than an imperative.²¹ Provided they produce no societal turbulence they are sacrosanct, but must inevitably concede to "cold reason" should there be an irreconcilable conflict.²² Religion must therefore remain both discrete and discreet.

Yet this separation is only partially convincing as "jurisgenesis always takes place through an essentially cultural medium."²³ Any legal system is the product of its culture and in that culture religion is integral. The North American legal systems have Christian morality as their foundation. The "moral tones or values of the ambient society"²⁴ have always been ultimately Christian whether the judiciary were openly asserting that the "condemnation of sodomy is firmly rooted in Judeo-Christian moral and ethical standards;"²⁵ or "Christianity is a part of the common law of the state in that its divine

¹⁷ Horwitz, P. (1996). "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2 (a) and Beyond." University of Toronto Faculty of Law Review 54(1): 1-64,62

¹⁸ Although this is not Anglicanism as there is no single established religion due to Catholic Quebec. It is merely a replication of her title as Queen of England from Beschle, D. (2001) *op.cit.*, . p 474

¹⁹ Patrick, J. (2006). "Church, State, and Charter: Canada's Hidden Establishment Clause." Tulsa Journal of Comparative & International Law 14: 25-52, 34.

²⁰ Stephen Carter quoted in Horwitz, P (1996) *op.cit.*, p4

²¹ *ibid* p23

²² *ibid* p23

²³ R. Cove quoted in Borrows, J (2002) *op.cit.*, p4

²⁴ Idleman, S. (1993). "The Role of Religious Values in Judicial Decision-making." Indiana Law Journal 68: 433-487,474

²⁵ *Bowers v. Hardwick* 478 U.S. 186 at 196 (1986)

origin and truth are admitted;”²⁶ or that discovery by “Christian nations gave them sovereignty over and title to the lands discovered;”²⁷ or citing “Judeo-Christian teachings” in order to justify the prohibition on public nudity.²⁸ One only has to observe the interrogation of prospective U.S. Supreme Court justices in respect of their religious beliefs to realise that the public “have not fallen for the illusion of an autonomous legal system.”²⁹ Indeed, the United States Supreme Court opens its session with a monotheistic plea of “God save the United States and this Honourable Court.”³⁰

Yet the counter-majoritarian United States *Bill of Rights* and Canadian *Charter of Rights and Freedoms* were designed to insulate minority faiths from political interference.³¹ It is because both the United States and Canada are predominantly Christian that they would be highly unlikely, either deliberately or incidentally, to unduly burden Christianity with adverse legislation.³² Just as federalism dictates the allocation of power between the state and central government, acting as a diluent and restraint, so are the judiciary entrusted with policing the legislature and executive.³³ In our context, their function is to “protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.”³⁴

Madison described the ultimate purpose of the American religious freedom clauses as an accommodation to duties of rendering homage to God which are “precedent both in

²⁶ *Vidal v. Girard's Executors*, 43 U.S. (1 How.) 127 (1844) at 198

²⁷ *United States v. Alcea Band of Tillamooks* 329 U.S. 40 at 57 (1946)

²⁸ *People v. David*, 549 N.Y.S. 2d 564, at 567 (N.Y. City Ct. 1989)

²⁹ Modak-Truran, M. (2004). "Reenchanting the Law: The Religious Dimension of Judicial Decision Making." *Catholic University Law Review* 53: 709-816, 810

³⁰ Duncan Jr, J. (2002). "Privilege, Invincibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States." *Alabama Law Review* 54: 617-63, 617 Even the US currency itself is monotheistic, bearing the inscription “In God we Trust” *ibid* p626

³¹ Berg, T. (2004). "Minority Religions and the Religion Clauses." *Washington University Law Quarterly* 82: 919-1000, 924

³² Feldman, S. (2004). "Religious Minorities and the First Amendment: The History, The Doctrine, and The Future." *Journal Of Constitutional Law* 6:2: 222-277, 252

³³ Gildin, G. (2006). "The Sanctity of Religious Liberty of Minority Faiths under State Constitutions: Three Hypotheses." *University of Maryland Law Journal of Race, Religion, Gender and Class* 6: 21-50, 33

³⁴ Justice Brennan’s dissent in *Goldman v. Weinberger* 475 U.S. 503 (1986) at 523-524

order of time and degree of obligation to the claims of civil society.”³⁵ In order of time, duty to the Great Spirit must therefore precede the demands of the recently arrived American polity by several thousand years on the North American continent.

2.3 The Great Spirit

“An old Crow Chief once asked of the difference between Indian... and white [religion] responded thatfor the Indian there were visions for the whites there were only ideas.”³⁶

This is not a theological treatise that will exhaustively compare Indian and non-Indian religious practices. Nevertheless, it would be beneficial at this stage, in order to provide context, to explain at least some of the major theoretical differences in the traditions. Indeed, any inquiry into the suppression of Indian religion, and in particular any charge of discriminatory treatment, must be based upon some comparison with the non-Indian traditions. However, it must be admitted from the outset that “every scholarly writing on tribal religions is woefully incomplete.”³⁷ A particular difficulty is that there are sacrosanct practices or sacred sites that must forever remain hidden from the non-Indian for a myriad of reasons. For example, their divulgence would sacrifice their sacrality or encourage an alien and intrusive tourism.

Indian religions are tribal not universal and make no attempt to proselytise, which in itself can be seen as suspicious by mainstream religions.³⁸ There may be much intra-tribal variation of belief: monotheists may co-exist with henotheists and polytheists³⁹ and identifying the essence of a tribal faith may be impossible. People cannot join tribal religions by acceptance of doctrine; indeed, Indians are indifferent to the beliefs of outsiders.⁴⁰ Christianity, by contrast, claims a universal truth which is monotheistic and exclusive. This necessarily frames the relationship to others as not merely evangelical but

³⁵ Berg, T. (2004) *op.cit.*, p982

³⁶ Deloria, V “Vision and Community” in Treat, J. (ed) (1996) *op.cit.*,.

³⁷ Deloria, V (1999) *op.cit.*, p200

³⁸ Sherry, S. (1997) *op.cit.*, p508

³⁹ Vecsey, C. “Prologue” in Vecsey, C (1991) *op.cit.*, p12

⁴⁰ Deloria, V. (1973). God is Red. NY, Grosset, p202

“adversarial and non-negotiable.”⁴¹ Indeed, as Stephen Feldman remarks: “Christian... imperialism.... pulses through the American social body.”⁴²

Judeo-Christian religions are “commemorative” in that they can often be traced to a foundational event or figure with a subsequent linear progression to the present.⁴³ In contrast, the Indian cyclical concept of time emphasises degeneration and regeneration⁴⁴ and many Indian Languages “do not have past and future tenses; they reflect rather a perennial reality of the now.”⁴⁵ Native religious experience is a “continual renewal of relationships with holy places”⁴⁶ which have less relevance in Judeo-Christian traditions, at least in North America. Indian religions are therefore temporally diffuse but spatially precise and although Indians may be uncertain, for example, *when* their creation stories occurred, they may be certain *where* they occurred.⁴⁷

Indian religion and culture are oral not literate. There is therefore no sacred literature comparable to the Bible or Koran,⁴⁸ indeed memorialisation by text may be forbidden as a form of desacralization.⁴⁹ Ethnocentric notions may presume that literacy is a “step further along the evolutionary scale”⁵⁰ and view language in purely “instrumental terms.”⁵¹ As will be discussed later, the orality of Indian tradition also contributes to the failure of litigation.

Tensions also exist between capitalist ideologies and certain native religious practice. In particular, ceremonies such as the Potlatch (Giveaway Ceremony) were targeted

⁴¹ Deloria, V. (1999) *op.cit.*, p159

⁴² Quoted in Sherry, S. (1997) *op.cit.*, p507

⁴³ Suagee, D. (1982). "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers." American Indian Law Review 9: 1-58

⁴⁴ Deloria, V. (1973) *op.cit.*, p91

⁴⁵ Brown, J.E., Weatherly M.B et al (2007) *op.cit.*, p37

⁴⁶ Pryor, A. and Bailey, G. (1989). "An Indian Site-Specific Religious Claim against Trips over Judeo-Christian Stumbling Blocks." Journal of Land Use & Environmental Law 5: 293-322, 317

⁴⁷ *ibid* p138

⁴⁸ Ward, R. (1992) *op.cit.* p799

⁴⁹ Sanchez, V. (1997) *op.cit.*, p60

⁵⁰ Chamberlin, J.E. “Culture and Anarchy in Indian Country” in Asch, M. (ed) (1997) *op.cit.*, p9

⁵¹ *ibid*

as a violation of a solemn tenet of capitalism being wasteful and retrograde.⁵² Although the acquisition of wealth was pursued in, for example, certain North West coastal tribes this was not for the joy of possession or generating a surplus for profit, but for giving away at the Potlatch. “To give away wealth was to be wealthy”,⁵³ not materially but spiritually and in terms of tribal prestige.⁵⁴

There is also an Indian reverence for land and nature which recognises that “while the resources have an existence without us we have no existence without them.”⁵⁵ Yet the “preservation of species diversity”⁵⁶ plays no part in Indian belief systems, thus the Indian killing of eagles for ceremonial and religious purposes can conflict with the dominant society’s concept of ecology. Western endangered species legislation is regarded as “anthropocentric and utilitarian”⁵⁷ as it emphasises the human interest rather than the inherent spirituality of the animal world. Rather, a spiritual ecology informs the Indian relationship with the animate world, which demands that man must answer to a higher authority in his treatment of the biosphere. Of course the irony is that Western culture can be seen as nominally more protective of species diversity than cultural diversity, although the environmental record would belie even that assertion.

The Christian deity is in a sense portable.⁵⁸ Worship can occur in any church of the same denomination with a similar chance of success. In contrast, Indian worship is often site-specific with the spirituality inherent in the geography. Specific sites may represent the emergence of ancestors from the earth or the dwelling place of gods.⁵⁹ This whole concept of sacred sites *within North America* bemuses the non-Indian. Although some places such as Gettysburg National Cemetery are hallowed, it is due to human activity,⁶⁰ specifically

⁵² Pettipas, K. (1994) *op.cit.*, p215

⁵³ Cole, D. and Chaikin, I. (1990) *op.cit.*, p12

⁵⁴ *ibid*

⁵⁵ Borrows, J. (2002) *op.cit.*, p20

⁵⁶ Ward, R. (1992) *op.cit.*, p826

⁵⁷ *ibid*

⁵⁸ Pryor, A. and Bailey, G (1989). *op.cit.*, p317

⁵⁹ O’Brien, C. (1991) *op.cit.*, p22

⁶⁰ Deloria, V. (1999) *op.cit.*, p207

violence and the consecration by those who “gave their last measure of devotion.”⁶¹ Indians, of course, have been on the continent much longer and their relationship with the land has had more time to spiritually develop. Indeed, many sacred sites predate the United States.⁶² Of course Indian sacred sites can be analogized to certain sites in the Holy Land yet this is only partially satisfactory. Bulldozing the Wailing Wall or converting the Mount of Olives into a ski slope would be extremely painful but not fatal. These religions could still be practised, whereas destruction of Indian sacred sites necessarily results in “actual spiritual destruction.”⁶³ Furthermore, such is the universal significance of some sites and rituals that they believe “that the continual welfare of their people, or even the entire world, depends upon certain rituals and ceremonies being properly performed.”⁶⁴

Of course parallels do exist with certain Western religions: Judaism has an acute sense of community and a complete cultural and religious tradition;⁶⁵ the Amish are also insular and communally tight, with a strict adherence to custom and an intimate relationship to tracts of land.⁶⁶ It is perhaps significant that both these communities have often come into conflict with mainstream Christianity and fared poorly at the hands of North American Jurisprudence. Indeed, it may be noteworthy in terms of religious minority empathy that one study in the United States found that Jewish and non-mainstream Christian judges were “significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch....that refused to accommodate religious dissenters.”⁶⁷

Not only are there differences in religious traditions but of equal, if not greater significance, is the different relationship between religion and the legal system *within* Indian society. This will be the focus of the next section.

⁶¹ Abraham Lincoln's Gettysburg Address from Morris, J. (1999). Lincoln : A Foreigner's Quest. London, Viking p188

⁶² Michaelsen, R. (1985). "American Indian Religious Freedom Litigation: Promise and Perils." The Journal of Law and Religion: 3: 47-76, 60.

⁶³ Gordon, S. (1985). "Indian Religious Freedom and Governmental Development of Public Lands." Yale Law Journal: 94: 1447-1471, 1450.

⁶⁴ Suagee, D. (1982) *op.cit.*, p10

⁶⁵ Deloria, V. (1993) *op.cit.*, p222

⁶⁶ *ibid* p207

⁶⁷ Sisk, G. (2005). "How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases." University of Colorado Law Review 76: 1021-1056, 1029

2.4 Church and State in Indian Society

*"There are two kinds of societies-apple societies and orange societies. In the orange society, everything is separated, in an individual section-law, religion, economics, politics; but in an apple society everything is one great big whole."*⁶⁸

No Indian language has a comparable word to the English religion.⁶⁹ Indians also have no concept of the secular.⁷⁰ They are the archetypal apple society as religion is inseparable from other social, political, legal and cultural aspects. As Justice Brennan memorably said in his spirited dissent in *Lyng v. Northwest Indian Cemetery Protective Association*, "any attempt to isolate the religious aspects of Indian life is in reality an exercise which forces Indian concepts into non-Indian categories."⁷¹ Indian spirituality is all-pervasive.⁷²

Indeed, this inextricable relationship was recognised and exploited by the majoritarian culture in their Nineteenth Century assimilationist policy, as it was well understood that an assault on the Indian spirituality was an assault on the totality of the Indian lifeway and culture. Although Victorian sensibilities may have recoiled at the more overtly sexual and visceral nature of some of the practices, this only partially explains the vigour of the suppression, the integral nature of the religious, political, economic and social spheres was equally relevant.⁷³ North American governments realised that a successful assault on Indian religion would bring down the whole edifice of Indian identity.

As with other aspects of Indian identity, law also feels the all-pervasive impact of Indian spirituality. Law to the Cherokees, for example, was a part of their larger worldview, a "directive from his spirit world."⁷⁴ The interconnectedness between law and religion was even acknowledged by the U.S. when Congress passed the *Indian Civil Rights Act* (1968). The Act was designed to incorporate most of the *Bill of Rights* provisions into internal tribal law⁷⁵ and to ensure that a tribal member could now rely on similar rights against his tribal

⁶⁸ Professor Neill Alford, Jr quoted in Strickland, R. (1997). "Wolf Warriors and Turtle Kings: Native American Law before the Blue Coats." *Washington Law Review* 72: 1043-1062, 1045.

⁶⁹ Brown, J. E., Weatherly, M. B. et al. (2007)*op.cit.*, p2

⁷⁰ Pommersheim, F. (1997) *op.cit.*, p1182

⁷¹ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439 (1988) at 469.

⁷² Beaman, L. (2002) *op.cit.*, p137

⁷³ Pettipas, K. (1994)*op.cit.*, p18

⁷⁴ *ibid* p1047

⁷⁵ The Indian Civil Rights Act 1968 25 U.S.C. ss 1301-3

government as against the federal and state governments, although independent federal enforcement was limited to *habeas corpus* applications.⁷⁶ Of particular significance was the fact that the *Act* included the Free Exercise provision of the First Amendment, but no counterbalancing Establishment Clause.⁷⁷ This was an acknowledgement that the liberal, secular concept of a church-state dichotomy would be inappropriate for internal tribal governance as the two are complementary in Indian society, often bordering on theocracy.⁷⁸

The conflation of law and spirituality also means that Indians have a different concept of the Treaty. North American Governments regarded them as a temporal contract, whereas Indians saw them as a sacred bond,⁷⁹ breach of which invited spiritual censure not merely secular legal remedies. As the *Royal Commission on Aboriginal Peoples* commented, Indian treaties were regarded by the North American governments as “devices of statecraft” rather than solemn covenants.⁸⁰

The importance of community harmony emphasises that the tribal entity is the fundamental concept. Individual action must be based on responsibility and duty and must be functional in the furthering of tribal interests. The concept of individual civil rights *against* the tribe is often alien and absurd.⁸¹ Furthermore, a focus on an individual’s rights ignores the fact that “religion must be passed down through the generations or the culture and religion cannot survive and this means that some people in each generation are obligated to perform certain roles.”⁸² If this responsibility is avoided it means that “others will not have the [individual] freedom to choose the tribal religion because it will no longer exist.”⁸³

In summary, the relationship between religion and law within Indian society differs markedly from that within non-Indian society. Indian spirituality pervades all aspects of

⁷⁶ *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978)

⁷⁷ The Indian Civil Rights Act 1968 s1302(1)

⁷⁸ Deloria, V. (1973) *op.cit.* p218

⁷⁹ Pommersheim, F. (1997) *op.cit.*, p1183

⁸⁰ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 8 p3

⁸¹ Deloria, V. (1999) *op.cit.*, p180

⁸² Suagee, D. (1999). "The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity." Arizona State Law Journal 31: 483-520, 517

⁸³ *ibid* p510

their culture and society. The nominal but disingenuous separation of law and religion within non-Indian society is as incomprehensible as it is inappropriate to the Indian mind. Although, as mentioned, many Indians have a complete indifference to the views of outsiders as to the validity of their religious traditions and their means of tribal governance, the majoritarian culture, when armed with the law, cannot be ignored. Those particular tensions must now be examined.

2.5 Indians and Western Legality

The Cherokees call the white man's court the place "where the toads chatter," to the Sioux it is "the place of the spiders."⁸⁴ The Navajo name for a lawyer is *agha'diit'aabii* which literally means "one who can never lose an argument" or "one who pushes out with words."⁸⁵ There is not therefore an unequivocal engagement with the litigation process, nor indeed the legal profession.

2.5.1 Tribal Rights

In a general sense Indians often encounter difficulty in vindicating *group* tribal rights within North American legal systems. Any collective rights are usually "outside the acceptable framework for rights claims in the United States."⁸⁶ In particular, a racial or ethnic grouping may be regarded as inherently exclusionary and any preference morally unacceptable to a liberal society.⁸⁷ Indians can suffer at the hands of both a conservative and liberal judiciary but for different reasons. The conservative may have an innate hostility to minority rights whereas for the liberal any tribal preference may, when viewed through an individualist optic, smack of preferential treatment and a violation of equal protection.⁸⁸ Indeed, liberalism tends to perceive the individual as the "only holder of morally important rights."⁸⁹

⁸⁴ Strickland, R. (1997) *op.cit.*, p1059

⁸⁵ Zion, J.W. "Justice as Phoenix: Traditional Indigenous Law, Restorative Justice and the Collapse of the State" in Ross, J.L. and Gould, L.A. (eds) (2006) *op.cit.*, p65

⁸⁶ Beaman, L.G. (2002) *op.cit.*, p146

⁸⁷ Goldberg, C. (2001). "American Indians and "Preferential" Treatment." *UCLA L. Rev.* 49: 943-989,976

⁸⁸ Berger, B. (2006). "Liberalism and Republicanism in Federal Indian Law." *Connecticut Law Review* 38: 813-831,815

⁸⁹ Goldberg, C.(2001) *op.cit.*, p974

Yet the liberal judge can sometimes be persuaded that any partial treatment of Indians is a corrective for past oppression or current majoritarian disfavour. Thus as Kymlicka would suggest, these rights are actually intended to advance equal protection because the majoritarian culture's status is inherently but tacitly privileged through "social institutions, official language, public holidays, symbols, museums and buildings as well as public school curricula that reflect the mainstream culture."⁹⁰

Tribal rights can also sometimes resonate with the liberal judge if framed as a self-determination of peoples question. Similarly, it could be argued that the denial of collective rights impacts the individual. Indeed, the definition of group right may not be obvious: is it an individual right that can only be exercised *within* a collective such as language, or is it a right that can only be exercised *as* a collective, such as self-determination?⁹¹

Fundamentally however, it must be admitted that liberal theory prioritises the individual rather than the community: "plurality over unity."⁹² This of course is the opposite of the Indian perspective, in which any struggle for individual rather than tribal rights, is a "quest for things that are meaningless unless shared."⁹³

2.5.2 Indian Religion and Western Jurisprudence

There is a generalised and mutual incomprehension, even hostility, between the Indian religious rights litigant and majoritarian jurisprudence on the North American continent. This may be due to the fact that Indian litigants suffer from having to perform a double translation: their spirituality must be translated into Judaeo-Christian religious concepts and then into judicially cognizable forms.⁹⁴

The interconnectedness of Indian religion, alluded to before, means that Indians can have difficulty framing an action as a free exercise claim as it is at times impossible to distinguish between Indian religious and cultural activities. Indeed, the return of sacred objects and sacred site protection could be "treaty, cultural, religious or political rights or more likely all four issues together."⁹⁵ This unfamiliarity and difficulty in categorisation can

⁹⁰ *ibid* p977

⁹¹ Goldberg, C. (2001) *op.cit.*, p973

⁹² Berger, B. (2006) *op.cit.*, p824

⁹³ *ibid* p825

⁹⁴ Dussias, A. (1997) *op.cit.*, p811

⁹⁵ Anderson, R.T., Goldberg, C. et al (eds)(2005) *op.cit.*, p749

result in hostility and “even suspicion of fraud.”⁹⁶ For free exercise purposes, Indian religion is viewed as inseparable from culture and therefore not a discrete element, deemed worthy of protection.⁹⁷ Paradoxically, an accommodation of Indian religious practice, however minor, may provoke alarm at a perceived establishment of religion. As Ward remarks, the two concepts of Indian religion should be mutually exclusive.⁹⁸

These difficulties are compounded because the secrecy of many tribal religions prevents their desacralization as evidence. Indeed, as the anthropologist Don Bahr reminds us, “the ephemerality of Native American mythologies helped to protect their sacredness”⁹⁹ and as Stohr remarks, Indians face a dilemma: “they must destroy their religion to save it.”¹⁰⁰ Nevertheless, for the judge, “the reason why the evidentiary cupboard is bare does not change the fact that it is.”¹⁰¹

Another fundamental difficulty is that constitutional provisions for the protection of religious liberty were drafted to prevent inter-Christian dispute and that non-evangelical Indian faiths were not part of the calculus. Beyer makes the distinction between “Freedom of Religion and Freedom of Religions. The latter determines whether a religion qualifies as one of the “legitimate religions”, the former the extent to which, once recognised, that freedom is protected.”¹⁰² It is crossing the initial qualitative threshold that proves a difficulty for minority religions and Indians in particular.

Judges may also have great difficulty in assessing the symbolic meaning of many Indian communications be they stories, phrases, metaphors and narratives.¹⁰³ Analogizing to Christian concepts is only partially satisfactory as mentioned before in relation to land. For example, Peyote has been compared to the sacramental wine of the Eucharist, yet this is incomplete, as it is an “object of worship; prayers are devoted to it much as prayers are

⁹⁶ Michaelsen, R. (1985) *op.cit.*, p60

⁹⁷ Dussias, A. (1997) *op.cit.*, p810

⁹⁸ Ward, R. (1992) *op.cit.*, p814

⁹⁹ Stohr, G. (1999). "The Repercussions of Orality in Federal Indian Law." *Arizona State Law Journal* 31: 679-703, 696.

¹⁰⁰ *ibid* p698

¹⁰¹ *New Mexico Ranchers Association v Interstate Commerce Commission* 850 F.2d 729 (D.C Cir. 1988) at 734

¹⁰² Beyer, P. (2003) *op.cit.*, p334

¹⁰³ Borrows, J (2002) *op.cit.*, p90

devoted to the holy ghost.”¹⁰⁴ Other analogies include the pipe ritual to the host; drums as a messenger to the Great Spirit like the church organ;¹⁰⁵ the Sun Dance as Jesus’ suffering on the cross; the burning of sweetgrass as incense;¹⁰⁶ prayer sticks as crucifixes and rosaries; and clouds of yucca suds as holy water.¹⁰⁷ Yet is this not merely assimilation by analogy, rather than a celebration and accommodation of diversity?¹⁰⁸

In the final analysis, there may also be differing attitudes as to what constitutes a legal victory. The money judgement awarded for the illegal taking of the Black Hills has been left unclaimed.¹⁰⁹ The Sioux don’t want the money but the land: *Paha Sapa* is sacred and priceless.

2.6 Conclusion

The Doctrine of Discovery was patently a Christian legal fiction and thus any subsequent nominal isolation of religion from law and politics must be regarded as cynical and disingenuous in regard to the indigenous population. The pretence of a completely secular polity and a perfection of the enlightenment goal of the separation of church and state is, in any case, undermined by the civil religion: a mainstream Christian hegemon that treats minority faiths as alien.¹¹⁰ The religious freedom clauses in the United States Constitution were a laudable intent to entrench a counter-majoritarian judicial check on the Protestant ambient yet, as has been suggested, and will be proven in greater detail later, the Supreme Court has largely abdicated this responsibility.

In contrast to the constitutional protection of religious freedom in the United States, only the protection of denominational schooling was entrenched at Canadian confederation. The *Canadian Charter of Rights and Freedoms* in 1982 belatedly introduced a

¹⁰⁴ *People v. Woody*, 394 P.2d 813 (1964) at 817

¹⁰⁵ Dussias, A. (1997) *op.cit.*, p817

¹⁰⁶ Pettipas, K. (1994) *op.cit.*, p220

¹⁰⁷ Bowden, H. W. (1981). American Indians and Christian Missions : Studies in Cultural Conflict. Chicago ; London, University of Chicago Press. p46

¹⁰⁸ Stohr, G. (1999) *op.cit.*, p704

¹⁰⁹ *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) The award was for the \$17m estimated value in 1877. In 1980, with interest, this amounted to \$100m. In 2009 between \$250m and \$300m

¹¹⁰ Justice Brennan’s dissent in *Goldman v. Weinberger* 475 U.S. 503 (1986) at 523-524

free exercise guarantee, but with no Establishment Clause.¹¹¹ Although Canadian jurisprudence will be explored in the relevant chapters, it would be safe to say that, absent a constitutional review facility for substantive rights violations, religious freedom was at the mercy of each parliament.

Any attempt to isolate Indian spirituality within the compartmentalised western frameworks of church and state is inappropriate. Indian spirituality informs all aspects of law and society. Indeed, this integration was recognised by the proscription of Indian religions which, it was hoped, would totally destroy Indian identity and lead to a more complete assimilation.¹¹²

This blurring of religion and culture in general also enables the judiciary to deny characterisation of Indian religion *qua* religion and thus worthy of constitutional protection.¹¹³ The lack of a written scripture is deemed suspect: without miracles being documented they are regarded as the product of febrile superstition. The absence of a fervid evangelism is regarded as a lack of conviction, yet this serves to protect the sacrality of Indian traditions.¹¹⁴ Of course, such secrecy remains an inevitable but real evidential disability for the Indian litigant.

Indian spirituality suffers at the hands of western jurisprudence for several reasons. Firstly, there must be a double translation into western religious concepts and then into judicially cognizable forms.¹¹⁵ Such enforced analogy may indeed be assimilative in itself. Secondly, an oral legal tradition may suffer evidentially at the hands of a hermeneutic-driven western analysis, as does the lack of a scripture undermine the credibility of the faith.¹¹⁶ Finally, and most fundamentally, the religious freedom concepts were designed to be applied to inter-faith disputes within a narrow spectrum of Judaeo-Christian religion; outside this ambit Indian spirituality could be classified as mere superstition or conflated with culture.

¹¹¹ The *Canadian Charter of Rights and Freedoms* of 1982 grants “freedom of conscience and religion” Constitution Act 1982 Part I s2 (a)

¹¹² Pettipas, K. (1994)*op.cit.*,p18

¹¹³ Dussias, A. (1997)*op.cit.*, p810

¹¹⁴ O’Brien, S (1991) *op.cit.*, p13

¹¹⁵ Dussias, A. (1997)*op.cit.*, p811

¹¹⁶ Allegretti, J. (2002)*op.cit* 1069.

The general philosophical differences and points of conflict between Indian and non-Indian law and spirituality have now been outlined. The next two chapters will situate, within the Nineteenth Century, the legal status of Indians within North America and the prevailing religious freedom jurisprudence within the majoritarian society. Having established this framework, there will then be an enquiry into how the treatment of Indian spirituality within this period differed both from non-Indian religion within the two countries and across the 49th parallel.

PART II

CULTURAL GENOCIDE IN THE LONG NINETEENTH CENTURY

CHAPTER THREE

The Indian within the Nineteenth Century North American Legal Systems

3.1 Introduction

The development of Indian Law has not been free from paradox. If the Indians enjoyed a form of internal tribal sovereignty, according to the Marshall model, how could the federal government impose its own jurisdiction over intra-tribal affairs? If the Indians were wards of the government, how could such legal incompetents be deemed capable of ceding vast areas of the North American continent by treaty?

This chapter will explain these inconsistencies by charting the evolution from a bilateral and conciliatory legal relationship at the start of the Nineteenth Century, to a more unilateral and dictatorial framework by the end of the century. In particular, the differing common law understanding of tribal sovereignty in each country will be examined, together with the treaty relationships, the constitutional mandates of federal competency, the civil disabilities and the gradual imposition of criminal and civil jurisdiction. It will be demonstrated how, from the common roots of the Royal Proclamation, the Indians' legal status pursued divergent paths across the 49th parallel.

3.2 United States

3.2.1 Indian Treaties

As discussed above, the Marshall Trilogy of cases established the Supreme Court's view of the Doctrine of Discovery and its effect on the legal status of the Indian tribes in the United States.¹ Internally sovereign, but described as "domestic dependent nations"² and subject to an overarching federal sovereignty which, although later recognised as plenary, had remained for the most part dormant.³ This understanding was reflected in the fact that the Treaty Making Clause dictated the relationship in the early years.⁴

The significance of treaties is articulated in Article VI Section 2 of the Constitution: "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; *and all treaties made.....*shall be the Supreme Law of the Land." (author's italics).⁵ Indian treaties were therefore regarded as having the same status as international treaties.⁶ Despite the exalted status of treaties, it has long been established that, *as a matter of domestic law*, a subsequent contrary statute can abrogate a treaty.⁷ This remains an international delinquency, but is theoretical in the case of an Indian tribe without international *locus standi* and recourse to an international tribunal.

Perhaps to compensate for the inequities and inequalities of treaty making in a foreign language and an unfamiliar legal culture, the Supreme Court developed the so-called Canons of Treaty Construction at the end of the Nineteenth Century. These state that, "Indian treaties should be construed as the Indians would have understood them";⁸

¹ *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

² *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters.) 1, 15 (1831).

³ *United States v. Kagama*, 118 U.S. 375 (1886)

⁴ Article II Section 2 Paragraph 2 from the United States Constitution 1787 from <http://www.usconstitution.net/const.html#A2Sec2> [accessed 30 September 2009]

⁵ *ibid*

⁶ *Turner v. American Baptist Missionary Union*, 24 Fed.Cas, 344,346 (1852) from Wilkins, D. E. and K. T. Lomawaima (2001) *op.cit.*, p173.

⁷ Either an International Treaty (*Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889)); or an Indian Treaty *The Cherokee Tobacco Case*, 78 U.S. (11 Wall) 616 (1871). The *Cherokee Tobacco* case also confirmed that tribes are included in congressional acts unless specifically excluded. Wilkins, E. D. (2008) *op.cit.*, p223.

⁸ *Jones v. Meehan*, 175 U.S. 1, 10 (1899) *United States v. Winans* 198 U.S. 371, 380 (1905)

liberally in favour of the Indians;⁹ and with ambiguities resolved in their favour.¹⁰ Later, in the Twentieth Century, this principle was extended to statutes.¹¹ Of course for the Canons to become operative an ambiguity must first be found; any explicit and deliberate inconsistency prevails.

Congress officially discontinued treaty making in 1871 but emphasised that it was preserving the treaty obligations already assumed.¹² This was the result of Congressional pique, particularly in the House of Representatives, at being reduced to a mere cipher to furnish money for treaties made by the Executive and confirmed by the Senate. Whereas Congress had already been gradually assuming a more prominent role, it now had something approaching an exclusive role.

3.2.2 Tribal Sovereignty and the Role of Congress

Advocates of the legality and legitimacy of congressional power point to the specific congressional mandate in the Commerce Clause, "to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."¹³ The phrasing was in contrast to Article IX of the previous *Articles of Confederation*, which had given Congress a more wide-ranging power of "managing all affairs with the Indians."¹⁴ This would imply an intended circumscription to "commerce" in the Constitution.

By contrast, the subject matter of the Treaty Power described above was theoretically unlimited. The concomitant congressional power of treaty implementation, which was a separate power to that of the Commerce Clause, was similarly broad irrespective of any enumerated power of Congress. Yet such a seemingly broad competence was of course limited to that of consummating the results of a bilateral compact to which the Indians, crucially, had assented.¹⁵

⁹ *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942)

¹⁰ *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)

¹¹ "Statutes are to be construed liberally in favour of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)

¹² *Act of March 3, 1871*, 16 Stat., 544, 566. Agreements were still made, particularly for land cessions but these now needed ratification by both houses of Congress.

¹³ Article I Section 8 Paragraph 3

¹⁴ Prygoski, P. (1997). "War as the Prevailing Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism." *Thomas M. Cooley Law Review* 14: 491-531.494

¹⁵ *ibid* p495

The Commerce Clause was designed principally as a federalism provision giving a supposedly more disinterested Federal Congress the competency in Indian affairs, rather than the more acquisitive and parochial states.¹⁶ The wording of “with” not “over” itself implies a bilateral nature with the tribes. Early legislation under this power was initially correctly targeted at restricting non-Indians’ commercial dealings with the tribes by imposing licensing restrictions and trade regulation.¹⁷ Therefore, the Commerce Clause, if applied correctly, should merely have justified congressional regulation of commercial transactions with the tribes not the “source of a general police power to regulate and order all federal-tribal relationships.”¹⁸ Still less should it have been a mandate to intrude on intra-tribal affairs.

An early indication of the assumption of a more unilateral relationship came with the *Trade and Intercourse Act* 1817. This was the first federal statute to apply to Indians in Indian Country and imposed a federal criminal code for Indian crime, although with the exceptions that it “shall not extend to offenses committed by one Indian against the person or property of another Indian nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe.”¹⁹ Thus tribal sovereignty remained intact for all Indian-Indian crime and for Indian on non-Indian crime already punished by the tribe, but not for non-Indian perpetrators. It is difficult to see a sufficient and direct nexus to “commerce *with* Indian tribes” which could have justified this exercise of congressional power and infringement of tribal sovereignty.

The tribal entity was further marginalised when in *United States v Rogers*²⁰ the Supreme Court determined that a non-Indian could not bring himself within the exemption for Indian-Indian criminal jurisdiction by marrying a tribal member and becoming an adoptive Indian.²¹ Thus, the Supreme Court, for the first time, established a biological rather than political concept of the “Indian.” Having relegated the tribe to a loose

¹⁶ Valencia-Weber, G. (2002). "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets." University of Pennsylvania Journal of Constitutional Law 5: 405-482, 452.

¹⁷ For example in the *Trade and Intercourse Acts* of 1790, 1793, 1796 and 1799.

¹⁸ Prygoski, P. (1997) *op.cit.*, p494

¹⁹ Now codified as *The Indian Country Crimes Act* 18 U.S.C. s1152.

²⁰ *United States v. Rogers* 45 U.S. (4 How.) 567 (1846)

²¹ Berger, B. (2004). "'Power over this Unfortunate Race': Race, Politics and Indian Law in *United States v Rogers*." William & Mary Law Review 45: 1957-2052, 1962.

aggregate defined by race, its political significance was depreciated and any governmental status as a barrier to the intrusion of jurisdiction was diluted.²² The *Rogers* case was similar to *Johnson v McIntosh*, which articulated the Doctrine of Discovery, in that there was no Indian representation in a case that would be definitional in terms of their legal rights. Moreover, by the time of the hearing, the accused had been dead 10 months and there was therefore no live issue or indeed live defendant.²³

3.2.3 Plenary Power and the Supreme Court

A more serious legislative intrusion occurred with the *Major Crimes Act* (1885)²⁴ which imposed United States jurisdiction on seven *Indian-Indian* crimes within Indian country.²⁵ The constitutionality of the *Major Crimes Act* was tested in *United States v Kagama*.²⁶ The Supreme Court did indeed belatedly reject the Commerce Clause as constitutional authority.²⁷ Instead, and more alarmingly, legitimacy was found in the Marshall Trilogy's model of ward status. Specifically, a duty of protection gleaned from the Trust Relationship gave rise to an overarching sovereignty and a Plenary Power which must rest with Congress "[n]ot so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the [t]erritory and other property of the United States, as from the ownership of the country in which the [t]erritories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."²⁸ Of course, such a spurious justification by virtue of "ownership" and "sovereignty" is particularly repugnant as such concepts rely on the Christian Doctrine of Discovery, discussed in a previous chapter.

It must be remembered that the Plenary Power is "a judicial fiction created to justify clearly extra-constitutional (and hence unconstitutional) exercises of congressional power over Indians."²⁹ The justification that it "can be found nowhere

²² *ibid*

²³ Berger, B. (2004). *Op.cit.*, p1964

²⁴ 23 Stat. 385 (1885)

²⁵ Murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny

²⁶ *United States v. Kagama* 118 U.S. 375 (1886)

²⁷ *ibid* pp378-379

²⁸ *United States v. Kagama*, 118 U.S. 375, 380 (1886)

²⁹ Prygoski, P. (1997).*op.cit.*, p12

else” was an abdication of the Supreme Court’s responsibility to identify a more convincing mandate. In the early days of the Republic the Supreme Court, in the great case of *Marbury v Madison*, assumed the role of final arbiter on the meaning of the Constitution.³⁰ This power should have remained as one of interpretation, not creation. The Plenary Power was quite simply a judicial fabrication.

In *Lone Wolf*³¹ the Supreme Court confirmed that Congress could abrogate and disregard Indian treaty rights whenever it wished and that such a power was *political and unreviewable*.³² This confirmed the earlier political categorisation in *Johnson and Rogers*.³³ As Wunder has commented, this “foreclosed the Bill of Rights³⁴ as an available avenue for legal redress. Tribes were at the mercy of the political system without the traditional checks of the judiciary.”³⁵ With such power, adrift from any conceivable constitutional mooring and in the absence of judicial restraint, the United States was seemingly free to govern the tribes as it wished.

Lone Wolf became known as the “Dred Scott decision number two.”³⁶ Yet the analogy is imperfect: the original Dred Scott decision, as Berger reminds us, was reversed by Civil War, the death of 650,000 Americans, and constitutional amendment. *Lone Wolf* remains largely intact.³⁷

³⁰ 5 U.S. 137 (1803) on the basis of Article III which reads “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution”

³¹ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)

³² Wilkins, D. E. and Lomawaima, K. T. (2001).*op.cit.*, p110

³³ *Johnson v M'Intosh* 21 U.S. (8 Wheat) 543 (1823); *United States v Rogers* 45 U.S. (4 How). 567 (1846)

³⁴ In this case the Due Process and Just Compensation provisions of the Fifth Amendment

³⁵ Wunder, J. R. (1994). "Retained by the People" : A History of American Indians and the Bill of Rights. New York ; Oxford, Oxford University Press.p42

³⁶ Wilkins, D. E. and Lomawaima, K. T. (2001).*op.cit.* ,p111

³⁷ Berger, B. (2004) *op.cit.*, pp2042-2044

3.2.4 Indians and Citizenship

As for the *individual* Indian, he was regarded as a “person” for the purposes of a writ of *habeas corpus*,³⁸ but not a citizen entitled to vote, even should he have met the property qualifications and withdrawn from tribal life.³⁹ The Fourteenth Amendment, which was passed for the emancipated slave and granted “universal citizenship”, was not regarded as applicable to him in the tribal context. The inclusion of the “Indians not taxed” in Section 2 of the Amendment, which dealt with congressional representation, was regarded by implication as excluding the tribal Indian from automatic citizenship.⁴⁰ Citizenship was only granted piecemeal as a result of the *General Allotment Act* of 1887.⁴¹

Therefore their status was unique: “neither citizens, nor aliens, nor foreign nations.”⁴² They did however have the consolation, in contrast to the Canadian Indian as will be discussed, that within tribal land they remained *de jure* immune from state and territorial jurisdiction⁴³ and *de facto* immune from a largely unexercised federal plenary authority. It must be remembered however, that there was now no *constitutional* obstacle to abolishing the tribal entity and reducing Indian status to that of a religious community.⁴⁴ Moreover, as will be discussed, a religious community whose members were seemingly outside the protections of the Bill of Rights.

³⁸ *Standing Bear v Crook* 25 F. 695, 700-701 (1879).

³⁹ *Elk v Wilkins* 112 U.S. 94, 98-99 (1884) The Supreme Court ruled that John Elk, born a tribal member but who had severed himself from tribal relations, could not vote in Nebraska. Some Act of Congress was necessary to naturalize him.

⁴⁰ According to a report from the Committee of the Judiciary instructed by Congress to deliberate on the Fourteenth Amendment and which reported in December 1870 from Prucha, F. P. (1976) *op.cit.*, p344.

⁴¹ 24 Stat. 388. To allottees and those who had severed their tribal relations.

⁴² Prucha, F. P. (1976). *Op.cit.*, p332

⁴³ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

⁴⁴ Mansfield, J. (1986). "The Religion Clauses of the First Amendment and Foreign Relations." DePaul Law Review 36: 1-40, 6.

3.3 Canada

3.3.1 Ontario and Quebec

In Canada, prior to confederation, the situation differed between English Upper Canada (Ontario) and French Lower Canada (Quebec). In the former, no common law rights to tribal sovereignty were recognised. As Chief Justice Macauley remarked in 1839, there was “no claim to separate nationality such as would except him from being amenable to the laws of the land.”⁴⁵ In the *King v. Phelps* Indians were analogized with French settlers and “the idea that the Indians were not subject to the laws of Canada absurd.”⁴⁶ Indeed, as Haring remarks, individual Indians were legally accorded the same rights as white people in the courts. Moreover, any Indian who met the individual property qualifications was theoretically entitled to vote.⁴⁷ This is the importance difference between early Nineteenth Century Canadian and American Indian law.⁴⁸

As Ontario Supreme Court Justice William Riddell remarked later in 1913, “in the United States there has been from time to time question as to the legal status of Indians and Indian land; in Ontario there has never been any doubt that all the land, Indian or otherwise is the King’s and that Indians are subjects in the same way as others. There are no troublesome subtleties in Canadian Law.”⁴⁹ As a practical matter Indian tribes were left as *de facto* self-governing until the *Indian Acts*. However, this was not due to any legal principle, but mainly on account of geography.

Whatever the anomalies and debate about access to the civil law, the criminal law was always applicable to the Indians, whether they were tribal members living on reserve land or within the mainstream society.⁵⁰ This contrasts with the United States, where some pretence of extending jurisdiction incrementally within the tribes was required, even though this was constitutionally illegitimate as mentioned.⁵¹

⁴⁵ Haring, S. (1992). "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law." *Saskatchewan Law Review* 56: 297-372,315

⁴⁶ *The King v. Epaphrus Lord Phelps*(1823), 1 Tay. 47.at 88-89

⁴⁷ Haring, S. L. (1998) *op.cit.*, p101

⁴⁸ *ibid* p100

⁴⁹ Backhouse, C. and Osgoode Society for Canadian Legal History (1999). *Colour-Coded : a Legal History of Racism in Canada, 1900-1950*. Toronto, Published for the Osgoode Society for Canadian Legal History by University of Toronto Press. p123

⁵⁰ Haring, S. L. (1998).*op.cit.*, p218

⁵¹ *ibid* p345.

In contrast to English-dominated Upper Canada, Indian tribes in Lower Canada were regarded as *de jure* retaining at least part of their legal systems, as Judge Samuel Monk emphasised in *Connolly v. Woodrich*, “the common law could be no more carried to Rat River in a knapsack than the Cree law ...could be carried to Lower Canada in a canoe.”⁵² However, the significance of the *Connolly* case should not be overestimated, as this only related to Cree marriage law in 1803, in an area over which European sovereignty was limited at the time. Significantly, Monk refused to endorse any wider powers of self-government.

3.3.2 The Union of the Two Canadas

Following the 1840 union of the two Canadas,⁵³ any difference between Upper and Lower Canada changed and the *Gradual Civilization Act* of 1857⁵⁴ was intended to “remove all ...distinctions... between Indians and Her Majesty’s other Canadian subjects.”⁵⁵ To this end, it paradoxically initiated a “legal duality,”⁵⁶ and was a more direct intrusion into internal tribal affairs. As Haring commented, this “marked the transition from law to equity, from equality to paternalism. There was now a legal model of Indian as child, as ward of the government.”⁵⁷ The ultimate aim of the Act was assimilation into Canadian society by breaking up the tribal land mass and conveying freehold acreage to each member.⁵⁸ It established, for the first time, an explicitly inferior legal status for the Indian as a precursor to assimilation. Although theoretically an Indian could have previously registered to vote, had he met the individual property ownership, now to become enfranchised he also had to give up his band status as well as his share of tribal land.⁵⁹ There was a penalty of six months imprisonment for those falsely claiming to be enfranchised.⁶⁰ Enfranchisement, with its attendant rights and privileges would be granted

⁵² *Connolly v. Woodrich* (1867) 17 R.J.R.Q. 75, 91

⁵³ *The Union Act* 1840 (U.K.), 3 & 4 Vict. c.35

⁵⁴ *Statutes of Canada*, 20 Vict., c.26

⁵⁵ *ibid*

⁵⁶ Haring, S. L. (1998) *op.cit.*, p33

⁵⁷ *ibid* p108

⁵⁸ Nichols, R. L. (1998) *op.cit.*, p199

⁵⁹ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 6 p11

⁶⁰ *ibid* Volume I Chapter 9 p20

only to those who were “literate in either English or French, free of debt and of good moral character,”⁶¹ conditions which would have been beyond many European Canadians of that time. Isolation on reserves was to be maintained and consolidated by subsequent land treaties during this difficult transitional period.⁶² Thus, the policy of civilization and Christianization was to be performed in quarantine, free from the risk of the moral contamination and degradation of these inchoate whitemen, by actual frontier whitemen.⁶³ The policy of voluntary enfranchisement had only limited success: only one Indian named Elias Hill is known to have applied.⁶⁴

The *Gradual Civilization Act* should actually have been declared *ultra vires* the colonial legislature as the *Royal Proclamation* of 1763 had reserved Indian affairs to the Crown.⁶⁵ The Royal Proclamation had of course remained a constitutional document, in contrast to the situation south of the border, where it had been rejected in the thirteen colonies by revolution.⁶⁶

3.3.3 Confederation

At the time of confederation in 1867 and the conferral of dominion status, the *British North America Act*⁶⁷ confirmed that competency for all Indians was a federal responsibility, with section 91(24) allocating legislative authority to the national parliament over “Indians, and Lands reserved for Indians.”⁶⁸ How much this preserved of an admittedly tenuous tribal sovereignty was demonstrated with the *Gradual Enfranchisement Act* of 1869,⁶⁹ which explicitly replaced traditional tribal governments with non-Indian style

⁶¹ Tobias, J.L. “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy” in Getty, I. A. L. and Lussier A. S. (eds) (1983). As Long as the Sun Shines and Water Flows : A Reader in Canadian Native Studies. Vancouver, University of British Columbia Press. p42

⁶² Bracken, C. (1997). The Potlatch Papers : A Colonial Case History. Chicago ; London, University of Chicago Press. p185

⁶³ Grant, J. W. (1984). Moon of Wintertime : Missionaries and the Indians of Canada in Encounter since 1534. Toronto ; London, University of Toronto Press. p234.

⁶⁴ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 6 p11

⁶⁵ Milloy, J. “The Early Indian Acts” in Miller, J. R. (1991). Sweet Promises : A Reader in Indian-White Relations in Canada. Toronto, University of Toronto Press.p148

⁶⁶ St. Germain, J. (2001) *op.cit.*, p22

⁶⁷ 1867 (U.K.) 30 & 31 Vict., c.3

⁶⁸ Monahan, P. (2006) *op.cit.*, p517.

⁶⁹ 1869 (U.K.) 32 and 33 Vict., c6

municipal level structures. Tribal governments were empowered to deal with “public health; order and decorum at public assemblies; repression of intemperance and profligacy; preventing trespass by cattle; maintaining roads, bridges, ditches and fences.....”⁷⁰ The governor was enabled to order the elections of chiefs and councils and to dismiss leaders for “dishonesty, intemperance and immorality.”⁷¹

The Canadian parliament adopted the first of a number of consolidating *Indian Acts* in 1876, which provided a more complete regime of federal governance, with very limited retention of tribal self-government. As Harring remarked, “it was a cradle to grave legal regime imposed on Indians without their consent, denying their rights and controlling their lives, even purporting to define who is an Indian.”⁷² The *Indian Act* established that the Indian “could not vote, buy or use alcohol, sell the produce from their own farms, enter into contracts for any purpose, mortgage their property, or sell or lease their lands.”⁷³ It is important to note that the Prairies and Pacific Northwest were colonized after Confederation and thus Dominion Law and the *Indian Act* were applied as a complete framework from the start of contact.⁷⁴

3.3.4 Indian Treaties

Paradoxically, just as the United States discontinued its treaty making policy in 1871, Canada embarked on a series of seven numbered land cession treaties between 1871 and 1877.⁷⁵ Canadian Indian tribes were thus regarded as legally competent to cede lands but not to exercise more than a municipal level of self-government on any non-ceded land or reserve. As mentioned, treaty-making with Indian tribes in the United States had provoked a separation of powers conflict at the national level between the marginalized House of Representatives and the Executive and Senate. This was less relevant in Canada, because in the parliamentary system of government the Executive is more of a subset of the Legislature.⁷⁶

⁷⁰ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p26

⁷¹ Pettipas, K. (1994) *op.cit.*, . p65

⁷² Harring, S. L. (1998). *Op.cit.*, p33

⁷³ *ibid* p263

⁷⁴ *ibid* p165

⁷⁵ St. Germain, J. (2001) *op.cit.*,p168

⁷⁶ *ibid* p22

As for the status of Indian treaties, it is significant that following dominion status Britain divested itself of responsibility for Canadian internal business, reserving the management of only foreign affairs and defence.⁷⁷ Thus, by implication, Indian treaties with the dominion government, unlike United States' Indian treaties, were not regarded as enjoying the status of international treaties as foreign relations remained legally in "the purview of the imperial government until the statute of Westminster of 1931."⁷⁸

3.4 Conclusion

Throughout the continent, once the Indians had lost any military significance as power brokers between the European nations and their tribal populations were reduced, the need for meaningful accommodation was similarly reduced. Early use of the more bilateral Treaty Power gradually gave way to the more unilateral Commerce Clause in the United States. Indians in Canada, who had been accorded a theoretical equality within the legal system in the early Nineteenth Century, were reduced by the *Indian Act* to an explicitly inferior status with its corresponding civil disabilities. Canadian Indians had always remained subject to general criminal law, in contrast to American Indians who had to be brought within such jurisdiction.

In each country responsibility for Indian affairs was national rather than local. In the United States the Treaty Making Clause and Commerce Clause framed the relationship with the federal government. North of the border, section 91 (24) of the *British North America Act* 1867 gave responsibility to the Canadian National Parliament for "Indians and land reserved for Indians."

Indian Treaties in the United States were regarded as enjoying equal status as foreign treaties,⁷⁹ whereas in Canada, as foreign treaties were reserved to the metropolitan country, the implication was that they were purely a domestic convenience.⁸⁰ Although both countries have developed sympathetic canons of construction,⁸¹ to compensate for the imbalance in the negotiation process, Canada's emerged only in the Twentieth

⁷⁷ St. Germain, J. (2001) *op.cit.*, p6

⁷⁸ *ibid* p23

⁷⁹ *Turner v. American Baptist Missionary Union*, 24 Fed.Cas, 344,346 (1852) from Wilkins, D. E. and Lomawaima K. T. (2001) *op.cit.*, p173

⁸⁰ St. Germain, J. (2001).*op.cit.*, p23

⁸¹ In the United States *Jones v. Meehan*, 175 U.S. 1, 10 (1899) *United States v. Winans* 198 U.S. 371, 380 (1905)

Century.⁸² It must be emphasised that in neither country would an explicit and intentional abrogation be saved.

Common law rights to tribal sovereignty were recognised in the United States by the Marshall trilogy of cases. This meant that any jurisdictional intrusions, such as the *Major Crimes Act* 1885, had to be justified, if disingenuously and illegitimately, by the Trust Power and Commerce Clause. In Canada, any internal tribal sovereignty was casually swept away by the *Indian Acts* without seemingly any need to justify the legality or legitimacy, leaving merely a municipal level government. Fundamentally, the difference was that internal tribal sovereignty in the United States was recognised as complete except where Congress acted, and it had acted often. By contrast, Canadian tribal sovereignty was assumed to be absent except when conferred by Parliament, and this had been seldom and trivial. In the United States the Indians were regarded more as wards in the *collective*, tribal sense whereas in Canada, from the point of confederation, the model was that of an *individual* wardship with the tribal entity marginalised.

Universal citizenship was absent in both countries during the Nineteenth Century and as mentioned above, only granted to certain Indians in the United States as a result of the *General Allotment Act* of 1887.⁸³ United States tribal Indians were deemed members of a quasi-foreign polity; Canadian Indians were regarded as simply individual domestic incompetents.

⁸² *Nowegijick v. The Queen* [1983] 1 S.C.R. 29

⁸³ 24 Stat. 388.

CHAPTER FOUR

4 Religious Freedom Jurisprudence in Nineteenth Century North America

4.1 Introduction

This chapter will examine the differing religious freedom jurisprudence on each side of the border in the Nineteenth Century. In the United States, as mentioned above, a substantive rights-based constitutional judicial review was available, by virtue of the First Amendment. By contrast, in Canada, any constitutional enquiry, in the absence of a specific religious freedom provision, had to pursue a more federalist and procedural analysis. This meant that any protection of religious freedom had to be circuitous and incidental.

The differing religious demograph will also be highlighted. In particular, Canada had emerged from the wars of the Eighteenth Century with a sizeable catholic community to assuage, whereas south of the border there was a more homogenous communion with a less accommodating attitude to those who were outside the protestant mainstream. In neither country was there any thought of accommodating indigenous spirituality.

4.2 United States

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” (First Amendment)

4.2.1 The Establishment Clause

There were two theological perspectives prevalent at the drafting of the Constitution: Congregational Puritans and Free Church Evangelicals; and two political perspectives: Enlightenment thinkers and Civic Republicans.¹ The Congregational Puritans saw “church and state as two covenantal associations, two seats of Godly authority in the community. Each institution, they believed, was vested with a distinct polity and calling.”² Although they were to be kept separate, with church officials banned from political office

¹ Witte, J Jr. “The Essential Rights and Liberties of Religion in the American Constitutional Experiment” in Berg, T. C. (2008) *op.cit.*, p33

² *ibid* p34

and vice versa, they were both manifestations of God's will.³ It was a sort of "divine federalism."

The Evangelical tradition sought a more perfect division of church and state, or as Roger Williams put it, "a wall of separation between the Garden of the Church and the wilderness of the world."⁴ More tolerant of the dissentient view, the emphasis was on liberty of conscience and religious voluntarism. It was more heterodox than the puritan orthodox, which refused to countenance "Familists, Antinomians, and other Enthusiasts."⁵ The Evangelicals regarded both state funding and repression as obnoxious.⁶ They held no view of the political world except that it should be discrete. It was "political agnosticism."

The Enlightenment view was virtually the obverse of the Evangelical. It was a purely political creed that regarded any religion in the polity as a dangerous contaminant. In combination the two would be mutually destructive producing, in the words of that "filthy little atheist"⁷ Thomas Paine, "a sort of mule-animal capable only of destroying and not of breeding up."⁸ Its Crown Prince and principle apostle was Jefferson that "arch infidel, the Virginia Voltaire."⁹ They subscribed to the Lockean view of religion as "speculative opinion."¹⁰

The Civic Republican espoused liberty of conscience, like the Evangelical and Enlightenment viewpoints but, as with the Congressional Puritans, saw no particular danger in state support of religion (or more accurately *religions* in their case). Their scriptures included the Declaration of Independence and the Bible in equal measure and they saw no inherent evil in chaplains for state institutions and thanksgiving days. They felt that religious values should inform the public square but not dictate,¹¹ thus the role of religion was perhaps to imbue but not imbrue civil society.

³ *ibid*

⁴ *ibid* p35

⁵ *ibid* p35

⁶ *ibid* p36

⁷ Gordon, B. S. (2008). Law and Religion, 1790-1920. The Long Nineteenth Century (1789-1920). Cambridge, Cambridge University Press.p424

⁸ Witte, J Jr. (2008) *op.cit.*,p36

⁹ Gordon, B. S. (2008) *op.cit.*, p424

¹⁰ Hamburger, P.A. "A Constitutional Right of Religious Exemption: An Historical Perspective" from Berg, T. C. (2008) *op.cit.*,p103

¹¹ Witte, J Jr. (2008).*op.cit.*, pp38-39

Constructing an effective compromise between these disparate voices took careful drafting. In particular, there was uncertainty as to whether Congress had intended a non-preferentialist or non-entanglement understanding of the Establishment Clause. Foremost among the advocates of the non-entanglement concept were the Enlightenment thinkers such as Jefferson who, echoing Roger Williams in an early letter to the Danbury Baptist Association, described the First Amendment as “building a wall of separation between church and state.”¹² In exchange for the generous and absolute free exercise provision the Establishment Clause was a *quid pro quo*, a complementary insulation of the secularity of government; a necessary emollient to what he regarded as a concession of his “enlightenment-deist-rationalist viewpoint.”¹³ Laycock supports the view that the founders sought to obviate any entanglement by reminding us that earlier drafts which were rejected read, “Congress shall make no law establishing any particular denomination of religion in preference to another” or “”establishing any Religious Sect or Society,” in favour of just “religion.”¹⁴

Whatever the original intention, the actual reality reflected more the non-preferentialist understanding, typified by the Civic Republican, which rejected one religion but embraced religion over irreligion. Examples abound from the early years of the Republic. The *Northwest Ordinance* of 1787 declared that “religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁵ The first congress funded two official chaplains¹⁶ and ratified a proposal for a National Thanksgiving Day.¹⁷ Congress voted funds for a treaty of 1795 with the Oneida, Tuscarora and Stockbridge Indians which had pledged \$1000 for the building of a church.¹⁸ A treaty of 1803 with the Kalaskia Indians

¹² Cited in *Reynolds v United States*, 98 U.S. 145, 164 (1878)

¹³ Pepper, S (2008) *op.cit.*, p52

¹⁴ Laycock, D. “”Nonpreferential” Aid to Religion: A False Claim about Original Intent” in Brownstein, A. (2007)*op.cit.*, p68

¹⁵ 1 Stat. 50

¹⁶ Cord, R.L. “Church-State Separation: Restoring the “No Preference” Doctrine of the First Amendment” in Brownstein, A. (2007)*op.cit.*,p61

¹⁷ Rehnquist from his dissent in *Wallace v Jaffree* 472 U.S. 38 (1985) quoted in Brownstein, A. (2007) *op.cit.*, p46

¹⁸ Cord, R.L. (2007)*op.cit.*,p61

pledged funds to “help build a church and to support a catholic priest in his duties.”¹⁹ In 1796 an Act was passed “regulating the grants of land, appropriated for military services and for the society of the United Brethren for propagating the Gospel among the Heathen.”²⁰ Thus, it can be seen that, far from a rigid non-entanglement paradigm, Congress was quite liberal, even incontinent, in its funding and endorsement of various religious projects.

The Supreme Court determined only one Establishment Clause issue in the Nineteenth Century.²¹ The Court declared that federal aid to a hospice run by Catholics in Washington DC did not breach the Constitution, as it was “simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church.”²² Justice Peckham opined that, “Congress has power to make “a law respecting a religious establishment”.... which is not synonymous with a “law respecting an establishment of religion.””²³ This is a rejection of the non-entanglement position, if not a ringing endorsement of the non-preferentialist stance. Thus the complete wall of separation was, if not absent, certainly porous. It would take the Supreme Court of another era to reconstruct it.²⁴

4.2.2 The Free Exercise Clause

As Buck remarks, the Free Exercise component *itself* could be understood to privilege, endorse or even establish religion, as the Constitution would be searched in vain for any protection for the free exercise of any other civic faith, such as “economics, sociology, or biology.”²⁵ Furthermore, as Pepper remarks, the guarantee of religious freedom in the First Amendment is seemingly absolute.²⁶ There are no qualifiers to the

¹⁹ *ibid* p61

²⁰ Cord, R.L. (2007) *op.cit.*, p62

²¹ *Bradfield v. Roberts*, 175 U.S. 291 (1899)

²² *ibid* pp298-299

²³ *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899)

²⁴ In *Everson v Board of Education*, 330 U.S. 1 (1946) Justice Black stated “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable” from Brownstein, A. (2007) *op.cit.*, p36.

²⁵ Buck, S. (2001). “The Nineteenth-Century Understanding of the Establishment Clause.” Tex. Rev. L. & Pol. **6**: 399-429, 413

²⁶ Pepper, S “Taking the Free Exercise Clause Seriously” in Berg, T. C. (2008) *op.cit.*, p49

right that are found elsewhere in the Bill of Rights, such as “*peaceably* to assemble”;²⁷ “*unreasonable* searches and seizures”;²⁸ “*due* process of law”;²⁹ “*cruel* and *unusual* punishments.”³⁰

Congress had rejected one previous draft, which read “rights of conscience,” in favour of “free exercise.”³¹ McConnell posits two reasons for this rejection. Firstly, that it encompassed a wider protection which included conduct not merely belief. Secondly, it was to exclude other wider belief systems, such as those based on “science, history, economics, political ideology, or secular moral philosophy.”³² But what was understood as worthy of protection? Justice Story, a Supreme Court Justice between 1811 and 1845, perhaps caught the prevailing view: “The real object of the [First] Amendment was not to countenance much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry between Christian sects, and to prevent any national ecclesiastical establishment which should give rise to a hierarchy the exclusive patronage of the national government.”³³ The debate was intra-Christianity, other faiths being beyond the calculus.

The Supreme Court was asked, for the first time, explicitly to determine the extent of the free exercise right in *Reynolds v United States* (1878), when faced with the legality of polygamy in the territories.³⁴ On a preliminary constitutional and jurisdictional matter, the Court held that, “Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion.”³⁵ This confirmed that the Bill of Rights extended to the territories which will have great significance when the treatment of Indian religion is considered in a later chapter.

Justice Peckham remarked that Congress was deprived of the power to regulate mere opinion but was “free to reach actions which were in violation of social duties or

²⁷ Amendment I

²⁸ Amendment IV

²⁹ Amendment V

³⁰ Amendment VIII

³¹ McConnell, M.W (2008) *op.cit.*, p94.

³² *ibid* p94

³³ Quoted by Rehnquist from his dissent in *Wallace v. Jaffree* 472 U.S. (1985) quoted in Brownstein, A. (2007) *op.cit.*, p48

³⁴ *Reynolds v. United States*, 98 U.S. 145 (1878)

³⁵ *ibid* p162

subversive of good order.”³⁶ Polygamy, he continued, had always been “an offence against society, cognizable by the civil courts and punishable with more or less severity”³⁷ and a statute properly enacted by congress does not violate the constitutional right to free exercise by failing to accommodate a religious exemption for conduct repugnant to societal mores. Indeed, were Congress limited by the requirement to excuse such practice, on the grounds of religious belief, then it would “permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”³⁸

McConnell has criticised this decision as inconsistent with the standard of many state constitutions, which were not confined to beliefs and opinions, but encompassed the actions that flow from those beliefs.³⁹ Yet there must be some circumscription to religious-motivated conduct as such a right can never be absolute. Indeed, Justice Peckham did not condemn all conduct; he merely held that religious conduct was not *necessarily* immune from scrutiny. The difficulty of course is that societal mores on the relative deviance of conduct are those of the protestant civil religion. Polygamy again attracted the Court’s scrutiny in *Davis v Beason* (1889).⁴⁰ Justice Field remarked, “bigamy and polygamy are crimes by the laws of all civilized and Christian countries.”⁴¹ Crime is crime, he held, even though it may be sanctioned “by what [a] particular sect may designate as religion.”⁴²

Mormonism, although nominally Christian, regarded mainstream Christianity as having committed a number of serious theological errors: Protestants were apostates and the Catholic Church was the “mother of all harlots.”⁴³ While it would not have been difficult in late Nineteenth Century to have found Protestants that agreed in large measure with this view of Catholicism any criticism of Protestants was beyond the pale. Indeed, anti-Catholicism was rife at the time due to hostility to the rapid influx of European immigrants who did not fit the Anglo–Saxon Protestant template.⁴⁴ This, together with the

³⁶ *ibid* p164

³⁷ *ibid* p165

³⁸ *ibid* p167

³⁹ McConnell, M.W (2008) *op.cit.*, p86

⁴⁰ *Davis v. Beason*, 133 U.S. 341 (1889)

⁴¹ *ibid* p341

⁴² *ibid* p345

⁴³ Gordon, B. S. (2008). *Op.cit.*, p431

⁴⁴ Prucha, F. P. (1986) *op.cit.*, p206

recent and rather startling revelation that the Pope was infallible,⁴⁵ led to a more complete identification of Protestantism and Americanism.”⁴⁶ Catholics were deemed suspect as they owed allegiance to the Pope, and he was an alien.⁴⁷

In *Church of the Holy Trinity v. United States*, (1892)⁴⁸ the matter at issue was an 1885 statute originally designed to exclude foreign workers (mainly Chinese) who had pre-signed work contracts. Its subsequent unfortunate and incidental application to an Anglican priest prompted an eventual appeal to the Supreme Court. As the New York Times quipped, “[t]he Law is no respecter of Parsons.”⁴⁹ On appeal, Justice Brewer for the Supreme Court rejected this use of the statute saying, “this is a Christian nation and the statute could not conceivably have been intended to apply to the Reverend without contradicting the basic assumptions behind all national legislation—that impinging on Christian observance was inimical to religious freedom”⁵⁰

Thus, as Gordon opines, towards the end of the Nineteenth Century religious liberty meant simply that “Protestant faiths competed on a level playing-field.”⁵¹ When confronted by alien beliefs, and deviant practices pursuant to such beliefs, they united in their condemnation and persecution. If there was not an overt privileging of Protestantism then certainly no such compunction was displayed with Christianity, which as Lord Bryce observed, “is in fact understood to be, though not the legally established religion, yet the national religion.”⁵²

⁴⁵ First Vatican Council of 1870

⁴⁶ Prucha, F. P. (1986) *op.cit.*,...p206

⁴⁷ Prucha, F. P. (1979). The Churches and the Indian Schools, 1888-1912. Lincoln ; London, University of Nebraska Press. p27

⁴⁸ 143 U.S. 457 (1892)

⁴⁹ Gordon, B. S. (2008) *op.cit.*, p438.

⁵⁰ 143 U.S. 457,471 (1892)

⁵¹ Gordon, B. S. (2008) *op.cit.*, p434

⁵² Prucha, F. P. (1986)*op.cit.*, p206

4.3 Canada

4.3.1 Pre-Confederation

Following the Seven Years War, the *Treaty of Paris* (1763) expressed a degree of religious tolerance to the defeated French: the King conceded that, “his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit.”⁵³ The qualifier “as far as the laws of Great Britain permit” was significant in that Catholics were still at that time subject to legal proscription in the mother country. Similarly, in the *Quebec Act* (1774) the Roman Catholic subjects could exercise their religion “subject to the Elizabethan Act of Supremacy.”⁵⁴ Despite these seemingly qualified rights, the Catholic religion, as a practical matter, was left largely undisturbed.⁵⁵ Indeed, a legal opinion issued by the Attorney and Solicitor Generals in 1765, even stated that the penal laws of England did not apply to the Roman Catholics of Canada.⁵⁶

The *Constitutional Act* of 1791⁵⁷ divided Quebec into Upper Canada and Lower Canada, comprising mainly Protestant loyalists and French Catholics respectively.⁵⁸ Although there was no formal establishment of Anglicanism, one seventh of all crown land grants in Upper Canada were set aside as reserves to support the Protestant clergy.⁵⁹ The Crown also authorized the Governor or Lieutenant Governor to erect parsonages or rectories within every township or parish⁶⁰ “according to the Establishment of the Church of England.”⁶¹ Following union of the two Canadas⁶² in 1840, the clamour grew for this

⁵³ Article II from *ibid* p62

⁵⁴ I Eliz., c.1 (1558)

⁵⁵ Schmeiser, D. A. (1964). *Civil Liberties in Canada*. Oxford University Press: London. p64. Indeed the Act guaranteed the Catholic Church its “accustomed Dues and Rights, with respect to such Persons only as shall profess the said religion.” Monahan, P. (2006) *op.cit.*, p37.

⁵⁶ McLachlin, B. “Freedom of Religion and the Rule of Law: A Canadian Perspective” in Farrow, D. (2004) *op.cit.*, p17

⁵⁷ 1791 Imp. C.31. Although the actual division was by a subsequent Order in Council dated 24 August 1791 from Schmeiser, D. A. (1964) *op.cit.*, p64

⁵⁸ Moore, D. (1996). "Religious Freedom and Doctrines of Reluctance in Post-Charter Canada." *Brigham Young University Law Review*: 1087-1140, 1089

⁵⁹ ss 36 & 37

⁶⁰ Schmeiser, D. A. (1964) *op.cit.*, p64

⁶¹ ss 38, 39 & 40

⁶² *The Union Act* 1840 (U.K), 3 & 4 Vict. c.35

real estate privilege to be removed until the *Clergy Reserves Act* (1854) finally abolished the reserves and also proclaimed the intention “to remove all semblance of connexion between Church and State.”⁶³

Further afield in British Columbia the Hudson’s Bay Company, which was the governing authority at the time, made public grants to support Anglican churches, chaplains and teachers. Yet such endorsement was not unconditional, as missionaries were expected to refrain from over-imposing their morality or disturbing the Indian way of life. In short, anything that could conceivably affect trade.⁶⁴ Following protests this funding was withdrawn in 1859.⁶⁵ The Prairie Provinces were colonized after any dominion church-state controversy had been settled and thus had no independent establishment route.⁶⁶

4.3.2 Confederation

The Canadian Constitution of the Nineteenth Century was something of a hybrid between the American and British constitutions: it was similar to the American system in that it was largely written and the apportionment of legislative powers was entrenched and immune from the normal legislative process. However, like the British constitutional system, there were few substantive issues in the Nineteenth Century which were immune from the normal legislative process. There were no free exercise or establishment provisions. Indeed, the only constitutional mention of religion was found in Section 93 of the *British North America Act* (1867)⁶⁷ which entrenched government funding guarantees for denominational schooling. Without such guarantees, in particular for the Roman Catholic schools, Quebec would not have joined the confederation. It was therefore a pragmatic compromise and a “*de facto* establishment of religious privilege.”⁶⁸

Judicial authority, however, maintained that neither church was established,⁶⁹ with perhaps the Roman Catholic Church in Quebec coming the closest, having the right to

⁶³ Patrick, J. (2006) *op.cit.*, p33

⁶⁴ Grant, J. W. (1984) *op.cit.*, p107

⁶⁵ Schmeiser, D. A. (1964) *op.cit.*, p71

⁶⁶ *ibid* .p71

⁶⁷ 1867 (U.K.) 30 & 31 Vict., c.3

⁶⁸ Horwitz, P. (1996) *op.cit.*, p22.

⁶⁹ Neither the Church of England in Ontario according to *Dunnet v. Forneri* (1877) 25 Gr.199, nor the Catholic Church in Quebec according to *Brown v. Cure &c. de Notre Dame de Montreal* (1874) L.R. 6 P.C. 157 from Schmeiser, D. A. (1964) *op.cit.*, p67.

tithe at law.⁷⁰ The position of religious bodies was described by the Ontario High Court in the case of *Dunnet v. Forneri* (1877),⁷¹ “[a]ll religious bodies are here considered as voluntary associations: the law recognises their existence and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization or with questions of religious faith.”⁷²

4.3.3 Federalism and Religious Freedom

As mentioned, there was no explicit mention of religious freedom in the *British North America Act* of 1867. With no equivalent to the American *Bill of Rights*, this heavily circumscribed the ambit of judicial review.⁷³ Furthermore, parliamentary supremacy confers an almost absolute sovereignty on each parliament with substantial judicial deference to this concept. The sole enquiry became the *vires* of legislation, that is whether the act was within the legislative competency of the federal component. Beyond that there was no mechanism for declaring any legislation in violation of fundamental rights.

An early federalist challenge to a religious law occurred in *Attorney-General for Ontario v. Hamilton Street Railway Co.*⁷⁴ with Ontario’s *Lord’s Day Act* (1897) which prohibited various activities on the Sabbath. The Privy Council ruled that a prohibition on Sunday opening was not within provincial competence because it was criminal law that was reserved to the national parliament under section 91(27) of the *British North America Act*.⁷⁵ The legislation was regarded as prohibitory rather than regulatory.⁷⁶

Yet even the rigid dichotomy of this federalism analysis could be circumvented by a principle which became known as the “essential purpose” or “pith and substance.”⁷⁷ It placed the emphasis on purpose rather than effects: should the purpose be benign and within the nominal federal competency, an incidental effect outside this would be

⁷⁰ *The Parish and Fabrique Act* 2 Vict., c.29 from Schmeiser, D. A. (1964) *op.cit.*, p58

⁷¹ *Dunnet v. Forneri* (1877) 25 Gr.199

⁷² *ibid* at 206

⁷³ Moore, D. (1996) *op.cit.*, p091

⁷⁴ *Attorney-General for Ontario v. Hamilton Street Railway Co* 13 App. Cas. 201 (P.C.) (1903)

⁷⁵ Moore, D. (1996) *op.cit.*, p1095

⁷⁶ Schmeiser, D. A. (1964) *op.cit.*, p90

⁷⁷ *Russell v. R.*, (1882) 7 App. Cas. 829 (P.C.)

overlooked.⁷⁸ It could save the facially neutral but operationally disparate. However, even should there be a judicial pronouncement of invalidity on federalism grounds, this could be circumvented, if desired, by the other correct federal component enacting the same legislation. Thus, it must be said that these limited inquiries provided merely indirect, coincidental and potentially temporary protection of fundamental liberties in the presence of another constitutional violation.

A better argument, at least for Christianity, would be an indirect reliance on section 93 of the *British North America Act* (1867)⁷⁹ which guaranteed denominational schooling. Such denominational privilege of schooling must assume the continuance of the relevant denomination.⁸⁰ Beyond the enumerated denominations of Catholicism and Protestantism any fundamental freedom of other sects or religious traditions would be pure speculation. For native religions, as will be discussed, denominational schooling actively sought to destroy their religion.

4.4 Conclusion

Religious freedom was constitutionalised in the United States by virtue of the First Amendment but Supreme Court jurisprudence was sparse. Establishment concerns were usually satisfied if the federal governmental ambition was non-preferentialist: any non-entanglement paradigm must wait for another era, after all the Founders were overwhelmingly God-fearing if not all God-bothering. As for intrastate establishment, that was simply no business of the United States government as the First Amendment Establishment and Free Exercise clauses were only applied to the states from the Twentieth Century.⁸¹ By contrast, the territories were regarded as within the ambit of the *Bill of Rights*⁸² in order to temper Congress' plenary legislative power.⁸³

Within this era free exercise in the United States meant an absolute free right to a chosen belief, but a restricted right to the consequences and actions in pursuit of such a

⁷⁸ Moore, D. (1996) *op.cit.*, p1096

⁷⁹ 1867 (U.K.) 30 & 31 Vict., c.3

⁸⁰ Schmeiser, D. A. (1964) *op.cit.*, p83

⁸¹ *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940)(Free Exercise); *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause)

⁸² *Reynolds v. United States*, 98 U.S. 145,162 (1878)

⁸³ *Mormon Church v. United States*, 136 U.S. 42, 42 (1889)

belief. General criminal laws proscribing, for example, the assumption of multiple wives were upheld.⁸⁴ Mormonism, and to a certain extent Catholicism, were beyond the pale for a predominantly Protestant country and the Supreme Court was reflective of that consensus. Any free exercise right seemed limited to ensuring that mainstream Protestantism was not disadvantaged.

By contrast, Canada had to accommodate a sizeable Catholic community from its conception. Thus denominational Catholic schooling was constitutionally protected from 1867 and Catholicism tolerated, despite being technically proscribed.⁸⁵ As for any other religious freedom, the judiciary displayed great deference to the legislature in the absence of an entrenched Bill of Rights. The only judicial review available concerned whether the correct federal component had enacted the legislation, and only from the turn of the Twentieth Century was this exercised in earnest.⁸⁶ If it was determined that the wrong federal component had legislated then it was always open to the other to fill the jurisdictional lacuna. The judiciary could therefore only give a protection that was sporadic, temporary and incidental.⁸⁷

The next chapters will explore how Indian religious freedom was regarded as both falling outside the accepted range of constitutionally protected religions in the United States and indeed jurisdictionally beyond the protection of the *Bill of Rights*. As mentioned above, Canada could proceed without the restraint of *any* substantive constitutional protection of religious freedom.

⁸⁴ *Reynolds v. United States*, 98 U.S. 145 (1878)

⁸⁵ *British North America Act* 1867 (U.K.) 30 & 31 Vict., c.3 section 93

⁸⁶ *Attorney-General for Ontario v. Hamilton Street Railway Co.*, (1903) 13 App. Cas. 201 (P.C.)

⁸⁷ Macklem, P. (1984). "Freedom of Conscience and Religion in Canada." University of Toronto Faculty of Law Review 42: 50-81, 57

CHAPTER FIVE

5 Legalising Christianity as an Instrument of Assimilation

5.1 Introduction: The Biology of Assimilation

At times it was difficult to tell if the Indian Department's view that aboriginal peoples were a "dying race" was an observation, a prediction, or a policy assumption. (J R Miller, historian, in 1996)¹

Two schools of thought emerged in the Nineteenth Century regarding the exact biological nature of the indigenous population of North America. The monogenetic theory stated that everyone was descended from Adam and Eve according to Mosaic teaching.² Any differences were explained purely by environment; nurture rather than nature. This theory was endorsed by abolitionists, reformers and missionaries who would have been redundant without this portrayal of the Indian as a noble, but essentially redeemable savage, who was not biologically precluded from advancement.³ As the Canadian missionary John Maclean remarked, "We are all savages in the estimation of somebody."⁴ The remedy was "fair treatment and acceptance by Indians of the values of Christianity and acquisitive capitalism;"⁵ the prescription was the bible and the plough.

By contrast, polygenetic theory postulated a Linnaean taxonomy, with differences explained biologically rather than environmentally.⁶ This theory, occasionally propounded by ethnology and anthropology, painted a less promising future for the indigenous populations. In the event of their continued survival, which was by no means certain, the

¹ Miller, J. R. (1996). Shingwauk's Vision : A History of Native Residential Schools. Toronto ; London, University of Toronto Press p302

² Higham, C. L. (2000). Noble, Wretched, & Redeemable : Protestant Missionaries to the Indians in Canada and the United States, 1820-1900. Albuquerque, N.M., University of New Mexico Press p33

³ Prucha, F. P. (1986) *op.cit.*, p49

⁴ Higham, C. L. (2003). "Saviors and Scientists: North American Protestant Missionaries and the Development of Anthropology." The Pacific Historical Review 72(4): 531-559, 542.

⁵ Tinker, G. E. (1993). Missionary Conquest : The Gospel and Native American Cultural Genocide. Minneapolis, Fortress Press.p109

⁶ Higham, C. L. (2000) *op.cit.*, p35

model had to be a “paternalism [which] was no longer a trusteeship until maturity was reached, but a perpetual guardianship over ageless children.”⁷ Alternatively, the future held out an isolation prior to their eventual and inevitable Darwinian extinction as they were a “doomed race melting like the snow before the sun.”⁸ In terms of government policy, the monogeneticist theory narrowly prevailed and the Indians were deemed capable of “improvement.”

This chapter will begin with a discussion of the early Nineteenth Century Civilization Fund in the United States which was the first formal use of the missionaries as instruments of government policy. Although nominally an educational programme, it will be scrutinised for any subtext of Christianisation and therefore any potential violation of the Establishment Clause of the Constitution.

In the late 1860s the Peace Policy employed churchmen as Indian agents in a more direct, executive role. There then followed a more extensive contract school programme with direct and complete government funding of mission schools, although some were established pursuant to agreed treaty provisions. This chapter will analyse these issues in terms of the freedom of religion provisions contained in the First Amendment, in particular the extent to which the Establishment Clause was violated by such church-state intimacy. Indeed, crucially whether the protection of the Bill of Rights was even applicable to these geographically discrete “domestic dependent nations” as a shield from such intrusions.

In the absence of free exercise and anti-establishment provisions, the Canadian Constitution provided no obstacle to church-state entanglement and so mission funding and church schools could proceed without any Constitutional difficulty. Indeed, by virtue of section 93 of the *British North America Act* 1867, denominational schooling was actually declared an entrenched right immune from provincial abridgement. Indians also specifically requested education and many treaties included provisions for schooling. Yet, whereas these were to be provided on reserves, the Canadian government instead provided a comprehensive and compulsory residential school programme *off-reserve*. These schools will therefore be examined as a violation of these treaties.⁹

⁷ Douglas Lorimer quoted in Pettipas, K. (1994) *op.cit.*, p21

⁸ Francis Bond Head in *ibid* p38

⁹ As for the genocidal treatment of Indian children in these schools please see Appendix B.

5.2 The United States

How can we have confidence in the white people? When Jesus Christ came upon the earth you killed and nailed him on a cross. (Tecumseh)¹⁰

5.2.1 Early Policy

Although some Christian communities known as “Praying Towns” had been established in the 17th century, most attempts at the Christianization of the Indians had had limited success. The Indians’ often nomadic existence in pursuit of the fur bearing animals on which their economy was founded prevented the settled and captive audience amenable to conversion.¹¹ Only where the Indians were settled and agrarian, such as the Five Civilized Tribes, was there any measure of success. It was realized that, “you cannot evangelize a people always on the wing.”¹²

Any systematic Christianization effort would therefore have to wait until the Nineteenth Century when the Indians had been militarily overwhelmed, confined to reserves, and rendered quiescent. At that point governments could afford magnanimity. This they interpreted as the bible not the bullet, conversion rather than extermination.¹³

5.2.2 The Civilization Fund

The first congressional financial support for any “civilization programme” came with the establishment of the *Civilization Fund Act* in 1819.¹⁴ The sum appropriated initially was \$10,000 annually which rose to \$60,000 annually by 1845 and came to represent approximately half of the required mission funding.¹⁵ The missions were the organizations *in situ* and thus the intended recipients of this fund, which ostensibly was educational not evangelical.

¹⁰ Dowd, G. E. (1992). "Thinking and Believing: Nativism and Unity in the Ages of Pontiac and Tecumseh." American Indian Quarterly 16(3): 309-335, 313

¹¹ Nichols, R. L. (1998) *op.cit.*, p109

¹² Henry Spalding quoted in Cebula, L. (2003). Plateau Indians and the Quest for Spiritual Power, 1700-1850. Lincoln, Neb., University of Nebraska Press. p99

¹³ Beaver, R. P. (1966) *op.cit.*, p179

¹⁴ *Civilization Fund Act* (1819) 3 stat 516

¹⁵ Keller, R. H. (1983). American Protestantism and United States Indian Policy, 1869-82. Lincoln, University of Nebraska Press. p6

The House Committee on Indian Affairs, when discussing the bill, made little effort to hide the Christianization subtext beneath the nominally educational and agricultural purposes: “Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow; and as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those of minds less cultured, and become useful members of society.”¹⁶ Put in another less generous way by the same committee, “the sons of the forest should be moralized or exterminated.”¹⁷

5.2.2.1 The First Amendment and the Civilization Fund

After a resolution of the House of Representatives this scheme was investigated for potential Establishment Clause concerns. The House Committee’s conclusion was that the education was secular, even though the instrument was sectarian.¹⁸ This was consistent with similar congressional funding in the early Nineteenth Century that was described in Chapter 4.

Although the Civilization Fund was certainly an entanglement it was non-preferential, as any mission could apply for educational funds. Indeed, the Supreme Court later remarked in *Bradfield v. Roberts* (1899)¹⁹ that “a law respecting a religious establishment”.... is not synonymous with a “law respecting an establishment of religion.”²⁰ In any case, the non-entanglement paradigm, which forbade government entanglement in religion irrespective of denominational preference, was yet to be developed; only emerging in the Twentieth Century.²¹

Due to the essentially voluntary nature of the education and the lack of any overt deprecation or restriction of Indian religion then the free exercise clause was not implicated. The missionaries hoped that the example of virtue and usefulness presented by

¹⁶ From Bowden, H. W. (1981) *op.cit.*, p167

¹⁷ Beaver, R. P. (1966) *op.cit.*, p67

¹⁸ *ibid* p75

¹⁹ *Bradfield v. Roberts*, 175 U.S. 291 (1899)

²⁰ *ibid* at 297

²¹ *Everson v. Board of Education*, 330 U.S. 1 (1946)

the Christian farmer would turn the Indians away from their roaming life and their pagan superstitions.

5.2.3 The Peace Policy

The Peace Policy was actually also known as the Quaker Policy, as it was the initial suggestion of some enlightened Friends. As Grant had remarked, “[i]f you can make Quakers out of [the Indians] it will take the fight out of them. Let us have peace.”²² There were two main elements introduced to consolidate what was hoped would be an enduring cessation of hostilities and eliminate sources of grievance. Firstly, a Board of Indian Commissioners, comprising wealthy philanthropic volunteer laymen, who monitored and recommended action on the procurement of supplies. The Board actually performed excellent work in reducing graft and corruption and ensuring the quality of goods supplied. It continued in existence until 1933.²³ Secondly, and most significantly, the nomination of agents by churches which would improve both probity and incidentally piety.²⁴ Agents had to be sought who “feared God and were ashamed to steal.”²⁵

By an *Act of April 10* 1869 there was a special fund of \$2 million provided “to enable the President to maintain peace among and with the various tribes, bands and parties of Indian, and to promote civilization among said Indians, bring them, where practicable upon reservations, relieve their necessities, and encourage their self-support.”²⁶ Secretary of the Interior Columbus Delano summarised the main aims of the Policy: “relocation and confinement to reservations to learn agriculture and be Christianized; combine this kindness with necessary severity should it be rejected; improve the quality of supplies and eliminate graft; uplift the Indians spiritually by the instrumentality of Christian agents; finally churches and schools would demonstrate the signal advantages of a Christian civilization.”²⁷ The reservations were to be the “incubators of civilization.”²⁸

²² Prucha, F. P. (1976) *op.cit.*, p48

²³ Beaver, R. P. (1966) *op.cit.*, p133

²⁴ Bowden, H. W. (1981) *op.cit.*, p192

²⁵ Commissioner Dole quoted in Fritz, H. E. (1963) *op.cit.*, p45

²⁶ Section 4 from Prucha, F. P. (2000) *op.cit.*, p125

²⁷ *ibid* p31

²⁸ St. Germain, J. (2001) *op.cit.*, p94

Advocates of the Peace Policy highlighted the issue of the cost effective application of federal funds in general. Military action, as well as being less humane, “cost the federal government one million dollars and twenty-five white lives for each single warrior killed in the Sioux wars of 1852 and 1854.”²⁹ This was contrasted with the lack of expenditure on military matters needed to keep in order the Five Civilized Tribes.³⁰

The missionary societies themselves had preferred to harvest foreign rather than domestic souls due to the greater yield per dollar. This phenomenon was also seen in Canada, as one church official remarked, “[w]e spend about £1 for every 17,000 heathen in Asia and about £1 for every six heathen in the ecclesiastical province of Rupert’s Land.”³¹ Due to this disproportionate value for money, any missionary effort for the continental, rather than sub-continental Indians, must seek government funding rather than rely on the missionary societies.

Therefore when it came to simple economy, both church and state were prepared for a more symbiotic relationship. It was cheaper to save souls than shoot them. Any diffidence about breaching the “wall of separation” between Church and State had to be suppressed when the issue was one of simple cost effectiveness. The banknotes slipped easily through the cracks.

Interdenominational rivalry was never far from the surface and was especially distasteful, bitter and unchristian between the Protestants and Catholics, with each accusing the other’s agents of denying Indians freedom of conscience. Indeed, Indian choice between denominations was sometimes refused, for example when Red Cloud’s request for Catholic missionaries was denied.³² As Harold Cardinal remarked: “churches prefer sectarianism to faith.”³³ As for freedom to practice any other religious tradition one Catholic statement asserted, without apparent irony, “[t]he Indians have a right under the Constitution, as much as any other person in the Republic to the full enjoyment of liberty of conscience; accordingly they have the right to choose *whatever Christian belief* they wish

²⁹ Beaver, R. P. (1966) *op.cit.*, p79

³⁰ Cherokees, Choctaws, Chickasaws, Creeks and Seminoles.

³¹ Higham, C. L. (2000) *op.cit.*, p110

³² Beaver, R. P. (1966) *op.cit.*, p157.

³³ Cardinal, H. (1969). The Unjust Society. The Tragedy of Canada's Indians, Edmonton: M. G. Hurtig. p89

without interference from the government.”³⁴ Freedom of Indian religions was regarded as beyond contemplation.

There was also criticism of the administrative inexperience of the churches, in particular by the Board of Inquiry set up by the new Secretary of the Interior Schulz in 1877, which regarded as impractical the “undertaking through pigmies of the solution of [the Indian] problem that had engaged the best efforts of statesmen and philanthropists ever since the days of the republic.”³⁵ Congress became embittered, lobbying hard and undermining the policy. Appropriations were resented and delayed. More importantly, having been denied political patronage through agent appointments, Congress made up for this with political gifts of subordinate offices on reservations for jobless friends, the churches being powerless and guileless to resist.³⁶

Gradually the denominations started to withdraw, first the Quakers, then the Episcopalians, then the Methodists, until few remained. The military were recruited to fill vacant agent posts from 1892 as a response to the corrupt politically-appointed agents who had quickly moved into the agencies vacated by the denominations. In 1893 twenty-seven out of fifty-seven agents were army officers.³⁷ Yet by 1898 the number had dwindled to three, the remainder being civilians, thus signalling the eventual triumph of Congress.

5.2.3.1 The First Amendment and the Peace Policy

Ely Parker had written in 1869 on behalf of President Grant to Benjamin Hallowell, secretary of the Quaker conference, “any attempt which may or can be made by your society, for the improvement, education and Christianization of the Indians, under such Agencies, will receive all the encouragement and protection *which the laws of the United States will warrant him in giving*.”³⁸ (author’s italics). The acknowledgment that there may be some circumscription of his actions was perhaps a reference to the First Amendment Establishment Clause and that such overt endorsement and sponsorship could be a violation.

³⁴ Prucha, F. P. (1976) *op.cit.*, p58.

³⁵ *ibid* p61

³⁶ *ibid* p59

³⁷ *ibid* pp367-368

³⁸ Kelsey, R. W. (1917). *Friends and the Indians, 1655-1917. [With plates.]*, pp. xi. 291. Associated Executive Committee of Friends on Indian Affairs: Philadelphia. p168

The whole question as to whether the Bill of Rights contained the federal government's actions on Indian reservations is not straightforward. The case of *Mormon Church v United States*, mentioned in Chapter 4, confirmed that “the power of congress over the *territories* [in contrast to the states] of the United States is general and plenary.”³⁹ Yet *Reynolds v United States* held that “congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion,”⁴⁰ implying that congressional power was exclusive but not absolute, tempered as it was by the Constitution.

Much Indian tribal land, although geographically situated within, was not regarded as part of, the territories. Internal tribal sovereignty of these “domestic dependent nations”, according to the Marshall trilogy, was complete subject to two disabilities: they “could not freely alienate their land and they could not treat with foreign powers.”⁴¹ However, congressional power over Indians was also described as plenary (1886),⁴² and later even confirmed as political and justicially unreviewable (1903).⁴³ But such a Plenary Power *should*, by analogy to *Reynolds* and its application to the territories, have been subject to the restraint of the Bill of Rights.

Nevertheless, the status of “domestic dependent nation” did differ from that of a territory. Mansfield described it as “somewhere between the Amish and a foreign nation.”⁴⁴ Of course there had never been a murmur of an Establishment Clause violation when Congress had subsidized foreign missions in Africa and Asia.

Perhaps their status more resembled that of “overseas territories” such as the Philippines or Puerto Rico. The application of the Bill of Rights to such territories was investigated in the *Insular Cases*.⁴⁵ Views ranged from the thought that the Bill of Rights does not necessarily apply in its entirety but only to those rights deemed fundamental; to that which held that the whole set of rights should apply or else the United States should

³⁹ *Mormon Church v. United States*, 136 U.S. 42, 42 (1889)

⁴⁰ *Reynolds v. United States*, 98 U.S. 145,162 (1878)

⁴¹ Canby, W. C. (2004) *op.cit.*, p76

⁴² *United States v. Kagama* 118 U.S. 375 (1886)

⁴³ *Lone Wolf v. Hitchcock* 187 U.S. 553 (1903)

⁴⁴ Mansfield, J. (1986) *op.cit.*, p6.

⁴⁵ *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. United States*, 195 U.S. 138 (1904) from Mansfield, J. (1986) *op.cit.*, p21

not enter into any sort of political relationship.⁴⁶ It is submitted that religious liberty, and therefore the preclusion of the favouring of one church by establishment, is a fundamental freedom and thus on either of these views it should have applied. If the United States decided to violate the inherent sovereignty of tribal nations it should have been restrained from violations of the Bill of Rights within the geographical confines of U.S. borders, at least to the same extent as outside its borders in the overseas territories. The argument that it did not apply to aliens outside the United States, based on a Lockean compact between citizens, again is unpersuasive. As Mansfield reminds us, there is no textual restriction to “citizens” in the Bill of Rights.⁴⁷ Indeed, “Congress shall make no law respecting an establishment of religion” has no geographical qualifier.

In the 1907 case of *Quick Bear v Leupp*⁴⁸ the Supreme Court dealt with the use of tribal monies to fund sectarian schooling. This will be discussed in more detail in the next section but suffice to say that the Court, by considering the substantive issue that there was no Establishment Clause violation, assumed that the First Amendment did indeed apply within Indian country.

Assuming therefore that the Establishment Clause applied, then the selective recruitment of agents from some, but significantly not all,⁴⁹ denominations should have been an egregious breach of even a non-preferentialist paradigm. Furthermore, their employment both as agents and simultaneously as missionaries would be an even greater violation than sectarian schooling, in which the evangelism could at least have been arguably incidental, although disingenuously so, to the education.

The Free Exercise Clause should also have been implicated as the full panoply of Christian denominations was not represented in the selection of agents. Should the Indians, bizarrely, have requested a Mormon or Southern Baptist agent/missionary this would not have been permitted, as these denominations were excluded.⁵⁰

⁴⁶ Mansfield, J. (1986) *op.cit.*, p21

⁴⁷ *ibid* p27. Indeed any textual restriction to “citizens” is only present in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments. Anderson, R.T. Goldberg, C. et al (eds)(2005) *op.cit.*, FN 190 p753.

⁴⁸ *Quick Bear v. Leupp* 210 U.S. 50 (1907)

⁴⁹ The Mormons, Moravians, Methodist Episcopal Church, South; the Southern Baptist Convention and the Southern Presbyterian Church were all rejected. Beaver, R. P. (1966) *op.cit.*, p138

⁵⁰ *ibid*

As for other constitutional breaches, Article VI of the United States Constitution reads, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁵¹ This provision was intended to prevent a religious test from acting both as a preclusion from, and as a prerequisite for, public office. Of course, the selective appointment of denominational Indian agents is a flagrant violation of this prohibition, which is without qualifier.⁵²

5.2.4 Christianization through Education

*“The pretty innocent papoose has in itself the potency of a painted savage, prowling like a beast of prey, or the possibilities of a sweet and gentle womanhood or a noble and useful manhood.”*⁵³ (Indian Commissioner Morgan in 1889)

5.2.4.1 Compulsory Education

Assimilation was consolidated with the forcible education of children, which was a means of reducing “cultural reproduction.”⁵⁴ This education was combined with a prohibition on native languages, except for the use of the vernacular bible, and a policy of renaming Indian children with anglicized names.⁵⁵ As Harring remarks, the proscription of adult ceremonies did not always destroy cultural tradition but schooling, which prevented any participation in, or access to, their spiritual traditions, could “pull it up by the roots.”⁵⁶

As for coercing attendance, in 1891 Congress authorised the Commissioner of Indian Affairs to “make and enforce such rules and regulations as will ensure the attendance of Indian children of suitable age and health at schools established and maintained for their benefit”⁵⁷ This was reinforced with sanctions two years later when Congress stipulated that the “Secretary of the Interior may in his discretion withhold rations clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion

⁵¹ United States Constitution 1787 from <http://www.usconstitution.net/const.html#A2Sec2> [accessed 30 September 2009]

⁵² Keller, R. H. (1983) *op.cit.*, p176

⁵³ Prucha, F. P. (1978). Americanizing the American Indians : Writings by the 'Friends of the Indian', 1880-1900. Lincoln [Neb.] ; London, University of Nebraska. p239

⁵⁴ Tinker, G. E. (1993) *op.cit.*, p8

⁵⁵ Strickland, R. (1985) *op.cit.*, p726.

⁵⁶ Harring, S. L. (1998) *op.cit.*, p270

⁵⁷ *Indian Appropriations Act* 3 March 1891 21 stat ch. 543

of the year.”⁵⁸ In practice, coercion was widely practised with one notorious example being the imprisonment of Hopi parents for several years on Alcatraz Island for refusing to surrender their children.⁵⁹

Although admittedly some tribes had requested education in treaties this was generally to be situated on reservations.⁶⁰ Thus the provision of boarding schools violated treaties. In the absence of a treaty request, the compulsory education was a flagrant breach of tribal sovereignty. Moreover, when the education was denominational in nature, such as that provided by the contract schools, religious freedom was also implicated.

5.2.4.2 The Contract Schools

The contract schools were a pragmatic response to government inertia. Although the principle of secular education had been accepted the necessary schools would take time to construct. In the meantime the mission schools were in situ and in a position to offer immediate value, although admittedly this was something of an abdication of government responsibility.⁶¹ By 1883, there were twenty-two boarding schools and sixteen day schools run by Christian denominations that had signed contracts with the federal government and had therefore directly received federal money.⁶²

Due to a relentless lobbying effort, the Catholics obtained two-thirds of the funds allocated to contract schools. This began to spark resentment and a movement to break this church-state relationship in Indian education. Foremost among the critics was the *American Protective Association* which was a “manifestation of rabid agrarian American nativism violently opposed to immigration and the Roman Catholic Church.”⁶³ Nativism, of course, referred to a privileging of the earlier, largely protestant immigrants, not the aboriginals. Thus bigotry masked as secularism prevailed. Congress progressively reduced funding for denominational contract schools, 80% in 1895, 50% in 1897, 40% in 1898 to zero in 1899.

⁵⁸ *Indian Appropriations Act* 3 March 1893 21 stat ch. 209

⁵⁹ Churchill, W. (2004). Kill the Indian, Save the Man : The Genocidal Impact of American Indian Residential Schools. San Francisco, City Lights.p17

⁶⁰ Higham, C. L. (2000) *op.cit.*, p113

⁶¹ Prucha, F. P. (1979) *op.cit.*, pp 8-9

⁶² Prucha, F. P. (1976) *op.cit.*, p290

⁶³ Beaver, R. P. (1966) *op.cit.*, p167

Protestants knew that government-funded schools fulfilled many of their own ambitions and that American Secularism was in reality a consolidation of the ambient Protestant norm. Furthermore, they argued that the Indians were the “wards of the government not of Rome” and the responsibility lay with the national government.⁶⁴ Indeed, many would have preferred to see the Indian unconverted rather than Catholicised, regarding Catholics as no better than “Jews, Moslems, Orientals and other heathen.”⁶⁵

Denominations sought to circumvent this lack of funding, which had been calculated at \$150,000 per year,⁶⁶ by diverting treaty rations, normally received at home, direct to the schools, thus obliging attendance or starvation.⁶⁷ However, this could not retrieve all of the funding shortfall so Indian tribal funds, which could make a significant contribution, were targeted. These monies, it was claimed, were not the congressional appropriations proscribed from 1899, but Indians’ own funds either from treaty annuities or proceeds from the sale of land, which theoretically could be available for any purpose.⁶⁸ Missions therefore sought direct contracts with the tribes for the use of their own money. President Roosevelt gave his approval, subject to a demonstrable request by the Indians themselves, which could be evidenced by petition.⁶⁹ The Executive was thus agreeing to facilitate financial support that the legislature had been proscribed from furnishing directly in 1899.⁷⁰ Furthermore, it is debateable whether a majority of the Indians of each tribe would have consented to such a use of their monies and been literate enough to sign a “petition.”

5.2.4.3 The First Amendment and the Contract Schools

Questions over the differential treatment of such treaty monies arose in *Quick Bear v. Leupp*⁷¹ when the Supreme Court was asked to determine an Establishment Clause challenge, brought by Quick Bear, a Protestant Indian, to the validity of a contract between

⁶⁴ Prucha, F. P. (1979) *op.cit.*, ppx,57

⁶⁵ Keller, R. H. (1983) *op.cit.*, p38

⁶⁶ Prucha, F. P. (1979) *op.cit.*, p41

⁶⁷ Beaver, R. P. (1966) *op.cit.*, p168

⁶⁸ Prucha, F. P. (1979) *op.cit.*, p84

⁶⁹ *ibid* p86

⁷⁰ *ibid* p88

⁷¹ *Quick Bear v. Leupp* 210 U.S. 50 (1907)

the United States and the Bureau of Catholic Indian Missions for sectarian schooling. The schooling was provided pursuant to a treaty provision.⁷² At issue were not congressional appropriations *per se*, which had been forbidden by certain provisos contained in the Indian Appropriation Acts of 1898, 1896, 1897, 1898 and 1899,⁷³ but the application of a Treaty Fund (annual appropriations to fund annuities stipulated in a treaty) and a Trust Fund (capital sum representing the value of the land cession). Both were held to be technically Indian money and the Supreme Court held that “it is inconceivable that congress [by an application of the Establishment clause] should have intended to prohibit them from receiving religious education at their own cost if they so desired it; such an intent would be one “to prohibit the free exercise of religion.””⁷⁴ However the Supreme Court, by not denying the application of the Establishment Clause to *tribal* land, if the contract school was unsolicited and funding was not derived from Indian monies, tacitly confirmed its relevance. The selective conferral of school contracts to only certain denominations was surely an unconstitutional establishment. Furthermore, in *Quick Bear*, the application of the free exercise of religion element of the First Amendment was also acknowledged for *Indians* on *tribal* land. Had Indian spirituality been recognised as religion the contract schools that were not authorised by a treaty provision and were not funded by Indian monies would, of course, have violated the Free Exercise component by their relentless Christianization.

5.3 Canada

5.3.1 Early Policy

The situation in Canada differed markedly between the western and eastern tribes. First contact with the eastern tribes occurred from the late Seventeenth Century, when they were still militarily powerful, and a degree of respect remained with the relationship persisting as more bilateral. The Indians were subsequently encouraged to send their children to school but little intrusion was attempted into their culture. Eastern tribes were allies and the missionaries were tolerated, provided they did not disturb the delicate equilibrium. By contrast, the western tribes often first confronted an all-powerful

⁷² by article VII of the Sioux treaty of April 29, 1868 (15 Stat. 635, 637)

⁷³ *Quick Bear v. Leupp* 210 U.S. 50, 77 (1907)

⁷⁴ *ibid* at p82

Confederation in the mid Nineteenth Century with the relationship more coercive and unilateral.⁷⁵

The *Gradual Civilization Act* of 1857,⁷⁶ as mentioned in Chapter Three, was the first dedicated assimilative legislation in the United Canadas with the stated purpose of “remov[ing] all ...distinctions... between Indians and Her Majesty’s other Canadian subjects.”⁷⁷ To this end it paradoxically created a legal duality:⁷⁸ Indians were consigned to the status of citizen aspirants, with various criteria to satisfy, before being granted full citizenship. Furthermore, the tribal entity and tribal land mass were to be destroyed; the one by legislative intrusion, the other by unequally negotiated treaties of land cession.

The Bagot Commission Report of 1844 had recommended the centralization of control over all Indians and Indian lands. This was the policy adopted by the *Indian Lands Act* of 1860, which was codified constitutionally at confederation by section 91(24) of the *British North America Act* 1867.⁷⁹ The first manifestation of this federal control, as mentioned before, was the *Indian Act* of 1876 which provided a “cradle to grave legal regime” covering all facets of Indian life.⁸⁰

5.3.2 Missionaries

You tell us that God sent you. Why did he not send you sooner? Our fathers would not have been lost, as you say they were. The missionary Fathers are men like us. Why are they rather than other men privileged to speak to God? (Chief Iacoupen in 1613)⁸¹

In contrast to the situation south of the border with President Grant’s Peace Policy, missionaries were never officially regarded as partners in government policy.⁸² The Canadian government did use missionaries, but never considered them integral to policy or

⁷⁵ Buckley, H. (1992). From Wooden Ploughs to Welfare : Why Indian Policy Failed in the Prairie Provinces. Montreal & Kingston ; London, McGill-Queen's University Press. p60

⁷⁶ *Statutes of Canada*, 20 Vict., c.26

⁷⁷ *ibid* Preamble

⁷⁸ Harring, S. L. (1998) *op.cit.*, p33

⁷⁹ 1867 (U.K.) 30 & 31 Vict., c.3

⁸⁰ Harring, S. L. (1998) *op.cit.*, p33

⁸¹ Rosenstiel, A. (1983) *op.cit.*, p46

⁸² Higham, C. L. (2000) *op.cit.*, p170

worthy of consultation.⁸³ They were not selected wholesale as Indian agents but did work closely with the agents on the reservations. This is the most important difference between the two countries: the lack of an official executive role in Canada for the church. There was no large scale “Peace Policy,” with its employment of legions of churchmen, as there had been no “War Policy” to reverse. Whether the relative lack of violence was due to the Canadian temperament and a deliberately more benign policy, or the lack of pressure from acquisitive settlers on the frontier is debateable. The missionary was not needed to assuage the guilt of a government that had been responsible for, or at least complicit in, large-scale wars of extermination.

An early and rare example of mission funding was when the Hudson’s Bay Company established a successful mission at Metlakatla in 1862, similar in concept to the praying towns of colonial New England.⁸⁴ The Hudson’s Bay Company was the major landowner in central and western Canada until it ceded its territory to the Crown in 1868. But it was above all a pragmatic and commercial venture whose purposes, according to Lord Palmerston, were simply “to deprive the local quadrupeds of their fur and keep the local bipeds off their liquor.”⁸⁵ Priests could only upset the fur trade by detaining Indians from the hunt and were merely tolerated, provided they did not become too turbulent. As the Dominion of Canada tentatively spread across the continent, this passive role of the government, in regard to missionary involvement, was maintained, at least in respect of the adult Indian population. Only when the white population had reached a critical mass did the government dare to employ a more proactive role. This will be seen more in the next chapter when the suppression of Indian religion will be examined.

5.3.2.1 The Constitutionality of the Missions

Any challenge on the grounds of an illegal governmental establishment of religion or infringement of free exercise fails on a number of grounds. Firstly, and most importantly, there was no constitutional obstacle to governmental promotion of missionaries in general as, unlike the United States, there was no Establishment Clause or indeed Free Exercise Clause. Secondly, there was no large scale governmental involvement and funding of the missions. Thirdly, in contrast to the United States, the intimate

⁸³ *ibid* p213

⁸⁴ Pettipas, K. (1994) *op.cit.*, p89

⁸⁵ Morris, J. (1973). Heaven's Command : An Imperial Progress. London, Faber p216

relationship between the missions and government was lacking as they were not employed as reserve agents and were not therefore, in effect, an arm of the executive. Lastly, conversions seemed largely voluntary and perhaps Christianity was regarded more as an addition to native spirituality not a replacement, which Dargo has described as a “process of non-exclusive cumulative adhesion.”⁸⁶ Of course this voluntarism applied to the sentient adult. The manipulation, indoctrination and violent acculturation of the credulous child were altogether different and more sinister matters.

5.3.3 Education

As Hutchinson remarks, the theory behind education of the aborigines was to “kill the Indian in the child” and to sever the “artery of culture that ran between generations and [which] was the profound connection between the parent and child sustaining family and community.”⁸⁷

Canadian Indians had been mostly free of contamination by the rougher frontier elements and persecution by the military.⁸⁸ They therefore were perhaps less suspicious of western education, having had less experience of the worst manifestations of the western-educated. Education was often regarded by the Indians as a means of coping with the change the Europeans brought, not as an acculturation exercise. Trades and farming instruction were sought, not religious indoctrination. In other words, a vocational, not denominational education.⁸⁹ Queen Victoria for her part “wished her red children to learn the cunning of the white man.”⁹⁰

5.3.3.1 The Residential School System

Boarding schools were a Canadian device to accelerate the assimilation by removing any influence of the Indian home. These boarding schools were to be denominational in character, as to deprive the Indians of their spirituality and culture was regarded as

⁸⁶ Dargo, G. (1995). "Religious Toleration and Its Limits in Early America." Northern Illinois University Law Review **16**: 341-370,359.

⁸⁷ Hutchinson, C. (2007). "Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Residential Schools Provide Justification for Aboriginal Cultural Rights." Saskatchewan Law Review **70**: 425-458,440

⁸⁸ Higham, C. L. (2000) *op.cit.*, p113

⁸⁹ Miller, J. R. (1996) *op.cit.*, p408

⁹⁰ Alexander Morris, the Crown's treaty negotiator Miller, J. R. (1996) *op.cit.*, p98

inhumane without a replacement with something Christian and virtuous. Missionaries as teachers were also cheaper than professionals, and the Catholics were the cheapest of all as their vows of celibacy and poverty ensured they would have no dependants to accommodate and would work for a stipend.⁹¹

The education of Indians steadily became more coercive. *Indian Act* amendments of 1894 authorised the government to require attendance at residential schools by Order in Council. Also the cabinet was authorised “to make regulations which shall have the force of law, for the committal by justices or Indians agents of children of Indian blood to industrial school or boarding school, there to be kept, cared for and educated for a period not extending beyond the time at which such children shall reach the age of eighteen years.”⁹² In theory, only a neglected child could be conveyed to school by force. The parents had a right of appeal, although few availed themselves of this due to the generally coercive atmosphere, the language barrier and the limited knowledge of such a system that prevailed during that era.⁹³

A 1906 amendment reiterated the 1894 terms as part of the *Indian Act* and also renewed the facility to direct the annuities of children in school as the agent saw fit, thus coercing attendance or malnutrition.⁹⁴ In 1920, after representations from the Department of Indian Affairs for a more explicit coercion, the *Indian Act* itself made education at boarding schools compulsory for children between 7 and 15. The Royal Canadian Mounted Police were used as truant officers, until they started to bill the Indian department and so their services were discarded.⁹⁵ Some children were forcibly removed from their parents; others were relinquished under duress by threatening fines, imprisonment or withholding rations.⁹⁶ Coercive efforts were limited by manpower, geography and the number of

⁹¹ Miller, J. R. (1996) *op.cit.*, p176

⁹² *ibid* p129

⁹³ O'Connor, P. (2000). "Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment." *Int'l J. Legal Info.* **28**: 232-257, 237

⁹⁴ Miller, J. R. (1996) *op.cit.*, p169

⁹⁵ *ibid* pp170-171

⁹⁶ Cassidy, J. (2006). "The Stolen Generations-Canada and Australia: The Legacy of Assimilation." *Deakin L. Rev.* **11**: 131-177, 140-141.

schools. In all, perhaps 50% of all Indian children attended these schools: 10,000 students in 80 schools at one time.⁹⁷

As for the targeting of culture, it was standard practice, as in the U.S. schools, for the speaking of native languages to be prohibited and anglicized names to be used in place of native ones.⁹⁸ Regular church attendance was similarly obligatory. The quality of teaching was uneven. Indeed, one contemporary critic claimed that a teacher need only have “piety and the ability to play the piano.”⁹⁹

5.3.3.2 The Constitutionality of the Schools

The government managed to control any diffidence at this church-state collaboration with the thought that it was not subsidizing the churches, but merely paying them for educational services that it would have had to render itself.¹⁰⁰ Any qualms the missionaries may have felt were suppressed: the Indians were wards and it was the duty of the government to fund their spiritual and material needs.¹⁰¹

The absence of any Canadian constitutional equivalent of the U.S. prohibition on the establishment of religion would, in any case, have rendered such funding immune from any substantive constitutional judicial review. Indeed the guarantee of section 93 of the *British North America Act (1867)* constitutionally entrenched denominational schooling and, far from being an obstacle, could have been regarded as a positive endorsement. Once the concept of denominational schooling had been accepted then its application to Indians raised little concern.

Similarly, there was no constitutional free exercise right that could have protected Indian religion from destruction. Any claims of equal protection for minorities in Nineteenth Century Canada would have been regarded as novel to say the least. For Indians that were discretely allocated to the federal government under section 91(24), it would have been incredible.

⁹⁷ Thorner, T. and Frohn-Nielsen, T (2003). A Country Nourished on Self-doubt : Documents in Post-confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor).p403

⁹⁸Harring, S. L. (1998) *op.cit.*, p270

⁹⁹ Grant, J. W. (1984) *op.cit.*, p182

¹⁰⁰ *ibid* p177

¹⁰¹ *ibid* p189. With the notable exception of the Baptists which was the only denomination that felt it improper to accept state subsidies.

5.3.3.3 Indian Treaties and Residential Schools

Although various purely land cession agreements had been concluded in pre-confederation treaties,¹⁰² a comprehensive system of treaty making in Canada only started in earnest with the numbered treaties. Treaties 1-7 were ratified between 1871 and 1877. In none of the treaties was there any explicit mention of Christianization, merely provisions for agricultural assistance and education. Specifically, education was phrased as “schools provided on each reserve when Indians desire them” (Treaties 1,2,3,5,6); “Schools provided on each reserve when Indians are ‘settled and prepared’” (Treaty 4); “Teachers’ salaries to be paid when deemed advisable and Indians are settled.” (Treaty 7)¹⁰³ Although treaty money was diverted to missionaries for education by the federal government, thus abdicating its responsibility for such purposes, there was no formal contractual relationship. Indians, as Miller remarks, often requested that their funds be used for education and indeed requested the treaty clauses.¹⁰⁴

All the treaties, except Treaty 7, stipulated that the schools were to be *on reserves*; thus the provision of boarding schools was patently a breach of treaty. Yet Indian Treaties in Canada did not have the same constitutional status as international treaties that pertained south of the border. Any sympathetic treatment by the Courts of Construction only developed in the late Twentieth Century¹⁰⁵ and in any case would not have operated in the event of an explicit abrogation, which was provided by the subsequent *Indian Act* amendments. This power of explicit abrogation by legislation, which can proceed free of any overarching restriction, is a cardinal feature of parliamentary supremacy. Although absolute in theory its exercise is tempered somewhat by political considerations and

¹⁰² For example the Manitoulin Treaty and the Robinson-Huron and Robinson-Superior Treaties of 1850 see website of Indian and Northern Affairs <http://www.ainc-inac.gc.ca> [accessed 9/11/09]

¹⁰³ St. Germain, J. (200) *op.cit.*, p169

¹⁰⁴ Higham, C. L. (2000) *op.cit.*, p113

¹⁰⁵ *Nowegijick v. The Queen* [1983] 1 S.C.R. 29

majoritarian will. For the powerless and forlorn indigenous populations, without any effective lobby, it assumes its most extreme and unbridled manifestations.

5.4 Conclusion

Following vigorous debate within North America, the Indians were deemed biologically competent to receive the undoubted blessings of Christianity. Their own cultures were regarded as merely the product of misinformation and superstition and thus their predicament was judged essentially correctable. Having been confined to reserves both militarily and diplomatically, they became the captive audience which was a prerequisite for any successful systematic acculturation and Christianisation.

In the United States the Civilization Fund was the first church-state partnership directed at the Indians. As the purpose was nominally educational, and the Christianisation incidental, albeit intentional, this programme could survive the scrutiny of a pre-entanglement Establishment Clause jurisprudence, particularly as missions competed for educational grants on equal terms. Indeed, Indians had often ingenuously requested education in treaties, not fully realising the sectarian package with which it would arrive. Any diffidence the churches may have felt at the arrangement they managed to suppress.

A more intimate relationship between the state and Christianity followed the Civil War with President Grant's Peace Policy. This involved only selected denominations who were given a corresponding geographical exclusivity in proselytisation. This was a flagrant breach of the Establishment Clause, which together with the other Bill of Rights protections should have applied in Indian country, either as a United States territory or to the same extent as an overseas territory. Indeed, in *Quick Bear* the Supreme Court had assumed the First Amendment did apply within Indian country as it felt the need to determine whether there had been unconstitutional establishment.¹⁰⁶

The mission contract schools, introduced in the late Nineteenth Century, could have survived a pre-entanglement establishment challenge following *Bradfield v Roberts*¹⁰⁷ if

¹⁰⁶ *Quick Bear v. Leupp* 210 U.S. 50 (1907)

¹⁰⁷ *Bradfield v. Roberts*, 175 U.S. 291 (1899)

they had remained purely an educational instrumentality. However, the systematic suppression of Indian culture and spirituality in both missions and the government public schools should have triggered free exercise concerns and the relentless evangelism undoubtedly violated the Establishment Clause. As will be seen in the next chapter, this should also have prevented the simultaneous proscription of native religious practices. Compulsory attendance at boarding schools was a breach of many treaties which had stipulated the provision of local schools on the reservations.

In Canada the missionary was less often an instrument of government policy. Indeed, he was tolerated by both European and Indian only as long as his evangelism did not interfere with trade. The Canadian government was therefore largely agnostic on the value of the missionary.

Denominational education was more enthusiastically endorsed in Canada as it absolved the government of its responsibility. Treaty provisions were violated, as they had stipulated day schools on reserves instead of residential schools, which were designed as a more assimilative instrumentality. Great cruelty was undoubtedly perpetrated on their charges with fifty per cent of students who passed through the residential schools dying. The genocidal implications of the schools are discussed in Appendix B.¹⁰⁸

Canada had no entrenched fundamental constitutional rights. Thus any substantive judicial review of establishment or free exercise was unavailable, the only constitutional enquiry was whether the correct federal component had acted. As “Indians and land reserved for Indians”¹⁰⁹ was a federal responsibility, and the federal government had indeed been the governmental component that had acted, this satisfied the limited inquiry into legality.

This relentless assimilation and Christianisation had only limited success. The next chapter will explain how frustration at such uneven results, together with alarm at some of the self-mortification of Indian religious rites, provoked a more specific and determined acculturation with the proscription of Indian religious practices.

¹⁰⁸ A Healing Fund, set up in 1994, was designed to compensate survivors for this treatment in the Twentieth Century. It involved a Common Experience Payment intended to compensate primarily for physical, not spiritual harm. Curcio, A. (2006) *op.cit.*, p126 The United States should adopt a similar scheme for compensating victims of such schools.

¹⁰⁹ section 91 (24) of the *British North America Act* 1867

CHAPTER SIX

6 The Proscription of Indian Religion

6.1 Introduction

The Wild West Show was a popular amusement amongst the North American public in the late Nineteenth Century on both sides of the border. The North American governments were less enthusiastic and deprecated this apparent regression because it “perpetuated old ways and hindered an all-out commitment to American Civilization.”¹ The irony was that the North American governments were striving to suppress Indian culture whereas their populations were paying to see it. Just as the “passing of tradition was being outlawed among Indians, its passing to the American public was pursued with a penchant.”² Thus we may see, as Gooding remarks, “Indian traditions were not prohibited, they were merely prohibited for Indians.”³

Indian religion had always been regarded with feelings that ranged from mild condescension at an unreasonable superstition, through revulsion at paganism, to terror of an imminent insurrection. The Missionary had enjoyed only a mixed success. Some Indians had completely converted to Christianity, others had merely adopted some elements while retaining their native religion. However, such a pragmatic compromise did not appeal to the North American governments which regarded Christianity as a complete replacement for such unreasonable superstition and barbarous practices.

This chapter will begin with a description of some of the Indian religious practices and then discuss the development of the United States Courts of Indian Offenses. In particular, how the Indians themselves were recruited as accomplices in the suppression of their own culture. There will be an enquiry into the procedures of the courts and an

¹ Prucha, F. P. (1976) *op.cit.*, p319

² Gooding, S. S. (1996). "At the Boundaries of Religious Identity: Native American Religions and American Legal Culture." *Numen* 43(2): 157-183,163.

³ *ibid* p163.

assessment of their legality. This section will close with the retreat from this policy during the 1930s, following the arrival of a more enlightened Indian Commissioner John Collier.

There will then be a comparison with Canada and the banning of many religious practices in the plains and northwest coast area. In contrast to the more covert and administrative policy of the United States, Canada chose to pursue a more brazen route with specific legislation which, due to a lack of protection of substantive constitutional rights, was less susceptible to challenge. Again, the painfully gradual reversal of this policy will be followed into the Twentieth Century.

6.2 United States

6.2.1 Heathenish Dances and Medicine Men

Secretary of the Interior Henry Teller noted in 1883 that there is “a great hindrance to the civilization of the Indians, viz the continuance of the old heathenish dances, such as the sun-dance, scalp-dance and war dance etc.”⁴ The religious dances, in the words of a later Indian Commissioner Francis Leupp, “were quite out of keeping with our accepted canons of propriety.”⁵ Indian administrators also argued that participation in ceremonies interrupted agriculture and education, leaving aside its evil role in the vertical transmission of traditional culture.⁶ Dances were even implicated in the horizontal transmission of pathogen: it was argued that the dust raised spread tuberculosis or the confined spaces bred pandemics.⁷

The Sun Dance, also known as the Thirst Dance, was practised on both sides of the border, predominantly by plains tribes. It was thought to originate from the sun gazing ritual of the Lakota Sioux and indeed was one of their seven sacred rites.⁸ Sponsoring a Sun Dance was a major undertaking and motivations included “community well-being, world regeneration and thanksgiving through communal worship.”⁹ Practice varied but usually a sacred cottonwood tree was the focal point of the four day event which included

⁴ Letter to Commissioner of Indian Affairs from Prucha, F. P. (2000). Documents of United States Indian Policy. Lincoln, University of Nebraska Press.p159

⁵ Talbot, S. (2006). "Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934." Wicazo Sa Review **21**: 7-39,16

⁶ Pettipas, K. (1994) *op.cit.*, pp102-103

⁷ Backhouse, C. and Osgoode Society for Canadian Legal History (1999) *op.cit.*, p67

⁸ Hirschfelder, A. B. and Molin, P. F. (2000) *op.cit.*, p293

⁹ Pettipas, K. (1994) *op.cit.*, p56.

dancing, the blowing of eagle whistles, drumming, gift-giving and story-telling, until the culmination which proved the most objectionable to white sensitivity. This involved the ritual piercing of the breasts of the male participants with wooden pegs. These pegs were tied to the central tree with leather thongs and in the act of breaking free made sacred flesh offerings.¹⁰ As for the Scalp Dance and War Dance, the original eponymous elements had become mainly allegorical by this time.

The Medicine Man varied between cultures but was usually a religious leader and healer whose calling was either due to a childhood vision or heredity.¹¹ Teller regarded them with suspicion as he viewed their role as one of “resort[ing] to various artifices and devices to keep the people under their influence.... using their conjurers’ arts to prevent the people from abandoning their heathenish rites and customs.”¹²

6.2.2 The Courts of Indian Offenses

The Indian agent fulfilled several roles on the reservation. He was at once the executive, the legislative and the judicial arm of government.¹³ The infraction of local rules and regulations devised, drafted, approved and enforced by the agent resulted in detention, denial of rations and various other minor punishments. The Courts of Indian Offenses differed from such agent-conducted “courts,” which targeted mainly civil disobedience and misdemeanours, in that they were specifically aimed at Indian cultural practices that had so long been deemed an obstacle to civilization. They were to employ Indian judges and were an extension of the successful experiment with the Indian-staffed police, as setting Indian against Indian was regarded as a more effective and corrosive strategy.

On Teller’s orders the Commissioner of Indian Affairs Hiram Price issued a directive on 30 April 1883 detailing the new courts. The judges were to be drawn from the Indian police and were to be “intelligent, honest, and upright and of undoubted integrity,”¹⁴ with an absolute maximum of one wife each.¹⁵ They were given jurisdiction over “dances,

¹⁰ Hirschfelder, A. B. and Molin, P. F. (2000) *op.cit.*, pp293-294

¹¹ *ibid* p177

¹³ Prucha, F. P. (1976) *op.cit.*, p208

¹⁴ *ibid* p209

¹⁵ Hagan, W. T. (1966). Indian Police and Judges. Experiments in Acculturation and Control. [With plates, including portraits, and a bibliography.], New Haven & London. pp133,135

polygamous marriages, interference of the medicine man with the civilization program, thefts and destruction of property, intoxication and liquor traffic and misdemeanours.”¹⁶

The agent was to send cases to the court which met twice a month. The judges were to be the three most senior officers of the Indian police, which meant that the same official often investigated, arrested, tried and sentenced. This seriously undermined any concept of due process.¹⁷ Their decisions were subject to agent approval and ultimate appeal to the Commissioner of Indian Affairs.¹⁸ The courts were not extended to the Five Civilized Tribes, the Indians of New York, or the Eastern Cherokees whose religious practices were not deemed so objectionable.¹⁹ In all, at the turn of the Twentieth Century, approximately two-thirds of tribes had Courts of Indian Offenses.²⁰

The Bureau of Indian Affairs continually lobbied Congress hard for a more formal legal status of the courts, yet the only congressional acknowledgment came in the form of compensation for the judges in the *Indian Appropriation Act* of 29 June 1888.²¹ The Indian police had previously received congressional *imprimatur* with the authorisation of their pay in the *Indian Appropriation Act* of 27 May 1878.²²

The agents were delighted with the experiment, reporting the courts as a major success. According to Commissioner Price they had suppressed “most of the barbarous and pernicious customs that have existed among the Indians from time immemorial.”²³ Exact statistics on incarceration were not kept, although it is clear that Indians were regularly locked up on many reservations.²⁴

The Rules for the Courts were modified in 1892.²⁵ For the appointment of judges, preference was to be given to those who *inter alia* “read and write English readily wear

¹⁶Prucha, F. P. (1976) *op.cit.*,p209

¹⁷ Hagan, W. T. (1966) *op.cit.*, p111

¹⁸Prucha, F. P. (1976) *op.cit.*, p209

¹⁹*ibid* p209

²⁰*ibid* p210

²¹Harring, S. L. (1994) *op.cit.*,p187

²² Privates at \$5 per month Officers at \$8 per month from Prucha, F. P. (1976) *op.cit.*,p204

²³ Prucha, F. P. (1976) *op.cit.*, p210

²⁴ Harring, S. L. (1994) *op.cit.*, FN 40 p199.

²⁵ *Rules for Indian Courts* August 27, 1892 from Prucha, F. P. (2000) *op.cit.*, p185

Citizens' dress, and engage in civilized pursuits.”²⁶ An additional provision provided that, “if an Indian refuses or neglects to adopt the habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a vagrant and guilty of misdemeanour.”²⁷ The punishment for the first conviction was a fine of not more than \$5 or imprisonment for up to ten days, rising to \$10 and 30 days for subsequent convictions.²⁸ It is debatable how many frontier whites would have been at liberty if this provision had been extended to them.

As for the Sun Dance and Scalp Dance, first time offenders were denied rations or imprisoned for 10 days, rising to court-imposed starvation for between 10 and 30 days or imprisonment for up to 30 days for subsequent offences.²⁹ Polygamous marriages attracted sanctions of a fine of \$20 to \$50 or hard labor for between twenty and sixty days.³⁰ There was no mention of subsequent offences. The practice of Medicine Man attracted an initial penalty of between ten and thirty days imprisonment, rising to a maximum of six months on subsequent conviction.³¹

The legal suppression of Indian religions continued well into the 1920s, until the Merriam Report of 1928 signalled the start of a different approach to Indian policy and in particular culture. Consistent with this approach, the procedures of the Courts of Indian Offenses were changed by John Collier, a more enlightened Commissioner, who was appointed in the 1930s. In his new guidelines for the Courts, issued on November 17 1935, he permitted Indian defendants to summon witnesses, raise bail, to see formal accusations against them and to have a jury trial.³² Another problem he had identified was the undue influence of the superintendents over the judges who had been removable at will. The new regulations required the approval of the reservation Indians for the removal of any judge.³³

²⁶ *ibid* section 2.

²⁷ *ibid* section 5

²⁸ *ibid* section 5

²⁹ *ibid* section 4(a)

³⁰ *ibid* section 4(b)

³¹ *ibid* section 4(c)

³² Wunder, J. R. (1994) *op.cit.*, p66

³³ *ibid* p65

Finally, a new code of misdemeanours was to be formulated in consultation with the tribes and *crucially* the cultural offenses were at last officially *removed*.³⁴

Collier had previously signalled a change in policy by his 1934 circular number 2970 entitled *Indian Religious Freedom and Culture* which read, “[n]o interference with Indian religious life will be hereafter tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group.”³⁵ This administrative gesture had effectively extended First Amendment protection at last to the Indians which, of course, had been originally removed by the purely administrative Courts of Indian Offenses.³⁶ This protection of Indian religious freedom was perhaps his most enduring legacy.³⁷ In a further circular of 1934 he forbade compulsory attendance at religious services in boarding schools without parents’ permission.³⁸ Perhaps his most remarkable achievement was to unite Catholic and Protestant sentiment in branding him a “devil worshipper.”³⁹

6.2.2.1 Legal Analysis

The legality of the Courts was challenged in the case of *United States v Clapox*,⁴⁰ on the grounds that they were unconstitutional as they were not courts set up by Congress, pursuant to Article III Section 1, but were an administrative exercise of power by the Bureau of Indian Affairs. Although the United States, by means of Congress, had the power to establish the place of *criminal* trials for crimes not committed within a state, Congress had not explicitly given such official sanction for these courts.⁴¹

Undeterred, Judge Deady of the Oregon Federal District Court ruled that they were “educational and disciplinary instrumentalities by which the government of the United

³⁴ *ibid* p66

³⁵ *ibid* p65

³⁶ *ibid* p64

³⁷ Bowden, H. W. (1981) *op.cit.*, p206

³⁸ Wunder, J. R. (1994) *op.cit.*, p65

³⁹ *ibid* p65

⁴⁰ *United States v Clapox* 34 Fed. Rep. 575 (1888)

⁴¹ “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish” from <http://www.usconstitution.net/const.html> [accessed 15 October 2009]. Furthermore Section 2 states that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

States endeavours to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.”⁴² It carried the Plenary Power doctrine of *Kagama*⁴³ to an “obscene conclusion” as a jail was now regarded as a “school” for correcting the practice of an aberrant culture.⁴⁴ *Clapox* was the last legal challenge to the Courts.⁴⁵ There were no legal challenges based more substantively on First Amendment violations,⁴⁶ yet, in the proscription of Indian religious practice by the Courts of Indian Offenses, it is not difficult to see Congress “prohibiting the free exercise” of religion.

There were also no challenges on the basis of other equally flagrant violations of the Bill of Rights such as the Fifth (Due Process), Sixth (Formal Accusation and Witnesses), Article III (Jury Trial) and Eighth Amendments (Bail) to the Constitution.⁴⁷ None of the “offenses” were categorically defined in the regulations, which should have been a prerequisite for any indictment. This was perhaps a recognition that such a precise definition would have been beyond the disciplines of anthropology, let alone jurisprudence. Furthermore, *any* incarceration, following the ruling in *Standing Bear*⁴⁸ discussed in Chapter Three, should have triggered a *habeas corpus* application, as the Indian had been found quite categorically to constitute a person for the purposes of such a writ.

As for the application of the Bill of Rights on tribal land, this was discussed in the previous chapter. In particular, the fact that Indians are politically sovereign and separate and that First Amendment protection is inapplicable is unpersuasive. There is no geographical qualifier to the restriction on Congress, the prohibition is absolute.⁴⁹ In the subsequent case of *Quick Bear v. Leupp*⁵⁰ Indians were held to be protected in their religious freedom on reservations. Admittedly this choice was intended to be restricted to the various strains of Christianity, but protected they were nevertheless. As mentioned above, Mansfield reminds us there is also no textual restriction on the protection of “citizens” in

⁴² *United States v Clapox* 34 Fed. Rep. 575,577 (1888)

⁴³ *United States v Kagama* 118 U.S. 375 (1886). Please see Chapter 3.

⁴⁴ Harring, S. L. (1994) *op.cit.*, p187

⁴⁵ *ibid* p187

⁴⁶ Anderson, R.T. , Goldberg, C. et al (eds)(2005) *op.cit.*, FN 318 p763

⁴⁷ Wunder, J. R. (1994) *op., cit.* p66

⁴⁸ *Standing Bear v Crook* 25 F. 695, 700-701 (1879)

⁴⁹ Deloria, V. and Wilkins D. E. (1999) *op.cit.*, p109

⁵⁰ *Quick Bear v. Leupp* 210 U.S. 50 (1907)

other provisions of the Bill of Rights.⁵¹ Fundamentally, any illegal and illegitimate jurisdictional intrusion into tribal sovereignty should, as an emollient, have imported the Bill of Rights.

6.3 Canada

When Buffalo Bill's Wild West Show travelled to England in 1886 "Grandmother England" herself Queen Victoria, was in the audience. Black Elk, the Sioux Holy Man, reported her as being "little but fat" and saying to him, "if you belonged to me, I would not let them take you around in a show like this."⁵² He liked her and speculated that "if she had been our Grandmother, it would have been better for our people."⁵³ Sadly, this generous assessment is not borne out by history. Grandmother's sympathy for the persecuted and exploited aborigine south of the border was rather partial as her very own Dominion's government was, at that time, engaged in a legal proscription of Indian culture throughout the Plains and Northwest Territories every bit as vigorous and oppressive as that pursued in the United States.

To impose jurisdiction over Indians in these areas an Act of 1874 extended the existing Indian laws to Manitoba and British Columbia.⁵⁴ This Act also made it an imprisonable offence for an Indian to be found intoxicated on or off reserve.⁵⁵ In 1876 this was extended to prohibit Indians from even possessing alcohol on reserves.⁵⁶ Although the general criminal law had been applicable to Indians from first contact,⁵⁷ these were the first criminal offences applicable *only* to Indians.⁵⁸ This *selective* application of criminal law was a portent of things to come.

⁵¹ Mansfield, J. (1986) *op.cit.*, p27

⁵² Black, Elk., Neihardt, J. G. et al. (2004) *op.cit.*, p170.

⁵³ *ibid* p171.

⁵⁴ *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia* S.C. 1874, Chapter 21.

⁵⁵ It was finally struck down for "off-reserve drinking" as a violation of the equality provision of the *Canadian Bill Of Rights* in the appropriately titled case of *The Queen v. Drybones* [1970] S.C.R. 282

⁵⁶ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p49

⁵⁷ Please see chapter 3

⁵⁸ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p28.

6.3.1 The Potlatch and the Tamanawas Dance

The word Potlatch derives from the Nootka *patsbatl* which means gift or giving,⁵⁹ and gained popular usage through the Chinook trade jargon around the 1860s. It was practised on the Northwest Coast both sides of the border. Potlatches were used to “mourn deaths, bestow names, erase the shame of accidents or ceremonial errors, recognize the succession to titles and economic rights and acknowledge marriages and divorces.”⁶⁰ The central elements were a feast, some dancing and speeches, prayers, and most importantly a giveaway ceremony which consecrated the honour or name bestowed, or solemnly commemorated the event.⁶¹ There was an essential reciprocity to the ritual with the degree of gifts carefully accounted for and repaid by the recipients at a later date. It had both a religious and socioeconomic purpose and tended to strengthen tribal solidarity. Furthermore, it was a form of welfare, an “assurance or benefit society” when the “elderly were indirectly clothed during the winter months.”⁶²

To the Euro-Canadian mind the Potlatch was wasteful of resources and time as it distracted the Indians from more useful activities, such as labour and industry and, moreover, kept children from school.⁶³ It also destroyed accumulated capital and hindered economic and social progress, anathema to the tenets of the Protestant work ethic and “acquisitive capitalism.”⁶⁴ So profligate was the ceremony that the Fraser River agent reported that one Potlatch, held by a “bad Indian” named Uslick, had resulted in him giving away everything that he had owned, with the exception of his “wife and a few potatoes, that nobody wanted.”⁶⁵

Other whites regarded them as essentially harmless and for the trader a good source of business as blankets and copper sales were vibrant when a Potlatch was imminent. Furthermore, many whites enjoyed attending these events, often purchasing

⁵⁹ Cole, D. and Chaikin, I. (1990) *op.cit.*, p6

⁶⁰ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 4 p39

⁶¹ Hirschfelder, A. B. and Molin, P. F. (2000) *op.cit.*, p228

⁶² Cole, D. and Chaikin I. (1990) *op.cit.*, p27

⁶³ *ibid* p20

⁶⁴ Tinker, G. E. (1993) *op.cit.*, p109

⁶⁵ Cole, D. and Chaikin, I. (1990) *op.cit.*, p44

souvenirs; although the process of gift distribution could be protracted and tedious, and the full significance of the religious rite rather mystifying to the uninformed tourist.⁶⁶

Heavily intertwined with the Potlatch was the marriage tradition, which dictated that the groom's family pay an amount on arrangement of the marriage. The bride's family agreed to repay this at a later date with interest. Once the repayment was made the bride was free to leave the groom and often did. The incentive for the groom was the purchase of membership in the bride's clan for the children.⁶⁷ Serial marriages resulted, the bride's family's motivations often being to obtain money to buy goods for Potlatching. Euro-Canadians recoiled at the tender age of the bride (often at first menarche) and the business-like nature of the transaction.⁶⁸ It is not difficult to see the clash with Victorian mores in such a transaction.

If the Potlatch offended Nineteenth Century sensibilities the Tamanawas Dance, it could be argued, would have been deemed offensive in any age. The Tamanawas or Tamanous was a Chinook term meaning anything associated with the spiritual.⁶⁹ It also referred to a society in which participants wore blackened faces during an initiation ceremony and which involved various degrees of ritual cannibalism and the consumption of dogs. White commentators described it as the "the tearing apart [of] dead dogs or exhumed human bodies....which were orgies of the most disgusting character."⁷⁰ Held in the wintertime, there was drumming, dancing and the sporadic gnawing of live spectators.

6.3.1.1 Legislation

Exact definitions of both these practices eluded the non-native population and remain difficult. Indeed, the first legislative proscription avoided the issue: section 114 of the *Indian Act* (1884) read:

*Every Indian or person who engages in or assists in celebrating the Indian festival known as the "Potlatch" or the Indian dance known as the "Tamanawas," is guilty of a misdemeanour, and liable to imprisonment for a term not exceeding six months and not less than two months.*⁷¹

⁶⁶ *ibid* p51

⁶⁷ Cole, D. and Chaikin, I. (1990) *op.cit.*, p77

⁶⁸ *ibid* p80

⁶⁹ Hirschfelder, A. B. and Molin, P. F. (2000) *op.cit.*, p298

⁷⁰ Cole, D. and Chaikin, I. (1990) *op.cit.*, p19

⁷¹ *Indian Act* (1884)

By placing the terms in inverted commas the government conceded that a satisfactory statutory definition was, if not impossible, certainly beyond the competence of non-Indian drafters of that era, or perhaps any era.⁷² Section 115 proscribed the same punishment for anyone “who encourages either directly or indirectly.... such a festival or dance.”⁷³

The first arrest was made on 1st August 1889.⁷⁴ A Kwakwaka’wakw⁷⁵ Indian named Ha-mer-cee-luc was subsequently given a six month prison sentence.⁷⁶ However, his simultaneous arraignment for trial in Victoria for the same offence prompted a *habeas corpus* application by his supporters to the Supreme Court of British Columbia. Justice Begbie ordered his release on the grounds that “he was not held on a proper warrant of Committal.”⁷⁷ Begbie remarked that, “if it be desired to create an offence previously unknown to the law there ought to be some definition of it in the statute. It seems an abuse of the forms of justice to have a defendant plead guilty to an offence the facts constituting which we should ourselves be unable to set forth.”⁷⁸ The Tamanawas was similarly undefined, as Begbie remarked, “it may be that an Indian who had taken part in some quite innocent performance of dancing which the Legislature never intended to ban might plead guilty to a charge of having danced.”⁷⁹ Begbie’s *obiter dicta* rendered the law a “dead Letter.”⁸⁰ Parliament responded and section 114 was altered on 22nd July 1895, omitting the words Potlatch and Tamanawas, but clumsily providing a definition:

Every Indian or other person who engages in celebrating or encourages either directly or indirectly another to celebrate, an Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same and every Indian or other person who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any

⁷² Bracken, C. (1997) *op.cit.*, p84

⁷³ *ibid*

⁷⁴ *ibid*

⁷⁵ Southern Kwakiutl

⁷⁶ Bracken, C. (1997) *op.cit.*, p91

⁷⁷ *ibid*

⁷⁸ Cole, D. and Chaikin, I. (1990) *op.cit.*, p35-36

⁷⁹ Bracken, C. (1997) *op.cit.*, p93

⁸⁰ Cole, D. and Chaikin, I. (1990) *op.cit.*, p36

*human being or animal forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months.*⁸¹

Thus the original section 114 mentioned Potlatch and Tamanawas without defining them, the revised statute defined them without mentioning them. As Bracken remarks, this provision was drafted so widely that it banned “every conceivable exchange and every possible circulation of money goods or articles.”⁸² It could be interpreted to ban trade between aboriginal people anywhere in Canada.⁸³ As one contemporary government report remarked, “a potlatch encompassed everything from what a white man might call an invitation to dinner up to a frenzied carouse leaving the hosts absolutely penniless.”⁸⁴ The Act had one exception: “but nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereof.”⁸⁵ Agriculture was to be encouraged as an essential and virtuous pillar of white civilization.⁸⁶

6.3.1.2 The Inveterate Kwakiutl

By 1900 the Potlatch ceremony was fading throughout British Columbia. The law had played its part, but the most significant factor was probably the wholesale Christianization of the Indian communities.⁸⁷ However, the Southern Kwakiutl (Kwakwaka’wakw) remained inveterate, also practising the Tamanawas dance. Indeed, in March 1900, a Kwakiutl named George Hunt, was charged with the mutilation of an exhumed woman under section 114, namely the “the wounding or mutilation of the dead or living body of any human being.” The Prosecution alleged that the unfortunate lady had been dismembered and decapitated with selected portions of her consumed. The jury disagreed.⁸⁸

Various techniques were adopted to evade prosecution for Potlatching. The Kwakwaka’wakw decided they could evade the law by allowing six months to elapse

⁸¹ S.C. 1895 c.35

⁸² Bracken, C. (1997) *op.cit.*, p119

⁸³ *ibid*

⁸⁴ A.W. O’Neill quoted in Bracken, C. (1997) *op.cit.*, p168

⁸⁵ S.C. 1895 c.35

⁸⁶ Bracken, C. (1997) *op.cit.*, p120

⁸⁷ Cole, D. and Chaikin, I. (1990) *op.cit.*, p55.

⁸⁸ *ibid* p75

between the ceremony and its consecration by property distribution. This was because the *Statute of Limitations* meant that only six months were allowed to prosecute. Moreover, it could be argued, that such a delay circumvented the provision that the gift-giving “must form part of an Indian festival, dance or ceremony to be illegal.”⁸⁹ Other tactics included coinciding ceremonies with Christian festivals such as Christmas and disguising the gifts as Christmas gifts or distributing them door to door instead of at the event.⁹⁰ Still another idea was to distribute the gifts as prizes for the best speeches at gatherings, or for other notable achievements.⁹¹ However, due to the necessary subterfuge involved in concealing the true nature of the gifts, the public visibility and sacred validation of the ceremony was absent, thus rendering the Potlatch less meaningful both spiritually and as a “unifying force in Kwakwaka'wakw society.”⁹²

The law was sporadically enforced in the late 1890s and early 1900s until Duncan Campbell Scott assumed the Deputy Superintendency in 1913.⁹³ At his prompting a more vigorous enforcement of section 149 (the previous section 114) was pursued.⁹⁴ He nominated William Halliday as the agent of the inveterate Kwakiutl agency and he swiftly moved to secure a conviction in May 1914. In the case of *R v. Harris and Bagway* both defendants were initially acquitted. Justice Gregory defined a “festival as a religious gathering and a ceremony as something conducted by fixed rules.”⁹⁵ The jury could not agree that a Potlatch fitted either description. At a subsequent retrial the next day the two were found guilty and given suspended sentences as the prosecution proved that there had also been prohibited dancing at the event.⁹⁶ In another case concerning Kishwagila the grand jury determined that there was no true bill of indictment and dismissed the case.⁹⁷ Halliday was dismayed to discover that the jury “did not see any offence in Potlatching.”⁹⁸

⁸⁹ Bracken, C. (1997) *op.cit.*, p228

⁹⁰ Harring, S. L. (1998) *op.cit.*, p267

⁹¹ *ibid*

⁹² Cole, D. and Chaikin I. (1990) *op.cit.*, p142.

⁹³ *ibid* p93

⁹⁴ Relocated in a 1906 amendment from Bracken, C. (1997) *op.cit.*, p170

⁹⁵ Cole, D. and Chaikin I. (1990) *op.cit.*, p98.

⁹⁶ *ibid*.

⁹⁷ *ibid*

⁹⁸ *ibid*

The bar of public opinion had perhaps pronounced the Potlatch as a harmless activity and had no enthusiasm for persecution and prosecution.

Halliday saw the solution as bypassing the jury and the inconvenience of public sympathy by making the offences disposable by summary trial. Previously the agent, as Justice of the Peace, could take evidence and lay information for a county court hearing. In April 1918 the word "indictable" was replaced with "on summary conviction." This gave the necessary authority to agents as Justices of the Peace.⁹⁹ The omnipotent agent was now prosecutor, judge and jury.¹⁰⁰

The conviction rate unsurprisingly increased: in January 1920 Halliday convicted eight Potlatchers, all received two month sentences except for an old man who was given a suspended sentence. These were the first sentences *actually served* for Potlatching.¹⁰¹ In February 1922 thirty-two people were before Halliday for participation in the infamous Cramer Potlatch. An agreement was reached: all Potlatch paraphernalia had to be surrendered and promises never to Potlatch again in return for suspended sentences.¹⁰²

During the Great Depression the Potlatch seemed to disappear from public consciousness as it was dependent on the greater Canadian economy. That, together with acculturation, the gradual demise of arranged marriages, and the threat of section 149, were all responsible for the decline.¹⁰³ Following the Second World War, the Potlatch faded further from view, replaced as it was by more pressing social concerns such as housing, old age pensions, veterans' benefits and healthcare. The criminal prohibitions on the Potlatch, dances and giveaways were only removed from the *Indian Act* in 1951. Two years after the repeal of the anti-potlatch law Chief Mungo Martin held the first legal potlatch for seventy years.¹⁰⁴ In 1963 two Kwakiutl Indians went to Ottawa to request the return of their confiscated Potlatch paraphernalia. The Museum of Civilization eventually returned the last item in 1987.¹⁰⁵

⁹⁹ Bracken, C. (1997) *op.cit.*, p209

¹⁰⁰ Cole, D. and Chaikin, I. (1990) *op.cit.*, p110.

¹⁰¹ *ibid* p116

¹⁰² *ibid* pp120-121

¹⁰³ Bracken, C (1997) *op.cit.*, pp228-229

¹⁰⁴ Masco, J. (1995). "'It is a Strict Law That Bids Us Dance': Cosmologies, Colonialism, Death, and Ritual Authority in the Kwakwaka'wakw Potlatch, 1849 to 1922." *Comparative Studies in Society and History* 37(1): 41-75, 71.

¹⁰⁵ Thorner, T (2003) *op.cit.*, p43

It is difficult to assess exactly to what extent the laws were effective. Rolf Knights suggests that the “relative effects of the Potlatch law seem often over-exaggerated.”¹⁰⁶ Any reduction in native practice may be explained by a generalized acculturation and Christianisation process which diminished the role of tradition. It is perhaps significant that south of the border the Potlatch was legal, but had largely disappeared: the Makah of Cape Flattery who didn’t Potlatch, although it was legal, could be contrasted with the Nootka on Vancouver Island where it was illegal, but still practised.¹⁰⁷ This would perhaps dilute the significance of the prohibition.

6.3.2 Other Illegal Dances

The Sun Dance was one of the listed offenses in the Courts of Indian Offenses in the United States.¹⁰⁸ During the last part of the Nineteenth Century its practice began to attract the disapproval of Victorian England and thereby the Dominion of Canada. Deputy Superintendent Campbell Scott declared his policy was to “substitute reasonable amusements for this senseless drumming and dancing.”¹⁰⁹

As mentioned in the last section, the *Indian Act* prohibitions on the Potlatch and the Tamanawas Dance were broadened with the *Indian Act* 1895 amendment to include other festivals, dances and giveaway ceremonies. The original act of 1884 had only specified the Potlatch and the Tamanawas Dance. The amended act from 1895 required that either a giveaway or self-mutilation form part of the offence. Without these objectionable features there was no breach of section 114.¹¹⁰

Sun Dance arrests were sporadic. One early example was that of Matoose, a Saskatchewan Cree, arrested in the summer of 1895 when the Indian Agent had stopped a ceremony in the Touchwood Hills Areas. He was bound over to keep the peace for three months.¹¹¹ In 1896 Kah-pee-cha-pees was convicted of sponsoring a Sun Dance and sentenced to two months hard labour.¹¹² 1897 saw several convictions for dancing

¹⁰⁶ Cole, D. and Chaikin I. (1990) *op.cit.*, p176

¹⁰⁷ Thorner, T. and Frohn-Nielsen T. (2003) *op.cit.*, p44

¹⁰⁸ Prucha, F. P. (2000) *op.cit.*, p185

¹⁰⁹ Pettipas, K. (1994) *op.cit.*, p160

¹¹⁰ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p47

¹¹¹ Pettipas, K. (1994) *op.cit.*, p115

¹¹² *ibid* p115

including Yellow Bird, another “bad Indian”, who had used threatening language against the Indian agent after having been refused rations.¹¹³ The Cree Chief Piapot was arrested and convicted twice in 1897 and 1901. Despite being elderly he was given two months imprisonment on each occasion. Other convictions included that of a 90 year old blind man named Taytapashung who was also given two months imprisonment.¹¹⁴ In total there were two indictments for holding dances in 1900 with no convictions; twenty-seven arrests, nine cases and nine convictions in 1902; ten arrests and nine convictions in 1903; and two arrests and two convictions in 1904.¹¹⁵

In 1903, Wanduta was charged and convicted by a single magistrate, following his “acknowledgement of guilt,” for holding a Grass Dance¹¹⁶ at a Rapid City annual fair the year before that had been organized by the white community.¹¹⁷ The Grass Dance, it was argued by the defence, had no objectionable features specified in the Act such as mutilation or giveaway. Alternatively it fell under the “agricultural show or exhibition” exception to the Act.¹¹⁸ White supporters did not argue on freedom of religion grounds but freedom of entertainment. They claimed that these laws, which were supposed to engender a protestant work ethic, harmed non-Indian prairie businesses.¹¹⁹ The white organisers could actually have been prosecuted under the “encouraged directly or indirectly” element of the offence yet in the entire history of the prohibition no whites were ever charged.¹²⁰ Wanduta was forced to serve his four month sentence as his legal team failed to raise the glaring jurisdictional error: the offence was only made summarily disposable by the later 1918 amendment. In 1903 a single magistrate had no authority.¹²¹

Although the last recorded prosecution of a Sun Dance participant was in 1921 the fear of prosecution certainly discouraged the continuance of these forms of overt religious

¹¹³ *ibid* p118

¹¹⁴ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p47

¹¹⁵ Pettipas, K. (1994) *op.cit.*, p122

¹¹⁶ Ceremony held to pray for the grass to grow and for the plentiful supply of other food groups which was practiced among many plains tribes. Hirschfelder, A. B. and Molin, P. F. (2000) *op.cit.*, p107

¹¹⁷ Backhouse, C. and Osgoode Society for Canadian Legal History (1999) *op.cit.*, p79

¹¹⁸ *ibid* p84

¹¹⁹ *ibid* p90

¹²⁰ *ibid* p92

¹²¹ *ibid* p100

expression.¹²² However, many Indians simply held their dances in secret, far from prying eyes, which on the vast prairie was not difficult.

6.3.3 Off Reserve Dancing

The Canadian Government seemed intent on destroying native religion and culture *per se*, not merely the elements deemed repugnant to white society, such as giveaways or mutilation. This was evidenced by a 1914 prohibition of *off-reserve* dancing “in aboriginal costume without the consent of the Superintendent General of Indian Affairs or his authorized Agent.” Furthermore, “any person who induces or employs any Indian to take part in such dance, show, exhibition, performance, stampede or pageant, or induces any Indian to leave his reserve or employs any Indian for such a purpose,” was guilty of an offence.¹²³ Anthropologists feared that the “induces or employs” element would destroy their research.¹²⁴ Wild West Show impresarios complained it would destroy their business. In 1933, another amendment deleted the words “in aboriginal costume” from section 149, which meant that any off-reserve dancing was prohibited, even in a tuxedo.¹²⁵

6.3.4 Legitimacy of the Proscriptions

Cole and Chaikin suggest that, because the Potlatch law sought to assist those victimized by this “tyranny of tradition,”¹²⁶ it was morally justifiable. Furthermore, the apologists for the law pointed out the detriment to health by the crowded winter ceremony and the ill-treatment of Kwakiutl women due to the marriage system, together with the corresponding patriarchy of male prestige and rank as factors taking precedence over more humanistic principles.¹²⁷ Yet pluralism and cultural relativism must profess distaste for governmental coercion and the oppression of a powerless minority, engaged in relatively harmless practices.¹²⁸ Native autonomy was seriously compromised and Indian pitted

¹²² Pettipas, K. (1994) *op.cit.*, p153

¹²³ Indian Act (1914) s149.

¹²⁴ Pettipas, K. (1994) *op.cit.*, p150

¹²⁵ *ibid* p164

¹²⁶ Cole, D. and Chaikin I. (1990) *op.cit.*, p178

¹²⁷ *ibid*

¹²⁸ *ibid* p181

against Indian, pagan against Christian, conservative against progressive and traditional against acculturated. The main appeal must be to fairness, as this unjust law punished something that was essentially peaceful and private.¹²⁹

By contrast, the Tamanawas dance was less defensible on the grounds of cultural relativism. The exhumation and consumption of the dead and the mutilation of dogs, dead or otherwise, would in any age be deemed unacceptable. If for no other reason than health and safety concerns; even respect for the dead.

Although there were, and indeed still are, certain extreme Christian sects that include self-mortification as part of their worship the Sun Dance ritual was seen as nothing short of a barbaric pagan rite.¹³⁰ Yet other dances that involved no such mutilations were also banned, which suggests that the overriding motive was acculturation not revulsion. Similarly, the profligacy of the giveaway elements of certain ceremonies was specifically targeted implying that a lack of conformity with Victorian acquisitive capitalism was a determining factor. These largely harmless ceremonies should have remained private matters, yet Anglo-Saxon morality insisted that the Indians had to be saved from themselves. The criminalising of off-reserve dancing, without self-mutilation and giveaways and whatever the attire, reached the height of absurdity. It revealed the extent to which the Canadian government would go to destroy Indian cultural identity even in the absence of any of the associated practices that had been deemed so objectionable.

6.3.5 Legal Analysis

There is no doubt that legislation for “Indians, and lands reserved for Indians”¹³¹ was reserved to the National Parliament of Canada. Therefore, any federalist challenge to the nationally enacted *Indian Acts* would have been futile. Any equal protection jurisprudence was similarly absent during this period, even for other racial minorities, let alone those discretely apportioned to the national legislature by section 91(24). However, it is noteworthy that no whites were prosecuted under the section 115 prohibition on anyone “who encourages either directly or indirectly.... such a festival or dance.” Indeed, non-Indian farmers escaped prosecution in the 1930s when openly sponsoring Rain dances¹³²

¹²⁹ *ibid* p28

¹³⁰ Cole, D. and I. Chaikin (1990) *op.cit.*, p18.

¹³¹ Section 91(24) British North America Act 1867 (U.K.) 30 & 31 Vict., c.3

out of desperation at the drought conditions, despite the fact that such conduct could have been interpreted as encouragement.¹³³

As discussed previously, before the Charter in 1982 there were no entrenched substantive fundamental rights to the free exercise of religion. The case of *The Queen v. "Bear's Shin Bone"*¹³⁴ confirmed that Indian religious practice, in this case polygamous marriage dictated by Blood Indian Rites, provided no shield from general criminal law. Thus parliamentary supremacy, empowered by section 91(24) and unfettered by any fundamental constitutional rights, could proceed without restraint.

The change from indictable to summary offense in 1918 meant that the agent, who had both an executive role on the reserves and an alter ego as Justice of the Peace, could now act as prosecutor, judge and jury. This, together with the excessively wide drafting of the various amendments defining the offences, provided dictatorial powers of persecution.

The Canadian government sought to consolidate their legal stranglehold on the indigenous people by passing legislation in 1927 that made it an offence for anyone to solicit funds for Indian legal claims without obtaining a licence from the Superintendent General.¹³⁵ Ostensibly this was to protect Indians from unscrupulous lawyers; in reality it was to silence dissent.¹³⁶ It further immunised the autocratic agent from challenge.

6.4 Conclusion

Motives for the suppression of the ceremonies varied across the border. In the United States, although the self-mortification of certain dances was a relevant factor, the suppression of these dances was an attempt to eliminate difference and foster acculturation. In Canada, the unsavoury aspects of the dance and the wastefulness of the giveaways were emphasised more as discordant with Victorian morality and capitalism, although this was suffused with an acculturative subtext.

¹³² A shorter version of the Sun Dance amongst the Plains Cree which lasted 2 days and involved piercing from Haring, S. L. (1998) *op.cit.*, p269

¹³³ Section 115 prescribed the same punishment for anyone "who encourages either directly or indirectly.... such a festival or dance." From Bracken, C. (1997) *op.cit.*, p83

¹³⁴ *The Queen v. "Bear's Shin Bone"* (1899) 3 C.C.C. 329

¹³⁵ Section 141 of the Indian Act (R.S.C. 1927, c98) which was repealed in 1951 from Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p51.

¹³⁶ *ibid*

The sweeping mandate of section 91(24) in Canada, the lack of any common law tribal rights, and the lack of any other constitutional restraint, meant that Canadian Indian Law could proceed largely free from any legal challenge. As mentioned above, the 1918 *Indian Act* amendment in Canada made the offences summarily convictable by substituting “indictable” with “liable on summary conviction” in section 149. This meant that the agent was not limited to merely pressing charges for hearing by another official but could actually try the cases as well.¹³⁷ This enhanced his despotic powers and casually swept away any due process.¹³⁸

By contrast, the United States had recognised the common law right to tribal sovereignty in the Marshall Trilogy of the early Eighteenth Century. Therefore, any legislative intrusion had to be incremental and demonstrably justifiable, however spurious the theoretical grounding, on concepts such as the Plenary Power.¹³⁹ Alternatively, it had to be covert and administrative such as the Courts of Indian Offenses with the co-operation of some malleable natives. The United States Government decided that the co-option of Indians would make the Courts a more effective corrective instrumentality by promoting cultural self-destruction. As mentioned above, the clear violations of the United States Constitution included the First Amendment (Free Exercise Clause) the Fifth (Due Process), Sixth (Formal Accusation and Witnesses), Article III (Jury Trial) and Eighth Amendments (Bail) in addition to the absence of any congressional mandate for the courts.¹⁴⁰

Part II has demonstrated how aberrant culture and spirituality were generally crushed throughout the period from the early Nineteenth Century until the 1930s. Treaties, tribal sovereignty, equal protection, due process, religious freedom and thousands of stainless lives were all casually extinguished in the relentless quest for a homogeneous population.

In Part III we will move forward from the 1930s and examine the evolution of a more pluralistic attitude to Indian spirituality with blind prejudice and the suppression of difference less gratuitously apparent. However, this more accommodating paradigm is not without its circumscription as will be seen. When a more material forfeit is required of the

¹³⁷ Bracken, C. (1997) *op.cit.*, p209

¹³⁸ Dussault, R., Erasmus, G. et al (1996) *op.cit.*, Volume I Chapter 9 p44

¹³⁹ For example the *Major Crimes Act* (1885) as discussed in Chapter Three.

¹⁴⁰ Wunder, J. R. (1994) *op.cit.*, p66

majoritarian society, old prejudices re-emerge and contemporary legal principles are moulded to gratify them.

PART III

ACCOMMODATION FROM THE TWENTIETH CENTURY

CHAPTER SEVEN

7 The Indians within the Twentieth Century North American Legal Systems

7.1 Introduction

Indian policy in the United States has demonstrated more fluctuation, or perhaps schizophrenia, than in Canada. The allotment period from the 1880s was designed to perfect the transformation from nomadic hunter to small-holding farmer, while simultaneously eroding the tribal landholding base. Following the Merriam Report of 1928, this devastating effect was partially reversed by the *Indian Reorganization Act* (IRA),¹ which ended allotment, provided money to consolidate the Indian land base, and actively promoted Indian self-government, albeit with prefabricated western-modelled tribal constitutions. From 1953 until 1962, the federal government re-assumed its assimilative pose and adopted a policy of terminating the federal status of certain tribes and imposing wholesale state criminal jurisdiction on approximately 25% of the reservation-based tribal populations.² Again, from 1962 until the present, there was a change of approach, with a self-determination paradigm adopted and President Kennedy boldly declaring that, “there would be no change in treaty or contractual relationships without the consent of the tribes concerned. No steps would be taken to impair the cultural heritage of any group. There would also be protection for the Indian land base.....”³

¹ Indian Reorganization Act 1934 codified at 25 U.S.C. ss461-479

² By Public Law 280 from Goldberg, C. and Champagne, D. (2006). "Is Public Law 280 fit for the Twenty-First Century? Some Data at Last." Connecticut Law Review 38: 697-729, 697

³ From Clinton, R. N., Goldberg, C. et al. (2003) *op.cit.*, p41

In Canada, by contrast, there was simply a consistently paternalistic and assimilative administration of individual Indians starting from the *Indian Act* of 1876. In the words of Prime Minister Trudeau, “it’s inconceivable, I think, that in a given society one section of the society should have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties among ourselves.....Our answer is “no”. We can’t recognise aboriginal rights, because no society can be built on historical “might-have-beens.”⁴ This changed with the aboriginal title case of *Calder*⁵ in 1973 at which point Trudeau conceded, “perhaps you had more legal rights than we thought you had.”⁶

Chapter 3 described the development of the legal status of Indians both individually and tribally during the Nineteenth Century. This chapter will continue these developments into the Twentieth Century, concentrating initially on aboriginal title and aboriginal rights, which will provide a foundation for the sacred objects and sacred sites chapters that follow. The effect of Canada’s lack of historical definition of aboriginal rights will be contrasted with the United States’ more developed Indian law. The significance of the Canadian constitutionalisation of aboriginal rights in 1982 will also be assessed.

The evolution of the Trust Relationship and Equal Protection will then be discussed and compared in each country. In particular, how the absolute and exclusive mandate of the Plenary Power can simultaneously circumvent Equal Protection, yet be tempered somewhat by the Trust Relationship.

⁴ Trudeau quoted by the Honourable Lance Finch, Chief Justice of British Columbia) from Foster, H., Webber, J et al. (eds) (2007) *op.cit.*, p222

⁵ *Calder v. Attorney General of British Columbia* [1973] S.C.R. 313.

⁶ Asch, M “Calder and the Representation of Indian Society in Canadian Jurisprudence” in Foster, H., Webber, J et al.(eds) (2007) *op.cit.*, p101

7.2 Aboriginal Title

7.2.1 United States

The Marshall Trilogy, discussed in Chapter One, first articulated the nature of aboriginal title as a possessory interest, less than a full fee title, but still extinguishable for value. Nowadays there are two types: recognised title and unrecognised title. Recognised title means that the United States has taken some formal action by treaty, statute or agreement to confer or recognise a right of permanent occupancy.⁷ This right is compensable under the Just Compensation Clause of the Fifth Amendment.⁸ By contrast, unrecognised title attracts no such compensation. The extinguishment of aboriginal title by Congress is not subject to review by the Supreme Court, merely the quantum of damages in the event of recognised title.⁹ Only Congress may extinguish title, such a power cannot be exercised by the President or a federal agency.¹⁰

The practical significance of aboriginal title nowadays is reduced, as the vast majority of the United States has been either subject to Indian treaties or the *Indian Claims Commission Act* of 1946, which was intended to foreclose any future actions.¹¹ However, tribes that can demonstrate that they and their ancestors have had uninterrupted possession of their ancestral lands have, at least in theory, a continued possessory interest.¹²

The last major extinguishment of aboriginal title was the *Alaska Native Claims Settlement Act* of 1971 although more recent, but smaller claims, have included the *Maine Indian Claims Settlement Act* of 1980 and the *Mashantucket Pequot Indian Claims Settlement Act* 1983. Claims can therefore still occasionally occur, but usually due to historic, faulty, procedural extinguishment by the federal government; not by virtue of any fresh recognition of un-extinguished title or doctrinal development.¹³

⁷ Pevar, S. L. (2004) *op.cit.*, p26

⁸ *Tee-Hit-Ton v. United States* 348 U.S.272 (1955)

⁹ *US v Santa Fe Pacific Railroad Company*, 314 U.S. 339 (1941)

¹⁰ *US v Dann*, 873 F.2d 1189, 1195 n.5 (9th Cir.) (1989)

¹¹ Canby, W. C. (2004) *op. cit.*, p379

¹² *US v Dann*, 470 U.S. 39,50 (1985)

¹³ Canby, W. C. (2004) *op.cit.*, pp 373-374

7.2.2 Canada

By contrast, the situation in Canada is still in flux. There has never been such extensive treaty extinguishment of title and vast swathes of British Columbia, the Yukon the Northwest Territories, Quebec and Atlantic Canada have not been the subject of any land cession.¹⁴ Indeed, there had never been any conceptual clarity that such a title had existed until the seminal case of *Calder* in 1973.¹⁵

In *Calder* six of the seven judges affirmed that aboriginal title had existed in British Columbia based not on the *Royal Proclamation*, as they held that it did not extend so far west, but on prior occupation. However, three judges led by Justice Judson, held that it had in fact been extinguished by subsequent land transactions that were inconsistent with the continuance of such title.¹⁶

The Supreme Court in *Delgamuukw*¹⁷ confirmed that aboriginal title was a legal right of occupation and possession of land, the ultimate title of which remains with the Crown. It is *sui generis* as it is inalienable to anyone but the Crown and communal, with its source of *recognition* in the Royal Proclamation, but its *creation* by common law possession.¹⁸ It has an inherent limit, in that certain activities that are inconsistent with aboriginal attachment are not permitted, such as strip-mining on sacred sites should, bizarrely, the aborigines be inclined to do such a thing.¹⁹

To establish aboriginal title three general criteria must be satisfied. Firstly, there must be proof of occupation prior to the assertion of British sovereignty. Secondly, there must be a degree of continuity to the present day. Finally, at the point of the assertion of British sovereignty, there must have been exclusive occupation of the land.²⁰ The critical time is the assertion of British sovereignty. This differs from the pre-contact time frame for establishing an aboriginal right and casts doubt on whether aboriginal title is a subset of

¹⁴ Cairns, A. (2000). *Citizens Plus : Aboriginal Peoples and the Canadian State*. Vancouver, UBC Press. p189

¹⁵ *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313

¹⁶ Godlewska, C and Webber, J (2007) *op.cit.*, p5

¹⁷ *Delgamuukw v British Columbia* [1997] 153 D.L.R.

¹⁸ Culhane Speck, D. (1998). *The Pleasure of the Crown : Anthropology, Law and First Nations*. Burnaby, B.C., Talonbooks p363

¹⁹ At 247

²⁰ Manus, P. (2006). "Indigenous Peoples' Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States." *British Columbia Environmental Affairs Law Review* 33: 1-86, 21.

aboriginal rights.²¹ Aboriginal title confers the right to engage in a broader range of activities, not all of which need to be integral to a distinctive culture.²² Even should their occupation not be sufficient to establish title they may have rights over the land, for example to hunt and fish.²³

7.3 Aboriginal Rights

7.3.1 United States

Aboriginal rights in the United States have traditionally emanated from treaties, which have explicitly or implicitly reserved certain rights to hunt, fish and obtain water; or alternatively due to inherent tribal sovereignty.

In *United States v. Winans*²⁴ the Supreme Court, only two years after *Lone Wolf*, (discussed in Chapter Three), articulated both the reserved rights doctrine, by which tribes retained all rights not specifically ceded in treaties and agreements, and also the canons of treaty construction, which meant that treaties should be interpreted from the Indian perspective. This seemingly pro-Indian holding incidentally determined that the states had no role in abrogating treaty-guaranteed fishing rights. In fact both cases affirmed federal supremacy: *Lone Wolf* over tribal interests and *Winans* over state interests. Indeed, as Wilkins cynically remarks, this decision meant less of an intrusion into the rights of the non-Indian community than *Lone Wolf* in which significant numbers of white squatters would have had to be relocated, and thus this affirmation of tribal sovereignty came at less cost.²⁵

The Marshall Trilogy's model of inherent tribal sovereignty meant that aboriginal rights of, for example, self-government within tribal land, were complete but subject to the whim of congressional Plenary Power or the creativity of a hostile Supreme Court.²⁶ Thus federal criminal law jurisdiction within tribal land over tribal members had to be

²¹ Monahan, P. (2006) *op.cit.*, p445.

²² Ross, M. L. (2005) *op.cit.*, p18

²³ Godlewska, C and Webber, J (2007) *op.cit.*, p20

²⁴ (1905) 198 U.S. 391

²⁵ Wilkins, E. D. (2008) *op.cit.*, p236

²⁶ Morse, B. (1997) *op.cit.*, p132.

legislatively imposed²⁷ and tribal criminal law jurisdiction over non-Indians had to be judicially removed.²⁸ Similarly, *Montana v. United States*,²⁹ laid down a principle of tribal *civil* jurisdiction over non-Indians. The court limited such jurisdiction to two categories: “where non-members enter consensual relations with a tribe or where territorial regulation is required to protect against a threat to a tribe's political or economic security.”³⁰

7.3.2 Canada

There was no such inherent tribal sovereignty recognised in Canada and thus no derivative aboriginal rights. Indeed, the actual existence of *any* aboriginal rights in Canada only penetrated legal consciousness after the *Calder* aboriginal title case. So enamoured were the Canadian people with this novelty that aboriginal rights, whatever they may have been, were constitutionalised in 1982 by virtue of section 35 which reads: “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.” Section 35 rights are not subject to the section 1 circumscription of the seemingly absolute nature of *Charter* rights to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”³¹ Furthermore, section 25 stipulated that any *Charter* rights do not affect any other rights held by aboriginals, thus whichever is the more favourable can be employed. The difficulty lay in a satisfactory determination of what exactly was an aboriginal right that had been deemed so important. Thus the constitutionalisation preceded the definition.

Van Der Peet, and its two companion cases, form the *Van Der Peet* trilogy and provided some conceptual structure for determining the existence of aboriginal rights.³² The *Van Der Peet* case brought in a “central and significant part of the society's distinctive culture” threshold for recognition as an aboriginal right.³³ Furthermore, it “must not have

²⁷ *Major Crimes Act* (1885)

²⁸ *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191 (1978) denying tribal jurisdiction over non-Indian crime on Indian land; *United States v Wheeler* 434 U.S. 313 (1978) confirming that concurrent tribal and federal jurisdiction over a tribal defendant was an exception to the double jeopardy rule.

²⁹ 450 U.S. 544, 563-67 (1981).

³⁰ Manus, P. (2006) *op.cit.*, p 63

³¹ Manus, P. (2006) *op.cit.*, p5. Please see next chapter

³² *R v Van Der Peet* 1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse La*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723

³³ *Van der Peet* at para 560

existed in the past ‘simply as an incident’ to other cultural elements” or merely as a response to European influences.³⁴ Additionally, the practice must have been engaged in prior to contact with Europeans and there must be reasonable continuity from then to the present, although it can be the exercise in a modern form of a pre-contact practice.³⁵ As Godlewska and Webber remark, the pre-contact test produces anomalies; for example, it obviates practices that evolved in connection with the fur trade.³⁶ This “frozen rights approach” only protects those practices which existed at pre-contact and have continued largely unchanged. Any subsequent development of other rights is regarded as due to European influence and unworthy of protection, and therefore the protection is more of rights that are *ab origine* than aboriginal.

As for the degree of continuity required, in *Minister of National Revenue v. Mitchell*³⁷ the court discussed Mohawk trade across the US-Canada border. In particular, the elements to be satisfied were “whether the tribe had established that its ancestral trading practices involved crossing the St. Lawrence River; whether that particular route was integral to Mohawk culture; and whether the tribe had engaged in the practice continuously from a date prior to European settlement until the present”³⁸

The requirement of centrality parallels U.S. religious freedom jurisprudence for Indians with its requirement of “central and indispensable,”³⁹ yet in Canada centrality applies to *all* aboriginal rights.⁴⁰ Of course an alien judiciary making such a determination is inherently paternalistic and colonial. Such a case by case evidential approach, according to Barsh and Henderson, means that “[h]istorians, anthropologists and lawyers should rejoice well into the next millennium.”⁴¹ The disparity in resources is crucial. As Wildsmith remarks, the tribes, with limited finances, must confront the federal government, with

³⁴ Barsh, R. and Henderson, J. (1996). "The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand" *McGill Law Journal* 42: 993-1009,997

³⁵ Manus, P. (2006) *op.cit.*, p14.

³⁶ Godlewska, C and Webber, J (2007) *op.cit.*, p21

³⁷ *Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911, 934 (Can.).

³⁸ Manus, P. (2006) *op.cit.*, p 29

³⁹ *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 at 1164 (6th Cir. 1980),

⁴⁰ Barsh, R. and Henderson, J. (1996) *op.cit.*, 1000

⁴¹ *ibid* p1005

unlimited resources, and its rather incongruent responsibility as a trustee pursuant to the Trust Power.⁴²

The section 35 constitutionalisation of aboriginal rights was a significant milestone. Yet this has developed into something less than an absolute concept alterable solely by constitutional amendment. Perhaps recoiling at the reckless and imprudent enthusiasm of the Canadian government the judiciary have developed certain criteria that, if satisfied, can justify an infringement of such seemingly inviolate rights. In particular, the courts will examine legislation that infringes aboriginal rights (including aboriginal title) under various *Sparrow* criteria.⁴³ Firstly, the court asks if there is an aboriginal right affected. Secondly, is there a valid legislative objective which is “compelling and substantial” and which is “consistent with the Honour of the Crown.”⁴⁴ Thirdly, whether this is the least infringement possible. Subsidiary questions include whether compensation has been provided (particularly for aboriginal title) and if there has been meaningful consultation. Johnson remarks that this enquiry is similar to equal protection and religious freedom strict scrutiny analysis in the US.⁴⁵ Both provincial and federal infringements are subject to the same test of justification.⁴⁶ As to actual *extinguishment*, “aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this court in *Sparrow*.”⁴⁷ Extinguishment of aboriginal rights (including title) prior to 1982 had to be evinced by a “clear and plain intention” and was only possible by treaty or federal (not provincial) legislation.⁴⁸

Thus to summarise, the *Van Der Peet* Test is for the *establishment* of an aboriginal right and the *Sparrow* Test for the *justifiability* of any *infringement*. In *Van Der Peet* the limitation is on the aboriginal right due to inconsistency with the common law, in *Sparrow*

⁴² Wildsmith, B. (2001). "Vindicating Mi'kmaq Rights: The Struggle Before, During and After Marshall." *Windsor YB Access Just.* 19: 203-240, 217.

⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075

⁴⁴ Johnson, R. (1991) *op.cit.*, p691.

⁴⁵ *ibid* p 693

⁴⁶ Monahan, P. (2006) *op.cit.*, p465

⁴⁷ *R v Van Der Peet* [1996] 2 S.C.R. 507 para 28

⁴⁸ Monahan, P. (2006) *op.cit.*, p455 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075. This would seem a high threshold and needed explicit intention according to Heureux-Dube (Smokehouse) although an implicit inconsistency with the common law sufficed in *Thomas v Norris* [1992] 2 C.N.L.R. 139. Also see Borrows, J. “Living Law on a Living Earth: Aboriginal Religion, Law and the Constitution in Moon, R. (ed) (2008). *Law and Religious Pluralism in Canada*. Vancouver, UBC Press pp161-191

the reconciliation is a limit on governmental power by virtue of trust duties.⁴⁹ These trust duties will now be examined in more detail.

7.4 Trust Relationship

7.4.1 United States

There is a “symbiotic relationship between the plenary⁵⁰ and trust doctrines: with every degree of liberty the United States takes with these people's lives through its plenary authority, the United States incurs a responsibility to them through the Trust Doctrine.”⁵¹

The Trust Relationship varies in context. There is a general Trust Relationship on the federal government, but this carries few legal duties and merely moral obligations. By contrast, specific statutes, such as the *General Allotment Act*, import legal obligations enforceable by declaratory or injunctive relief. Still more stringent duties arise when trust monies are concerned and comprehensive and intimate federal management is involved. This amounts to a full fiduciary relationship, which can be legally forced, at least against the executive.⁵² For example, in *United States v Mitchell*,⁵³ which concerned the federal government's mismanagement of timber resources on reservation lands,⁵⁴ the Supreme Court determined that when statutes “give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians, . . . [t]hey thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.” The Court added: “Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a

⁴⁹Barsh, R. and Henderson, J. (1996) *op.cit.*, p999

⁵⁰ Discussed in Chapter 3

⁵¹ Rivera, D. (2003). "Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution." *Ariz. J. Int'l & Comp. L.* **20**: 443-489, 463.

⁵² Tsosie, R. (2003). "Conflict between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians." *Tulsa Law Review* **39**: 271-312, 276

⁵³ 463 U.S. 206 (1983)

⁵⁴ Baer, S. (1987). "The Public Trust Doctrine--A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources." *BC Envtl. Aff. L. Rev.* **15**: 385-436, 430.

common-law trust are present: a trustee (the United States); a beneficiary (the Indian allottees); and a trust *corpus* (Indian timber, lands, and funds).’’⁵⁵

There is of course a conflict of interest at the heart of government as the Court remarked on when discussing the congressional role as trustee and its power of eminent domain in *Three Tribes of Fort Berthold Reservation vs. United States*, “Congress can own two hats, but it cannot wear them both at the same time.”⁵⁶ Thus the benevolent disinterest that marks a wardship and a Trust Power only works in the absence of such a conflict.⁵⁷

7.4.2 Canada

A similar conflict of interests exists in Canada as the National Chief of the Assembly of First Nations Phil Fontaine remarked in 2000: “DIAND [The Department of Indian and Northern Affairs], like the Government of Canada itself, suffers from a schizophrenic personality. It holds and administers fiduciary obligations to our peoples at the same time as it must observe its political obligations to the rest of Canada. ... It advocates one moment on our behalf and in the next moment, through the Justice Department, against us.”⁵⁸

In the absence of a federalism challenge the federal Plenary Power, conferred by section 91(24) of the British North American Act (1867), was practically absolute and unlimited. This has been tempered since 1982, by section 35 and the constitutionalisation of aboriginal rights. Similarly, the Trust Relationship, although not as evolved a concept as in the United States, now acts as something of a restraint.

The 1984 case of *Guerin* first articulated an enforceable fiduciary relationship between the Crown and aboriginal peoples.⁵⁹ Such a relationship derived from aboriginal title and the Crown’s historical responsibility to protect Indian interest when dealing with their land. Dickson J described the key features as being fiduciary, trust-like and non-public. It did not include a generalised duty to receive government services, but merely a beneficiary’s right to enforce the trustee’s duty in regard to land.⁶⁰

⁵⁵ At 225

⁵⁶ *Three Tribes of Fort Berthold Reservation vs. United States*, 182 Ct. Cls. 543, 553 (1968)

⁵⁷ Wilkins, D. (1994). "The Cloaking of Justice: The Supreme Court's Role in the Application of Western Law to America's Indigenous Peoples." *Wicazo Sa Review* 9: 1-13, 8

⁵⁸ <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0009-e.htm> [Accessed 10 February 2011]

⁵⁹ *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335,

⁶⁰ Elliott, D. (1996) *op.cit.*, p145.

In *R v Sparrow* the concept of the “honour of the Crown” was articulated as a guide to whether actions that infringe other aboriginal rights can be justified.⁶¹ The honour of the crown is a broader and more generic concept than the more specific fiduciary duty.⁶² Both are paternalistic in tone and both are used as a metre of justification for infringing aboriginal duties with the “honour of the Crown” testing more the legitimacy and the trust duty the legality of the proposed action. The honour of the Crown has been described as “not a mere incantation, but rather a core precept that finds its application in concrete practices”⁶³

As Rotman argues, the exact parameters of the fiduciary relationship have not been established and it enjoys an “axiomatic yet embryonic” status.⁶⁴ Paradoxically, the more it is cited, he argues, the less need for its elucidation.⁶⁵ He summarises the relevance of the duty. Firstly, “it acts as an important check on governmental legislative power (as seen in *Sparrow*, this applies to both federal and provincial power);” Secondly, it is the “primary manifestation of the notion of the “honour of the Crown.” Thirdly, it is the “primary link between historic and modern Crown-Native relations,” and lastly it “animates the rights contained in section 35(1) of the *Constitution Act, 1982*.”⁶⁶

At the very least this relationship imports a duty to consult. In *Haida Nation* McLachlin CJ remarked: “this requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests”⁶⁷ The duty is not dependent on an already established right but a mere putative claim and the “obligation arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it.”⁶⁸ It was not contingent on a “final determination of the scope and content of the [asserted]

⁶¹ <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0009-e.htm> [accessed 20 June 2011]

⁶² Godlewska, C and Webber, J (2007) *op.cit.*, p22

⁶³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at 522

⁶⁴ Rotman, L. (2003). "Crown-Native Relations as Fiduciary: Reflections almost Twenty Years after *Guerin*." *Windsor YB Access Just.* 22: 363-396, 366.

⁶⁵ *ibid* p367

⁶⁶ *ibid* p381.

⁶⁷ [2004] 3 S.C.R. 511 (S.C.C.). at para 25

⁶⁸ At para 35

right.”⁶⁹ Yet the duty *is* dependent on the *prima facie* strength of the claim and varies from a duty to merely give notice on a speculative and peripheral claim to something approaching involvement in the decision making procedure, although perhaps short of requiring actual consent, should a convincing claim exists.⁷⁰

Therefore, any trust responsibilities in Canada are often seen in the context of consultation over mere putative rights and title and the concept remains in its infancy, dating back merely from the 1984 *Guerin* case. The United States has a more clearly defined relationship of considerable pedigree and ancestry, owing largely to the fact that it has a more mature and defined set of aboriginal rights. These date back to the wardship model of the Marshall Trilogy in the Nineteenth Century, discussed in Chapters One and Three.

7.5 Equal Protection⁷¹

7.5.1 United States

The unique and discrete mandate of the Commerce Clause complicates any Equal Protection Clause analysis for Indians within the United States. The leading case is *Morton v Mancari*⁷² in which an Indian preferential hiring provision for the Bureau of Indian Affairs was upheld on the grounds that this was permitted by the Commerce Clause mandate or, alternatively, because it was a political rather than racial classification as the BIA restricted its application to members of federally recognised tribes. As the Court remarked, “[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized”⁷³ *Rice v Cayetano*⁷⁴ limited this approach when a Hawaiian statute

⁶⁹ At para 28

⁷⁰ Mullan, D. (2009). "The Duty to Consult Aboriginal Peoples- The Canadian Example." *Canadian Journal of Administrative Law and practice* 22: 107-131, 113

⁷¹ Federal Citizenship was granted to U.S. Indians by the *Citizenship Act 1924* and the Fourteenth Amendment confers state citizenship Canby, W. C. (2004) *op.cit.*, p348. In Canada the *Act to Amend the Canadian Citizenship Act of June 7 1956* conferred Canadian citizenship to Indians.

⁷² 417 U.S. 535 (1974).

⁷³ *ibid* at 552

restricting the franchise to descendants of the indigenous was struck down as a violation of the more precise Fifteenth Amendment.⁷⁵

To circumvent the traditional strict scrutiny of equal protection and use rational basis review for Indian-specific legislation, one strand of *Mancari* suggested there be an assumption that the classification is political, rather than racial.⁷⁶ Indeed, a citizenship response based on tribal membership circumvents the difficulty of race or ancestry. However, determining tribal membership is not always straightforward with certain tribes being without governing documents. More problematic is the fact that some tribal membership is based on blood quantum.⁷⁷ Furthermore, a purely political categorisation would sweep away many laws based on ancestry that confer educational and cultural benefits.⁷⁸

By contrast, the Commerce Clause approach uses the specific language of Article I, Section 8, Clause 3 of the Constitution⁷⁹ to trump the less specific equal protection language of the Fourteenth Amendment, which requires equal treatment in only general terms.⁸⁰ This would also cohere with *Rice* as the Fifteenth Amendment is more specific in actually mentioning race.⁸¹ Potential problems emerge from the fact that it could also be questioned as applying only to tribes, not individual Indians.⁸² But as Goldberg remarks, from the earliest times legislation has been targeted at individual Indians when there was no formal enrolment.⁸³ Goldberg does suggest the need for some nexus between individual Indians that are included and a valid tribal interest and points to federal criminal law, which

⁷⁴ 528 U.S. 495 (2000).

⁷⁵ Goldberg, C. (2001) *op.cit.*, p951

⁷⁶ Goldberg, C. (2001) *op.cit.*, p 958

⁷⁷ *ibid* p960.

⁷⁸ Goldberg, C. (2001) *op.cit.*, p 964

⁷⁹ “Congress shall have power.....To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”

⁸⁰ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” see Goldberg, C. (2001) *op.cit.*, p967

⁸¹ “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of *race*, color, or previous condition of servitude.”

⁸² Goldberg, C. (2001) *op.cit.*, p968

⁸³ *ibid* p969

applies to individuals on a combination of descent and tribal recognition, and the *Indian Arts and Craft Act* (1990), which applies to enrolled tribal members and those certified by the tribe from which they have descent.⁸⁴

Thus *Mancari* can shield legislative favour for Indians from equal protection scrutiny but, should the federal government be less benevolent, it could of course just as easily be employed to justify legislation which operated to Indian disadvantage. Yet the federal obligations to Indians under the Trust Power theoretically operate to contain such disfavour.

7.5.2 Canada

Equal protection, guaranteed by section 15 of the *Charter of Right and Freedoms*, is again complicated by the fact that Parliament has a mandate to legislate in regard to aboriginals by virtue of section 91(24) of the *British North America Act* (1867).⁸⁵ *Morton v Mancari* provides the template for analysis in the United States but Canada has not squarely faced up to this conundrum, at least for the federal government, since the enactment of the *Charter* in 1982. There has, however, been consideration under the Canadian *Bill of Rights*.

In the appropriately titled case of *Queen v Drybones*⁸⁶ the defendant was charged with being intoxicated *off a reserve*, contrary to s. 94 (b) of the *Indian Act*. At the time there was legislation in the Northwest Territories which made intoxication in a *public* place an offence,⁸⁷ with no minimum fine and maximum imprisonment of *30 days* (compared to *3 months* in the *Indian Act*). There were no Indian reserves in the Northwest Territories and thus, as well as the sentence disparity for a public place, an Indian could be prosecuted for being drunk *in his own home*.⁸⁸ It was held that these provisions violated the right of equality under the law contrary to the *Bill of Rights*. This was the only time that a federal statute was declared inoperative if it could not be construed as consistent with the *Bill of Rights*.⁸⁹ This undermined section 91 (24) and its specific mandate to legislate for "Indians and land

⁸⁴ *ibid* p972

⁸⁵ Please see chapter 3

⁸⁶ [1970] 1 S.C.R. 282

⁸⁷ Liquor Ordinance R.O.N.W.T. 1956, c. 60

⁸⁸ Sinclair, J. (1970). "The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights." Osgoode Hall Law Journal 8: 599-620, 599.

⁸⁹ Macklem, P. (1984) *op.cit.*, p58.

reserved for Indians,” yet this jurisprudence was not developed as a potential challenge to the *Indian Act* in its entirety.

Section 25 of the *Charter* claims that the rights contained within the *Charter* do not interfere with aboriginal rights guaranteed under section 35 thus the more advantageous right can be adopted. It is the extent to which the *Charter* can be employed to contain disadvantage that remains to be elucidated. The particular federal mandate of section 91(24) does not insulate provincial laws from traditional equal protection challenge.⁹⁰

7.6 Conclusion

Indian Law in the United States is a more developed discipline than in Canada, Indeed, until the *Calder* case of 1973 the notion that generic aboriginal rights even existed in Canada would not have been met with hostility but incredulity. Since that case there has been a confused and contradictory jurisprudence with little clarification, not least over what exactly has been constitutionalised by section 35. Superficially protective of aboriginal rights, section 35, it could be argued, was a magnanimous but empty gesture as few rights actually existed. The *Calder* case did spark some land treaties and self-government agreements, although these reflected more a federal delegation than an acknowledgement of any inherent rights. The exact relationship between the *Charter of Rights and Freedoms* and section 35 remains unclear.

The United States differs in that many treaties of land cession have been negotiated thus rendering the question of aboriginal title largely moot. Similarly, inherent tribal sovereignty has meant that aboriginal rights have been regarded as intact except when Congress or the courts have acted, although this has occurred increasingly frequently, particularly in regard to jurisdiction over non-members within Indian country. This is virtually the obverse of the Canadian situation in which each right has followed a painstaking and piecemeal judicial recognition or alternatively a parsimonious federal delegation. The exact relationship amongst the various doctrines of Equal Protection, the Trust Power and the Plenary Power remains subject to judicial whim and congressional mood.

Thus to conclude, aboriginal rights in Canada would seem to be more protected by virtue of section 35 but less well established: as Cross and Lomond comment, “neither the Canadian parliament nor a province can *extinguish* a right and a province

⁹⁰ Cross, J. and K. Lomond (1993) *op.cit.*, p275.

may also be prohibited from *infringing* a right.”⁹¹ In Canada, there were no restraints either procedurally or in relation to subject matter before section 35 in 1982, and the fiduciary duties only developed from 1984 in *Guerin*. There must also be a compelling interest before impairing a right.⁹² In the United States Indian rights are more defined and precise due to the more prolonged evolution since the 1830s, but they are also more vulnerable as they have not been constitutionalised and remain vulnerable to the *Lone Wolf* congressional Plenary Power, although admittedly this is tempered somewhat by the Trust Relationship.⁹³

⁹¹ *ibid* p269

⁹² *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1109

⁹³ Cross, J. and K. Lomond (1993) *op.cit.*, p268.

CHAPTER EIGHT

8 Religious Freedom in the Twentieth Century and Beyond

8.1 Introduction

As discussed in Chapter 4, Canada had no substantive constitutional right to religious freedom until the *Charter of Rights and Freedoms* in 1982. By contrast, the United States had an accelerating constitutional religious freedom jurisprudence with both the establishment and free exercise provisions enthusiastically litigated from the start of the Twentieth Century. This chapter will begin with free exercise case law in the United States, with particular emphasis on the seminal case of *Employment Division v Smith* (1990) which concerned the religious use of Peyote by Native Americans, but which had wider ramifications for all minority religions. There will then be a discussion of Establishment Clause jurisprudence, although it must be borne in mind that there is much overlap between the two concepts which do not exist in water-tight compartments and thus any separation is a somewhat artificial exercise.

There will be only a brief section on Canadian religious freedom litigation before the *Charter* followed by a more detailed examination of post-1982 case law. However, the *Charter* is of relatively recent vintage and its interpretation is continually evolving so there is necessarily a less settled and definitive jurisprudence.

8.2 United States

8.2.1 Free Exercise of Religion

The picture presented in Chapter Four was that of a country where freedom to believe was largely inviolate yet religious conduct, in pursuit of that belief, was circumscribed. *Reynolds v United States* (1878) had calcified this dichotomy and supposedly rejected the standards of the contemporary state constitutions which claimed to protect belief *and* action. Yet *Reynolds* merely stated that the religious action *could* be within the competency of the government to regulate, not that it necessarily *had* to be.

In *Cantwell v Connecticut*,¹ as well as extending the Free Exercise element of the First Amendment to the states, the Supreme Court, for the first time, struck down a law on the

¹ *Cantwell v Connecticut* 310 U.S. 296 (1940).

basis of an infringement of religious *conduct*.² This artificial distinction was finally explicitly rejected in *Wisconsin v Yoder* when the Court remarked that: “belief and action cannot be neatly confined in logic-tight compartments.”³

A compelling interest test was introduced in *West Virginia State Board of Education v Barnette*⁴ and consolidated in the case of *Sherbert v Verner*⁵ when the Supreme Court stipulated that, in order to justify a governmental infringement of religious liberty, such an interest must be compelling and construed as narrowly as possible to exclude anything that did not pose a “substantial threat to the public safety, peace, or order.”⁶ *Sherbert* was also the first time that the Supreme Court applied such strict scrutiny to a generally applicable and neutral law,⁷ to which there were already secular exemptions.⁸

There was some circumscription to the right in the case of *Bowen v Roy*⁹ in which a Native American requested an exemption from the system of universal social security numbers for his daughter, “Little Bird of the Snow,” on the grounds that it would have robbed her of her spirit. Justice Burger remarked, “[n]ever to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family.”¹⁰ This would have been an intrusion into the internal affairs of government. The *Lyng* case, discussed more fully in Chapter 10, extended the ambit of internal governmental action that failed to trigger a substantial burden to religious practice.¹¹ The *Lyng* plaintiffs were Native Americans who were deemed to have no protected rights to worship at sacred

² The distribution of religious material door to door by Jehovah’s Witnesses from Falk, D. (1989) *op.cit.*, p531.

³ *Wisconsin v Yoder* 406 U.S. 205, 220 (1972).

⁴ *West Virginia State Board of Education v Barnette* 319 U.S. 624 (1943)

⁵ *Sherbert v Verner* 374 U.S. at 422-23 (1963).

⁶ 374 U.S. at 403 (1963)

⁷ Johnston, D. (2001). “The Native American Plight: Protection and Preservation of Sacred Sites.” *Widener Law Review* 8: 443-461, 444.

⁸ Dalton, J. (2005). “There is Nothing Light about Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions.” *Brigham Young University Law Review*: 1575-1624, 1582.

⁹ *Bowen v Roy* 476 U.S. 693 (1986)

¹⁰ *ibid* at 699

¹¹ *Lyng v Northwest Indian Cemetery Association* 485 U.S. 439 (1988).

sites on federal public land as the management of such land was regarded as an internal federal administrative matter.

The law thus seemed *relatively* settled on the eve of the *Smith* case. In essence, the compelling interest test applied strict scrutiny to any governmental action that infringed religious exercise, including generally applicable and neutral laws, unless it could be categorised, however tenuously, as intruding into the internal workings of government.

8.2.1.1 Employment Division v Smith¹²

Smith determined that the First Amendment permitted Oregon to criminally proscribe the religious use of Peyote. The criminalization of Peyote was constitutional and therefore, as a consequence, the state's denial of unemployment benefits to workers sacked for misconduct by using Peyote, failed to attract First Amendment protection.¹³ The majority decision was delivered by Justice Scalia, who purported to justify his decision on established precedent. In particular, he held that only purposeful discrimination triggers strict scrutiny; any incidental effect of generally applicable and neutral laws is largely irrelevant.

Scalia selectively cited several cases to support his theory that neutral laws never involve free exercise issues. Yet in each of these cases the court *did* weigh the governmental interest with the infringement and *only then* decided in favour of the government.¹⁴ He cited *Reynolds v United States* and the government prohibition of polygamy, but this *had* been weighed as a sufficiently compelling governmental interest because it was an "overt act against peace and order."¹⁵ Indeed, by discussing the importance of marriage, the implication was that there was logically a balancing process employed. Scalia also quoted from *Minersville School District Board of Education v Gobitis*¹⁶ to support his principle that all neutral laws must prevail, in this case a flag saluting and pledging of the oath of allegiance. However, the narrow justification in this case was on national security grounds and any

¹² *Employment Division v. Smith*, 494 U.S. 872 (1990)

¹³ Pochop, S. (1991). "Employment Division, Department of Human Resources of Oregon v. Smith: Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections." *SDL Rev.* **36**: 358-381 364.

¹⁴ Tepker Jr, H. (1991). "Hallucinations of Neutrality in the Oregon Peyote Case." *American Indian Law Review* **16**: 1-56,16

¹⁵ *Reynolds* at 163

¹⁶ *Minersville School District Board of Education v Gobitis* 310 U.S 586 (1940)

wider holding specifically overruled three years later in *Barnette*.¹⁷ He also cited *Prince v Massachusetts*,¹⁸ in which the Court upheld the conviction of a mother who had used her child to distribute religious literature, but only after weighing up the governmental interest in preventing child labour.¹⁹ Finally, he referred to *United States v Lee*,²⁰ in which an Amish employer sought an exemption from social security payments on the grounds that his faith prohibited him funding governmental support programmes. Again, after a careful consideration, the Court decided that the integrity of the social security system must prevail over more particular considerations. Scalia also asserted that the Court had never circumvented an otherwise valid criminal statute on free exercise grounds. This directly contradicts *Yoder*, in which Amish children were exempted from compulsory school attendance regulations.²¹

Thus in all these cases the governmental interest prevailed only after careful consideration and the application of a balancing test of some description.²² Because the government *had* usually prevailed did not mean that it *should* always prevail. As Justice O'Connor remarked, "[t]hat we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us."²³

In the alternative, Scalia dismissed previous cases such as *Yoder* as "hybrid cases" in which a free exercise claim was in conjunction with another freedom such as speech, or the press, or in that particular case family life.²⁴ But this would be to suggest, as Cook argues, that previous holdings have no precedential value if they could have been reached on other grounds or alternatively, that the free exercise clause is "subsumed within free speech and

¹⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)

¹⁸ *Prince v Massachusetts* 312 U.S. 158 (1944)

¹⁹ Tepker Jr, H. (1991) *op.cit.*, p17

²⁰ 455 U.S. 252 (1982)

²¹ Rugg, J. and Simone, A (1990). "The Free Exercise Clause: Employment Division v. Smith's Inexplicable Departure from the Strict Scrutiny Standard." *John's J. Legal Comment.* 6: 117-142,138.

²² Tepker Jr, H. (1991) *op.cit.*, p21

²³ *Department of Human Services v. Smith (Smith II)*, 110 S. Ct. 1595, 1610 (1990).

²⁴ *Smith* at 1602

parental rights” which is a judicial perversion of the Constitution.²⁵ Indeed in *Yoder*, the court specifically applied the compelling interest *before* discussing parental rights.²⁶ Brownstein rightly rejects this hybrid rights approach as a violation of the basic principle that fundamental rights should be protected equally for all as otherwise, one religious practitioner with a “hybrid claim,” would enjoy greater protection for his religious exercise.²⁷ As Gedicks remarks, if neither right is sufficient to trigger heightened scrutiny why should a combination do so?²⁸

Scalia admitted that this decision would prejudice minority religions, which should look to the legislature for protection.²⁹ Yet the expression of the state’s police powers pertaining to morality is reflective of the state’s majoritarian religious traditions with which it is intertwined. One pertinent example being alcohol and hallucinogens: most Christians partake of alcohol but reject drugs whereas the Native American Church rejects alcohol and uses Peyote as part of worship.³⁰ Indeed, as Celichowski remarks, “[m]ost people would be shocked if a priest and his parishioners celebrating an open air mass in Washington, D.C. were arrested and prosecuted for violating the district statute which prohibits the drinking of alcoholic beverages in public places' because they served and consumed wine.”³¹

Justice Blackmun in his dissent saw the issue as requiring a compelling interest in *denying the exemption* rather than the *overall legislation*, but found no such interest would outweigh the free exercise right.³² He suggested that the *Smith* court had ample precedent to choose from which would have produced a different outcome. For example, as mentioned above, in *Yoder* the Court granted an exemption from an otherwise valid generally applicable criminal law and anarchy did not ensue. The more cynical might point

²⁵ Cook, T. (1991). "The Peyote Case: A Return to Reynolds." Denver University Law Review 68: 91-104,100.

²⁶ Beeson, A. (1992). "Dances With Justice: Peyotism in the Courts." Emory Law Journal 41: 1121-1184, 1175.

²⁷ Brownstein, A. (2006) *op.cit.*, p144.

²⁸ Gedicks, F. M. (2005). "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States." Emory International Law Review 19: 1187-1275,1220

²⁹ Oregon did legislate subsequently to amend its *Controlled Substances Act* to provide an exemption for religious possession and use of Peyote

³⁰ Cook, T. (1991) *op.cit.*, p102.

³¹ Celichowski, J. (2000). "A Rough and Narrow Path: Preserving Native American Religious Liberty in the Smith Era." American Indian Law Review 24: 1-35, 2.

³² Rugg, J. and Simone, A (1990) *op.cit.*, p130

out that the Amish were of white, Christian, European stock who were regarded as God-fearing, hardworking, thrifty, independent and with a family-oriented existence.³³ These are good all-American virtues, if perhaps taken somewhat to the extreme. He also remarked that in the *Sherbert* case the denial of a government benefit was overturned as it failed to demonstrate a compelling interest from a neutral and generally applicable law.³⁴ Again, this should have controlled the outcome in *Smith* in which unemployment benefits were denied.

8.2.1.2 The Religious Freedom Restoration Act 1993

Following *Smith*, Congress attempted to restore the compelling interest test for generally applicable laws with the *Religious Freedom Restoration Act* (1993) which stated in section 3: “Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability” unless it “demonstrates that application of the burden to the person 1) furthers a compelling governmental interest; and 2) is the least restrictive means of furthering that governmental interest.”³⁵

The RFRA recited its connection to *Smith* and avowed its intention to “restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).”³⁶ It also expressly disavowed any intent “to affect, interpret, or in any way address the establishment clause.”³⁷ When President Clinton signed RFRA into law, he noted that the *Act* was an exercise of Congress’ “extraordinary” power to “reverse by legislation a decision of the United States Supreme Court.”³⁸

The Supreme Court was less impressed and struck down the *Act* as unconstitutional in *City of Boerne v Flores*³⁹ because Congress had exceeded its powers under Section 5 of the Fourteenth Amendment⁴⁰ with respect to the states, by enacting substantive, rather than remedial legislation, and thus had violated principles of federalism:

³³ *ibid* p1177.

³⁴ *Sherbert v. Verner* 374 U.S. 398 (1963).

³⁵ 42 U.S.C. s2000bb.

³⁶ *ibid.* s 2000bb(b)(1).

³⁷ *ibid* s 2000bb-4

³⁸ Eisgruber, C. and Sager, L (1994) *op.cit.*, p437

³⁹ 521 U.S. 507, (1997)

⁴⁰ “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” (referring to the Fourteenth Amendment)

“[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”⁴¹

Furthermore, in attempting to reverse a constitutional determination by the Court, Congress had violated horizontal separation of powers:⁴² “Congress does not enforce a constitutional right by changing what the right is.”⁴³ Indeed, regarding interpretations of constitutional law, the Supreme Court is the final arbiter and its determinations cannot be overruled by statute.⁴⁴

Significantly for Native Americans, *Boerne* did not declare RFRA unconstitutional in its application to the federal government, which encompasses federal governmental action pertaining to reservations and public lands. Yet, as Celichowski remarks, “it should be recalled that roughly half of the Native Americans in the United States do not live on or near a reservation. Like other citizens, this group is subject to the jurisdictions of the state and local governments where they reside.”⁴⁵ In *Gonzales v O Centro Espirito*⁴⁶ the Supreme Court did indeed sustain the RFRA for federal action (as opposed to states’ actions) which would appear to contradict its earlier vehement opposition to Congress’ determination of what exactly should receive First Amendment protection on horizontal separation of powers grounds. Of course, the operation of the RFRA can be defeated by failing to find a substantial burden to the free exercise of religion and thus denying the claim at the outset. This is what has happened in sacred sites cases, which will be discussed in Chapter Ten. Indeed, by specifically re-establishing the pre-*Smith* jurisprudence, the *Lying* sacred site holding of 1986, which held there was no burden when government uses its own land in its own way, would seem to be left intact.⁴⁷

⁴¹ *Flores* at 520

⁴² *ibid* 520-535 and 536

⁴³ *ibid*

⁴⁴ *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803) and its progeny *Eisgruber, C. and Sager, L* (1994) *op.cit.*, p441.

⁴⁵ Celichowski, J. (2000) *op.cit.*, p12.

⁴⁶ 126 S. Ct. 1211 (2006).

⁴⁷ Brucker, S. (2008). "Navajo Nation v. United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands." *Environ Environmental Law and Policy Journal* 31: 273-295, 289.

As Justice Souter remarked, in the later case of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,⁴⁸ the *Smith* holding was flawed as neither the respondents nor petitioners advocated abandoning the strict scrutiny test, and thus the Court's determination was without "full dress argument" on this issue. Furthermore, the new test was not necessary to uphold the state criminal law as evidenced by Justice O'Connor's application of the compelling interest test when finding in favour of the government.⁴⁹ In *Lukumi*⁵⁰ there was a city council ordinance prohibiting sacrifice and slaughter of animals covertly targeted at the church's religion (Santeria) and its rituals of animal sacrifice although non-religious slaughter was unaffected. The Supreme Court found a "religious gerrymander" in that the burdens singularly fell on Santeria adherents.⁵¹ The general applicability was not apparent as Colonel Sanders was not subject to the same restrictions.⁵²

Thus to summarise, *O Centro* means that the RFRA applies to federal action. At the state level the combined effects of *Smith* and *Lukumi* dictate the analysis of governmental action: Firstly, religiously neutral laws of general applicability are subject to merely rational basis scrutiny. Secondly, strict scrutiny applies in the case of a) hybrid rights cases which involve another constitutionally protected right or b) if laws provide selective exemptions that are granted to non-religious groupings but not religious groupings.⁵³ (individualised assessment rule).⁵⁴ For both federal and state action an application of *Lynx* may mean governmental action is classified as an internal matter and any further consideration aborted.

⁴⁸ 508 U.S. 520, 533 (1993)

⁴⁹ *ibid* at 572 and Briones, J. (2002). "We Want to Believe Too: The IRFA and Indigenous Peoples' Right to Freedom of Religion." University of California Davis Journal of International Law and Policy 8: 345-361, 354

⁵⁰ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 546 (1993)

⁵¹ *ibid* at 534-538

⁵² Russell, S. (2008). "American Indian religion in the Iron House: Searching for 'some accommodation!'" Contemporary Justice Review 11(3): 213-227, 218.

⁵³ Bluemel, E. (2004) *op.cit.*, p488.

⁵⁴ Gedicks, F. M. (2005) *op.cit.*, p1211.

8.2.2 Establishment Clause

Prior to 1947 there had only been two Establishment Clause cases: *Bradfield v Roberts* (1899) and *Quick Bear v Leupp* (1908), which were discussed in Chapters Four and Five respectively. Then in *Everson v Board of Education* (1947) the Court remarked that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁵⁵ Justice Black stated: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."⁵⁶ Jefferson would have approved.

There are two tests generally used to determine unconstitutional establishment: for legislation with an overt religious preference then an equal protection strict scrutiny analysis is used and there must be a narrowly tailored compelling interest which is extremely difficult to satisfy.⁵⁷ For other legislation, the "Lemon Test" is the standard for determining Establishment Clause compliance. The government action "must have a secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not involve excessive entanglement with religion."⁵⁸ *Lynch v Donnelly* determined that there must be a secular purpose, but not necessarily an *exclusively* secular purpose.⁵⁹

There are two other refinements which are used in addition to the Lemon Test: the Coercion Test and the Endorsement Test.⁶⁰ The Coercion Test asks "whether or not there is the effect of coercing persons into conforming their practices with those of a particular religion."⁶¹ It takes into account the credulity of the potential audience, with a school prayer being more suspect than one undertaken at the start of a legislative session.⁶² The Endorsement Test holds that government "actions are impermissible if they have the effect of alienating non-adherents to a specific religion as outsiders."⁶³

⁵⁵ *ibid* at 15

⁵⁶ Brownstein, A. (2007) *op.cit.*, p36

⁵⁷ *Larson v Valente* 456 U.S. 228 , 252-253 (1982)

⁵⁸ *Lemon v Kurtzman* 403 U.S. 602 (1971).

⁵⁹ Winslow, A. (1996). "Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites." *Arizona Law Review* 38: 1292-1343, 1303.

⁶⁰ Johnston, D. (2001) *op.cit.*, p450.

⁶¹ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁶² *Marsh v. Chambers*, 463 U.S. 783, 792, 794-95 (1983)

⁶³ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

As for the relationship between the two First Amendment clauses this was summarised in *Locke v Davey*⁶⁴ in that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause” and that “there is room for play in the joints’ between them.”⁶⁵

8.3 Canada

8.3.1 Pre-Charter Case Law

As discussed in Chapter Four, there was no entrenched constitutional protection of religious freedom in Canada with any challenge being on procedural grounds by alleging that the wrong federal component had acted.

According to Schmeiser, the case of *Chabot v. School Commissioners of Lamorandiere* (1957)⁶⁶ was the only judicial authority pre-1960 that described religious freedom as a “natural right” that could not be taken away by either provincial or national legislation. In *Chabot* mandatory catholic teaching for Jehovah’s Witness pupils was declared invalid as a violation of this “natural right.”⁶⁷ In *Re Drummond Wren*,⁶⁸ a covenant forbidding the alienation of land to Jews was struck down as violating “diffuse notions of public policy.”⁶⁹ Beyond that, the search through the case law for any recognition of an entrenched natural right would be in vain.

Much Twentieth Century case law involved the persecution of Jehovah’s Witnesses. As Doyle remarks, there was systematic discrimination against Jehovah’s Witnesses whose religion had been declared illegal in 1940 and who were banned from meeting, distributing their publications and speaking publicly for a period of three years.⁷⁰ Such a proscription is hardly consistent with an entrenched or indeed any substantive freedom of religion right.

⁶⁴ 540 U.S. 712 (2004)

⁶⁵ At 718

⁶⁶ *Chabot v. School Commissioners of Lamorandiere*, (1957) Que. Q.B. 707

⁶⁷ Doyle, D. (1984). "Religious Freedom in Canada." *Journal of Church and State* 26: 413-436, 425

⁶⁸ [1945] 4 D.L.R. 674 (Ont. H.C.)

⁶⁹ McLachlin, B. (2004) *op.cit.*, p19

⁷⁰ Doyle, D. (1984) *op.cit.*, p424.

In *Saumur v City of Quebec*,⁷¹ a by-law was successfully challenged which prohibited the distribution of religious tracts without permission from the police. The case centred on the Quebec *Freedom of Worship Act* (1851),⁷² which had continued at confederation by virtue of section 129 of the *British North American Act*, and which, by a doctrine of statutory interpretation, continued unless specifically abrogated.⁷³ As for a generalised fundamental freedom the court was perhaps a little quixotic: “Freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.”⁷⁴ Perhaps more realistic was Cartwright J’s dissenting view, which expressed the more correct assessment of the constitutional status of entrenched religious liberty protection: “Under the British North America Act ... the whole range of legislative power is committed either to Parliament or to the Provincial legislatures and competence to deal with any subject matter must exist in one or other of such bodies. There are thus no rights possessed by the citizens of Canada which cannot be modified by either Parliament or the legislatures, but it may often be a matter of difficulty to decide which of such bodies has the legislative power in a particular case.”⁷⁵ The only constitutional enquiry, he maintained, was one of federalism. There were no other constraints.

The Canadian *Bill of Rights* of 1960,⁷⁶ a mere statute, purported to describe “freedom of religion” as a “fundamental freedom” in section 1(c). But this only applied to the federal government, was susceptible to contrary legislation by virtue of parliamentary supremacy,⁷⁷ and crystallised the rights as those existing in 1960.⁷⁸ In *Roberts and Rosetanni v.*

⁷¹ *Saumur v. City of Quebec*, 4 D.L.R. 641, [1953] 2 S.C.R. 299 [*Saumur* cited to D.L.R.].

⁷² “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the province be allowed to all His Majesty's subjects living within the same” R.S.O. 1990, c. R-22. Originally enacted as 14 & 15 Vict., c. 175.

⁷³ Chambers, N. (1954). “Civil Liberties after the Saumur Case.” University of Toronto Faculty of Law Review 12: 12-21, 13.

⁷⁴ *ibid* at 670

⁷⁵ *Saumur v. City of Quebec*, [1953] 2 S.C.R., 299 at 384

⁷⁶ S.C. 1960, c.44 s1.

⁷⁷ But see *R v. Drybones*, [1970] S.C.R. 282, discussed in Chapter 7.

⁷⁸ Benson, I. (2007) *op.cit.*, p122.

*The Queen*⁷⁹ section 1(c) was held to offer no protection against a conviction for operating a bowling alley in violation of the federal *Lord's Day Act* (1952) which, it was argued, infringed the religious freedom of those that celebrated another Sabbath.⁸⁰ The defendants contended that the *Bill of Rights* had repealed the statute. The court disagreed and held that the *Bill of Rights* did not repeal or alter former statutes but merely protected the rights and freedoms existing at the enactment of the *Bill*. The *Lord's Day Act* was, in any case, classified rather disingenuously as a financial penalty not a religious freedom issue. Only Cartwright J., dissenting, saw the *Act's* purpose as one of compelling the observance of a religious day objectionable to other faiths.⁸¹

Thus before 1982 and the Constitutional entrenchment of "freedom of conscience and religion"⁸² jurisprudence had been sporadic and uncertain. Three "doctrines of reluctance" circumscribed the judicial enquiry: legal federalism, parliamentary supremacy and the essential purpose doctrine described in Chapter 4.⁸³ Legal federalism limited the judicial inquiry to one of legislative competence between federal and provincial governments rather than any substantive subject matter.⁸⁴ Thus Ontario's *Lord's Day Act*, unlike the federal *Lord's Day Act*, was declared *ultra vires* the province not on freedom of religion grounds but purely due to criminal law being a federal competence.⁸⁵ Parliamentary supremacy meant that the courts had to defer to parliamentary sovereignty and ensured that each parliament was legislatively omnipotent, within its sphere of competency, irrespective of any fundamental freedoms trampled.⁸⁶ The essential purpose doctrine focused on the legislation's ostensible purpose or "pith and substance" which, provided it falls within a head of legislative allocation, is left undisturbed even though it may have effects outside such a competence.⁸⁷

⁷⁹ *Roberts and Rosetanni v. The Queen* [1963] S.C.R. 651

⁸⁰ *Lord's Day Act*, R.S.C. 1952, c. 171.

⁸¹ Pauley, R. (1966). "Some Aspects of the Canadian Bill of Rights: An American View." *Osgoode Hall Law Journal* 4: 36-53, 46.

⁸² *Constitution Act* 1982 Part I s2 (a)

⁸³ Moore, D. (1996) *op.cit.*, p1091. Please see Chapter Four

⁸⁴ *ibid* p1094.

⁸⁵ *Attorney-General for Ont. v. Hamilton St. Ry. Co.*, 13 App. Cas. 201 (P.C. 1903) (appeal taken from Ontario).

⁸⁶ Moore, D. (1996) *op.cit.*, p1092

⁸⁷ Please see Chapter Four

8.3.2 The Canadian Charter of Rights and Freedoms

The doctrines of reluctance are modified somewhat by the *Charter*. Legal federalism survives but as an additional ground of unconstitutionality alongside the *Charter*. Yet conformity with legal federalism alone cannot save a *Charter* violation. As for parliamentary supremacy, the *Charter* limits the doctrine somewhat but there is still the possibility of Section 1 justification or Section 33 override.⁸⁸ For Section 1 any justification must be narrowly tailored as to means.⁸⁹ As for the essential purpose doctrine, this is modified by the *Charter* as there is now a greater scrutiny of effects when considering *Charter* values.⁹⁰

As to the scope of application, in an early case it was held that the *Charter* only applies to governmental entities not purely private activity.⁹¹ By contrast, section 35 aboriginal rights are also binding on private parties.⁹² Furthermore, “[t]he Charter is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.⁹³” This rejects the frozen rights approach of the *Bill of Rights*.

8.3.2.1 Religious Freedom and Section 2(a) of the Canadian Charter⁹⁴

The first step in a *Charter* freedom of religion case analysis is to determine whether the activity is religious. The Supreme Court of Canada helpfully gave a definition of religion in *Syndicat Northcrest v. Amselem*: “Religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to

⁸⁸ Section 1: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Section 33: “(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.”

⁸⁹ Moore, D. (1996) *op.cit.*, p1132.

⁹⁰ *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 334 (Can.) (emphasis added).

⁹¹ *RWDSU v Dolphin Delivery* [1986] 2 S.C.R. 573

⁹² Monahan, P. (2006) *op.cit.*, p406

⁹³ *Big M* at 343

⁹⁴ 2) Everyone has the following freedoms: a) freedom of conscience and religion

one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.”⁹⁵

The next step is the section 1 justification which is a qualification on the seemingly absolute rights contained in the Canadian *Charter*. According to Section 1, they are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹⁶ In *Regina v. Chaulk*⁹⁷ the Supreme Court explained that this meant that, once an infringement of religious liberty had been shown, the government must then demonstrate that a sufficiently important government interest exists and that the means used to fulfil this interest pass a proportionality test. To pass this test the means chosen must be rationally connected to the objective, infringe the right as little as possible and be proportionate to the objective.⁹⁸

The leading post-Charter case is *Big M Drug Mart*,⁹⁹ which concerned a challenge to the *Lord's Day Act*¹⁰⁰ that prohibited opening a business on Sunday. The Supreme Court considered the act religious in purpose and moreover infringed the religious rights of non-Christians: “If I am Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.”¹⁰¹ Similarly, the non-religious were equally protected from such coercion: there is a freedom from, as well as a freedom to, religion.¹⁰² Significantly Dickson J rejected the artificialities of a formal neutrality in favour of an anti-subordination approach: “The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.”¹⁰³ Thus the federal *Lord's Day Act* was held to violate section 2(a) because its purpose was observance of the

⁹⁵ *Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para 39

⁹⁶ *Constitution Act, 1982* pt. I (Canadian Charter of Rights and Freedoms), s1

⁹⁷ [1990] S.C.R. 1303, 1335-36

⁹⁸ *Ibid*

⁹⁹ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295

¹⁰⁰ R.S.C. 1970, c. L-13

¹⁰¹ *ibid* at para 100

¹⁰² Moon, R. (2002). "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms." *University of Louisville Law Review* 41: 563-574, 565.

¹⁰³ *Big M* at 362

Sabbath. Significantly, pre-charter, the legislation was upheld¹⁰⁴ as it could conceivably, if disingenuously, come within the federal criminal power of promoting “public peace, order, security, health [and] morality” but now is caught by section 2(a).¹⁰⁵ This starkly illustrates the difference between the *Charter* and *Bill of Rights*.

By contrast, in *Edward Brooks* (1986) the Supreme Court held that providing a “uniform day of rest,” which was the ostensible purpose of Ontario’s Sunday Closing Law, could come within provincial secular powers of “property and civil rights within the province” under s92(13).¹⁰⁶ Once a conceivable secular purpose (although rather spurious) has been found, such as a uniform day of rest and it is within the federal entity’s competency then the court proceeds to a balancing analysis.¹⁰⁷ The justices understandably were split: two thought there was no impingement on religious freedom and four thought there was but that it could be justified under section 1. Significantly, the law in *Edwards Brooks* did provide for a limited Saturday exemption: “retailers having no more than seven employees or 5000 square feet of store space could stay open on Sunday if they closed their stores for a twenty-four hour period Friday to Saturday evening.”¹⁰⁸ This undermined the sacrosanct nature of Sunday and emphasised the secular nature of the legislation. The law was actually challenged on the basis that there was no complete exemption for Sabbatarians. Although this was an infringement of religious freedom, it was not found to be disproportionate to the legislative objective after balancing under section 1.

8.3.2.2 Establishment Concerns

There is no non-establishment component to the religious freedom clause in the *Charter* as this would have been inconsistent with the history of constitutionally entrenched denominational schooling.¹⁰⁹ The government need not remain neutral to religion or indeed observe a strict and formal neutrality *between* religions. It is only where the government endorsement has the effect of imposing “coercive burdens on the exercise of religious

¹⁰⁴ *Roberts and Rosetanni v. The Queen* [1963] S.C.R. 651

¹⁰⁵ *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

¹⁰⁶ *Regina v. Edwards Books and Art, Ltd.*, [1986] 2 S.C.R. 713.

¹⁰⁷ In light of *Big M Drug Mart*, if the law had a religious purpose, it would also be violative of section 2(a).

¹⁰⁸ Sedler, R. (1988) *op.cit.*, p587

¹⁰⁹ *ibid* p582

beliefs” that there is a violation of section 2.¹¹⁰ This coercive element can be quite broad, for example in *Re Zylberberg and Director of Education*¹¹¹ a section 2(a) challenge to a school bible reading and Lord’s Prayer was upheld even though there was a pupil opt-out. The key point was that it forced the pupil to make a religious statement, thus inviting stigma.¹¹²

By contrast, Catholic denominational school funding and the refusal of funding for other denominations were unsuccessfully challenged in *Adler v Ontario*¹¹³ as a violation of the equal protection and religious freedom provisions of the Canadian Charter. The Court held that Catholic funding was constitutionally entrenched by section 93 of the *British North American Act* 1867 and immune to challenge.¹¹⁴ This holding determined that funding for other denominations is not mandated but is also not proscribed.¹¹⁵ It is left to the political process.¹¹⁶ In general in Canada the state *may* support religion, provided it does so in a non-coercive manner, which means usually it has to be spread evenly across denominations and similarly may fund religious education provided it is non-discriminatory. There is thus less of a rigid separation of church and state in the educational field than in the United States.¹¹⁷

¹¹⁰ See *Regina v. Edwards Books and Art, Ltd.*, [1986] 2 S.C.R. 713; *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

¹¹¹ *Re Zylberberg & Director of Educ.*, [1986] 55 O.R. 2d 749, 763 (Ont. H.C.).

¹¹² Patrick, J. (2006) *op.cit.*, p39.

¹¹³ [1996] 3 S.C.R. 809.

¹¹⁴ This reiterated the Court’s pronouncement in *Reference re Roman Catholic Separate High Schs. Funding*, [1987] 1 S.C.R. 1148. From Albert, R. (2004) *op.cit.*, p879.

¹¹⁵ Benson, I. (2007) *op.cit.*, p130.

¹¹⁶ These protection for denominational schooling were remarkably removed pursuant to referendums in Newfoundland and Quebec in 1998 and 1997 respectively fn 69 from Benson, I. (2007) *op.cit.*, p166

¹¹⁷ Moon, R. (2002) *op.cit.*, p564

8.4 Conclusion

A comparison between the two countries is slightly artificial as the Canadian jurisprudence is still evolving, having only had entrenched substantive protection for 30 years instead of 200 as in the United States.

Although the Canadian *Charter* contains no explicit Establishment Clause, case law illustrates that any establishment of religion is policed indirectly via the free exercise clause and the prohibition of coercion, which often form the same analysis. In the United States there tends to be a more rigid dichotomy with cases categorised as either establishment or free exercise questions with the other element subsequently marginalised in the analysis.¹¹⁸

The most glaring difference would be the permitted funding of Canadian denominational schools. Yet this does not proscribe nor does it mandate other denominational school funding. Outside this context Canadian courts demonstrate similar vigilance to the United States in policing any coercive effect on young and impressionable minds.

The major facial differences would be the Section 1 justification provision for *Charter* abridgements that “can be demonstrably justified in a free and democratic society,” although admittedly this can operate in a similar way to the United States Compelling Interest Test. The section 33 “notwithstanding provision” that permits a province or parliament to circumvent sections 2 (and 7 to 15) has no equivalent in the United States. Yet Collins has speculated that this legislative override facility may make Canadian judges less risk-averse as their decision may not have the constitutional finality of their US counterparts.¹¹⁹ Having said that, the political costs of invoking section 33 are perhaps prohibitively high.

¹¹⁸ Beschle, D. (2001) *op.cit.*, p485.

¹¹⁹ Collins, R. (2002). "Sacred Sites and Religious Freedom on Government Land." University of Pennsylvania Journal of Constitutional Law 5: 241-270, 270.

CHAPTER NINE

9 Sacred Objects¹

9.1 Introduction

During the dark days of the late Nineteenth Century Indian culture and religion were regarded by North American governments as something to be destroyed in the name of assimilation, although the private citizen was often not averse to attending a Wild West Show and buying the odd commemorative trinket. Yet to the scientist and the anthropologist, Indian cultural artefacts were objects of fascination which were destined for the laboratory and the museum. Gradually the governments themselves, by often funding such enterprises, endorsed a less assimilative but more acquisitive attitude. Cultural appropriation therefore replaced cultural destruction, but both policies resulted in acculturation.

Museums have undoubtedly played a role in preserving disappearing cultures with the western viewpoint traditionally regarding cultural artefacts as universal patrimony.² Yet when spiritual objects are displayed in museums they are unavailable for ongoing rituals and as such can represent another example of western cultural imperialism. In the final analysis, the scientist and tourist are seemingly prioritised before the practitioner of the religion.³ This attitude is at best paternalistic and at worst spiritual genocide.

The museum argument is also problematic because it assumes that preservation and display are the only natural and desirable outcomes for such objects.⁴ Yet totem poles are *meant* to decay, not to be displayed in perpetuity within a glass case. Similarly, the destruction of items such as the *Haida* end-of-mourning ceremonial masks is not simply physical destruction but “returning the object to the spirit world by fire.”⁵ The conflict can thus be between the preservation of a sacred item and the perpetuation of a religion.

¹ Sacred objects include ceremonial headdresses, sacred drums, totem poles, staffs, pipes, rattles, medicine bags, medicine bundles and ceremonial face masks.

² Cuk, N. (1997). "Carrying the Battle into the Form: Repatriating First Nations' Cultural Artifacts." *Dalhousie J. Legal Stud.* 6: 157-186, 167.

³ *ibid* p171

⁴ *ibid* p198

⁵ *ibid* p188.

This chapter will discuss the treatment of Native American sacred objects. There will first be a discussion of how archaeological protection laws failed to extend to Native American resources until the passage of the *Native American Graves Protection and Repatriation Act* (NAGPRA) in 1990. There will then be a discussion of NAGPRA, which now obliges museums to catalogue their inventory of such artefacts, and imports a presumption that these items must be returned to tribal descendants of the original owners. The importance of articulating tribal law on cultural property will also be stressed, both as a litigation strategy for the recovery of cultural objects, and as a measure to prevent further alienation.

The discussion will then turn to Canada and a comparison with her repatriation legislation. In particular, how cultural confiscation has not been so flagrant but neither has there been meaningful correction of the historical abuses that have occurred.

9.2 United States

9.2.1 Early Legislation

The *Antiquities Act* of 1906 punished anyone “who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity that is situated on federal lands without first obtaining permission from the Secretary of the Department that has jurisdiction over that land.”⁶ This statute has been of limited use because of the mild punishments and the fact that the Ninth Circuit in *Diaz* held it unconstitutionally vague because it failed to define “object of antiquity” and “ruin.”⁷ Most importantly, it did not apply to Indian burials, graves or objects found therein which meant that federal agencies and private parties could loot them with impunity.⁸

The *Archaeological Resources Protection Act* (ARPA) of 1979⁹ was both a response to the Ninth Circuit in *Diaz* and an attempt to improve the 1906 act. It covers artefacts 100 years old and before the issue of an excavation permit there must be consent from Native Americans if on Indian land and consultation if on public land.¹⁰ Excavation in violation of the permit provisions attracts criminal penalties of either a fine of \$10,000 and/or

⁶ 16 U.S.C. s 433 (1982).

⁷ *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974) Boyd, T. (1990) *op.cit.*, 894.

⁸ Trope, J. (1996). "Mending The Circle: A Native American Repatriation Guide." American Indian Ritual Object Repatriation Foundation, New York, NY. p76

⁹ 16 U.S.C. ss 470aa-47011 (1982).

¹⁰ Boyd, T. (1990) *op.cit.*, p898

imprisonment for one year.¹¹ Nevertheless, it is of limited use as there is no citizen suit available in the ARPA, so enforcement depends on federal authorities.¹² Furthermore, there is no provision *ensuring* confidentiality,¹³ although Section 9 *permits* federal land managers to withhold information from the public concerning the exact location and nature of archaeological resources.

9.2.2 Native American Graves Protection and Repatriation Act (1990)

NAGPRA extends protection to cultural items more recently excavated or discovered on federal or tribal land. Tribal land includes “all land within the exterior boundaries of any Indian reservation” and thus includes non-member lands within the reservation boundaries, in contrast to ARPA. For federal lands any removal must be after consultation with the relevant Indian tribes, for tribal lands there must be consent.¹⁴ As well as the restrictions on new excavations, the repatriation provisions of the *Native American Graves Protection and Repatriation Act* of 1990 (NAGPRA) were an attempt to *reverse* the historical cultural appropriation.¹⁵

NAGPRA is multi-faceted: it is property law, as it extends ownership over artefacts and bodies; human rights law, as it remedies longstanding violations; and administrative procedure law, as it establishes processes to be followed in repatriation.¹⁶ Furthermore, it is Indian Law, as it is based on a government-government relationship; as such the sympathetic Canons of Construction¹⁷ should be deployed to facilitate the *Act's* purpose.¹⁸

¹¹ Section 6(d)

¹² Suagee, D. (1996). "Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground." *Vermont Law Review* 21: 145-224, 202.

¹³ Ward, R. (1992) *op.cit.*, p819.

¹⁴ There is no application to state or private land. Dussias, A. (1996). "Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights." *Maryland Law Review* 55: 84-159, 151.

¹⁵ *The National Museum of the American Indian Act* (20 U.S.C. § 80q (2000)), which applied to the Smithsonian Institution, was a precursor to NAGPRA and has similar provisions relating to the return of human remains and funerary objects but only NAGPRA includes sacred items and other cultural patrimony. Trope, J. (1996) *op.cit.*, p1 The Smithsonian independently developed its own repatriation *policy* which does include sacred items and other cultural patrimony. Trope, J. (1996) *op.cit.*, p40.

¹⁶ Hutt, S. (2003). "If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans." *N. Ill. UL Rev.* 24: 527-562, 547.

¹⁷ Discussed in Chapters 3 and 7.

¹⁸ Trope, J. and Echo-Hawk, W. (1992) *op.cit.*, p76.

9.2.2.1 Main Provisions

NAGPRA applies to all federal agencies, defined as any federal governmental entity, as well as all federally-funded museums.¹⁹ As well as human remains there are four other categories.²⁰ For our purposes the most relevant are “sacred objects” and “objects of cultural patrimony.” “Sacred objects,” are defined in terms of their contemporary use as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”²¹ The legislative history suggests that this extends to the renewal of traditional religious ceremonies²² and the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves.²³ This is the first time that federal entities must consider what is sacred from an Indian perspective.²⁴ “Objects of cultural patrimony” are defined as: “[O]bject[s] having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual”²⁵

There is a four-step process in securing repatriation.²⁶ First, there must be an identification of the item as coming under the Act. Second, cultural affiliation must be established,²⁷ or an Indian grouping must demonstrate prior ownership or control either by the tribe or if individually by a lineal descendant. Thirdly, the claimant must demonstrate

¹⁹ 25 U.S.C. 3001(4); 20 U.S.C. 80q-9.

²⁰ Please see Trope, J (1996) *op.cit.*, for further details. The other two categories are associated funerary objects and unassociated funerary objects.

²¹ 25 U.S.C. 3001(3)(C).

²² “the practice of some ceremonies has been interrupted because of governmental coercion, adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at the time” H.R. REP. No. 877, 101st Cong., 2d Sess. 8 (1990) at 14

²³ Trope, J. and Echo-Hawk, W. (1992) *op.cit.*, p 66.

²⁴ *ibid* p 76.

²⁵ 25 U.S.C.A. s 3001(3)(D). Items include nominally sacred items such as wampum belts and Zuni War Gods which may not fall under the definition of “sacred objects” if they are not regarded as necessary for the contemporary practice of Indian religions.

²⁶ Trope, J. and Echo-Hawk, W. (1992) *op.cit.*, pp 65 et seq

²⁷ Trope, J. (1996) *op.cit.*, p11 For “Cultural Affiliation” to be established “a reasonable connection (“shared group identity”) must be shown between the present-day tribe or organization making the request and the earlier tribe or group.” Evidence used can be “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” s3005 (a) (4)

a *prima facie* case that the museum or organization does not have right of possession. Fourthly, the museum or organization must then rebut this and prove right of possession. Right of Possession is defined as. “[P]ossession obtained with the voluntary consent of an individual or group that had authority of alienation.”²⁸

Boyd remarks that burdening museums with the task of proving right of possession is unfair for several reasons.²⁹ Firstly, demonstrating right of possession may be evidentially extremely difficult due to the passage of time and lack of documentation. Secondly, it may be prohibitively expensive to investigate and impossible to conclusively prove who had the original authority to alienate the object. Finally the requesting party has merely to make out a *prima facie* case on the preponderance of evidence, not a requirement to actually prove a better title.³⁰

Yet for sacred objects in particular, surely there could never have been a tribal consensus to convey them to museums and private collectors as this would have been to invite spiritual censure.³¹ Such alienation must have been by rogue individual tribal member. Shifting the burden to the government also quite rightly recognises that there was an acknowledged historical practice of excavating Indians’ graves and looting items and remains contained therein. This received governmental imprimatur as evidenced by the Surgeon General’s order of 1868 to excavate crania and funerary items for scientific study. Estimates of the number of Indian graves ransacked range from 100,000 to two million.³² In the final analysis the assumption should be against lawful alienation, particularly for sacred objects, which should not receive a sterile property law analysis.

Nafziger cites several weaknesses in the legislation.³³ Firstly, only federally recognised tribes are protected. Secondly, there is no application to private land or indeed to privately-held property, unless the object was obtained from a museum or discovered on federal or tribal land after November 16 1990, as evidenced by the sale at Sotheby’s of two

²⁸ S 3001 (13)

²⁹ Boyd, T. (1990) *op.cit.*, p 930.

³⁰ *ibid* p930.

³¹ Tsosie, R. (2002). "Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights." Arizona State Law Journal 34: 299-358, 314.

³² Trope, J. and Echo-Hawk, W. (1992) *op.cit.*, p 40.

³³ Nafziger, J. A. (2006). "The Protection and Repatriation of Indigenous Cultural Heritage in the United States." Willamette Journal of International Law and Dispute Resolution 14: 175-225, 219-222.

Hopi and one Navajo mask in May of 1991.³⁴ Thirdly, although there have been some exemptions granted by NAGPRA'S Review Committee to the *Freedom of Information Act* (FOIA) requirements, these are piecemeal and unclear. Fourthly, the Review Committee's findings are not binding but merely advisory. Lastly, civil penalties apply only to museums and not federal agencies. As for the considerable cost of conducting research, tribes may apply for grants from the National Park Service Tribal Preservation Program to help with research into the provenance of items.³⁵ Similarly, there is a provision for grants under NAGPRA to assist in repatriation.³⁶

The National Association of Tribal Historic Preservation Officers (NATHPO) released a report in 2008 on governmental implementation of NAGPRA.³⁷ Government agencies reported lack of funding as seriously hampering compliance, with several still not having inventorised their sacred objects, despite the deadline being 1995.³⁸ Although, as mentioned above, tribes can apply for grants, there remains a lack of serious funding as tribes must sort through thousands of inventories and then enter into an exhaustive consultation to prove cultural affiliation and ensure repatriation. Between 1994 and 2004 only \$16.5 million was awarded for 562 federally recognised tribes.³⁹ Similarly, only \$9.8 million has been awarded to federal museums to assist their repatriation efforts.⁴⁰

There are many items which have been classified as Native American but insufficient evidence exists to establish "cultural affiliation" with a tribe and thus ensure repatriation.⁴¹ Strickland has suggested that hundreds of thousands if not millions of sacred objects may fall into this limbo.⁴² Indeed, as of 2008, only 4629 sacred objects and items of cultural patrimony have so far been identified for repatriation.⁴³

³⁴ Marsh, G. (1992). "Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items." *Ariz. St. LJ* **24**: 79-133, 102.

³⁵ <http://www.nps.gov/history/nagpra/FAQ/INDEX.HTM> [Accessed 20 April 2010]

³⁶ 25 U.S.C. 3008(a).

³⁷ Cryne, J. A. (2009). "NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts." *American Indian Law Review* **34**(1): 99-122, 104.

³⁸ *ibid* pp106-107.

³⁹ Gunn, S. J. (2010) *op.cit.*, pp524-525.

⁴⁰ *ibid* pp525-526

⁴¹ *ibid* p507

⁴² *ibid* p518

⁴³ *ibid* p521

9.2.3 Litigation and Tribal Law

Outside the framework of repatriation legislation the refusal to return religious objects may give rise to a First Amendment claim to enable the performance of contemporary religious rites.⁴⁴ However, it must be remembered that First Amendment claims against most museums are unavailable because they are non-governmental institutions.⁴⁵ In such cases the return of sacred objects is dependent on goodwill or alternatively a reliance on principles of property law to defeat title. This naturally becomes more difficult the longer the period of alienation.

Litigation for the return of cultural objects dates from 1899 when the Onondaga Nation failed in their lawsuit for the return of four wampum belts in the possession of a private New York collector that had been “sold” by a Chief.⁴⁶ Subsequently, in 1909 the New York State Legislature passed the Wampum Law that bestowed upon themselves the title of “Wampum Keeper,” and “claim[ed] the right to any wampum once in the possession of any Iroquois, past, present or future.”⁴⁷ The wampum belts were eventually returned to the Onondaga Nation on October 21, 1989,⁴⁸ with the patronising proviso that the tribe display the belts to museum standards.⁴⁹

A different result may ensue when greater deference is shown to tribal law as the determining factor in demonstrating title. The relationship between tribal law and federal law was raised in the Ninth Circuit case of *Chilkat Indian Village v. Johnson*.⁵⁰ In 1976 The Chilkat Village Council passed the following ordinance:

“No traditional Indian artifacts, clan, crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.”⁵¹

⁴⁴ Boyd, T. (1990) *op.cit.*, p890

⁴⁵ *ibid* p909

⁴⁶ *Onondaga Nation v. Thacher* 61 N.Y.S. 1027 (Sup. Ct. Onondaga County 1899).

⁴⁷ Trope, J. (1996) *op.cit.*, p76

⁴⁸ *ibid* p76

⁴⁹ Byrne, C. (1993). "Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects." *Journal of Environmental Law and Litigation* 8: 109-131, 124.

⁵⁰ 870 F.2d 1469 (9th.Cir 1989).

⁵¹ Byrne, C. (1993) *op.cit.*, p 115.

When several tribal members removed various cultural and religious artefacts in 1984 for the eventual sale to a collector, the tribe sought their return. Judge Canby recognised the sovereign authority of the tribe to enact the ordinance and remanded the matter back to the tribal court on jurisdictional grounds.⁵²

In the context of the protection of sacred objects it is therefore crucial for tribes to articulate their own legal protections which, following *Chilkat*, can be dispositive. Although the acknowledged *sui generis* nature of tribal law can impede its applicability outside Indian country, and in certain circumstances within Indian country over non-Indians, it can influence the dominant society's legal system as well as enhancing tribal sovereignty.⁵³ Defined tribal codes have the benefit of putting everyone on notice of potential alienation restrictions and can circumvent the perceived lack of transparency in indigenous customary law.⁵⁴ A tribal code specifying the non-alienability of items would also be of evidential value for statutes such as NAGPRA.⁵⁵ The actual codification and accompanying jurisprudence, although non-customary and perhaps assimilative, provides certainty, precedent and predictability. Codification and detailed description facilitates the conferral of full faith and credit of tribal judgements in other forums and enforcement of judgements outside tribal jurisdiction.⁵⁶ Furthermore, any conflict of laws is more likely to be decided in favour of tribal law should it be readily discernible.⁵⁷

Riley researched 351 tribal legal systems to determine which tribes protect tangible cultural property.⁵⁸ The majority of tribes had desecration statutes protecting sacred sites, burial sites, tribal antiquities, sacred objects and monuments.⁵⁹ One tribal example is the Navajo Nation's *Cultural Resources Protection Act*, 1988 which provides protection for any cultural property listed in the Navajo Register of Cultural Properties and prohibits anyone

⁵² 870 F.2d 1469, 1476 (9th Cir 1989).

⁵³ Riley, A. (2005) *op.cit.*, p74.

⁵⁴ Conway, D. (2009). "Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources." *Texas Wesleyan Law Review* 15: 207-256, 252-253.

⁵⁵ Nakai, K. (2003). "When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?" *Ariz. St. LJ* 35: 1283-1330, 1326.

⁵⁶ Riley, A (2005) p66

⁵⁷ *ibid* p67

⁵⁸ Riley, A. (2005) *op.cit.*, p97

⁵⁹ *ibid* p106.

other than enrolled members of the tribe from “visiting or investigating cultural property on non-public Navajo lands, destroying or removing cultural properties on Navajo lands, and selling or transporting cultural resources on Navajo lands.”⁶⁰ There are criminal and civil penalties.

The Center for the Study of American Indian Law and Policy at the University of Oklahoma has developed a model tribal repatriation law, the “Cultural Heritage Ordinance,” which may be of some use, although of course with adaptation for inter-tribal variation.⁶¹ Of course any model repatriation law could be an exercise in homogeneity. Yet cultural distinctiveness could still be preserved by the parochial interpretation of the code rather than its formalistic application.⁶²

9.2.4 United States Reform

Thus we may see how archaeological resources legislation provided little protection for Indian artefacts. NAGPRA was a considerable improvement and also sought to reverse the historical appropriation through its admittedly imperfect repatriation provisions. Successful implementation of NAGPRA’s objectives will depend on much greater funding. Furthermore, state entities remain outside its ambit.⁶³ To obtain the return of objects from a non-federal entity recourse must be had to property law principles and demonstrating superior title, which is uncertain and expensive. Defined tribal codes on cultural property would import presumptions of inalienability and repatriation could thus be facilitated as an expression of tribal sovereignty. As for any free exercise claims, these are only available against governmental entities, which prevents litigation against private parties and most museums.

A more comprehensive legal framework for the return of all spiritual artefacts, held in both private and public hands and in federal and state possession, would redress such longstanding injustice. This could be either a judicially-recognised inherent right to all sacred objects or a statutory repatriation framework, reaching private and public parties, with market value compensation provisions.

⁶⁰ Harris, S. (2005). Sacred Sites and Cultural Resource Protection: Implications for Mineral Development on, and off, Indian Lands. Rocky Mountain Mineral Law Foundation: Natural Resources Development in Indian Country p18

⁶¹ Trope, J. (1996) *op.cit.*, p34

⁶² *ibid* p62

⁶³ Although several states have similar repatriation laws for example Arizona, Kansas, Nebraska and California the vast majority of sacred objects are in federal museums. Gunn, S. J. (2010) *op.cit.*, p511.

9.3 Canada

9.3.1 Archaeological Resources

There is no *federal* law governing archaeological resources discovered on federal land.⁶⁴ There is varying provincial law, a detailed treatment of which is outside the scope of this thesis. In general, sacred objects that are excavated can be protected by challenging provincial legislation on the grounds that it is assigning ownership to non-Indians. This goes to the “core of Indianness”⁶⁵ and is *ultra vires* the province, or alternatively violates the fiduciary relationship.⁶⁶ For Indian reserve lands the federal government makes no claim of title to items found and First Nations have in certain cases developed their own heritage policies and permit systems.⁶⁷ Due to the limited geographical span of such reserves, in contrast to United States Indian land,⁶⁸ these policies fail to provide comprehensive protection.

As for the large scale land and self-government agreements that have been negotiated in recent times, the Nunavut Agreement provides that the Inuit Heritage Trust will grant or refuse permits and retain title to cultural objects found within Inuit-owned land.⁶⁹ On the other hand the federal or territorial government will determine the fate of other objects found within Nunavut Territory and retain title but must surrender possession to the Inuit government if requested.⁷⁰

The *Nisga'a Final Agreement* provides that legal title to any Nisga'a artefact currently held by the Canadian Museum of Civilization and the Royal British Columbia Museum will

⁶⁴ Kagan, T. (2005). "Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach." *University of Toronto Faculty of Law Review* 63: 1-43, 11.

⁶⁵ “Indians and land reserved for Indians” remain nominally a federal competency under section 91(24) of the *British North American Act* 1867. However provincial laws of general applicability can apply to Indians provided they do not go to the “core of Indianness” which broadly means anything which would fall within the *Van Der Peet* category of “integral to a distinctive culture.” Monahan, P. (2006)*op.cit.*, p459 but also see s88 of the Indian Act

⁶⁶ Bell, C. (2008) *op.cit.*, pp37-38.

⁶⁷ *ibid* p36

⁶⁸ 0.5% of Canada and 3% of the United States. Morse, B. (1997) *op.cit.*, p123.

⁶⁹ Kersey, A. (1994). "The Nunavut Agreement: A Model for Preserving Indigenous Rights." *Ariz. J. Int'l & Comp. L.* 11: 429-468, 461

⁷⁰ *ibid* p462

be transferred if requested.⁷¹ It also recognised that the Nisga'a have control over archaeological sites and materials on their lands.⁷² Paragraph 17 requires that joint custodial arrangements "must respect Nisga'a laws and practices relating to Nisga's artefacts and comply with federal and provincial laws of general application and the statutory mandate of the Canadian Museum of Civilization." Noble notes the differences: Nisga'a laws must be respected while federal and provincial laws must be complied with.⁷³

9.3.2 National Repatriation Legislation

There is no legislation *obliging* federal museums to inventorise and repatriate native items similar to NAGPRA in the United States.⁷⁴ Nor is there a positive duty to notify or indeed provide grants to assist First Nations as there is under NAGPRA.⁷⁵

The Canadian Museum of Civilization, under the *Museum Act*,⁷⁶ may dispose of or loan materials on approval by the Board of Trustees. It has also developed an informal repatriation policy which aims to balance the needs of First Nations and the museum's responsibility to the Canadian public at large. Objects will be returned to claimants who can demonstrate "an undisputed historical relationship to objects that are alleged to have been acquired under conditions which were illegal at the time."⁷⁷ Sometimes burdensome conditions are placed on the repatriation of objects, in particular that there should be suitable museum facilities for their display. This can impose considerable costs on the receiving tribe, which should ideally be borne by the society that benefited from their illegal confiscation.⁷⁸

⁷¹ FN51 FROM Kagan, T. (2005) *op.cit.*, Enacted in British Columbia as *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, and federally as the *Nisga'a Final Agreement Act*, S.C. 2000, c. 17, s. 1, online: Department of Justice Canada <<http://laws.justice.gc.ca/en/N-23.3h>, ss. 8(a), 22(a).

⁷² McLay, E et al (2008) *op.cit.*, p190

⁷³ Noble, B (2008) *op.cit.*, p471

⁷⁴ Paterson, R.K. "Ancestral Remains in Institutional Collection: Proposals for Reform" in Bell, C. E. and Paterson R. K. (2008) *op.cit.*, p171

⁷⁵ *ibid* p172

⁷⁶ S.C.1990 c3

⁷⁷ Bell, C.E. (2008) *op.cit.*, p48

⁷⁸ Bell, C and Napoleon, V. "Introduction, Methodology, and Thematic Overview" in Bell, C. E. and Napoleon, V. (2008) *op.cit.*, p70

First Nations have submitted claims under the generic Specific Claims Process, although this has the disadvantage that monetary compensation is the only remedy available and there is no provision for the return of cultural objects.⁷⁹ Furthermore, the federal government is both defendant and arbiter of the validity of the claims.⁸⁰

There may actually be a greater chance of obtaining the cross-border repatriation of objects from the U.S. Smithsonian Institution, which developed its own policy enabling Canadian Indians to apply for repatriation. Several items have already been returned from the Smithsonian, specifically Alert Bay potlatch paraphernalia.⁸¹ Indeed, the absence of a specific inter-governmental agreement does not stop cross-border co-operation between tribes.

The U.S. NAGPRA may also be recruited. In 2000 the Canadian Blackfoot enlisted the help of the American Blackfoot to receive medicine bundles recovered under NAGPRA and then transfer them across the border.⁸² Similarly, under Alberta's *Repatriation Act* the Theodore Last Star Medicine Pipe Bundle was claimed in 2002 and then shipped from Canada to the Montana Blackfoot. In a ceremony to commemorate this event on 1 July 2002 the bundle was opened for the first time since 1942.⁸³

9.3.3 Provincial Repatriation Legislation

As for provincial repatriation legislation, protection varies with Alberta's *First Nations Sacred Ceremonial Objects Repatriation Act*⁸⁴ providing the strongest protection which mandates the repatriation of a "sacred ceremonial object...used in the practice of sacred ceremonial traditions" and that continue to be *vital* to those traditions.⁸⁵ Vital, as Bell remarks, is a stricter approach than the standard aboriginal right threshold of "integral to a distinctive culture test."⁸⁶ Pursuant to the *Act*, the *Blackfoot First Nations Sacred Ceremonial*

⁷⁹ *ibid* p84

⁸⁰ *ibid* p85

⁸¹ *ibid* p70

⁸² Bell, C et al "Repatriation and Heritage Protection: Reflections on the Kainai Experience" in Bell, C. E. and Napoleon, V. (2008) *op.cit.*, p222

⁸³ Bell, C (2008) *op.cit.*, p372

⁸⁴ R.S.A. 2000, c. F-14. It applies to objects in the care of the Provincial Museum of Alberta or the Glenbow-Alberta Institute

⁸⁵ Section 1(e)

⁸⁶ Bell, C (2008) *op.cit.*, p41

*Objects Repatriation Regulations*⁸⁷ came into force in May 2004 and requires that for any agreement to repatriate an object there must be an undertaking to put it back in use.⁸⁸

Similar phraseology is found in the Royal British Columbia Museum Repatriation *policy* which applies to items “of religious significance and *essential* to the continuation of ceremonial and ritual life among aboriginal people.”⁸⁹ Furthermore, First Nations must demonstrate that “the materials are needed by a traditional aboriginal leader or leaders for traditional aboriginal practices”⁹⁰

The difficulty is that provincial legislation may prove to be unconstitutional as it applies solely to First Nations culture and could be *ultra vires* the province as it relates to the “core of Indianness.”⁹¹ In any case, federal laws over provincial property within provincial borders may be politically unfeasible as well as illegal.⁹² However, culture *per se* is not a federal competency,⁹³ and in the absence of challenge the laws would continue to operate. Bell suggests the use of parallel federal legislation to endorse provincial initiatives in an attempt to solve the fundamental jurisdictional impasse that federal jurisdiction does not extend over provincial property and provincial jurisdiction does not extend over matters relating to the core of Indianness.⁹⁴

9.3.4 Litigation and Tribal Law

Tribal law is marginalised in Canada as the *Indian Act* swept away virtually all sovereignty conferring merely a municipal level of government. Any recognition of aboriginal rights to self-government, as discussed in Chapter 7, is speculative and uncertain. Therefore, in contrast to the United States tribes, any full faith and credit or recognition of tribal jurisdiction is unavailable as a practical matter. Litigation must therefore rely on pure

⁸⁷ Alta Reg. 96/2004

⁸⁸ Bell, C (2008) *op.cit.*, p42

⁸⁹ *ibid* p48

⁹⁰ *Museum Act* R.S.B.C.1996 c.326 s4

⁹¹ Bell, C (2008) *op.cit.*, p42.

⁹² *ibid* p44

⁹³ *ibid* p43

⁹⁴ *ibid* p44

property law principles and proving better title as tribal law is unavailable to create a presumption of inalienability.

A major difficulty is that remedies for interference with real property centre on the uniqueness of the land whereas actions for personal property more often involve pecuniary remedies.⁹⁵ Cultural property is in an anomalous position as a non-fungible chattel and the common law has never recognised different categories of personal property based on a cultural or religious hierarchy.⁹⁶ Yet some legal systems do recognise a category of *res sacrae*, for example the Quebec Court of Appeals set aside sales of liturgical silver objects which had been alienated in violation of canon law.⁹⁷

Property law strategies could include a contractual claim to defeat title, for example the forced alienation by spurious “sale,” to avoid imprisonment, of potlatch paraphernalia could amount to “fraud, mistake, or undue influence, [and] a court might be inclined to void the contract.”⁹⁸ Potential hurdles of limitation periods and equitable defences remain. As for limitation periods the Supreme Court in *City of Kamloops v. Nielson and Central Trust Co. v. Rafuse*,⁹⁹ held that discoverability, which triggered the start of the limitation period, would only occur when facts relevant to determine that a cause of action exists were known. In *M (K.) v. M (H.)*,¹⁰⁰ in a case regarding stolen artwork during World War II, the plaintiff had to be reasonably aware that a cause of action did in fact exist and the court said that the “larger social context” could not be ignored. This could be relevant for the covert dispossession of indigenous cultural property.

As a response to these rulings some provinces enacted legislation that specified “ultimate limitation periods” which were to be binding irrespective of any discoverability issues. The *Ontario Limitations Act* now stipulates that “a plaintiff has no claim for the recovery of personal property against a good faith purchaser after two years have passed, notwithstanding any notion of reasonable discoverability.”¹⁰¹ Kagan suggests that the “good

⁹⁵ Kagan, T. (2005) *op.cit.*, p37.

⁹⁶ Paterson, R. (2006) "Resolving the Material Culture Disputes: Human Rights, Property Rights and Crimes against Humanity." *Willamette Journal of International Law and Dispute Resolution* 14: 155-174,162.

⁹⁷ *ibid* p162.

⁹⁸ Kagan, T. (2005) *op.cit.*, p20.

⁹⁹ [1984] 2 S.C.R. 2 at 36 [*City of Kamloop*] [1986] 2 S.C.R. 147 at 152 [*Central Trust Co.*].

¹⁰⁰ [1992] 3 S.C.R. 6 at 35

¹⁰¹ S.O. 2002, c. 24, Sch. B, s. 15

faith” element could be targeted which refers to a purchaser who “buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects against the seller’s title.”¹⁰² This would not protect a purchaser who knew or ought to know of the provenance and history of the item, which may be the case with sacred objects.

Paterson has analogised the theft of sacred objects to the Nazi looting of the Second World War. Like crimes against humanity, recovering the proceeds from such crimes should not be subject to limitation periods due to the gravity of crime committed and the nature of the property taken.¹⁰³ If such a suspension of limitation periods can be regarded as Customary International Law then this could be applied domestically.¹⁰⁴ In any case, *The Rome Statute of the International Criminal Court* was enacted into Canadian Law by the *Crimes Against Humanity and War Crimes Act* (the Act) which dispenses with limitation periods for crimes against humanity.¹⁰⁵ Categorising the treatment of First Nations and their sacred objects as a crime against humanity may however be a step too far for Canadian jurisprudence.

9.3.5 Canadian Reform

It must be remembered that much of the federal repatriation detailed above is policy rather than legislation. There should be a U.S. style *national* repatriation statute such as NAGPRA, both to enhance federal policies and to bolster the uneven provincial legislation with its varying and difficult thresholds.¹⁰⁶ As for the jurisdictional impasse regarding federal legislation over provincial property and provincial legislation pertaining to Indianness, simultaneous and identical legislation by each federal component could be enacted.

McLaughlin suggests alternatives to repatriation such as negotiated access, more culturally sensitive display and storage, replications, computer-imaging, on-line access, as

¹⁰² Garner, B. A. and. Black, H. C. L.. (2004). Black's Law Dictionary. St. Paul, MN, Thomson/West, p1271

¹⁰³ Paterson, R. (2006) *op.cit.*, p159.

¹⁰⁴ *ibid* p160.

¹⁰⁵ Criminal Code, R.S.C. 1985, c. C-46, § 462.32(4.1) Paterson, R. (2006) *op.cit.*, p160.

¹⁰⁶ Cuk, N. (1997) *op.cit.*, p 184.

well as loans and shared control.¹⁰⁷ Indeed the International Law Association (ILA) Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material (the ILA Principles), adopted at the June 2006 meeting of the International Law Association in Toronto, endorses alternatives such as long term loans, exchanges of objects, and the making of copies.¹⁰⁸ However, these compromises are unsatisfactory with their paternalistic and colonial emphasis on First Nations having to beg favours to gain access to their culture. Furthermore, for First Nations to have to continually prove concepts such as “vital” and “essential” in regard to sacred objects is offensive in the extreme.

Other more general strategies include the use of the Canadian *Charter* and its freedom of religion rights. However, it is more relevant in striking down legislation rather than forcing positive government action thus its application in the context of repatriation is limited.¹⁰⁹ Furthermore, it provides no rights against private entities, only governments.¹¹⁰ An unsuccessful attempt at obtaining the return of a ceremonial face mask occurred in *Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow Alberta Institute*.¹¹¹ Mohawk Indians had objected to the display of the mask as part of the 1988 Calgary Winter Olympics presentation. The request for return was refused on the grounds that it had been displayed elsewhere by the Royal Ontario Museum for sixty years despite Mohawk protests that it was equivalent to “putting the Catholic Host in a strip show.”¹¹² It was stressed that the *Glenbow-Alberta Institute Act* states that the museum collection is held for the benefit of all the people of Alberta.¹¹³ This is symptomatic of the Western doctrine that culture is a universal patrimony.

Ultimately, the recognition of a right to repatriation of a particular sacred object as a section 35 right would be the best solution. In Canadian Law there are aboriginal rights to hunt, fish and hold land which should be joined by a right to possess their own spiritual

¹⁰⁷ McLaughlin, R. (1996) *op.cit.*, p 790.

¹⁰⁸ Paterson, R. (2006) *op.cit.*, p166.

¹⁰⁹ Bell, C (2008) *op.cit.*, p29

¹¹⁰ See Chapter 8

¹¹¹ *Mohawk Bands of Kahnawake, Akwesasne and Kanesatake v. Glenbow Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.)

¹¹² Cuk, N. (1997) *op.cit.*, p160.

¹¹³ Bell, C. E. et al (2008) *op.cit.*, p238

artefacts.¹¹⁴ Furthermore, section 35 aboriginal rights are enforceable against private entities such as museums.¹¹⁵ Kagan has suggested that a claim for control over specific cultural objects could be made under the test articulated in *R. v. Van der Peet*.¹¹⁶ The *Van der Peet* requirements are that the right must be of “central significance to the aboriginal society” and have existed prior to contact and has been in continual, although not necessarily unbroken, existence since then.¹¹⁷ Of course demonstrating continuity for an item that has been in a museum is not straightforward.¹¹⁸

Simpler and more comprehensive would be a *generic* section 35 aboriginal right to *all* sacred objects without a tortuous incremental proof, object by object. It would be assumed that all sacred objects were integral to culture, together with a presumption of their inalienability. While it could be conceivable that an indigent indigene could sell other cultural items, the sacred would surely not have been voluntarily and consciously relinquished.

There is a further difficulty to circumvent: section 35 only conferred protection to rights that had not been extinguished prior to 1982. To meet the test for extinguishment the sovereign’s intention had to be “clear and plain.”¹¹⁹ Under the specific object analysis of *Van der Peet* this could potentially pose problems for individual items removed during the relentless assimilation of the late Nineteenth Century. Under a generic right this is circumvented as it would be impossible to demonstrate that the federal government extinguished *wholesale* the right to the possession of *all* sacred objects.

¹¹⁴ Cuk, N. (1997) *op.cit.*, p185

¹¹⁵ See Chapter 8

¹¹⁶ Kagan, T. (2005) *op.cit.*, p14.

¹¹⁷ *Van der Peet* para 50-65

¹¹⁸ Kagan, T. (2005) *op.cit.*, p15.

¹¹⁹ Godlewska, C and Webber, J (2007) *op.cit.*, p5

9.4 Conclusion

Indians must *request* that sacred items be returned to them with various thresholds to cross such as “needed” for contemporary spiritual practices as in NAGPRA or essential/vital as found in Canadian provincial legislation. Furthermore, NAGPRA and the Canadian provincial legislation are not binding on private parties and so the ultimate goal of returning such objects to Indian tribes can only ever be partially accomplished. Export controls merely prevent trans-border movement and do not facilitate repatriation.

As for litigation, this is expensive and protracted and the creative avoidance of limitation periods and various other litigation strategies are uncertain. Analogising the theft of sacred objects to the proceeds of crimes against humanity may be a step too far.

In general, Canada has repatriation policy whereas the United States has national legislation. Although laudable in intent NAGPRA has its disadvantages, the most fundamentally objectionable being that Indians must actively claim for a return of their culture. Comprehensive legislation and/or the recognition of inherent aboriginal rights to all spiritual objects would be the ideal solution.

This chapter has demonstrated how the governments have been sporadically magnanimous when conferring rights of repatriation for objects held by third parties. The next chapter will show that when the government itself has to make a more tangible and significant sacrifice over its own public land then accommodation has its limits.

CHAPTER TEN

10 Sacred Sites

10.1 Introduction

“The irony of the situation is, you can go on public lands to ski, to strip a mountain to mine, or leave a cyanide pool, but you can't go on public lands to pray for its continued fertility.”¹ (Vine Deloria Jr.)

Sacred sites can be places where gods reside and direct spiritual contact is obtained, places where creation stories originated, where ancestors were buried or where important tribal events occurred.² Each site is spiritually unique and access by non-practitioners, or even divulging the location, may disturb the inherent sacredness.³

Sacred sites on Indian land usually present few problems of desecration as tribal sovereignty, at least in the United States, mostly ensures protection, secrecy and access for prayer. However, due to massive land dispossession many sacred sites are now on public land and the Indians feel, in the words of Charlotte Black Elk, that “when we go back to these places we have to get permission from the government, or we have to sneak in as tourists to pray.”⁴

The previous chapter discussed some areas in which the North American Governments have recognised that both the destruction and appropriation of Indian culture had to be corrected. This magnanimity came at little *governmental* cost; if at times there was substantial cost to third parties. Yet when the government itself is required to exercise restraint over the use of its own land and thus make a more tangible concession then accommodation becomes somewhat less enthusiastic.

This chapter will begin with the case law in the United States up to the seminal Supreme Court holding in *Lyng v Northwest Indian Cemetery Association*.⁵ In particular, there

¹ Rivera, D. (2003) *op.cit.*, p443.

² Albert, M. (2008). "Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands." Colum. Hum. Rts. L. Rev. **40**: 479-521, 482.

³ *ibid* p483

⁴ *ibid* p485.

⁵ 485 U.S. 439 (1988).

will be an investigation into the extent to which a nominally independent judiciary has been complicit in preserving not the sanctity of religious sites, but the sacrosanct nature of property rights. Such a tension has always existed, but it must be remembered that the seizure of churches, under legal doctrines such as eminent domain, means they can be built elsewhere, the destruction or desecration of a unique and geographically-specific Indian sacred site is irretrievable.⁶

The degree of federal agency accommodation will then be examined and in particular how this can be circumscribed by Establishment Clause strictures. Indeed, how framing Indian religious activities as cultural, rather than religious, can paradoxically circumvent this limitation. Other potentially protective strategies include the use of heritage and environmental legislation, which can provide an incidental protection for sacred sites. Similarly, a creative pleading and sympathetic interpretation of retained rights in treaties may prove to be of some use. Finally, there will be an appraisal of direct congressional intervention in conveying selected sacred sites to Indian tribes. Although this has only been sporadic and limited it remains perhaps the most realistic hope for any definitive protection.

As discussed in Chapter 7, aboriginal land in Canada, in contrast to the United States, has not been subjected to any large scale treaty process or any Canadian equivalent to the US Indian Claims Commission. This influences the legal strategies pursued since Canadian tribes, as well as having other constitutional claims, also have the option of claiming un-extinguished aboriginal title to those areas which contain sacred sites. Since the passage of section 35 such rights may enjoy constitutional status and cannot therefore be casually extinguished. As for any aboriginal free exercise rights under section 2(a), this provision is of fairly recent vintage and its effectiveness in this context remains to be proven. Similarly, the relationship *between* section 2(a) and section 35 requires elucidation.

⁶ Rannow, R. (1982). "Religion: The First Amendment and the American Indian Religious Freedom Act of 1978." American Indian Law Review: 151-166, 162.

10.2 United States

10.2.1 Introduction

Tribal sovereignty is robust in the United States and any adverse development affecting tribal land can usually be prevented by the tribe, as the Navajo did with rock climbing on Shiprock, a sacred site in 2003.⁷ Alternatively, it could be defeated as a violation of the federal trust relationship, although *Attakai v. U.S.*⁸ held that this applies only on a tribe's own land and not on that of another tribe.⁹ However, it is on public land long since alienated by, or stolen from, the tribes that the tensions primarily occur.

There is no discrete rubric of sacred site protection in federal land management and therefore any protection under historic preservation, environmental laws or endangered species legislation is incidental.¹⁰ It is a bitter irony that the Tennessee Valley Authority was temporarily prevented by injunction from building the Tellico Dam, which is the subject of the *Sequoyah* case, on the grounds that it would harm the habitat of the Snail Darter, a tiny, oily, inedible, and unattractive fish with the considerable good fortune to be endangered.¹¹

The *American Indian Religious Freedom Act* (AIRFA) (1978) was a congressional apology for the history of religious suppression carried out by the federal government and seemed to signal new respect for sacred sites. It boldly proclaimed that "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sacred sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."¹² It provided no substantive cause of action, had no penalty provisions and was little more than a policy statement.¹³ At most, it required courts to consider Indian interests¹⁴ and thus did not require "any result, only process."¹⁵

⁷ Albert, M. (2008) *op.cit.*, p480.

⁸ 746 F. Supp. 1395 (D. Ariz. 1990)

⁹ Harris, S. (2005) *op.cit.*, p15

¹⁰ Ward, R. (1992) *op.cit.*, p804.

¹¹ Russell, S. (2008) *op.cit.*, p215.

¹² PL 95-341, 92 Stat. 469

¹³ Pevar, S. L. (2004) *op.cit.*, p264

¹⁴ *Wilson v Block* 708 F.2d 735, 746 (DC Cir.) (1983)

10.2.2 Case Law

In many sacred site cases Indians have been required to prove that the site was “central or indispensable” to their religions. In *Sequoyah v Tennessee Valley Authority*¹⁶ the Cherokees failed to stop the construction of the Tellico Dam as the potentially flooded area was not regarded as the cornerstone of, or sufficiently central to, their religion.¹⁷ The claims were described as personal cultural preferences and not convictions shared by an organized group.¹⁸ There was thus no need to proceed to the compelling interest test. This central or indispensable threshold is greater than that required in non-Indian cases reviewed in Chapter 8. Indeed the centrality requirement in non-Indian cases such as *Yoder* and *Woody* merely served to *qualitatively* illustrate the religious nature of a seemingly secular activity in order to overcome unfamiliarity to the dominant society. It was not intended to act as a *quantitative* threshold for First Amendment protection.¹⁹ In essence, such a requirement means that a religion must be threatened with virtual extinction before attracting First Amendment relief.²⁰

There was some comfort in the *Sequoyah* ruling as, crucially, it was acknowledged that Indians need not have a property interest in the land at issue to have a First Amendment right.²¹ As the Cherokees had successfully argued, environmental and endangered species claims had never been disabled by the lack of a property right. Indeed, as the court remarked, this was particularly poignant “in view of the history of the Cherokee expulsion from Southern Appalachia followed by the “Trail of Tears” to Oklahoma.”²²

¹⁵ McDonald, A. (2004). "Secularizing the Sacrosanct: Defining Sacred for Native American Sacred Sites Protection Legislation." *Hofstra Law Review* 33: 751-784, 767.

¹⁶ 620 F.2d 1159 (6th Cir.)(1980)

¹⁷ Trope, J. (1992) *op.cit.*, p378.

¹⁸ *Ibid* at 1164-1165

¹⁹ Boradiansky, T. (1990). "Conflicting Values: The Religious Killing of Federally Protected Wildlife." *Natural Resources Journal* 30: 709-754, 739

²⁰ Falk, D. (1989) *op.cit.*, p557.

²¹ Fish, J. (1990). "Sacred Site Free Exercise Claims on Government Land: The Constitutional Slighting of Indian Religions." *New Mexico Law Review* 20: 113-134, 123.

²² At 1164

In *Badoni v Higginson*,²³ Navajo gods were submerged under a lake in the pursuit of recreational boating with any potential accommodation of the Navajos regarded as an Establishment for First Amendment purposes. Yet the protection of a non-proselytising minority faith from government action can hardly be said to violate the Establishment Clause by acting as a coercive, evangelical force. The courts in *Sherbert* and *Yoder*, discussed in Chapter 8, managed such accommodation without inadvertently establishing the Seventh Day Adventist religion in South Carolina or the Amish in Wisconsin.²⁴

The *Badoni* court established a specific limitation on the accommodation of Indian religion on public lands: the “[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area.”²⁵ In addition, excluding tourists would mean creating a “government-managed religious shrine.”²⁶ The district court analogised the case to someone claiming that the Lincoln Memorial was a religious shrine and seeking to exclude visitors. Yet this ignored the fact that Rainbow Bridge had been a sacred site long before the United States came into being and the Navajos were not seeking exclusive possession.²⁷

In *Crow v Gullett*,²⁸ the construction of viewing platforms, parking areas and trail roads trumped the necessary tranquillity required for Lakota prayer as tourism was a sufficiently compelling interest. Thus the grotesque result was that the non-Indians’ right as a spectator of Indian religion outweighed the right to practice it in peace. The Indians failed to establish “that they are being injured or penalized by their adherence to the tenets of their religion, or that their conduct in the course of exercising their beliefs has been unduly restricted.”²⁹ Religious practices needed to be *indispensable* to be worthy of protection.³⁰

This case exceeded in crass insensitivity the other cases in that Bear Butte was being deliberately marketed as a tourist attraction for non-Indian consumption due to its

²³ 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

²⁴ Brown, B. E. (1999) *op.cit.*, p53

²⁵ 638 F.2d at 179

²⁶ At 179

²⁷ Brown, B. E. (1999) *op.cit.*, p46

²⁸ 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

²⁹ *ibid* at 858-859

³⁰ Fish, J. (1990) *op.cit.*, p123.

spiritual significance to Indians.³¹ Any establishment concern in accommodating the Indians was surely defeated by the fact that the Butte had indeed been purchased by the state in the knowledge that it was something of a religious shrine, and thus there was already an entanglement. Indeed, there was conceivably an endorsement of Indian religion, not *qua* religion and out of deference to the practitioners, but merely as a tourist attraction and spectacle. Indeed, the state remarked in the trial that “the Indian religious tradition helps define the value and importance of Bear Butte to this region.”³²

It was at this point in a dismal catalogue of the destruction of Indian religious practice at sacred sites that the Supreme Court made its definitive statement on the relationship between Indian free exercise of religion and the government’s property rights in *Lyng v Northwest Indian Cemetery Association*.³³

10.2.2.1 Lyng

This case concerned the building of a logging road on public land through an area of California considered sacred by various Indian tribes. The Supreme Court, in an opinion written by Justice O’Connor, determined that there was no free exercise infringement as there was no governmental coercion.³⁴ She admitted that the threat to the Indian religion was extremely grave yet seemed to take an inviolate and absolute view of the government’s property rights to use its land as it wished: “whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, its land.”³⁵ O’Connor did remark that “a law [actually] forbidding the Indian respondents from visiting the area would raise a different set of constitutional questions.”³⁶ There was no such barrier to physical access, yet when the government destroyed the tranquillity needed for *spiritual* access the First Amendment was not implicated.

³¹ Brown, B. E. (1999) *op.cit.*, p93

³² *ibid* p106

³³ 485 U.S. 439 (1988).

³⁴ Michaelson, R. (1988). "Is the Miner's Canary Silent? Implications of the Supreme Court's Denial of American Indian Free Exercise of Religion Claims." The Journal of Law and Religion: 97-114, 114.

³⁵ *Lyng* at 453

³⁶ *Lyng* at 453

In his dissent Justice Brennan questioned Justice O'Connor's comparison to *Roy*,³⁷ in which the Court had remarked that the "Free Exercise clause cannot be understood to require the Government to conduct its own affairs in ways that comport with the religious beliefs of particular citizens."³⁸ He rejected the characterisation of the matter as being merely an internal affair of the government as the land use decision had "substantial external effects that government decisions concerning office furniture and information storage obviously will not, and they [should therefore be] correspondingly subject to public scrutiny and public challenge."³⁹ Indeed, as Brown remarks, "*Lyng* involved 5000 tribal members plus various environmental organizations, not one citizen (*Roy*) challenging a rational federal scheme of social security."⁴⁰ Ironically, in *Roy*, O'Connor herself had strenuously resisted the call for a wider abandonment of the compelling interest test for government behaviour indirectly burdensome to religion.⁴¹

As a result of *Lyng*, once the conduct has been categorised as an internal governmental matter, the sole inquiry the court makes is whether the government is directly coercing or imposing a penalty on a religious practice. It is a purposive rather than effects-based inquiry. This excessive formalism, as Falk describes it, relies on form rather than substance, intent rather than effect.⁴²

As Justice Brennan commented: "The incongruous result is that when the government forces an individual or group to choose between their beliefs and a benefit, it is an impermissible burden, yet when the government prevents a practice and entirely eliminates the element of choice, no burden exists..."⁴³ He remarked that the Indian tribes faced a destruction far greater and more immediate than the Amish had faced in *Yoder*.⁴⁴ Furthermore, the "respondents here do not even have the option, however unattractive it

³⁷ Please see Chapter 8

³⁸ *Roy* at 699

³⁹ 485 U.S. at 470-71.

⁴⁰ Brown, B. E. (1999) *op.cit.*, p156

⁴¹ *ibid* p159

⁴² Falk, D. (1989) *op.cit.*, p546.

⁴³ Loesch, M. (1993) *op.cit.*, p 355

⁴⁴ Brown, B. E. (1999) *op.cit.*, p165

might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it non-transportable.”⁴⁵

The sacred site was eventually saved when Congress passed protective legislation in 1990 adding the area to Siskiyou Wilderness.⁴⁶ Yet this was protection of *wilderness*, not Indian *religion*,⁴⁷ and does not alter the adverse precedent.

10.2.2.2 Post *Lying* Case Law

Although the *Lying* sacred site was eventually saved by environmental legislation, in general, Indian attempts simultaneously to invoke environmental concerns have been unsuccessful. For example, in 1996 they failed to prevent the construction of an observatory on the top of Mount Graham, an Apache sacred site,⁴⁸ when they unfortunately allied with conservationists and their Red Squirrel crusade. Eventually, after protracted litigation and expensive lobbying, Congress exempted the telescope project from the *Endangered Species Act* and so the Red Squirrel, and incidentally the sacred mount, were doomed. University of Arizona astronomers were said to have beaten a Red Squirrel piñata to pulp in celebration.⁴⁹

Again, parallel environmental concerns were incidentally raised to no avail in *Navajo Nation v United States Forest Service*.⁵⁰ The Court confirmed that a ski resort extension, using treated sewage effluent to make artificial snow on the most sacred Navajo mountain, did not violate the *Religious Freedom Restoration Act*⁵¹ as it “does not place a *substantial burden* on their exercise of religion by forcing them to act contrary to their religion under the threat of a legal penalty or choose between their religion and the receipt of a government benefit.”⁵² The dissent remarked, “[A] court would surely hold that the government had imposed a

⁴⁵ At 467-468

⁴⁶ Falcone, B. (1994). "Legal Protection (or the Lack Thereof) of American Indian Sacred Religious Sites." *Federal Bar News and Journal* **41**: 568-575, 573.

⁴⁷ Griffin, R. (1995). "Sacred Site Protection against a Backdrop of Religious Intolerance." *Tulsa Law Review* **31**: 395-420, 407.

⁴⁸ Suagee, D. (1996) *op.cit.*, p165. *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992)

⁴⁹ Williams Jr, R. (1993). "Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World." *West Virginia Law Review* **96**: 1133-1164, 1136.

⁵⁰ 535 F.3d 1058 (2008)

⁵¹ Please see Chapter 8 for a discussion of RFRA.

⁵² <http://www.gallupindependent.com/2009/04April/042709tribeslook.html> [Accessed 20 October 2011]

‘substantial burden’ on the ‘exercise of religion’ if it purchased by eminent domain every Catholic Church in the country.”⁵³ Yet on this analysis the government would not be coercing Catholics to act contrary to their beliefs under the threat of sanctions nor would there be the conditioning of a government benefit.⁵⁴

To conclude, according to *Lying* and progeny, it is only government activity on public land which penalizes or coerces religion that violates the First Amendment.⁵⁵

10.2.3 Executive Accommodation

Lying determined the minimum protection for Indian sacred sites provided by the Free Exercise Clause of the First Amendment. Yet government agencies can give greater protection as long as there is no violation of the Establishment Clause of the First Amendment. Thus executive accommodation is about what is constitutionally permissible, whereas the *Lying* case was about what was constitutionally required.⁵⁶

10.2.3.1 Executive Order 13007

Executive Order 13007 directed “executive branch agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”⁵⁷ The language was hardly mandatory with phrases such as “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions” and “[w]here appropriate, agencies shall maintain the confidentiality of sacred sites.”

Ultimately, Executive Order 13007, like AIRFA, does not create rights of action, is dependent on administrative good will, and does not actually *prevent* administrative agencies from adversely affecting sacred sites.⁵⁸

⁵³ *Navajo Nation*, 535 F.3d at 1090.

⁵⁴ Wiles, J. (2010) *op.cit.*, p481.

⁵⁵ Fish, J. (1990) *op.cit.*, p131.

⁵⁶ Dussias, A. (2000) *op.cit.*, p38.

⁵⁷ Exec. Order 13,007, 61 Fed. Reg. 26,771 (1996).

⁵⁸ Lee, S. (2000). "Government Managed Shrines: Protection of Native American Sacred Site Worship." *Val. U.L. Rev.* **35**: 265-308, 296.

10.2.3.2 Case Law on Executive Accommodation

In *Bear Lodge Multiple Use Ass'n v. Babbitt*⁵⁹ a National Park Service Management Plan, which included a voluntary ban on rock climbing at the Indian sacred site of Devils Tower, was challenged on the grounds that it violated the Establishment Clause by favouring Indian religion. The court dismissed the challenge and found that the potential threat of a mandatory climbing ban was hypothetical and not an injury-in-fact.⁶⁰ As for any establishment concerns, such accommodation could hardly be coercive by forcing rock climbers to either participate or encouraging a feeling of alienation that they are not full members of the Sioux religious community.⁶¹

In 2004 the Tenth Circuit upheld a Park Service Management Plan requesting similar voluntary compliance on the part of tourists who were asked to refrain from walking beneath a sacred Navajo natural arch.⁶² These examples illustrate that agencies may, but are not required to, accommodate sacred sites.⁶³

Again, a recent Forest Service ban on all rock climbing at Cave Rock, a sacred site of the Washoe Indians, but the permitting of non-invasive recreational activity such as boating fishing and picnicking, was held not to violate the Establishment Clause.⁶⁴ Significantly, the rock climbing involved permanent bolts and the construction of a masonry floor within the cave. Applying the Lemon Test, (discussed in Chapter 8) the secular purpose was satisfied by the preservation of a cultural historic area. As for the second and third prongs, advancing religion or excessive entanglement, the plan passed constitutional muster as it did not impose a total ban on recreational activity, which was the Washoe preferred option, nor did it attempt the imposition of a Washoe orthodoxy.⁶⁵

⁵⁹ *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998)

⁶⁰ *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821-22 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000). Bluemel, E. (2004). "Accommodating Native American Cultural Activities on Federal Public Lands." *Idaho Law Review* 41: 475-563, 509.

⁶¹ Cross, R. and Brenneman, E. (1997). "Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century." *Public Land & Resources Law Review* 18: 5-45, 33.

⁶² *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998)

⁶³ Carpenter, K. (2008). "Real Property and Peoplehood." *Stanford Environmental Law Journal* 27: 313-395, 333.

⁶⁴ *Access Fund v. United States Department of Agriculture*, 499 F.3d 1036 (9th Cir. 2007).

⁶⁵ Albert, M. (2008) *op.cit.*, p508.

When cries of Establishment Clause violations by excessive entanglement are raised it must be remembered that federal agencies are already heavily entangled with religion, particularly Christianity. Indeed, the National Park Service (NPS) owns and leases churches and other religious properties on government lands imposing restrictions on interference with services. Additionally, twice a year at Tumacacori National Historic Park in Arizona, the Park Service waives park fees and even sponsors a Catholic mass re-enacting 18th century religious traditions.⁶⁶ The NPS also manages the church in which Martin Luther King was a pastor, closing it periodically for religious services,⁶⁷ and furthermore endorses a non-profit Christian proselytisation mission in 35 national parks.⁶⁸ Even the Pope was allowed to conduct a mass on the National Mall in Washington DC.⁶⁹ Thus, as Carpenter reminds us, Christians have been permitted to exclude the public at least temporarily.⁷⁰ As for the solemn duty to climb rocks this is banned on Mount Rushmore which incidentally is closed to visitors on Christmas Day.⁷¹ The disappointed tourist must also find other entertainment during religious services at Arlington Cemetery.⁷²

10.2.4 Culture or Religion

In some sacred sites cases the courts have categorised the Indian activity as cultural, which has two important implications. Firstly, it appropriates the ability of Indians to self-define their own culture. Secondly, it *should* circumvent the Establishment Clause as the federal government cannot violate the Constitution by establishing a culture. Indeed, it could be claimed that the federal government has a positive mandate, via the Trust Relationship, to support Indian culture. Of course any privileging of Indian culture, by means of the Trust Relationship, is theoretically circumscribed by the concept of Equal Protection.⁷³ However, following *Morton v Mancari*, this is merely subject to rational basis

⁶⁶ Brady, J. (1999). " 'Land Is Itself a Sacred, Living Being': Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge." American Indian Law Review **24**: 153-186, 170.

⁶⁷Dussias, A. (2000) *op.cit.*, p30.

⁶⁸ Langford, M. (2003) *op.cit.*, p135.

⁶⁹ Zellmer, S. (2002). "Sustaining Geographies of Hope: Cultural Resources on Public Lands." University of Colorado Law Review **73**: 413-520, 458.

⁷⁰ *O'Hair v. Andrus*, 613 F.2d 931, 937 (D.C. Cir. 1979). [FN58] From Carpenter, K. (2006) *op.cit.*, pp37-55.

⁷¹ Carpenter, K. (2006) *op.cit.*, p44.

⁷² Brady, J. (1999) *op.cit.*, p170.

⁷³ Bluemel, E. (2004) *op.cit.*, p496.

review. It may therefore be beneficial for the Indian litigant himself to plead that the activity is cultural,⁷⁴ or paradoxically collaborate with a judiciary that regards it as little more than pagan superstition.⁷⁵

10.2.5 The Religious Land Use and Institutionalized Persons Act 2000

The *Religious Land Use and Institutionalized Persons Act* 2000, although introduced to enable religious land use to, in certain circumstances, circumvent zoning laws, held out some promise for sacred sites. It mandated the compelling interest test for land use that restricts religious practice. However, it is not applicable to land use decisions on public land,⁷⁶ and only applies when the plaintiffs have a property interest in the religious institution or place,⁷⁷ such as “an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest”⁷⁸ In *Northern Cheyenne v. Martinez*⁷⁹ an Indian nation successfully asserted a property interest sufficient to trigger application of RLUIPA by virtue of owning small parcels of land adjacent to Bear Butte, and furthermore all had a right of access to the Butte which also constituted a sufficient property interest.⁸⁰

In *Cutter v. Wilkinson*⁸¹ the Supreme Court recently held that the institutionalized portions of the act, which have similar provisions (Section 3), were constitutional but made no comment on the land use provisions.⁸² If the land use provisions of RLUIPA are ultimately determined to be constitutional it means that Congress can specifically, but not

⁷⁴ *ibid* p497

⁷⁵ Sewell, E. (1984). "The American Indian Religious Freedom Act." *Arizona Law Review* 25: 429-472, 463.

⁷⁶ See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1077 (2008). “RLUIPA applies only to government land use regulations of private land—such as zoning laws—not to the government's management of its own land.” FN147 FROM Key, J. (2010). "This Land is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act." *AFL Rev.* 65: 51-106.

⁷⁷ Carpenter, K. (2006) *op.cit.*, p996.

⁷⁸ 42 U.S.C. s 2000cc-5(5).

⁷⁹ Plaintiff's Third Amended Complaint for Preliminary and Permanent Injunction, *N. Cheyenne Tribe v. Martinez*, No. Civ. 03-5019 (D.S.D.W.D. May 23, 2003).

⁸⁰ The case concerned a challenge to a shooting range on *private* land which would have had detrimental effects on Indian worship at Bear Butte, a state park purchased from private owners in 1961. Leach, J. (2005). "A Shooting Range at Bear Butte: Reconciliation or Racism." *SDL Rev.* 50: 244-292, 279

⁸¹ 125 S. Ct. 2113 (2005).

⁸² Brucker, S. (2008) *op.cit.*, p280.

generally, enact remedial legislation.⁸³ In attempting to satisfy the congruence and proportionality requirement of *Boerne* the legislative history listed several examples of land use regulations and their effect on religion.⁸⁴ This was an attempt to avoid the disproportionality objection raised in *Boerne* to congressional remedial enforcement, by way of the RFRA, of the Fourteenth Amendment by section 5.⁸⁵ For the RLUIPA, Congress drew on a study by Professor W. Cole Durham of Brigham Young University which found that minority religions, although representing only 9% of the population, were involved in over 49% of cases over the right to use religious buildings at a local site and over 33% of cases that sought approval of accessory uses. He argued that this demonstrated that minority religions were overrepresented in zoning disputes.⁸⁶

The difficulty, as discussed in Chapter 8 in the context of RFRA, is that applying *Lying* may mean that a “substantial burden” is never found to trigger application of the statutes.⁸⁷ This would mean that RLUIPA merely changed the definition of the exercise of religion⁸⁸ not the test of a substantial burden.⁸⁹

10.2.6 Establishing a Property Right

The diverse property interests that were recognised in RLUIPA as triggering the Act’s protection were “an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest”⁹⁰ There are several advantages of a property rights framework: Firstly, they run with the land thus negating fears of a lack of perpetuity.⁹¹ Secondly, they can protect a greater range of

⁸³ See FN 121 Schragger, R. (2004) . "The Role of the Local in the Doctrine and Discourse of Religious Liberty." Harvard Law Review **117**: 1810-1892 FOR ALL CASES

⁸⁴ Jensvold, S. (2001) *op.cit.*, p3. For Boerne case please see Chapter 8.

⁸⁵ Adams, C. (2001). "The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will Rluipa's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny." Fordham L. Rev. **70**: 2361-2408, 2371. Please see Chapter 8

⁸⁶ *ibid* p2381

⁸⁷ Bluemel, E. (2004) *op.cit.*, p490

⁸⁸ “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. s. 2000bb-2(4) (2006) (citing to 42 U.S.C. s. 2000cc-5(7)(A)'s definition of "religious exercise").

⁸⁹ Skibine, A. (2009). "Exhibiting Culture: Museums and Indians. Culture Talk or Culture War in federal Indian Law?" Tulsa L. Rev. **45**: 89-109, 102.

⁹⁰ 42 U.S.C. s 2000cc-5(5).

⁹¹ Bluemel, E. (2004) *op.cit.*, p557

interests than the Constitution and its free exercise protection.⁹² Thirdly, property-based claims can be pleaded alongside constitutional or treaty claims as there is no conflict and often no significantly different remedy sought.⁹³ Lastly, property rights can *compel* agency action.⁹⁴

The framing of claims within a property rights paradigm runs the risk of diluting the free exercise component. However, as Worthen remarks, relying purely on the First Amendment has had little success anyway.⁹⁵ Two examples, easements and adverse possession may be relevant in the context of sacred sites.

10.2.6.1 Easements and Adverse Possession

There is no *federal* law establishing easements.⁹⁶ Prescriptive easements are established under *state* law by demonstrating that the “claimant’s use of the property was open, notorious, exclusive, adverse or under claim of right, continuous and uninterrupted for the statutory period.”⁹⁷ Because state-imposed statutory periods for such establishment do not run against the federal government there may be a difficulty for federal public land.⁹⁸ Furthermore, a defence of “permissive use” may be raised as evidenced by government recognition of the importance of the use of public land by Native Americans for cultural (but of course not necessarily religious) practices.⁹⁹

More promising is the use of prescriptive easements against *private* land, for example the Zuni successfully gained access rights to a path across private land that they had been reportedly using since 1540. The court found that their use was “actual, open

⁹² *ibid* p558

⁹³ *ibid* p561

⁹⁴ *ibid* p562

⁹⁵ Worthen, K. (2001). "Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude." *St. Thomas Law Review* 13: 239-258, 253.

⁹⁶ *ibid*

⁹⁷ Bluemel, E. (2004) *op.cit.*, p550

⁹⁸ *ibid* p548

⁹⁹ *ibid* p548

and notorious, continuous and uninterrupted.”¹⁰⁰ The statutory time period of 10 years was easily evidenced by the four yearly pilgrimage documented since 1924.¹⁰¹

Easements are not absolute: the owner in certain circumstances may change the servient parcel which for a sacred site would be disastrous. Furthermore, only individuals may obtain easements, which is problematic when tribes seek to establish a right.¹⁰² Should an easement be found then a declaratory judgement as to continued use or other equitable remedy should be requested; monetary damages for infringement would of course be inappropriate.¹⁰³ However, the threat of money damages could be used as leverage to exact other more relevant concessions.¹⁰⁴

Claims for adverse possession are also not generally available against a government. Yet some state lands not reserved for public use may be so acquired as well as sub-state government owned land.¹⁰⁵ The denial of adverse possession was held in one case as “inconsistent with the federal posture of trust and vigorous protection of Indian rights.”¹⁰⁶

The bitter irony is that “[as] American law stands today, organized churches can acquire title through adverse possession by praying on a site for less than a lifetime, while Indians’ prayers do not make out title even after a millennium.”¹⁰⁷

¹⁰⁰ *United States ex rel. Zuni Tribe v. Platt*, 730 F. Supp. 318, 321 (1990)

¹⁰¹ Carpenter, K. (2005) "A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners," *UCLA Law Review* 52: 1061-1148, 1095.

¹⁰² *ibid* p1097

¹⁰³ *ibid* p1098

¹⁰⁴ *ibid* p1100

¹⁰⁵ Bluemel, E. (2004) *op.cit.*, p552.

¹⁰⁶ *Schaghticoke Tribe of Indians v. Kent Sch. Corp.*, 423 F. Supp. 780, 784 (D. Conn. 1976).

¹⁰⁷ Dalton, S. (1994). "Saving Native American Religious Sites: The Haskell Medicine Wheel." *Kansas Journal of Law & Public Policy* 4: 61-69, 64.

10.2.7 Historic Preservation and Environmental Legislation

Two potential sources of sacred site protection, albeit incidental, are the *National Historic Preservation Act* (1966)(NHPA)¹⁰⁸ and the *National Environmental Policy Act* (1969)(NEPA).¹⁰⁹ The NHPA has been described as a procedural statute or a “stop, look and listen” statute.¹¹⁰ It authorised the Secretary of the Interior to “maintain a register of structures, areas and districts considered significant in American history, architecture, archaeology, engineering and culture.”¹¹¹ However, it was the first preservation law to require Native American involvement,¹¹² as the 1992 amendment gave tribes the option of taking over the role of Preservation Officer for sites within tribal lands and gave them the statutory right to be consulted in the section 106 consultation process, should a federal undertaking potentially affect a historic property.¹¹³ The 1992 amendments also specifically added “properties of traditional religious and cultural importance” to Native American tribes as types of properties eligible for listing.¹¹⁴

The parameters of the duty of agency consultation vary from mere notice to actual consent. In *Attakai v United States* the court remarked that the NHPA regulations “clearly require that an Indian Tribe participate as a consulting party and that it must *concur* in any agreement regarding undertakings which affect *its* lands.”¹¹⁵

Bluemel criticises the act as ineffective as there is no private right of action to prevent the destruction of sacred sites on *public* land.¹¹⁶ It is merely a procedural statute requiring consultation, although consent if on Indian lands.¹¹⁷ Injunctive relief is available

¹⁰⁸ 16 U.S.C. ss 470a to 470w-6

¹⁰⁹ 42 U.S.C. ss 4321-4347

¹¹⁰ *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir. 1994); *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988)

¹¹¹ 16 U.S.C. s 470a (1982).

¹¹² De Meo, A. (1994). "More Effective Protection for Native American Cultural Property through Regulation of Export." *American Indian Law Review* 19: 1-72, 29.

¹¹³ Suagee, D. (1999) *op.cit.*, p523.

¹¹⁴ 16 U.S.C. s 470a(d)(6) (2000). Amato, C. (2002). "Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage." *Colum. J. Envtl. L.* 27: 1-44, 22.

¹¹⁵ *Attakai v. U.S.*, 746 F. Supp. 1395 (D. Ariz. 1990) at 1408

¹¹⁶ Bluemel, E. (2004) *op.cit.*, p529.

¹¹⁷ Pianca, E. (2004). "Protecting American Indian Sacred Sites on Federal Lands." *Santa Clara Law Review* 45: 461-492, 488.

but only for failure to pursue the required procedures, not for a substantive destruction. Importantly, it did contain a special mandate to keep information about traditional cultural properties confidential if such disclosure could result in an “invasion of privacy,” “risk harm to the historic property,” or “impede the use of a traditional religious site.”¹¹⁸

Although environmental concerns were incidentally pleaded in the *Mount Graham* and *Navajo Nation* cases above, the *National Environmental Policy Act* (NEPA) provides an explicit framework for considering Indian concerns. Under NEPA consultation is with tribal leaders, in contrast to NHPA when it is with tribal and religious leaders.¹¹⁹ Unfortunately, it is also a largely procedural statute with the major requirement being to produce an Environmental Impact Statement (EIS) and/or Environmental Assessment. Failure to complete an EIS when renewing geothermal leases caused them to be set aside in *Pit River Tribe v. U.S. Forest Service*.¹²⁰ Yet there is no substantive protection of Indian religion as religion and only procedural protection for the environment.

National antiquities laws, such as NHPA and the ARPA (discussed in Chapter 9), recognise the importance of secrecy for Indian sacred sites by permitting agencies to refuse to disclose the “location or character” of historical or archaeological sites whenever there is a “substantial risk of harm, theft, or destruction.”¹²¹ For environmental legislation there is no specific mandate but rather a reliance on generic administrative procedure.¹²² In administrative proceedings on the adverse impact of a hydroelectric project on the Kootenai religion, the Judge refused a blanket protective order over details of Kootenai rituals, vision quests, and the names and functions of spiritual entities but ruled that any such materials should remain confidential.¹²³ In effect, the final decision was split into two parts, one for full distribution and the other containing the sensitive information for restricted distribution.¹²⁴ However, as Barsh remarks, judges are often reluctant to

¹¹⁸ NHPA s 304, 16 U.S.C. s 470w-3. from FN 153 FROM Suagee, D. (1999) *op.cit.*, p517.

¹¹⁹ Stern, W. (2009). Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective). Rocky Mountain Mineral Law Foundation: Energy Development: Access, Siting, Permitting and Delivering on Public Land p7

¹²⁰ 469 F.3d 768 (9th Cir. 2006)

¹²¹ FN 198 from Barsh, R. (1986). "The Illusion of Religious Freedom for Indigenous Americans." Oregon Law Review 65: 363-412. "National Historic Preservation Act, 16 U.S.C. s 470w-3 (1982) and Archaeological Resources Protection Act, 16 U.S.C. s 470hh (1982). 5 U.S.C. s 552 (1982)."

¹²² Michaelsen, R. (1985) *op.cit.*, p72

¹²³ Barsh, R. (1986) *op.cit.*, p393.

¹²⁴ Michaelsen, R. (1985) *op.cit.*, p71

compromise Sixth Amendment requirements of a public tribunal.¹²⁵ Indeed the Freedom of Information Act (FOIA) creates a judicially enforceable public right to agency records in particular the Environmental Impact Assessment produced pursuant to NEPA.¹²⁶ Furthermore, since the decision in *Klamath*, which held that the Trust Relationship was not sufficient to exempt information from FOIA,¹²⁷ there is no *automatic* protection from the disclosure provisions of the FOIA.¹²⁸

10.2.8 Treaty Rights

The reserved rights doctrine may be useful to establish a continuing right of worship, or religious usufruct, on ceded lands in the same way that it has been employed to establish water, fishing and hunting rights.¹²⁹ These implied rights were to accord with Indians' reasonable expectations at the signing of the treaty. Similarly, a tribe could argue that only the exclusive right of occupation of the ceded land was relinquished by treaty, not the lesser right of visitation.¹³⁰ It could also be argued that compensation from the Indian Claims Commission was merely for economic uses of the land and was not intended to, and indeed could not, compensate for spiritual use.¹³¹

Should a retained treaty right be demonstrated then this would circumvent First Amendment and Equal Protection analysis. Furthermore the Indian Canons of Construction, which state that treaties should be liberally read in favour of the Indians with ambiguities resolved in their favour, could be deployed. Thus it may not be necessary or indeed possible to find the words "religious" or "sacred" in treaties.¹³²

¹²⁵ Barsh, R. (1986) *op.cit.*, p393

¹²⁶ Plaut, E. (2009). "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management." *Ecology LQ* **36**: 137-165, 147.

¹²⁷ *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001).

¹²⁸ Tsosie, R. (2003) *op.cit.*, p306.

¹²⁹ *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *United States v. Winans*, 198 U.S. 371, 381-82 (1905); and the Supreme Court case of *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999).fn 227 from Bluemel, E. (2004) *op.cit.*,

¹³⁰ Worthen, K (2001) *op.cit.*, p252.

¹³¹ *ibid* p252

¹³² Carpenter, K. (2005) *op.cit.*, p1103.

In all 60 Indian treaties contained reserved rights on public land.¹³³ The argument goes that the reservation of hunting and fishing rights would have included an implicit right to travel, camp and even pray in the ceded grounds.¹³⁴ Yet, as Carpenter remarks, any implication of retained religious rights for those treaties that were signed during the period of suppression in the Nineteenth Century is problematic.¹³⁵ When the federal government had embarked on a relentless criminalisation and assimilation programme an implied and retained right to continue with such “heathenism” seems hardly plausible.

10.2.9 Congressional Land Grants

Much of the above is vulnerable to the caprice of an unsympathetic Executive and Judiciary, requires an imaginative interpretation of treaty rights, or involves a circuitous recruitment of heritage and environmental protection law. Direct congressional legislative intervention circumvents these difficulties. One example in 1970 was legislation that gave trust title to approximately 48,000 acres of federal land in New Mexico. This had been taken from the Taos Indians in 1906 by presidential order and without the payment of any compensation. Although the Taos Indians had been granted a fifty year special use permit in 1933 they wanted a more permanent and exclusive arrangement, in particular at Blue Lake, one of their more sacred shrines. This would enable non-Indian use to be restricted and give more privacy to their religious practices.¹³⁶ Even President Reagan signed the “Zuni Heaven” bill,¹³⁷ which protected a Zuni sacred place.¹³⁸ This expanded the Zuni land base to include an area named *Kolhu/wala:wa*, which is also called Zuni Heaven or Kachina Village.¹³⁹ Other legislative interventions include protection of the El Malpais monument in

¹³³ Nie, M. (2008). "The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands." Nat. Resources J. **48**: 585-647, 597

¹³⁴ Carpenter, K. (2005) *op.cit.*, p1104

¹³⁵ Carpenter, K. (2002). "In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases." New England Law Review **37**: 619-633, 630.

¹³⁶ Fisher, L. (2001). "Indian Religious Freedom: To Litigate or Legislate?" American Indian Law Review **27**: 1-39, 17.

¹³⁷ Zuni Indian Tribe Lands Bill (P.L. 98-408; 98 Stat. 1533),

¹³⁸ Harjo, S. (2004). "The American Indian Religious Freedom Act : Looking Back and Looking Forward." Wicazo Sa Review **19**(2): 143-151, 150.

¹³⁹ Mills, B. and Ferguson, T (1998). "Preservation and Research of Sacred Sites by the Zuni Indian Tribe of New Mexico." Human Organization **57**(1): 30-42, 39.

1987 and the *Timbisha Shoshone Homeland Act* in 2000, which purchased strips of land that were part of tribal ancestral homeland.¹⁴⁰

This case by case congressional intervention is a more definitive outcome than relying on judicial whim or agency accommodation. In addition, any repatriation of ancestral lands can be justified more easily if the federal government had appropriated the land for a specific purpose which has now been fulfilled. For example in 2000, the Department of the Army transferred part of the land base of the former Fort Wingate Army Depot in New Mexico to the Bureau of Indian Affairs for the use of the Navajo and Zuni Tribes.¹⁴¹

10.2.10 Sacred Site Statute

These specific congressional interventions are welcome, if sporadic, whereas a generic sacred site statute would be a more comprehensive solution. Such a statute should include a wide-ranging definition of the adverse effects to the site that are prohibited, in the absence of a compelling interest, such as “any action that would, directly or indirectly, desecrate, destroy, disturb, inhibit, interfere, infringe upon, substantially alter or burden a Native American sacred site or the free exercise of traditional religious and cultural activities that are conducted at a sacred site.”¹⁴² “Religious and cultural” are included to avoid any characterisation dilemma and pre-empt establishment concerns, but a statute preserving the status quo of uninhabited federal land would hardly be an excessive entanglement.¹⁴³ In any case, no court as yet, that has considered the merits of a violation of the Establishment Clause by governmental accommodation of sacred sites, has held such action unconstitutional.¹⁴⁴

Alternatively, a sacred site statute need not explicitly create a denominational preference. The preference may simply be to site-specific religions, Indian or non-Indian. The fact that non-Indian religions do not have such an intimate relationship with the land in North America is beside the point. As Winslow remarks, a law exempting religions from

¹⁴⁰ Zellmer, S. (2002) *op.cit.*, p456.

¹⁴¹ Tsosie, R. (2003) *op.cit.*, p306.

¹⁴² Lee, S. (2000) *op.cit.*, p299

¹⁴³ Johnston, D. (2001) *op.cit.*, p451.

¹⁴⁴ Suagee, D. and Trope, J. (2008) *op.cit.*, p5

gender discrimination would favour the Catholic Church, but if there were no explicit mention of a denomination it would pass muster.¹⁴⁵

Both public and private land could be included in access provisions. There would be a specific confidentiality provision and a facility for a temporary closure to non-practitioners, but this would need to be narrowly drawn up both geographically and temporally.¹⁴⁶ There should also be a criminal penalty for any intentional damage to a site and for releasing confidential information.¹⁴⁷ Access by non-Indians cannot be completely denied. However any lack of confidentiality could provoke what Professor Nash calls the “irony of victory” in which the revelation of the site encourages desacralisation by tourists and backpackers.¹⁴⁸

10.2.11 Summary

Lyng was a seminal case in that the Court definitively held that any accommodation of Indian use of federal public land was not *required* by the Free Exercise Clause. Agency accommodation is *permitted* provided there is no violation of the Establishment Clause. When federal property rights, mining interests or engineering projects are at stake or even the sacred right to tourism is infringed, the nation’s first residents must usually yield. The greater the non-Indian interest at stake the less chance of any meaningful accommodation of aboriginal spirituality. Magnanimity must above all be cost-effective.

Other circuitous uses of treaty rights and property rights are uncertain and require litigation to establish which is expensive and protracted. Direct congressional intervention to delineate and protect sacred sites has been sporadically successful, but is a more permanent solution which is less susceptible to governmental whim. A sacred site statute, carefully drafted to circumvent establishment concerns and circumscribe the number of sites, would be an attainable objective.

¹⁴⁵ Winslow, A. (1996) *op.cit.*, p1334

¹⁴⁶ Neal-Post, J. (1994). "Sacred Sites and Federal Land Management: An Analysis of the Proposed Native American Free Exercise of Religion Act of 1993." Natural Resources Journal 34: 443-478, 461

¹⁴⁷ Lee, S. (2000) *op.cit.*, p305

¹⁴⁸ Ward, R. (1992) *op.cit.*, p841

10.3 Canada

10.3.1 Introduction

The *Indian Act* sets aside reserves for Indian bands and, while the Crown retains legal title and the *Act* circumscribes activities that can be carried out therein, sacred sites within their boundaries have been left largely within band control.¹⁴⁹ This has not been based on any serious recognition of tribal sovereignty but perhaps due to the fact that reserves in Canada account for only 0.5% of the land mass compared to 3% for reservations in the United States.¹⁵⁰

For sacred sites outside reserves certain legislation provides for consultation. For example the *British Columbia Heritage Conservation Act* section 13(4)¹⁵¹ requires the minister, before making any decisions, to provide “an opportunity for consultation with the First Nations whose heritage sites or objects would be affected.”¹⁵² Similarly, section 12(1) of the *Canada National Parks Act* instructs the Minister to “where applicable provide opportunities for public participation at the national, regional and local levels including participation by aboriginal organizations ...”¹⁵³ Such hortatory provisions do not impose a requirement of First Nations consent and so their effectiveness as a protection for sacred sites on public land is limited.

There are several other reasons for the vulnerable state of sacred sites on public land. Firstly, there has been no Indian-specific free exercise legislation such as the US *American Indian Religious Freedom Act* 1978 which, although flawed, did at least articulate a certain empathy. Secondly, there have been no executive orders entreating, if not mandating, executive agencies to protect sacred sites. Thirdly, there is a much less vigorous and mature general free exercise jurisprudence in Canada that can be invoked. Finally, treaty-reserved rights have been articulated to a lesser extent than in the United States.

As to the final point, there is a general lack of clearly defined and delineated aboriginal rights in Canada. In particular, as discussed in Chapter 7, much uncertainty remains because of the latent acknowledgement of the potential existence of continuing aboriginal title over wide areas of Canada due to the lack of wholesale title extinguishment

¹⁴⁹ Ross, M. L. (2005) *op.cit.*, p13

¹⁵⁰ With 1.5% and 0.9% of the respective populations being Indian. Morse, B. (1997) *op.cit.*, p23.

¹⁵¹ R.S.B.C 1996 c.187

¹⁵² FN 12 Ross, M. L. (2005) *op.cit.*, p183

¹⁵³ S.C. 2000 c32

by treaty that was pursued in the United States. Such uncertainty could paradoxically be an advantage: a claim for putative aboriginal title over sacred sites cannot be peremptorily dismissed particularly since section 35 of the Constitution Act 1982 constitutionalised such a right. Such a claim may prompt interim relief due to such uncertainty which, due to the protracted enquiry required to prove or disprove such title, is certainly not a matter suitable for summary disposal. It is such interim relief that presently provides the best strategies for protecting sacred sites.

10.3.2 Interlocutory Injunctions

Interlocutory injunctions have been employed to protect aboriginal rights from a variety of threats. They have been granted to prevent forestry operations on Crown Land,¹⁵⁴ mineral exploration,¹⁵⁵ golf course construction,¹⁵⁶ restrain pesticide spraying¹⁵⁷ and the construction of a railway line.¹⁵⁸ Indeed as Sweeney remarks, the issue of an interlocutory injunction led to the negotiation of the *James Bay and Northern Quebec Agreement*.¹⁵⁹

There are several difficulties in granting such injunctions based on a putative aboriginal title or aboriginal right of undisturbed access to a sacred site.¹⁶⁰ Firstly, as the injunction is likely to remain in place for some time, due to the evidential complexity in preparing for trial, there may be considerable judicial reluctance. Indeed the aboriginal claim may be so unclear and inchoate at this stage that even granting interlocutory relief may be premature. Secondly, the other party may be acting on the basis of statutory rights and a suspension of activity may result in hardship. Thirdly, a large industry may be suspended raising public interest concerns. Fourthly, laches or unreasonable delay may be raised against the aboriginal claim. Lastly, straitened finances of the aboriginal claimants

¹⁵⁴ *MacMillan Bloedel Ltd. v. Mullin* (1985) 2 C.N.L.R. 28 (C.A.), (*'Meares Island case'*); *Hunt v. Halcan Log Services Ltd.* (1986) 4 C.N.L.R. 63 (S.C.) (involving both Aboriginal title and treaty rights); *Westar Timber Ltd. v. Ryan* (1989) B.C.L.R. (2d) 352 (C.A.)

¹⁵⁵ *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* [1979] 1 F.C. 487; (1978) 87 D.L.R. (3d) 342, 7 C.E.L.R. 75 (F.C. TD.).

¹⁵⁶ *Jules v. Harper Ranch Ltd.* [1989] 3 C.N.L.R. 67 (B.C. S.C.),

¹⁵⁷ *Bolton v. Forest Pest Management Institute* (1985) 66 B.C.L.R. 126,

¹⁵⁸ *Pasco v. Canadian National Railway Company* (1986) 69 B.C.L.R. 76

¹⁵⁹ Sweeney, D. (1992). "Interlocutory Injunctions to Restrain Interference with Aboriginal Title-The Balance of Convenience." *University of Queensland Law Journal* 17: 141-168, 144.

¹⁶⁰ For criteria necessary to prove such title or rights please see Chapter Seven.

may prevent the paying of monetary damages at an eventual trial, thus discouraging interlocutory relief.¹⁶¹

Lord Wilberforce listed the common law criteria for granting an interlocutory injunction in *Hoffman La Roche v. Secretary of State for Trade and Industry* [1975].¹⁶² A three step inquiry is made. Firstly, there must be a serious issue to be tried. Secondly, there must be a likelihood that the plaintiff will suffer irreparable harm in the absence of relief. Lastly, the balance of convenience must favour the relief requested.¹⁶³

As for the serious issue test, the British Columbia Court of Appeals in *MacMillan Bloedel Ltd. v. Mullin* remarked that “a great amount of factual evidence will have to be heard and considered, opinion evidence of those knowledgeable in these matters will have to be assembled and related to the factual evidence and there will have to be a meticulous study of the law.”¹⁶⁴ The complex issues thus favoured the granting of interlocutory relief as such a determination could not be made at an early stage and must await determination at a full trial.

To prove irreparable harm it must be demonstrated that the nature of the harm is such that it cannot be adequately remedied by eventual monetary damages. In the case of spiritual sites an analogy can be made with specific performance in real estate transactions in which the uniqueness of each parcel is relevant. Monetary damages would clearly be inappropriate and insufficient.¹⁶⁵

The balance of convenience test is especially problematic when different types of irreparable harm will ensue, which is the typical scenario in aboriginal title cases. For non-Indian interests irretrievable damage to a going concern could be caused by delay.¹⁶⁶ This was rejected in the logging case of *MacMillan Bloedel Ltd. v. Mullin*: “If an injunction prevents MacMillan Bloedel from logging pending trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there”¹⁶⁷ Yet other cases may reach another conclusion should a “window of opportunity” close on private finance or a spike

¹⁶¹ *ibid* p145

¹⁶² A.C. 295, 355

¹⁶³ Sweeney, D. (1992) *op.cit.*, p146

¹⁶⁴ *MacMillan Bloedel Ltd v. Mullin* (1985) 61 B.C.L.R. 145, 151 per Seaton J.A

¹⁶⁵ Sweeney, D. (1992) *op.cit.*, p149

¹⁶⁶ *ibid* p151

¹⁶⁷ Seaton J in *MacMillan Bloedel Ltd v. Mullin* (1985) 61 B.C.L.R. 145, 159

in natural resource prices demands an urgent development.¹⁶⁸ Ultimately, the status quo may be preserved in finely balanced cases, which underscores the importance of an early application before any major expenditure or significant work has been completed. Thus in *Macmillan* the injunction was granted, yet in other cases, when logging had already commenced, it was not.¹⁶⁹

The public interest can influence the balance of convenience test with the spectre of a floodgates scenario and the consequent paralysis of all commercial activity.¹⁷⁰ Public interest arguments have been successful in building new roads where existing ones were unsafe¹⁷¹ and the preservation of employment.¹⁷² By contrast, double-tracking a railway to increase capacity was not regarded as a serious enough public interest to prevent an injunction.¹⁷³ In the *Westar* case, the Gitksan and Wet'suwet'en, who were the same plaintiffs in the *Delgamuukw* case described in Chapter 7, asserted both a claim of title and jurisdiction over their traditional territories when requesting an injunction to stop logging activities. The decision was a partial victory as an injunction was granted over logging operations on part of the territory.¹⁷⁴ The court recognised that certain specific and localized sites with unique qualities should be protected, yet the public interest and economic consequences did not support a total and widespread injunction.¹⁷⁵

The question of the plaintiff being in a position to make an undertaking to pay any subsequent damages was highlighted by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*: "If damages in the measure recoverable under such an undertaking would be an adequate remedy *and the plaintiff would be in a financial position to pay them*, there would be no

¹⁶⁸ Sweeney, D. (1992) *op.cit.*, p153

¹⁶⁹ *Tlowitsis Nation v. MacMillan Bloedel Ltd.*, 1991] 2 C.N.L.R. 164., *Bear Island Foundation v. Ontario* (1990) 70 O.R. (2d) 574, 578 *Westar Timber Ltd. v. Ryan* (1989) 60 D.L.R. (4th) 453, 459

¹⁷⁰ Sweeney, D. (1992) *op.cit.*, p156.

¹⁷¹ *British Columbia (Attorney General) v. Swan* (unreported). The plaintiffs who claimed Aboriginal title in one proceeding were restrained in related proceedings from interfering in the construction of the road.

¹⁷² *Western Forest Products Limited v. Dempsey Collinson* (unreported); *Tlowitsis Nation v. Macmillan Bloedel Ltd.* (1985) 61 B.C.L.R. R. 145, 169-170.

¹⁷³ *Pasco v. Canadian National Railway Company* (1986) 69 B.C.L.R. 76, 85.

¹⁷⁴ Ross, M. L. (2005) *op.cit.*, p42

¹⁷⁵ *ibid* p44

reason on this ground to refuse an interlocutory injunction”¹⁷⁶ However, the inability to make such an undertaking will not preclude an injunction yet will be weighed in the balance of convenience. In *Ominayak v. Norcen Energy Resources Ltd*¹⁷⁷ and *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*¹⁷⁸ the plaintiffs conceded they were not in a financial position to provide such an undertaking, yet this was only regarded as one factor to be taken into account. In *MacMillan Bloedel Ltd v. Mullin*¹⁷⁹ and *Pasco v. Canadian National Railway Company*¹⁸⁰ no undertaking was actually requested. By contrast, in *Tlowitsis Nation v. MacMillan Bloedel Ltd.*¹⁸¹ the plaintiffs’ ability to pay subsequent damages was a factor in the refusal of an injunction.

As an injunction is an equitable remedy laches may be pleaded by the defendants which of course emphasises the importance of acting promptly. In the *Meares Island* case Seaton J.A. remarked: “The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid. They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area.”¹⁸² Injunctions can have long-lasting effects, the one relating to Meares Island is still in effect.¹⁸³ However in the *Westar* case the injunction was removed on 31 March 1995.¹⁸⁴

¹⁷⁶ *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 408 (emphasis added). See also *Brigid Foley Ltd. v. Elliott* [1982] R.P.C. 433, 435-6

¹⁷⁷ (1983) 24 Alta. L.R. (2d) 394; [1983] 3 C.N.L.R. 83 (Q.B.)

¹⁷⁸ [1979] 1 F.C. 487, 495

¹⁷⁹ (1985) 61 B.C.L.R. 145, 161 per Seaton J.A.

¹⁸⁰ (1986) 69 B.C.L.R. 76, 86 (though the plaintiffs claimed Aboriginal title, the injunction was issued largely on the ground of interference with riparian rights arising out of their Aboriginal reserve).

¹⁸¹ [1991] 2 C.N.L.R. 164 170

¹⁸² *MacMillan Bloedel Ltd v. Mullin*, (1985) 61 B.C.L.R. 145, 156

¹⁸³ <http://fnbc.info/node/1738>

¹⁸⁴ Ross, M. L. (2005) *op.cit.*, p47

10.3.3 Judicial Review and the Duty to Consult

In addition to the interlocutory injunction strategy discussed above, a further strategy based on judicial review also asks a court to give effect to an asserted but un-established aboriginal right.¹⁸⁵ Yet what Ross calls the *Haida* strategy asks the court for a declaration that their rights *already* have a measure of legal effect, rather than that they have such potential at a later trial.¹⁸⁶ The doctrine stems from two decisions issued by the Supreme Court of Canada on 18 November 2004 (*Taku River* and *Haida Nation*)¹⁸⁷ confirming that un-established aboriginal title and rights *already* trigger the Crown's constitutional duties of consultation and possibly accommodation.¹⁸⁸

The *Taku River* case concerned a challenge to a decision by the Minister of Energy, Mines and Petroleum Resources and the Minister of Environment, Land and Parks to reopen a copper mine and construct a service road 160km long in the heartland of the Tlingit people's ancestral land, thus threatening their economic sustainability.¹⁸⁹ The court doubted that a duty of consultation only applied to those rights that had been established in the courts by litigation. If so, then the recognition and affirmation of constitutional rights in section 35 would be limited to say the least. Thus some legal effect must attach to such putative rights *prior* to their definitive recognition at trial.¹⁹⁰

The actual *Haida* case also concerned the Crown's sanctioning of resource exploitation, this time timber. Like the *Taku* case this occurred after the Supreme Court's *Delgamuukw* decision.¹⁹¹ The *Haida* successfully challenged a minister's decision to grant logging licenses on the grounds that they had a presumed aboriginal title which, until rebutted, remained an encumbrance on the land within the meaning of section 35 of the *Forest Act*,¹⁹² and also that it existed as an equitable encumbrance triggering the Crown's

¹⁸⁵ *ibid* p73

¹⁸⁶ *ibid* p73

¹⁸⁷ *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), [2004] SCC 74; *Haida Nation v. British Columbia* (Minister of Forests), [2004] SCC 73

¹⁸⁸ Ross, M. L. (2005) *op. cit.*, p152

¹⁸⁹ *ibid* p75

¹⁹⁰ *ibid* p79

¹⁹¹ Discussed in Chapter 7

¹⁹² Ross, M. L. (2005) *op.cit.*, p89

fiduciary duty. Furthermore, they successfully showed that the minister had failed to consult with the Haida nation in good faith before granting the licence.¹⁹³

To summarise this doctrine, there is a duty on the Crown, both at the federal and provincial level, to consult and possibly even accommodate aboriginal rights that are asserted but only if the Crown has notice either from First Nations claims or having been established by the courts.¹⁹⁴

10.3.4 Section 35 and Section 2(a) of the Constitution Act 1982

In addition to putative section 35 aboriginal rights discussed above there may also be a section 2(a) freedom of religion claim. There can be confusion as to which provision provides the best protection for Canadian Indian religious rights. Switlo argues that section 35 and the *Sparrow* framework for permissible infringements¹⁹⁵ is less protective than the section 2(a) protections which can only be infringed in extremely rare circumstances such as the safety of the person.¹⁹⁶ As mentioned in Chapter 7, section 25 of the *Charter* states that the rights contained within the *Charter* (including 2(a)) do not interfere with aboriginal rights guaranteed under section 35 thus the more advantageous right can be adopted. Although the criteria required to justify an infringement may be more demanding for section 2(a) it must be remembered that section 35 rights may ultimately be more protective as they also bind private parties, whereas section 2(a) only applies to governments. Furthermore, section 2 rights are vulnerable to a section 33 legislative override.¹⁹⁷

There has been very little pleading on section 2(a) grounds due perhaps to the relatively recent enactment of the Charter and also the co-existing more specific section 35 rights. In the *Kitkatla*¹⁹⁸ case, which concerned British Columbia's decision to issue permits for the cutting down of 40 out of 178 culturally modified trees, a section 2(a) argument

¹⁹³ *ibid* p89

¹⁹⁴ Ross, M. L. (2005) *op.cit.*, p141

¹⁹⁵ Discussed in Chapter 7

¹⁹⁶ Switlo, J. (2002). "Modern Day Colonialism-Canadas Continuing Attempts to Conquer Aboriginal Peoples." International Journal on Minority and Group Rights 9(2): 103-141, 135.

¹⁹⁷ Please see Chapter 8

¹⁹⁸ *Kitkatla Indian Band v. British Columbia* (2000) 4 W.W.R. 431, 183 D.L.R. (4th) 103, 72 B.C.L.R. (3d) 247 (2000) 2 C.N.L.R. 36 (B.C.C.A.) leave to appeal allowed (17 August 2000), Doc. 27801 (S.C.C.).

was not raised and only section 35 was argued. Furthermore, the plaintiffs in *Kitkatla* challenged the legislation on federalism grounds claiming that it fell outside provincial competence in that it was pertaining to “Indians and land reserved for Indians” which, according to section 91(24) of the *Constitution Act*, was a federal competency. Furthermore, the permit system had the potential to destroy aboriginal rights. The Supreme Court disagreed saying that the act was in pith and substance related to “property and civil rights” and thus within provincial matters by virtue of section 92 (13), and that even though there may be a disproportionate effect on aboriginal people it did not single them out. As Ziff and Hope remark, such legislation could still be challenged on federalism grounds by proving that it went to the core of Indianness.¹⁹⁹

It must be admitted that the courts in Canada, apart from specific questions of putative aboriginal title, have focussed mainly on the physical effects such as deforestation, the reduction in wildlife resources, pollution and the physical destruction of burial sites with little concentration on the cultural and spiritual effects per se.²⁰⁰ In *Tlowitsis Nation v. MacMillan Bloedel Ltd*²⁰¹ the argument that the effect of logging would be a desecration to sacred ground was summarily dismissed.²⁰² Three months later the Lil’wat were similarly unsuccessful in a case which held that aboriginal rights on unoccupied Crown land were merely usufructuary and non-exclusive, and that the Lil’wat were still free to roam the area and absorb the spiritual surroundings.²⁰³ In the same year the Poplar Point Ojibway failed to obtain an injunction to protect a sacred burial site.²⁰⁴ Lastly, the Siska were equally unsuccessful in the *Siska Indian Band v British Columbia (Minister of Forests)*²⁰⁵ case in which they failed to demonstrate the uniqueness of a sacred site to obtain an injunction.

¹⁹⁹ Ziff, B and Hope, M “Unsightly: The Eclectic regimes that Protect Aboriginal Cultural Places in Canada” in Bell, C. E. and Paterson, R. K. (2008) *op.cit.*, p192.

²⁰⁰ Sweeney, D. (1992) *op.cit.*, p164

²⁰¹ [1991] 2 C.N.L.R. 164, 170-1 (C.N.L.R.)

²⁰² Sweeney, D. (1992) *op.cit.*, p165

²⁰³ *Mount Currie Indian Band v International Forest Products* [1991] B.C.J. No.703 at 4

²⁰⁴ *McCready v Ontario* [1991] O.J. No. 1722 (Ont. Ct. Gen. Div.)

²⁰⁵ [1999] B.C.J. No. 2354 (B.C.S.C.)

10.3.5 Heritage and Environmental Legislation

Heritage and environmental legislation have various sporadic and hortatory provisions relating to aboriginal people. The *Historic Sites and Monuments Act* (1985)²⁰⁶ establishes a Board to designate certain places of national significance and approximately 10% of the 900 sites are of aboriginal relevance.²⁰⁷

British Columbia's *Heritage Conservation Act* (1996) aims to protect and conserve heritage property within the province, such sites include those that have "heritage value to British Columbia, a community or an Aboriginal people."²⁰⁸ Should a site be designated then *prima facie* they are protected against desecration or alteration, although crucially the province can issue a permit to override this, which is subject to a balancing approach.²⁰⁹ The Yukon *Historic Resources Act* (2002)²¹⁰ is similar but has a more proactive approach to First Nations consultation. Significantly half of the advisory and appeals boards are First Nations representatives.²¹¹

The *Canada National Parks Act* (2000)²¹² covers parks and park reserves and provides for the protection of cultural resources and their use by aboriginal people for spiritual and ceremonial purpose as well as designation as a national park. Other provincial park acts have no express acknowledgement of aboriginal rights. One exception is Saskatchewan's *Wanuskewin Heritage Park Act*²¹³ which incidentally states that one purpose is to contribute to the "interpretation and preservation of Indian culture through the heritage sites, artefacts and knowledge."²¹⁴

As for environmental protection, the *Crown Forest Sustainability Act* came into effect in Ontario on 1 April 1995²¹⁵ and has several provisions for indigenous consultation: the

²⁰⁶ R.S.C. 1985, c. H-4

²⁰⁷ Ziff, B and Hope, M (2008) *op.cit.*, p184

²⁰⁸ R.S.B.C. 1996, C.187

²⁰⁹ *Kitlaktla Band v. British Columbia*, [2002] 2 S.C.R. 146

²¹⁰ R.S.Y. 2002, c.109

²¹¹ Ziff, B and Hope, M (2008) *op.cit.*, p186

²¹² S.C. 2000 c.32

²¹³ S.S. 1997, c.W-1.3.

²¹⁴ Ziff, B and Hope, M (2008) *op.cit.*, p189

²¹⁵ Macklem, P. and Morgan, E. (2000). "Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awas Tingni v. Republic of Nicaragua*." *Hum. Rts. Q.* **22**: 569-602, 587.

Forest Service Report must contain, *inter alia*, “sites of local archaeological, historical, religious and cultural heritage significance to those communities; including indigenous graveyards, spirit sites and burial sites;”²¹⁶ together with notice and consultation requirements, which may trigger application for interim relief. The spiritual relevance of forested areas finds specific recognition in British Columbia’s *Forest Practices Code* which refers to sustainable use as “balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including indigenous peoples.”²¹⁷

As in the United States much of this legislation merely provides for consultation and possible accommodation. Thus they facilitate, but do not mandate, the protection of aboriginal cultural and religious sites.

10.3.6 Treaty Rights

A retained right to visit sacred sites within ceded land could be implied in a treaty with the Canons of Construction operating in a similar fashion to the United States. Yet as discussed in Chapter 7, vast swathes of Western Canada were never subject to a comprehensive treaty process. Furthermore, the retention of water and other rights has not been as extensively recognised in Canada and thus an extrapolation to sacred sites may be ambitious.

First Nations cultural sites in Canada may be more effectively protected by virtue of a property right under a modern treaty such as the Nisga’a Treaty. Indeed the preferred solution is of course the return of ancestral lands to aboriginal ownership. The greatest indigenous success is the creation of Nunavut, a self-governing Inuit territory. With such a land base and self-government then religious site protection becomes an exclusively internal matter.²¹⁸ Expecting more large-scale conveyances may be optimistic.

²¹⁶ *ibid* p587

²¹⁷ *ibid* p596

²¹⁸ Collins, R. (2002) *op.cit.*, p259.

10.3.7 Summary

The lack of a comprehensive system of Indian treaties over much of the Canadian landmass leaves the potential for un-extinguished aboriginal title and other aboriginal rights of access to sacred sites. Since the passage of section 35 such rights cannot be casually disregarded, certainly not at the interlocutory stage. Thus the government's historical disregard of Indian rights may prove advantageous in the modern era.

Environmental and heritage legislation, as in the United States, hold out little concrete hope to protect sacred sites as sacred and provide merely a hollow process of consultation. A more proactive approach to the pleading of section 2(a) freedom of religion rights would be beneficial, if for no other purpose than clarifying to the dominant society what is at stake for indigenous peoples. The negotiation of large real estate agreements with corresponding rights of self-government provides a better if not entirely practical solution.

An ideal solution would be a judicially-recognised aboriginal right of undisturbed access to *all* sacred sites. The judiciary may however balk at the implications of such a step, considering that such a right would enjoy constitutional status by virtue of section 35. This would obviate the costly and time-consuming establishment of access by litigation on a case by case basis. However, such an aboriginal right would be susceptible to the claims that access to certain sites had been extinguished prior to 1982.

A more democratically acceptable option for non-Indians would be a sacred site statute with similar provisions to the suggested U.S. version above. Unlike the United States there would appear to be no establishment concerns for privileging Indian religion quite apart from the fact that there is already a constitutional mandate under s91(24) to treat Indians as a discrete object of legislation. This is because Canadian jurisprudence on establishment, via its section 2(a) free exercise provision, requires coercion, peer pressure and an obligation to make a statement about religion, none of which would be triggered.²¹⁹

Alternatively treaties could be negotiated providing access to sacred sites. Such treaties would enjoy constitutional status due to section 35 (3), which clarified that the treaty rights entrenched by section 35(1) "includes rights that now exist by way of land claims agreements or may be so acquired." They would also obviate any concern of pre-1982 extinguishment as they would, in effect, be new rights.

²¹⁹ Eisgruber, C. and Zeisberg, M (2006) *op.cit.*, p261

10.4 Conclusion

Sacred sites are vulnerable on both sides of the 49th parallel. U.S. tribes rely on a combination of the AIRFA 1978; Executive Order 13007 and executive agency accommodation; First Amendment free exercise rights; and incidental protection by environmental and heritage legislation.

In Canada the situation is somewhat different as the concept of aboriginal rights is a relatively recent phenomenon. Yet paradoxically this means that one such right, aboriginal title, remains an important if inchoate concept as much of the Canadian land mass has not been subject to treaty extinguishment. Although heritage and environmental legislation, a recently articulated free exercise right, and duties to consult all have a role, it is the novelty of the claim for aboriginal title that forces the government to the table. Its use to potentially paralyse the forestry and other industries may ensure that projects are designed *around* sacred sites not *through* them.

In the absence of a large scale conveyance of North America to the aborigines, one solution would be judicially recognised rights, in each jurisdiction, to sacred site access similar to the U.S. water and fishing rights. A judicially-recognised *generic* right of access to *all* sacred sites without case by case recognition would be better still; such a right in Canada would enjoy constitutional protection by virtue of section 35. An effective lobby of the legislature resulting in a sacred site statute would perhaps be more realistic and palatable politically, rather than a judicially-imposed right. Negotiated treaties guaranteeing access would be another option and would enjoy constitutional status in Canada by virtue of section 35(3).

CHAPTER ELEVEN

11 International Law and Indigenous Peoples

11.1 Introduction

Chapter One described how the inchoate discipline of International Law, or more accurately the European Law of Nations, articulated the Doctrine of Discovery by which the confiscation of the North American continent was given a veneer of legality and legitimacy. For several centuries International Law was largely silent on the rights of indigenous peoples, who were regarded as a solely domestic competency. Indeed, until the decolonisation movement, which emerged following the two world wars of the Twentieth Century, imperial rule remained largely unchecked by any supranational censure.

This campaign to secure self-determination, according to the United Nations Charter¹ and subsequent human rights documents,² failed to encompass indigenous enclaves within states. That would have amounted to secession and violated the territorial integrity of the state. This received endorsement in the 1960 General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples* which rejected “any attempt aimed at the partial or total destruction of the national unity and the territorial integrity of a country.”³ Any decolonisation of “peoples” referred to the entire population of a geographically discrete entity, the parameters of which were transformed by *uti possidetis* from administrative conveniences into inviolable borders.

In this context any specific indigenous rights were regarded as unnecessary, as the regime of individual human rights sufficed.⁴ Furthermore, the indigenous were merely offered the emollient of equality and absorption into the colony. Indigenous peoples were

¹ Articles 1(2) and 55 of UN Charter

² For example article 1 of both the *International Covenant on Civil and Political Rights* 1966 and the *International Covenant on Economic, Social and Cultural Rights* 1966 and General Assembly Resolution 1541 1960 from <http://www.un.org> [Accessed 20 June 2010]

³ UNGA "Resolution 1514: Declaration on the Granting of Independence to Colonial Countries and Peoples" (14 December 1960).

⁴ Gibson, J. (2008). "The UDHR and the Group: Individual and Community Rights to Culture." *Hamline Journal of Public Law and Policy* **30(1)**: 285-317, 298.

regarded simply as disadvantaged minorities whose greatest aspiration was supposedly affiliation and homogeneity with the majoritarian mainstream.

This last chapter will chart the evolution of International Law on indigenous peoples from the ILO Conventions to the United Nations *Declaration*. In particular, how the realisation slowly dawned that indigenous peoples actually wanted a tribal, communal, and culturally sovereign existence somewhat removed from Western Liberalism. It must be admitted however, that much of International Law on indigenous peoples has either a limited global subscription, or exists as soft law with an ambiguous status.

11.2 The International Labour Organization Conventions 107 and 169

The International Labour Organization (ILO), founded in 1919, is the oldest of the United Nations specialized agencies and its mandate includes establishing international standards on work-related issues.⁵ The ILO also assumed competence over wider social justice issues and gradually began to concern itself with indigenous peoples, although not without receiving criticism for exceeding its remit.⁶

ILO 107 (*Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957*) seemed to reflect the contemporary view that indigenous peoples' aspirations were assimilation into majoritarian society. Its language was unfortunate in parts, referring as it did to "less advanced." The rights were heavily qualified, for example article 7(2) protected customs and institutions of indigenous populations only where "these are not incompatible with the objectives of integration programmes."

By contrast, ILO 169 (*Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989*), was less assimilative and more empathetic. It recognised indigenous peoples' aspirations to preserve their own culture and traditions, develop their own institutions and progress their own community development. Among the relevant provisions was article 5, which stated that, "in applying the provisions of this Convention: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected." In addition, article 14 stated that, "measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not

⁵Leaflet No. 8: The ILO and Indigenous and Tribal Peoples from www.ohchr.org [accessed 29 October 2011]

⁶ Korman, S. (2010). "Indigenous Ancestral Lands and Customary International Law." *University of Hawaii Law Review* 32: 391-462, 444

exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”⁷ The major limitation imposed by the ILO 169 was that any “right to retain their own customs and institutions” must not be “incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.”⁸

The ILO conventions 107 and 169 have only 18 and 20 parties respectively and in neither case did the U.S. or Canada participate. Thus the limited subscription must cast serious doubt over their status as establishing or evidencing customary law.⁹ When viewed alongside each other they do perhaps reflect a limited evolution in international thought between 1957 and 1989.

11.3 The International Covenant on Civil and Political Rights (1966)¹⁰

This is the most widely-subscribed, complete and detailed articulation of human rights within the United Nations system. Both Canada and the United States have ratified the Covenant, but only Canada has ratified the Optional Protocol which permits individual petition.¹¹

Article 27 expresses the principal international minority, although not specifically indigenous right:¹² “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹³ This seemed to affirm a limited communal

⁸ Article 8.2

⁹ Korman, S. (2010) *op.cit.*, p444.

¹⁰ The companion *International Covenant on Economic, Social and Cultural Rights* (1966) has not been ratified by the United States. (Canada acceded on 19 May 1976) This will not be discussed due to space constraints and the fact that there is no Optional Protocol permitting individual complaints. Furthermore, although article 15 obliges “state parties .. to recognise the right of everyone to take part in cultural life” the language overall is heavily qualified as states are required to undertake steps “to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (article 2)

¹¹ Sucharitkul, S. (2002). "The Inter-Temporal Character of International and Comparative Law regarding the Rights of the Indigenous Populations of the World." *The American Journal of Comparative Law* **50**: 3-31, 30.

¹² Kingsbury, B. (2001). "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law." *New York University Journal of International Law and Politics* **34**: 189-250, 204

¹³ International Covenant on Civil and Political Rights, 1966, (ICCPR).

expression of rights.¹⁴

As to the meaning of article 27, case law has been limited, although in *Ominiyak v. Canada*¹⁵ the Human Rights Committee held that historical failure to provide a reservation for the Lubicon Lake Band, combined with the continuing threat of the oil and timber industries, constituted a threat to their culture under section 27.¹⁶ Similarly, in *Lovelace v. Canada*,¹⁷ the committee found an infringement of article 27 as well as articles 2 (1), 3, 23 (1) and (4) and 26 of the ICCPR by section 12 (1) (b) of the *Indian Act* and its exclusion of Indian status to an Indian woman marrying a non-Indian man together with her children, although this exclusion had been upheld by her own Indian band.¹⁸ This led to an amendment of the *Indian Act*.

As for any domestic application, the US Senate inserted a non self-executing clause which means it has no legal effect within the United States.¹⁹ It has also not been explicitly implemented in Canada,²⁰ yet the Canadian Supreme Court has stated that the rights in the *Charter of Rights and Freedoms* should be at least as great as in similar international human rights documents.²¹ Furthermore, they are relevant in assessing section 1 justifications of derogations from the *Charter*.

¹⁴ Charters, C. and Stavenhagen, R (2009). Making the Declaration Work : The United Nations Declaration on the Rights of Indigenous Peoples. Copenhagen, IWGIA ; [New Brunswick. p35

¹⁵ *Ominiyak v. Canada*, U.N. GAOR, 45th Sess., Supp. No. 40, Annex 9, at 27, U.N. Doc. A/45/40 (1990).

¹⁶ Kingsbury, B. (2001) *op.cit.*, p207.

¹⁷ *Lovelace v. Canada*, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc A/36/40 (1981).

¹⁸ Kingsbury, B. (2001) *op.cit.*, p207.

¹⁹ Gabrieldis, A. M. (2006). "Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in US State Courts." Buff. Hum. Rts. L. Rev. **12**: 139-195, 147.

²⁰ De Mestral, A. and Fox-Decent, E. (2008). "Rethinking the Relationship Between International and Domestic Law." McGill LJ **53**: 573-648, 624. See *Ahnani v Canada* (**A.G**) (2002), 58 O.R. (3d) 107

²¹ Harland, C. (2000). "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents." Human Rights Quarterly **22**: 187-260, 210.

11.4 The Inter-American System of Human Rights

There are three sources of law in the Inter-American system. *The American Declaration of the Rights and Duties of Man* and the *Organization of American States Charter* are binding on all member states. The *American Convention on Human Rights* is only binding on those states that have ratified it. Neither the *Convention* nor the *Declaration* specifically mentions indigenous peoples.²²

11.4.1 The Inter-American Commission

The Commission is an autonomous body of the Organization of American States and all member states are subject to its jurisdiction. It investigates complaints of human rights violations with regard to the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*. Neither the U.S. nor Canada is a party to the *Convention* so any complaints must be framed under the *Declaration*.²³ The Commission may also investigate complaints of violations of *jus cogens* norms irrespective of any formal inclusion in a document.²⁴ The Commission also publishes reports on human rights situations within selected countries, thus heightening the embarrassment factor and exacting political forfeit.²⁵

If there has been no ratification of the *Convention*, that is the end of the matter.²⁶ If the *Convention* has been ratified and the state has formally accepted the Inter-American Court's jurisdiction then complaints still begin with the Commission but can subsequently proceed to the Court for a binding judgement.²⁷ There is no individual petition to the Court, only the Commission can refer cases should the states be parties. For the U.S. and

²² Hetzel, K. (2002). "Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments." Tulane Journal of International and Comparative Law 10: 307-331, 311.

²³ Cline, C. (1990). "Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy after *Lyng v. Northwest Indian Cemetery Protective Association*." Hastings Law Journal 42: 591-633, 615.

²⁴ *ibid* p616

²⁵ Al Attar, M et al (2008) *op.cit.*, p324

²⁶ Pasqualucci, J. (2009). "International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples." Winconsin International Law Journal 27: 51-98, 52.

²⁷ Thompson, T. (2009). "Getting Over the Hump: Establishing a Right to Environmental Protection for Indigenous Peoples in the Inter-American Human Rights System." Journal of Transnational Law and Policy 19: 179-209, 194

Canada the Commission is the sole competent body²⁸ and this prevents difficulty in enforcement. For example in the *Dann* case the Commission, although holding that the U.S. extinguishment of Western Shoshone land title had not complied with international human rights norms as the treaty had only been executed by one of their constituent bands, could not proceed the case any further. U.S. arguments that the gradual encroachment of settlers had extinguished title to their ancestral lands were rejected.²⁹ The Commission emphasised the importance of land which provided the “geographic space necessary for the cultural and social reproduction of the group.”³⁰

11.4.2 The Proposed American Declaration on the Rights of Indigenous Peoples

Negotiations have been ongoing since 1998. The participation of Indigenous Peoples was initially discouraged by some states but since 2003, in a similar way to the UN *Declaration*, they have played an integral role.³¹ Many of the provisions are similar to the UN *Declaration*, such as rights to a spiritual relationship with traditional lands, (Article XXIV) access to sacred sites (Article XV) and the right to “full enjoyment of all human rights and fundamental freedoms” (Article IV).³²

The proposed *American Declaration* may already be influential. For example, in *Carrie and Mary Dann v. The United States* the Commission applied principles from the *Draft Declaration*.³³ Furthermore, Canada is a prominent OAS member and, irrespective of the present status of the *Draft Declaration*, would be susceptible to the politics of “naming, blaming and shaming.”³⁴

²⁸ *ibid* p191.

²⁹ Anaya, S. and Williams, R.Jr (2001). "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System." *Harvard Human Rights Journal* 14: 33-86, 40.

³⁰ *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L.N/II.117, doc. 1 rev. 1 ¶ 128 (2003).

³¹ Overview of United Nations' Structure with Particular Regard to Indigenous Peoples from Indian Law Resource Center website <http://www.indianlaw.org/en/node/412> [accessed 20 December 2010]

³² Please see Comparative table of the OAS Draft Declaration and UN Declaration on the Rights of Indigenous peoples (October 24, 2007) at the Indian Law Resource Center website *ibid*

³³ Al Attar, M et al “Indigenous Cultural Heritage Rights in International Human Rights Law” in Bell, C. E. and Paterson, R. K (2008) *op.cit.* p325

³⁴ *ibid* p326

11.5 The International Convention on the Elimination of Racial Discrimination 1965

Both Canada and the United States have ratified the *Convention* but neither has made a declaration under Article 14 authorising individual complaints to the *Committee on the Elimination of Racial Discrimination* (CERD). Yet circuitous monitoring is possible under the Early Warning and Urgent Action Procedure.³⁵ This is the procedure by which the CERD heard the *Dann* case.³⁶ In a judgement rendered by the *Committee* in March 2006³⁷ the United States was directed to stop the violation of Shoshone land rights under article 5.³⁸ The decision found that the attempt to deny the right of the Shoshone “to use and occupy their lands and their natural resources in accordance with their traditional land tenure patterns”³⁹ was discriminatory and also condemned any action “disregarding the spiritual and cultural significance they give to their ancestral lands.”⁴⁰ This was the first determination by a UN committee on US Indian law and policy.⁴¹ The US has ignored the ruling.⁴²

The CERD had previously criticised the unilateral abrogation of Indian treaties by the US government as a violation of the equal protection rights in article 5(c) of the *Convention*.⁴³ Similarly, the failure to protect sacred sites and traditional religious practice violated article 5(d)(vii) and (e)(vi) of the *Convention*.⁴⁴ Moreover, the CERD has expressed

³⁵ McCauley, M. T. (2009). "Empowering Change: Building the Case for International Indigenous Land Rights in the United States." *Ariz. St. LJ* 41: 1167-1204, 1182

³⁶ McCauley, M. T. (2009) *op.cit.*, p1191.

³⁷ Decision 1(68) (United States of America), CERD, 68th Sess., from [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/25eeac288211bee9c1257181002a3cfb/\\$FILE/G0641251.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/25eeac288211bee9c1257181002a3cfb/$FILE/G0641251.pdf) [accessed 5 November 2010]

³⁸ Evans, M. (2005) *ibid* p95.

³⁹ Decision 1(68) *supra* n172 para 6

⁴⁰ *ibid* para 8

⁴¹ McDonald, B. (2009). "How a Nineteenth Century Indian Treaty Stopped a Twenty-First Century Megabomb." *Nev. LJ* 9: 749-774, 759.

⁴² McCauley, M. T. (2009) *op.cit.*, p1200

⁴³ CERD 2001 Concluding Observations at para. 400; CERD General Recommendation 23 at para. 4(d). From EXECUTIVE SUMMARY OF THE REPORT OF THE WORKING GROUP ON INDIGENOUS PEOPLES p9 <http://ilrc.xinsys.net/es/node/77>

⁴⁴ “The right to freedom of thought, conscience and religion” and “The right to equal participation in cultural activities” respectively

shock that the US relies on *Johnson v McIntosh*⁴⁵ and the Doctrine of Discovery as the foundations of its Indian law.⁴⁶

The CERD has also criticised Canada for the requirement that aboriginal claimants must relinquish aboriginal rights and natural resources in settlement of land claims and the disproportionate costs to aboriginal litigants.⁴⁷ Of course recommendations, general comments and observations on treaties by UN supervisory bodies are not legally binding.⁴⁸

11.6 United Nations Declaration on the Rights of Indigenous Peoples (2007)

Eide and Daes of the working group for the *Declaration on the Rights of Indigenous Peoples* (2007) pointed out three differences between the aspirations of minorities and indigenous peoples. Firstly, minorities usually seek “institutional integration,” whereas indigenous peoples prefer “institutional separateness.” Secondly, minorities seek to exercise individual rights, whereas indigenous peoples’ rights tend to be collective. Thirdly, indigenous peoples seek “self-government, whereas minorities seek non-discrimination.”⁴⁹

The international law documents detailed above were an expression of what traditional western liberalism believed was the universal aspiration of all minorities. By contrast, the *Declaration*, being the product of consultation with the indigenous peoples themselves, revealed their desire for a more discrete, communal and culturally sovereign status. Indeed, such was the indigenous input that during the protracted gestation period of 25 years an informal procedure evolved that required any substantive change to the text to have broad indigenous acceptance.⁵⁰ Thus the *Declaration* has made indigenous peoples subjects rather than objects of International Law.⁵¹

⁴⁵ Please see Chapter One

⁴⁶ Fishel, J. A. (2007) *op.cit.*, 77

⁴⁷ Press Release, March 8, 2007 “The UN Committee on the Elimination of Racial Discrimination calls upon Canada to immediately endorse the United Nations Declaration on the Rights of Indigenous Peoples” from http://www.treatycouncil.org/PDF/CR%20Press_Release_CERD_3%208%2007.pdf [accessed 20 January 2011]

⁴⁸ Ward, T. (2011). "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law." *Northwestern University Journal of International Human Rights* 10: 54-72, 57.

⁴⁹ Kymlicka, W. (2008). "The Internationalization of Minority Rights." *International Journal of Constitutional Law* 6: 1-21, 4

⁵⁰ Charters, C. and Stavenhagen, R. (2009) *op.cit.*, p79

⁵¹ *ibid* p265

The *Declaration* is the most comprehensive statement on the rights of indigenous peoples yet produced, although as a mere General Assembly Resolution its legal effect is uncertain. It was adopted on 13 September 2007 with 143 in favour, 4 against (Australia, Canada, the United States and New Zealand) and 11 abstentions.⁵² Subsequently, Australia and New Zealand, in April 2009 and April 2010 respectively, retracted their opposition and endorsed the *Declaration*.⁵³ The Canadian Government eventually endorsed the *Declaration*, on November 12th 2010.⁵⁴ President Obama also signalled U.S. support for the Declaration on 16th December 2010, although the accompanying exhaustive explanation described it as “not legally binding or a statement of current international law” but as expressing “aspirations.”⁵⁵

11.6.1 Provisions

Quite rightly there is no definition of “indigenous peoples” in the Declaration which is consistent with the trend of self-identification.⁵⁶ Among the relevant provisions, Article 25 states, “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”⁵⁷ There have been several endorsements of this article (or its draft predecessor) in the Inter-American system. In *Saramaka Peoples v. Suriname* it was held that indigenous peoples had a right to maintain their “spiritual relationship with the territory they have traditionally used and occupied.”⁵⁸ Similarly, in *Plan de Sanchez Massacre v. Guatemala indigenous peoples* the court held the view

⁵² Errico, S. (2007). "The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview." *Human Rights Law Review* 7(4): 756-759, 757.

⁵³ Organick, A. (2009). "Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for US Tribes." *U.C. Davis Journal of International Law and Policy* 16: 171-212, 175.

⁵⁴ <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp> [accessed 20 March 2011]

⁵⁵ Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples from <http://www.state.gov/documents/organization/153223.pdf> [accessed 20 March 2011]

⁵⁶ Barelli, M. (2009). "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples." *International and Comparative Law Quarterly* 58(04): 957-983, 961.

⁵⁷ 61/295 from <http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207> [accessed 20 June 2010]

⁵⁸ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007).

that “harmony with the environment is expressed by their spiritual relationship with the land.”⁵⁹

Other significant provisions include the first explicit recognition of the “right to the full enjoyment, as a collective ...of all human rights and fundamental freedoms,”(Article 1)and the protection of sacred sites and ceremonies by Article 12: “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites,” and the right to the “use and control of their ceremonial objects.”

Importantly, Article 19 requires governments to obtain the “free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Article 46 (1) seems to circumscribe the self-determination right of article 3 by qualifying all the preceding rights as not to be “construed or authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.” Indeed, the self-determination right in the *Declaration* is linked to the “exercise of autonomy or self-government in matters relating to internal and local affairs” (Article 4) implying purely internal self-determination, which is the minimum that indigenous peoples have repeatedly demanded.⁶⁰ It must also be remembered that self-determination is a process and its manifestation may not necessarily reach the endpoint of statehood but perhaps a looser cultural aggregate or similar endpoint.⁶¹ Indian threats to secede are in fact rare, the only specific example being the James Bay Cree Indians who threatened to secede from Quebec if Quebec had seceded from Canada.⁶² Self-determination may also mean merely the collective rights to make decisions on the preservation of religion and language rights.⁶³

Attempts by some countries to exclusively domesticate indigenous rights were resisted, although Article 46 (2) states that “the exercise of the rights set forth in the

⁵⁹ *Plan de Sanchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 85 (Nov. 19, 2004). Also see *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

⁶⁰ *ibid* p364

⁶¹ Charters, C. and Stavenhagen, R. (2009) *op.cit.*, p189

⁶² Wiessner, S. (2008). "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People." *Vand. J. Transnat'l L.* **41**: 1141-1176, 1160

⁶³ Kingsbury, B. (2001) *op.cit.*, p231

Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations.”⁶⁴

11.6.2 Influence of the Declaration

Of course there is no international dispute mechanism for the *Declaration*, but article 42 stipulates that, “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, (PFII) and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.” The PFII advises the ECOSOC on indigenous issues and half of its 16 members are indigenous.⁶⁵

Monitoring would also include the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. The PFII has indicated that it will use the Declaration as its legal framework and both the Special Rapporteur and EMRIP have stated the Declaration to be their normative framework.⁶⁶ The Special Rapporteur on Indigenous Peoples produces periodic reports which combine promotion of the *Declaration* and individual state recommendations. Although advisory and non-mandatory, the political costs of ignoring such a report may be considerable.⁶⁷

Ultimately, much of the influence of the *Declaration* will depend on its perceived legitimacy. This depends on “the justice inherent in its *content*, and the extent to which international actors, be they individuals, civil society, trans-national corporations, states, indigenous peoples and so on, *engage* with it.”⁶⁸

Fundamental fairness of content was evidenced by the involvement of indigenous peoples at all stages. Indeed, as mentioned above, during the myriad revisions, many states refused to countenance any change to the agreed text without the specific endorsement of indigenous peoples.⁶⁹ Conceptual coherence was more elusive due to the differing situations

⁶⁴ Charters, C. and Stavenhagen, R. (2009) *op.cit.*, p81

⁶⁵ Firestone, J., Lilley, J. et al. (2004). "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law." *Am. U. Int'l L. Rev.* 20: 219-292, 258.

⁶⁶ Charters, C. and Stavenhagen, R. (2009) *op.cit.*, p305

⁶⁷ *ibid* p331

⁶⁸ *ibid* p280

⁶⁹ *ibid* p286

of indigenous peoples, although there is enough flexibility in the document to adapt to parochial variations with minorities' rights, individual and collective rights and *sui generis* rights.⁷⁰ Ultimate determinacy was perhaps neither achievable nor desirable as this would freeze the rights and discourage any interpretational evolution.⁷¹

Legitimacy by engagement will depend on a relentless promotion, quotation and reiteration. Indigenous peoples can facilitate this by framing claims in terms of the *Declaration* which will oblige states to at least engage with it.⁷² Charters argues that, under the *Vienna Convention on the Law of Treaties* (1969), the *Declaration* is also relevant to the interpretation of other human rights law and the ILO conventions.⁷³

In essence, the perceived legitimacy of the *Declaration* can encourage adherence to a formally non-binding document even when this is politically inconvenient. A momentum can build almost obliging a state's compliance should political costs and international opprobrium be the alternative. Moreover, the overwhelming vote in favour perhaps already suggests a moral and political obligation to comply. A similarly overwhelming vote was observed for the *Universal Declaration on Human Rights* which may itself have evolved into Customary International Law.⁷⁴

Bartolome Clavero gives reasons why the *Declaration* may *already* be legally binding. First, the language of article 42 “uses the strong expression of *full application*”, as distinct from other similar human rights instruments.” Second, the *Declaration* “is the first Declaration that describes its own binding character without a foundation either in a Convention or a Treaty, or, for that matter, in a relevant Committee” and thus with no need for consummation by ratification. Lastly, the *Declaration* had significant input from indigenous peoples themselves.⁷⁵ As Bartelli remarks, the constant use of the term “shall” illustrates the intentions of the drafters.⁷⁶

⁷⁰ *ibid* p289

⁷¹ *ibid* p291

⁷² *ibid* p294

⁷³ *ibid* p294. Article 31 (3) (c) Treaties should be interpreted in the light of “any relevant rules of International Law applicable in the relations between the parties.”

⁷⁴ *ibid* p356

⁷⁵ Charters, C. and Stavenhagen, R. (2009) *op.cit.*, p317

⁷⁶ Barelli, M. (2009) *op.cit.*, 972

Nevertheless, this does not negate the clear difference in International Law between a declaration and a convention or treaty even though, often in the field of human rights, the distinction between the binding nature of hard and soft law has often been more theoretical than practical.⁷⁷ As for any claim that the *Declaration* represents Customary International Law, that is indeed controversial.

11.6.3 The Declaration as Customary International Law

Customary International Law is an exception to the doctrine that only parties to a treaty are bound by it. It is not a universally accepted phenomenon: United States Supreme Court Justice Scalia has described it as a “20th-century invention of internationalist law professors and human rights advocates.”⁷⁸ Nevertheless, the *Declaration* is binding in the United States to the extent that it codifies *existing* Customary International Law, which, in the recent case of *Sosa v. Alvarez-Machain*, was described by the Supreme Court as federal common law, enforceable in US courts.⁷⁹ The Supreme Court has also used international and foreign human rights law as an aid in interpreting the Constitution, for example in *Roper v. Simmons*, in which the Eighth Amendment was held to prohibit the execution of juveniles.⁸⁰ International Law, in the domestic setting, remains ultimately however “subject to the Constitution”⁸¹ and merely provides at best an indirect effect by virtue of the doctrine of consistent interpretation,⁸² or alternatively as a persuasive element.⁸³

In Canada, the Doctrine of Adoption holds that Customary International Law, in the absence of express legislative derogation, is part of Canadian law without enactment.⁸⁴

⁷⁷ FN21 FROM *ibid* Dinah Shelton. "Commentary and Conclusions," in Shelton, Dinah (ed) (2004). *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press), 449, 458 (noting that, in actual practice, "it becomes difficult to separate the impact of the non-binding instruments from the treaty obligations").

⁷⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004)

⁷⁹ Paulus, A “The Emergence of the International Community” in Nijman, J. E. and A. Nollkaemper (2007). *New Perspectives on the Divide between National and International Law*. Oxford, Oxford University Press pp240-241.

⁸⁰ *ibid* p236

⁸¹ *Boos v. Barry* (1988) 121 ILR

⁸² Paulus, A *supra* p238

⁸³ HLRA (2003). "International Law as an Interpretative Force in Federal Indian Law." *Harv. L. Rev.* 116: 1751-1773, 1764.

⁸⁴ *R. v. Hape*, [2007] 2 S.C.R. 292.

Furthermore, international human rights norms are regarded as “persuasive and relevant” when interpreting the Canadian *Charter of Rights and Freedoms*.⁸⁵

To establish Customary International Law there must firstly be state practice that is relatively uniform and by a substantial number of states; and secondly *opinio juris* or a belief that such practice is required by law.⁸⁶ The Chronological Paradox questions the requirement that there already be “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁸⁷

The extent of state practice necessary is difficult to define, but the behaviour of specially affected states, such as Canada and the United States would be especially pertinent. Yet the danger in accepting state practice as establishing a constellation of indigenous rights would be to ignore the differing nature and variety of such rights. For example indigenous property rights exist as a myriad of different domestic schemes and doctrines worldwide which lack the uniformity required to evidence state practice.⁸⁸ *Opinio juris* is similarly difficult to prove but may be evidenced by government statements or votes in favour of UN Assembly resolutions yet problematically involves a subjective element which thus imports a psychological analysis.⁸⁹

The status of other General Assembly Resolutions was addressed by the International Law Association in 2000⁹⁰ and it was concluded that as a general rule “they do not *ipso facto* create new rules of customary law” but can “constitute evidence of the existence.... contribute to the formation of ...or help to crystallize emerging customary law.”⁹¹ Very exceptionally “resolutions accepted unanimously or almost unanimously and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable.....of creating general customary law by the mere fact of their adoption.”⁹² Absent unanimity, then all affected states should consent and any dissenter

⁸⁵ *Slaight Communications v Davidson*, [1989] 1 S.C.R. 1038

⁸⁶ Aust, A. (2005). *Handbook of International Law*. Cambridge, Cambridge University Press, p7.

⁸⁷ *North Sea Continental Shelf Cases* (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 44 (Feb. 20)

⁸⁸ Korman, S. (2010) *op.cit.*, p441

⁸⁹ *ibid* p403.

⁹⁰ Committee on the Formation of Customary (General) International Law from <http://www.ila-hq.org/en/committees/index.cfm/cid/30> [accessed 20 November 2011]

⁹¹ *ibid* section 28, Such evidence of *opinio juris* for declarations was endorsed in the Nicaragua Case: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* Merits, [1986] I.C.J. Rep. 14.

⁹² *ibid* section 32

enjoys the benefit of the persistent objector exemption.⁹³

Canada and the United States, with their large indigenous populations, have consistently maintained that the *Declaration* is non-binding.⁹⁴ Yet, it could also be argued that by participating in the negotiations for many years these states may have at least accepted the framework of the *Declaration's* indigenous rights if not the exact parameters.⁹⁵ Indeed, as Korman argues, Canada and the United States objected initially more on the grounds of the vagueness of language rather than the overall message.⁹⁶

Although elements of the *Declaration* are reflective of existing international law such as the prohibitions against racial discrimination⁹⁷ and genocide⁹⁸ and the right to self-determination⁹⁹ the *Declaration* as a whole does not yet represent customary international law.¹⁰⁰ The International Law Association was itself unsure whether the *Declaration* as a whole had as yet “crystallised into customary law.”¹⁰¹ Perhaps the balanced view is that it is contributing to the formation of such law.¹⁰²

⁹³ *ibid* section 32

⁹⁴ *ibid* p450

⁹⁵ Wiessner, S. (2008) *op.cit.*, p1165.

⁹⁶ Korman, S. (2010) *op.cit.*, p454

⁹⁷ Articles 1, 2, 8(2)(e), 9, 14, 15(2), 16(1), 17(3), 21(1), 24(1), 29(1), 46(2) and 46(3).

⁹⁸ Article 7

⁹⁹ Articles 3 and 4

¹⁰⁰ Joffe, P. (2010). "UN Declaration on the Rights of Indigenous Peoples." National Journal of Constitutional Law 26(2): 121-228, 207.

¹⁰¹ Korman, S. (2010) *op.cit.*, p460

¹⁰² Barelli, M. (2009) *op.cit.*, p967

11.7 Conclusion

Although the ILO conventions have a limited subscription and other International Law instruments have concentrated on discrimination against minorities, an evolution can be seen from a promise of individual equality to a recognition of communal difference. The *United Nations Declaration on the Rights of Indigenous Peoples* is the culmination of this process, yet only elements of it can be regarded as expressing Customary International Law.

Ultimately, the North American governments determine the level of engagement with International Law to serve their own ends. The Doctrine of Discovery was embraced as an instrument of colonisation and subordination and moreover remains part of the Indian law canon. By contrast, the United Nations *Declaration* and *ILO Conventions*, with their messages of decolonisation and empowerment, are either rejected or deprecated. Indians remain, as ever, powerless objects of such caprice.

This does not mean such International Law is completely redundant. For example states' periodic reports to human rights bodies should be scrutinised for inconsistency and anomaly, with the greater use of shadow reports being produced by indigenous lobbyists.

Ultimately, in the domestic context, it may be better tactically to argue that any relevant soft law and putative Customary International Law are merely persuasive and an aid to interpretation. This is because a forlorn claim of a legally binding status may concentrate judicial minds on refuting such a bold assertion, rather than on engaging with the substantive human right in question.¹⁰³

¹⁰³ Gabrieldis, A. M. (2006) *op.cit.*, p157.

CONCLUSION

“The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”¹

The Doctrine of Discovery had its origins in the late middle ages and was a manifestation of the European Law of Nations, which, at the time, consisted merely of Christian tenets disguised as temporal law. The Doctrine was derived from the pronouncements of Popes and Christian Kings and reinforced by biblical authority that seemed to consign anyone who refused to subdue the earth to a rather precarious sovereignty and land rights. Despite these medieval origins it continues to resonate as it remains the foundation for much of the legal relationship between the Colonials and the Indigenes. Some Christians have the good grace to remain embarrassed by this, for example the Episcopal Church in the United States passed a resolution in 2009 at its 76th General Convention, repudiating and disavowing the Doctrine of Christian Discovery.² The Catholic Church remains intransigent, despite requests by indigenous peoples at the Parliament of the World’s Religions in 2003 to revoke the *Inter Caetera* of 1493,³ and in 2009 to disavow the Doctrine of Discovery.⁴ Yet it is the North American governments, more than the churches, which need to renounce this Doctrine that continues to dominate Indian law. As Newcomb has remarked, “Indian nations have been denied their most basic rights ... simply because, at the time of Christendom’s arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah.”⁵

¹ Cohen, F. S. (1953). "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy." The Yale Law Journal 62: 348-390, 390.

²“An Indigenous Peoples’ Statement to the World” from <http://earthspiritcommunity.blogspot.com/2010/06/indigenous-peoples-statement-to-world.html> [accessed 11 January 2011]

³ <http://bullsburning.itgo.com/Papbull.htm> [accessed 29 October 2011]

⁴ <http://earthspiritcommunity.blogspot.com/2010/06/indigenous-peoples-statement-to-world.html> [accessed 30 December 2011]

⁵ Newcomb, S. (1992) *op.cit.*, p309.

Discovery was originally intended to merely confer pre-emption rights between European nations in a vacant New World. When confronted with the inconvenience of an existing population, it evolved to sweep away the legal rights of non-Christians and undermine their land title, with derisory compensation and the hollow consolation of the bible offered in exchange. In the words of Indian scholar Vine Deloria, “First you had the Book and we had the Land. Now we have the Book and you have the Land.”⁶

Although the United States, with the Marshall Trilogy in the early Nineteenth Century, subsequently articulated a common law model of internal tribal sovereignty, to temper the absolute nature of the Doctrine, Indians, being infidels, were only permitted to exercise a *de facto* internal sovereignty that remained subject to an overarching and *de jure* Christian sovereignty. However, any intrusions into tribal sovereignty had to be at least justified on some doctrine, however tenuous, such as the Plenary Power or Trust Relationship. By contrast, in Canada any common law recognition of tribal sovereignty had to wait until the *Calder* case in the 1970s. Moreover, the *St Catherine’s Milling* case in 1899 had rejected any form of land tenure in favour of a mere usufruct, or right to roam. This also highlights the fact that Indian Law in the United States has been developed over 200 years, whereas in Canada the concept of aboriginal rights has only gained traction within the last 40 years. Yet Canada, by virtue of section 35 of the *Constitution Act* 1982, constitutionalised her aboriginal rights, which are therefore less well defined, but better protected. It is submitted that, just as Canada can learn from her neighbour’s prolonged jurisprudence, the United States could follow Canada’s example and pursue the constitutional entrenchment of her aboriginals’ rights.

In the Eighteenth Century and early Nineteenth Century, during the power struggle between the United States, France and Great Britain, Indians often held the balance of power, at least at a local level. Thus in the early years of the Great Republic, when there was still a vestigial threat to her territorial integrity, the United States pursued a bilateral and conciliatory treaty-based policy with the Indians and realism dictated that the Doctrine of Discovery’s mandate lay dormant. When peace broke out between the European states, any accommodation of the Indian interests was regarded as no longer necessary and so the relationship became more coercive and unilateral, with the overarching sovereignty of the Doctrine manifesting itself in incremental legislative intrusions into tribal sovereignty. Similarly, in Canada, before the existence of a critical mass of European settlers, the attitude towards the Indians was accommodating and

⁶ Deloria, V (1969) *op.cit.*, p101

deferential. This changed during the middle of the Nineteenth Century, when the comprehensive *Indian Act* regime casually swept away any internal tribal sovereignty and assumed, without any serious debate or justification, complete competence over all aspects of Indian life both tribally and individually.

Towards the end of the Nineteenth Century, with the Indians rendered largely quiescent and confined to reservations, the U.S. government sought to assimilate them, using the churches as the instruments of government policy. This seemed a direct contradiction of the claim to have perfected the division between church and state as, although Christianity had provided the rationale for the Doctrine of Discovery and served to justify the legal relationship with the Indians, the United States had purported to order their own affairs to reflect enlightenment attitudes and create a secular polity, by means of the Establishment Clause. The Peace Programme, which involved the employment of missionaries from only selected denominations as Indian agents, was a flagrant violation of this Establishment Clause. Children were also targeted in an attempt to eradicate the vertical transmission of culture. The vehicle chosen was the denominational contract school, which, had it stuck to a secular education but with a sectarian vehicle, could have survived such an establishment challenge. Yet the relentless proselytisation and suppression of Indian religion was surely a breach of both clauses of the First Amendment. It therefore appeared that any establishment tensions were only triggered when one mainstream Christian church was given preference over another, not seemingly when one church was favoured over no church. Similarly, any freedom of religion in Nineteenth Century United States extended to a free choice between mainstream variants of Christianity, anything else seemed beyond comprehension. As the Supreme Court remarked, without apparent irony, as recently as 1989, "[t]his Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent."⁷

In contrast to the United States, Canadian missionaries did not enjoy much of an executive role and were not employed as Indian agents. However, in the case of denominational residential schools, there was significant church-state collaboration. Yet such collaboration provoked little suspicion in a country without an Establishment Clause. Indeed the right to denominational education was thought worthy of constitutionalisation in 1867 and thus its application to Indian children raised no

⁷ *County of Allegheny v. ACLU*, 492 U.S. 573, 589 (1989)

difficulty. However, treaty provisions, stipulating as they did a reserve-based education, were undoubtedly breached. The most generous assessment of the death toll in Canadian residential schools (and also U.S. schools) would suggest criminal neglect, yet conceivably they operated as systematic extermination programmes.⁸

Despite these evangelical efforts Indians remained largely unconvinced of the advantages of Christianity and so the governments initiated a comprehensive suppression of their religious practices. Having crushed them physically the government sought to crush them spiritually. The U.S. Courts of Indian Offenses, as mentioned above, were flagrant breaches of the constitutional guarantees of Free Exercise, Due Process, Formal Accusation and Witnesses, Jury Trial and Bail. This is in addition to the glaring infringements of tribal sovereignty by these dubious fora.

Canadian suppression of Indian religious practices was just as vigorous yet could proceed without a constitutional right to freedom of religion, or indeed other substantive constitutional fundamental rights, as nominal obstacles. Moreover, the rejection of the Doctrine of Discovery's emollient of internal tribal sovereignty meant that Canadian Indians were vulnerable to any legislative intrusion. Furthermore, the specific mandate given to the federal government over "Indians and land reserved for Indians" under s91 (24) of the Constitution Act ensured there was no infringement of federalism.

As well as the spiritual destruction there were differing levels of physical destruction. In 1877 Prime Minister Alexander Mackenzie described the Canadian policy to Indians as "humane just and Christian."⁹ He contrasted the "deplorable war waged between the Indian tribes of the United States territories and the government of that country" with the fact that "no difficulty had arisen with the Canadian tribes living in the immediate vicinity of the scene of hostilities."¹⁰ Such an assessment is "general and impressionistic."¹¹ Although more United States Indians than Canadian Indians were shot during the Nineteenth Century this was probably due to geography and the relative lack of an acquisitive frontier European population rather than a policy of benevolence.¹²

⁸ Please see Appendix B for further discussion.

⁹ St. Germain, J. (2001). *op.cit.*, p xvii

¹⁰ *ibid*

¹¹ Higham, C. L. (2000) *op.cit.*, p3

¹² *ibid* p123

The direct suppression of Indian religions became less prevalent in the Twentieth Century but instead the governments endorsed an acquisitive attitude to cultural artefacts. The resultant alienation of sacred objects seriously impacts the contemporary practice of Indian religious rites and therefore amounts to another infringement of the freedom of religion. Thus there has been an escalating campaign for the repatriation of such material which has resulted in the laudable, if flawed, U.S. *Native American Graves Protection and Repatriation Act* (NAGPRA) of 1990. Yet this fails to secure the return of sacred objects held by non-federal entities and thus more comprehensive legislation mandating the return of all sacred objects, with market value compensation, is required.

In Canada, although the plunder of sacred objects was not as systematic or widespread, there has also been less of an attempt to correct past abuses. The continued alienation of such objects also infringes the recently introduced right of free exercise of religion provided by section 2 of the Canadian *Charter of Rights and Freedoms* of 1982. Although some progress has been made there is a need for national repatriation legislation, similar to the United States NAGPRA, to bolster the provincial laws of varying compulsion and the collection of hortatory repatriation *policies*. Better still would be the recognition of an aboriginal right to all sacred objects, entrenched by virtue of section 35, which would also bind private parties.

U.S. initiatives for the repatriation of sacred objects are commendable attempts to decolonise Indian culture and religion but have come with minimal governmental forfeit. The treatment of Indian sacred sites confirms that there is a limit to governmental largesse when powerful commercial stakeholders have diametrically opposed interests. Tourists, mining companies, logging interests and transport infrastructure projects often trump any free exercise rights. Any executive accommodation of Indian sacred site worship provokes cries of government establishment of religion and a violation of the Establishment Clause of the First Amendment, yet surely such concerns should be inversely proportional to the size of the denomination. In the final analysis, it would seem that any extension of First Amendment protection to the country's first inhabitants must be, above all, affordable. A sacred site statute, conferring exclusive rights of access, would perhaps be an attainable objective, provided that there was reasonable geographical and temporal circumscription. The comprehensive treaties of land cession in the United States, carried out during the Nineteenth Century, although coercive and usually representing a fraction of fair value, mean that any claim of lingering aboriginal title to their sacred sites is largely futile.

The situation in Canada differs as, due to the relative lack of land treaties, there remain putative Indian property rights that may be a more effective encumbrance on the commercial despoliation of such sites, binding as they are on governments and private parties. Therefore, paradoxically the lack of any historical recognition of aboriginal rights and title in Canada and their subsequent treaty extinguishment can prove an advantage. First Nations in Canada should combine this aboriginal title approach with, as in the United States, a more pro-active pleading on the grounds of an infringement of the free exercise of religion at their sacred sites. A judicially-conferred aboriginal right of access to sacred sites would perhaps be a little ambitious, due to the fact that the courts may be reluctant to establish what would be an entrenched right by virtue of section 35. Again, a sacred site statute from the legislature may be a more democratically palatable objective. A negotiated treaty guaranteeing access to sacred sites would be another option, which in Canada would enjoy entrenchment as an aboriginal right.

The opening chapter described the Christian origins of the Doctrine of Discovery. In the final chapter the evolution of International Law on indigenous peoples in the Twentieth Century was described and the promise of the reintroduction of a more secular International Law was offered to reverse the centuries of colonisation. Yet much of the International Law specifically on indigenous peoples has either been soft law or has failed to attract Canada and the United States as signatories. Ultimately, the North American governments have selectively embraced supranational law to suit their ends: the Doctrine of Discovery's mandate to deprive the indigenes of rights was enthusiastically adopted, yet more recent International Law, with messages of empowerment and decolonisation, are consistently rejected.

The United Nations *Declaration on Indigenous Peoples* (2007) was a comprehensive statement yet any claim that it reflects Customary International Law is premature. Indeed, it may be tactically more astute to argue that it is merely persuasive, rather than risk antagonising a hostile judiciary by an over-ambitious claim that it is legally binding. The *Declaration* did consolidate the paradigm shift started by ILO Convention 169, from the promise of an individual and assimilated equality to a communal, discrete and collective existence. This was primarily due to the fact that indigenous peoples were, for the first time, actually consulted during the prolonged gestation period. Ultimately, its effectiveness may depend on its ability to invoke supranational censure or perhaps provoke national embarrassment, assuming countries are capable of such an emotion. To this end, a detailed study of U.S. and Canadian compliance with each individual provision

of the *Declaration* would reinforce the dissonance with international indigenous legal norms and could be a worthwhile future project. So just as the unwritten principles of International Law, together with the Papal-inspired European Law of Nations, sustained the Doctrine of Discovery and the dispossession of the indigenes, the hope that a more secular, contemporary International Law may conceivably be used to call to account the heirs of the discoverers is perhaps premature.

Thus we may see that both countries' treatment of their indigenous populations has amounted to spiritual, and in some instances physical genocide. Canadian treatment has perhaps been more ignorant than malevolent in comparison to the United States. Commendable, if sporadic, attempts have been made to reverse at least some of the cultural destruction within the last century, more so by the United States. The present may be less sanguinary than the past, yet the future is less than sanguine.¹³ Indian religions are not regarded with the same level of horror of a century ago but depreciated in a more subtle and insidious manner. It remains the case that, whatever generosity of spirit that the dominant societies have demonstrated has needed to be, above all, cost-effective.

*It matters little where we pass the remnants of our days. They will not be many...But why should I mourn at the untimely fate of my people?...Your time of decay may be distant, but it will surely come, for even the white man, whose God walked and talked with him as friend, cannot be exempt from the common destiny. We may be brothers after all, we will see.*¹⁴ (Chief Seattle in 1855)

¹³ Vecsey, C. (1991) *op.cit.*, pp15-16

¹⁴ Rosenstiel, A. (1983) *op.cit.*, . p126

BIBLIOGRAPHY

- Abler, T. S. (1992). "Protestant Missionaries and Native Culture: Parallel Careers of Asher Wright and Silas T. Rand." American Indian Quarterly **16(1)**: 25-37
- Adams, C. (2001). "The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will Rluipa's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny." Fordham L. Rev. **70**: 2361-2408
- Aitken, B. (1930). "Temperament in Native American Religion." The Journal of the Royal Anthropological Institute of Great Britain and Ireland **60**: 363-387
- Al Attar, M et al "Indigenous Cultural Heritage Rights in International Human Rights Law" in Bell, C. E. and Paterson, R. K (2008). Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press
- Albert, R. (2004). "American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective." Marquette Law Review **88**: 867-925
- Albert, M. (2008). "Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands." Colum. Hum. Rts. L. Rev. **40**: 479-521
- Aldred, L. (2000). "Plastic Shamans and Astroturf Sun Dances: New Age Commercialization of Native American Spirituality." American Indian Quarterly **24(3)**: 329-352
- Allegretti, J. (2002). "The Unity of Law and Religion: A Response to Ackroyd and Vining." Mercer Law Review **53**: 1065-1073
- Amar, A.R. "The Bill of Rights: Creation and Reconstruction" in Brownstein, A. (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp90-96
- Amato, C. (2002). "Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage." Colum. J. Envtl. L. **27**: 1-44
- Anaya, S. and Williams, R. Jr (2001). "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System." Harvard Human Rights Journal **14**: 33-86
- Anderson, R.T. , Goldberg, C. et al (eds)(2005). Cohen's Handbook of Federal Indian Law. Newark, NJ, LexisNexis.
- Annett, K. "Hidden from History: The Canadian Holocaust" in Thorner, T. and Frohn-Nielsen T. (eds) (2003). A Country Nourished on Self-doubt : Documents in Post-confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor). pp404-418

Asch, M "Calder and the Representation of Indian Society in Canadian Jurisprudence" in Foster, H., Webber, J et al.(eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp101-110

Asch, M. (2002). "From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution." Can. JL & Soc. **17**: 23-39

Asch, M. (ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press

Aust, A. (2005). Handbook of International Law. Cambridge, Cambridge University Press

Backhouse, C. and Osgoode Society for Canadian Legal History(1999). Colour-Coded : a Legal History of Racism in Canada, 1900-1950. Toronto, Published for the Osgoode Society for Canadian Legal History by University of Toronto Press

Baer, S. (1987). "The Public Trust Doctrine--A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources." BC Env'tl. Aff. L. Rev. **15**: 385-436

Balkin, J. (2005). "Wrong the Day It Was Decided: Lochner and Constitutional Historicism." Boston University Law Review **85**: 677-725.

Banner, S. (2007). How the Indians Lost their Land : Law and Power on the Frontier. Cambridge, Mass. ; London, Belknap Press of Harvard University Press

Bannon Jr, J. (1997). "The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the Peyote Way Church of God Case." American Indian Law Review **22**: 475-507

Barelli, M. (2009). "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples." International and Comparative Law Quarterly **58**(04): 957-983

Barsh, R. (1986). "The Illusion of Religious Freedom for Indigenous Americans." Oregon Law Review **65**: 363-412

Barsh, R. L. (1991). "The Supreme Court, Peyote, and Minority Religions: Zero Tolerance." Wicazo Sa Review **7**(2): 49-52

Barsh, R. and Henderson, J. (1996). "The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand" McGill Law Journal **42**: 993-1009

Beaman, L. (2002). "Aboriginal Spirituality and the Legal Construction of Freedom of Religion." Journal of Church and State **44**: 135-152

Beaman, L. G. (2003). "The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada." Journal for the Scientific Study of Religion **42**(3): 311-325

Beaver, R. (1963). "American Missionary Efforts to Influence Government Indian Policy." Journal of Church and State 5: 77-94

Beaver, R. P. (1966). Church, State, and the American Indians ... Two and a Half Centuries of Partnership in Mission between Protestant Churches and Government, Saint Louis: Concordia Publishing House

Bedwell, R. J. (1999). Brink of Destruction : a Quotable History of the Civil War. Nashville, Tenn. ; [Great Britain], Cumberland House

Beeson, A. (1992). "Dances With Justice: Peyotism in the Courts." Emory Law Journal 41: 1121-1184

Bell, C et al "Recovering from Colonization" in Bell, C. E. and Napoleon, V. (2008) First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp33-92

Bell, C et al "Repatriation and Heritage Protection: Reflections on the Kainai Experience" in Bell, C. E. and Napoleon, V. (2008) First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp203-258

Bell, C. and Asch, M. "Challenging Assumption: The Impact of Precedent in Aboriginal Rights Litigation" in Asch, M.(ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press, pp38-74

Bell, C. E. "First Nations Cultural Heritage : A Selected Survey of Issues and Initiatives" in Bell, C. E. and Napoleon, V. (2008). First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp367-416

Bell, C.E. "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform" from Bell, C. E. and Paterson, R. K (2008) Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press pp15-78

Bell, C. E. and Napoleon, V. (eds) (2008). First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press

Bell, C and Napoleon, V. "Introduction, Methodology, and Thematic Overview" in Bell, C. E. and Napoleon, V. (2008) First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp1-30

Bell, C. E. and Paterson R. K.(eds) (2008). Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press

Bell, D. (1995). "Who's Afraid of Critical Race Theory." University of Illinois Law Review: 893-910

Benson, I. (2007). "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities." Emory International Law Review 21: 111-166

Berg, T. (2004). "Minority Religions and the Religion Clauses." Washington University Law Quarterly 82: 919-1000

- Berg, T. C. (2008). The Free Exercise of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus ; Lancaster : Gazelle Drake Academic [distributor]
- Berger, B. (2004). "'Power over this Unfortunate Race": Race, Politics and Indian Law in *United States v Rogers*." William & Mary Law Review **45**: 1957-2052
- Berger, B. (2006). "Liberalism and Republicanism in Federal Indian Law." Connecticut Law Review **38**: 813-831
- Berger, B. (2007). "Law's Religion: Rendering Culture." Osgoode Hall Law Journal **45**: 277-314
- Berkhofer, R. F. (1965). Salvation and the Savage : an Analysis of Protestant Missions and American Indian Response, 1787-1862. Westport, Connecticut, Greenwood Press
- Beschle, D. (2001). "Does the Establishment Clause Matter?--Non-Establishment Principles in the United States and Canada." University of Pennsylvania Journal of Constitutional Law **4**: 451-492
- Beyer, P. (2003). "Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context." Journal for the Scientific Study of Religion **42**(3): 333-339
- Biolsi, T. (ed) (2004). A Companion to the Anthropology of American Indians. Malden, MA, Blackwell Pub
- Biolsi, T. and L. J. Zimmerman (1997). Indians and Anthropologists : Vine Deloria, Jr., and the Critique of Anthropology. Tucson, University of Arizona Press.
- Black Elk., Neihardt, J. G et al. (2004). Black Elk Speaks : Being the Life Story of a Holy Man of the Oglala Sioux. Lincoln, University of Nebraska Press
- Bluemel, E. (2004). "Accommodating Native American Cultural Activities on Federal Public Lands." Idaho Law Review **41**: 475-563
- Bluemel, E. (2005). "Prioritizing Multiple Uses on Public Lands after Bear Lodge." BC Env'tl. Aff. L. Rev. **32**: 365-394
- Bonham, C. (2002). "Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands." Law and Inequality: A Journal of Theory and Practice **20**: 157-202
- Boradiansky, T. (1990). "Conflicting Values: The Religious Killing of Federally Protected Wildlife." Natural Resources Journal **30**: 709-754
- Borrows, J "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Asch, M. (ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press pp155-173

- Borrows, J. (2000). "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission." McGill LJ **46**: 615-661
- Borrows, J. (2002). Recovering Canada : The Resurgence of Indigenous Law. Toronto ; Buffalo, University of Toronto Press
- Borrows, J. "Let Obligations Be Done" in Foster, H., Webber, J et al.(eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp201-215
- Borrows, J. "Living Law on a Living Earth: Aboriginal Religion, Law and the Constitution in Moon, R. (ed) (2008). Law and Religious Pluralism in Canada. Vancouver, UBC Press pp161-191
- Bourne, R. (2002). Gods of War, Gods of Peace : How the Meeting of Native and Colonial Religions shaped early America. New York, Harcourt
- Bowden, H. W. (1981). American Indians and Christian Missions : Studies in Cultural Conflict. Chicago ; London, University of Chicago Press
- Boyd, T. (1990). "Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation." Missouri Law Review **55**: 883-936
- Bracken, C. (1997). The Potlatch Papers : A Colonial Case History. Chicago ; London, University of Chicago Press
- Brady, J. (1999). "" Land Is Itself a Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge." American Indian Law Review: 153-186
- Bramly, S. (1994). Leonardo da Vinci : the Artist and the Man. London, Penguin
- Brave Bird, M. and Erdoes, R. (1993). Ohitika Woman. New York, Grove Press.
- Brent, J. (1999). "An Agent and Two Principals: US Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act." American Politics Research **27**(2): 236-266
- Briones, J. (2002). "We Want to Believe Too: The IRFA and Indigenous Peoples' Right to Freedom of Religion." University of California Davis Journal of International Law and Policy **8**: 345-361
- Brown, B. E. (1999). Religion, Law, and the Land : Native Americans and the Judicial Interpretation of Sacred Land. Westport, Conn., Greenwood Press
- Brown, D. A. (1971). Bury My Heart at Wounded Knee; an Indian History of the American West. New York,, Holt

Brown, J. E. (1953). The Sacred Pipe. Black Elk's Account of the Seven Rites of the Oglala Sioux. Recorded & edited by Joseph Epes Brown. [With portraits.], pp. xx. 144. University of Oklahoma Press: Norman.

Brown, J. E., Weatherly, M. B et al. (2007). The Spiritual Legacy of the American Indian : Commemorative Edition with Letters while Living with Black Elk. Bloomington, Ind., World Wisdom,

Brownstein, A. (2006). "Taking Free Exercise Rights Seriously." Case W. Res. L. Rev. **57**: 55-145

Brownstein, A. (ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books

Brucker, S. (2008). "Navajo Nation v. United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands." Environs Environmental Law and Policy Journal **31**: 273-295

Bryce, P. H. (1922). The Story of a National Crime: Being an Appeal for Justice to the Indians of Canada; the Wards of the Nation, our Allies in the Revolutionary War, our Brothers-in-arms in the Great War. Ottawa, James Hope & Sons, Limited

Buck, S. (2001). "The Nineteenth-Century Understanding of the Establishment Clause." Tex. Rev. L. & Pol. **6**: 399-429

Buckley, H. (1992). From Wooden Ploughs to Welfare : Why Indian Policy Failed in the Prairie Provinces. Montreal & Kingston ; London, McGill-Queen's University Press

Bucko, R "Religion" in Biolsi, T. (ed) (2004). A Companion to the Anthropology of American Indians. Malden, MA, Blackwell Pub. pp171-196

Burton, L. and Ruppert, D. (1998). "Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands." Cornell Journal of Law and Public Policy **8**: 201-247

Byrne, C. (1993). "Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects." Journal of Environmental Law and Litigation **8**: 109-131

Cadwalader, S. L. and Deloria, V. (1984). The Aggressions of Civilization : Federal Indian policy since the 1880s. Philadelphia, Temple University Press.

Cairns, A. (2000). Citizens Plus : Aboriginal Peoples and the Canadian State. Vancouver, UBC Press

Canby, W. C. (2004). American Indian Law in a Nutshell. St. Paul, Minn., West Group

Cardinal, H. (1969). The Unjust Society. The Tragedy of Canada's Indians, Edmonton: M. G. Hurtig

- Carpenter, K. (2002). "In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases." New England Law Review **37**: 619-633
- Carpenter, K. (2004). "Considering Individual Religious Freedoms under Tribal Constitutional Law." Kansas Journal of Law & Public Policy **14**: 561-606
- Carpenter, K. (2005). "'A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners,'" UCLA Law Review **52**: 1061-1148
- Carpenter, K. (2006). "Old Ground and New Directions at Sacred Sites on the Western Landscape." Denver University Law Review **83**: 981-1002
- Carpenter, K. (2006). "The Interests of Peoples in the Cooperative Management of Sacred Sites." Tulsa L. Rev. **42**: 37-55
- Carpenter, K. (2008). "Real Property and Peoplehood." Stanford Environmental Law Journal **27**: 313-395
- Cave, A. A. (1988). "Canaanites in a Promised Land: The American Indian and the Providential Theory of Empire." American Indian Quarterly **12**(4): 277-297
- Cebula, L. (2003). Plateau Indians and the Quest for Spiritual Power, 1700-1850. Lincoln, Neb., University of Nebraska Press
- Celichowski, J. (2000). "A Rough and Narrow Path: Preserving Native American Religious Liberty in the Smith Era." American Indian Law Review **24**: 1-35
- Chamberlin, J.E. "Culture and Anarchy in Indian Country" in Asch, M. (ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press pp3-38
- Chambers, N. (1954). "Civil Liberties after the Saumur Case." University of Toronto Faculty of Law Review **12**: 12-21
- Charters, C. and Stavenhagen, R. (2009). Making the Declaration Work : The United Nations Declaration on the Rights of Indigenous Peoples. Copenhagen, IWGIA ; [New Brunswick]
- Chrisjohn, R.D. et al "Genocide and Indian Residential Schooling: The Past is Present" in Griffiths, A. and Wiggers, R. (eds) (2002). Canada and International Humanitarian Law : Peacekeeping and War Crimes in the Modern Era. Halifax, Centre for Foreign Policy Studies
- Churchill, W. and Jaimes M. A. (1992). Fantasies of the Master Race : Literature, Cinema and the Colonization of American Indians. Monroe, Me., Common Courage Press
- Cline, C. (1990). "Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy after *Lyng v. Northwest Indian Cemetery Protective Association*." Hastings Law Journal **42**: 591-633

- Clinton, R. N., Newton, N. J. et al. (2005). American Indian Law : Native Nations and the Federal Systems : Cases and Materials. Newark, NJ, LexisNexis
- Cohen, F. S. (2005). Cohen's Handbook of Federal Indian Law. Newark, NJ, LexisNexis
- Cohen, F. S. (1953). "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy." The Yale Law Journal **62**: 348-390
- Cohen, F. (1935). "Transcendental Nonsense and the Functional Approach." Columbia Law Review **35**: 809-849
- Cole, D. and Chaikin, I. (1990). An Iron Hand upon the People : The Law against the Potlatch on the Northwest Coast. Vancouver, Seattle
- Collins, R. (2002). "Sacred Sites and Religious Freedom on Government Land." University of Pennsylvania Journal of Constitutional Law **5**: 241-270
- Conkle, D. O. "Toward a General Theory of the Establishment Clause" in Brownstein, A. (ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp76-82
- Conway, D. (2009). "Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources." Texas Wesleyan Law Review **15**: 207-256
- Cook, T. (1991). "The Peyote Case: A Return to Reynolds." Denver University Law Review **68**: 91-104
- Cooter, R. and Fikentscher, W. (1998). "Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)." The American Journal of Comparative Law **46**: 287-337
- Cooter, R. and Fikentscher, W. (2008). "American Indian Law Codes: Pragmatic Law and Tribal Identity." American Journal of Comparative Law **56**(1): 29-74
- Cord, R.L. "Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment" in Brownstein, A.(ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp56-64
- Cote, P. and Gunn, T. (2005). "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada." Emory International Law Review **19**: 685-751
- Craven, R. (1984). "The American Indian Religious Freedom Act- An Answer to the Indian's Prayers?" South Dakota Law Review **29**: 131-143
- Cross, J. and K. Lomond (1993). "The Civil Rights of the Aboriginal Peoples of the United States and Canada." Arizona Journal of International and Comparative Law **10**: 253-299

Cross, R. and Brenneman, E. (1997). "Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century." Public Land & Resources Law Review **18**: 5-45

Cryne, J. A. (2009). "NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts." American Indian Law Review **34**(1): 99-122

Cuk, N. (1997). "Carrying the Battle into the Form: Repatriating First Nations' Cultural Artifacts." Dalhousie J. Legal Stud. **6**: 157-186

Culhane Speck, D. (1998). The Pleasure of the Crown : Anthropology, Law and First Nations. Burnaby, B.C., Talonbooks

Curcio, A. (2006). "Civil Claims for Uncivilized Acts: Filing Suit against the Government for American Indian Boarding School Abuses." Hasting Race and Poverty Law Journal **4**: 45-129

Dalton, J. (2005). "There is Nothing Light about Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions." Brigham Young University Law Review: 1575-1624

Dalton, J. (2006). "Aboriginal Self-Determination in Canada." Canadian Journal of Law and Society **21**: 11-37

Dalton, S. (1994). "Saving Native American Religious Sites: The Haskell Medicine Wheel." Kansas Journal of Law & Public Policy **4**: 61-69

Dannenmaier, E. (2008). "Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine." Wash. UL Rev. **86**: 53-77

Dargo, G. (1995). "Religious Toleration and Its Limits in Early America." Northern Illinois University Law Review **16**: 341-370

De Meo, A. (1994). "More Effective Protection for Native American Cultural Property through Regulation of Export." American Indian Law Review **19**: 1-72

De Mestral, A. and Fox-Decent, E. (2008). "Rethinking the Relationship Between International and Domestic Law." McGill LJ **53**: 573-648

Debo, A. (1970). A History of the Indians of the United States. Norman,, University of Oklahoma Press

Deloria, V. (1985). American Indian Policy in the Twentieth Century. Norman, University of Oklahoma Press

Deloria, V. (1974). Behind the Trail of Broken Treaties. [S.l.], Dell.

Deloria, V. (1969). Custer Died for your Sins; an Indian Manifesto. [New York], Macmillan

Deloria, V. (1970). We Talk, You Listen. New tribes, New Turf, New York: Macmillan Co.

Deloria, V. (1973). God is Red. NY, Grosset

Deloria, V. (1995). Red Earth, White Lies : Native Americans and the Myth of Scientific Fact. New York ; London, Scribner

Deloria, V. "Vision and Community" in Treat, J.(ed) (1996). Native and Christian : Indigenous Voices on Religious Identity in the United States and Canada. New York ; London, Routledge, pp108-119

Deloria, V. (1999). For this Land: Writings on Religion in America, Routledge

Deloria, V. and C. M. Lytle (1983). American Indians, American Justice. Austin, University of Texas Press

Deloria, V. and Wilkins, D.E. (1999). Tribes, Treaties, and Constitutional Tribulations. Austin, University of Texas Press

d'Errico, P. (1999). "Native Americans in America: A Theoretical and Historical Overview." Wicazo Sa Review 14(1): 7-28

Devlin, R. (2001). "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education." Queens Law Journal 27(1): 161-206

Donovan, J. M. (2007). Legal Anthropology : An Introduction. Lanham, MD, Altamira Press

Dowd, G. E. (1992). A Spirited Resistance : The North American Indian Struggle for Unity, 1745-1815. Baltimore, Md. ; London, Johns Hopkins University Press

Doyle, D. (1984). "Religious Freedom in Canada." Journal of Church and State 26: 413-436

Duncan Jr, J. (2002). "Privilege, Invisibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States." Alabama Law Review 54: 617-63

Dussault, R., Erasmus, G. et al (1996) The Report of the Royal Commission on Aboriginal Peoples Ottawa, Canada Communication Group, downloaded from the Indian and Northern Affairs Canada website

Dussias, A. (1996). "Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights." Maryland Law Review 55: 84-159

Dussias, A. (1997). "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases." Stanford Law Review: 773-852

Dussias, A. (2000). "Cultural Conflicts Regarding Land Use: The Conflict Between Recreational Users at Devil's Tower and Native American Ceremonial Users." Vt. J. Env'tl. L. 2: 13-40

Dussias, A. (2005). "Kennewick Man, Kinship, and the Dying Race: The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act." Neb. L. Rev. **84**: 55-161

Eastman, C. A. (1911). The Soul of the Indian. An Interpretation, pp. xiii. 170. Houghton Mifflin Co.: Boston & New York

Eastman, E. G. and Pratt R. H. (1935). Pratt. The Red Man's Moses. [A biography of General R. H. Pratt. With plates, including a portrait.]. University of Oklahoma Press: Norman

Ehle, J. (1988). Trail of Tears : the Rise and Fall of the Cherokee Nation. New York, Anchor Press

Eisgruber, C. and Sager, L (1994). "Why the Religious Freedom Restoration Act is Unconstitutional." New York University Law Review **69**: 437-476

Eisgruber, C. and Zeisberg, M. (2006). "Religious Freedom in Canada and the United States." International Journal of Constitutional Law **4**(2): 244-268

Elliott, D. (1996). "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship." Manitoba Law Journal **24**: 137-186

Elliott, D. W. (2005). Law and Aboriginal Peoples in Canada. North York, ON, Captus Press

Elshtain, B "Freedom of Religion and the Rule of Law" in Farrow, D. (ed) (2004). Recognizing Religion in a Secular Society : Essays in Pluralism, Religion, and Public Policy. Montréal, McGill-Queen's University Press ; Chesham : Combined Academic [distributor]. pp35-40

Errico, S. (2007). "The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview." Human Rights Law Review **7**(4): 756-759

Evans, M. (2005). Blackstone's International Law Documents. Oxford, Oxford University Press

Ezra, J. (1989). "The Trust Doctrine: A Source of Protection for Native American Sacred Sites." Catholic University Law Review **38**: 705-736

Falcone, B. (1994). "Legal Protection (or the Lack Thereof) of American Indian Sacred Religious Sites." Federal Bar News and Journal **41**: 568-575

Falk, D. (1989). "Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands." Ecology Law Quarterly **16**: 515-570

Falkowski, J. E. (1992). Indian Law/Race Law : a Five-hundred Year History. New York, Praeger

Fallon, R. H. (2004). The Dynamic Constitution : an Introduction to American Constitutional Law. Cambridge, UK ; New York, Cambridge University Press

Farley, C. (1997). "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer." Connecticut Law Review **30**: 1-57

Farrow, D. (ed) (2004). Recognizing Religion in a Secular Society : Essays in Pluralism, Religion, and Public Policy. Montréal, McGill-Queen's University Press ; Chesham : Combined Academic [distributor]

Fautsch, D. (2010). "An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform." Mich. J. Int'l L. **31**: 449-473

Feest, C. (2000). The Cultures of Native North Americans. Cologne, Konemann

Feldman, A. (2000). "Othering Knowledge and Unknowing Law: Oppositional Narratives in the Struggle for American Indian Religious Freedom." Social & Legal Studies **9**(4): 557-579

Feldman, S. (2004). "Religious Minorities and the First Amendment: The History, The Doctrine, and The Future." Journal Of Constitutional Law **6:2**: 222-277.

Fielding, A. (2008). "When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada." Appeal: Review of Current Law and Law Reform **13**: 28-50

Firestone, J., Lilley, J. et al. (2004). "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law." Am. U. Int'l L. Rev. **20**: 219-292

Fish, J. (1990). "Sacred Site Free Exercise Claims on Government Land: The Constitutional Slighting of Indian Religions." New Mexico Law Review **20**: 113-134

Fisher, L. (2001). "Indian Religious Freedom: To Litigate or Legislate?" American Indian Law Review: 1-39

Flanagan, T. (2008). First Nations? Second Thoughts. Montréal, Québec, McGill-Queen's University Press ; Chesham : Combined Academic [distributor]

Fleras, A. and J. L. Elliott (1992). The "Nations Within" : Aboriginal-State Relations in Canada, the United States, and New Zealand. Toronto, Oxford University Press.

Fodella, A. (2005). "International Law and the Diversity of Indigenous Peoples." Vt. L. Rev. **30**: 565-594

Forest, G "Reminiscences of Aboriginal Rights at the 'Time of Calder'" in Foster, H., Webber, J et al. (eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp54-58

Foster, H., Webber, J et al. (eds) (2007). Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press

Frickey, P (2007) "The New Realism: The Next generation of Scholarship in Federal Indian Law" Conference Transcript the National Congress of American Indian (2006) American Indian Law Review **32**: 1-150

- Fritz, H. E. (1963). The Movement for Indian Assimilation, 1860-1890, pp. 244. University of Pennsylvania Press: Philadelphia.
- Fromherz, C. (2007). "Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples." U. Pa. L. Rev. 156: 1341-1381
- Gabrieldis, A. M. (2006). "Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in US State Courts." Buff. Hum. Rts. L. Rev. 12: 139-195
- Galanda, G. (2006). "Bar None! The Social Impact of Testing Federal Indian Law." Federal Lawyer 53: 30-33,
- Garner, B. A.(ed) and Black, H. C. L (2004). Black's Law Dictionary. St. Paul, MN, Thomson/West
- Garrity, J. F. (2000). "Jesus, Peyote, and the Holy People: Alcohol Abuse and the Ethos of Power in Navajo Healing." Medical Anthropology Quarterly 14(4): 521-542
- Garvais, D. (2003). "Spiritual But Not Intellectual-The Protection of Sacred Intangible Traditional Knowledge." Cardozo Journal of International and Comparative Law 11: 467-495
- Gaubatz, D. (2004). "RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions." Harvard Journal of Law & Public Policy 28: 501-607
- Gedicks, F. M. (2005). "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States." Emory International Law Review 19: 1187-1275
- Geertz, A. (2003). "Ethnohermeneutics and Worldview Analysis in the Study of Hopi Indian Religion." Numen: 309-348.
- Geertz, A. W. (1996). "Contemporary Problems in the Study of Native North American Religions with Special Reference to the Hopis." American Indian Quarterly 20(3/4): 393-414
- Geronimo, Barrett, S. M. et al. (1996). Geronimo : His Own Story. New York, Meridian.
- Getty, I. A. L. and Lussier A. S. (eds) (1983). As Long as the Sun Shines and Water Flows : A Reader in Canadian Native Studies. Vancouver, University of British Columbia Press
- Gibson, D. (1966). "Constitutional Amendment and the Implied Bill of Rights" McGill Law Journal 12: 497-501
- Gibson, J. (2008). "The UDHR and the Group: Individual and Community Rights to Culture." Hamline Journal of Public Law and Policy 30(1): 285-317
- Gildin, G. (2006). "The Sanctity of Religious Liberty of Minority Faiths under State Constitutions: Three Hypotheses." University of Maryland Law Journal of Race, Religion, Gender and Class 6: 21-50

Glauner, L. (2001). "The Need for Accountability and Reparations: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans." DePaul Law Review **51**: 911-961

Godlewska, C and Webber, J "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a" in Foster, H., Webber, J et al.(eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp1-33

Goldberg, C. (2001). "American Indians and "Preferential" Treatment." UCLA L. Rev. **49**: 943-989

Goldberg, C. and Champagne, D. (2006). "Is Public Law 280 fit for the Twenty-First Century? Some Data at Last." Connecticut Law Review **38**: 697-729

Gooding, S. S. (1996). "At the Boundaries of Religious Identity: Native American Religions and American Legal Culture." Numen **43**(2): 157-183

Gordon, B. S. (2008). Law and Religion, 1790-1920. The Long Nineteenth Century (1789-1920). Cambridge, Cambridge University Press

Gordon, S. (1985). "Indian Religious Freedom and Governmental Development of Public Lands." Yale Law Journal: **94**: 1447-1471

Gordon-McCutchan, R. (1991). "The Battle for Blue Lake: A Struggle for Indian Religious Rights." Journal of Church and State **33**: 785-797

Government of Canada "Statement of Reconciliation" from Thorner, T. and T. Frohn-Nielsen (eds) (2003). A Country Nourished on Self-doubt : Documents in Post-confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor)

Grant, J. W. (1984). Moon of Wintertime : Missionaries and the Indians of Canada in Encounter since 1534. Toronto ; London, University of Toronto Press

Gray, A. (1995). "Effects of the American Indian Religious Freedom Act Amendments on Criminal Law: Will Peyotism eat away at the Controlled Substances Act." American Journal of Criminal Law **22**: 770-807

Green, L. C. and Dickason, O.P. (1989). The Law of Nations and the New World. Edmonton, Alta., University of Alberta Press

Griffin, R. (1995). "Sacred Site Protection against a Backdrop of Religious Intolerance." Tulsa Law Review **31**: 395-420

Grimes, R. L. (1996). "This May Be a Feud, but It Is Not a War: An Electronic, Interdisciplinary Dialogue on Teaching Native Religions." American Indian Quarterly **20**(3/4): 433-450

Guest, R. (1995). "Intellectual Property Rights and Native American Tribes." American Indian Law Review **20**(1): 111-139

Gunn, S. J. (2010). "The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of our national Consensus." William Mitchell Law Review **36**: 503-531

Hagan, W. T. (1966). Indian Police and Judges. Experiments in Acculturation and Control. [With plates, including portraits, and a bibliography.], New Haven & London

Hamburger, P.A. "A Constitutional Right of Religious Exemption: An Historical Perspective" from Berg, T. C.(ed) (2008). The Free Exercise of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus ; Lancaster : Gazelle Drake Academic [distributor].pp99-106

Harjo, S. (2004). "The American Indian Religious Freedom Act : Looking Back and Looking Forward." Wicazo Sa Review **19**(2): 143-151

Harland, C. (2000). "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents." Human Rights Quarterly **22**: 187-260

Harring, S. (1992). " The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law." Saskatchewan Law Review **56**: 297-372

Harring, S. L. (1994). Crow Dog's Case : American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century. Cambridge ; New York, Cambridge University Press

Harring, S. L. (1998). White Man's Law : Native People in Nineteenth-Century Canadian Jurisprudence. Toronto ; London, University of Toronto Press for the Osgoode Society for Canadian Legal History

Harris, M. (1980). Culture, People and Nature : an Introduction to General Anthropology, Harper and Row

Harris, S. (2005). Sacred Sites and Cultural Resource Protection: Implications for Mineral Development on, and off, Indian Lands. Rocky Mountain Mineral Law Foundation: Natural Resources Development in Indian Country

Hetzel, K. (2002). "Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments." Tulane Journal of International and Comparative Law **10**: 307-331

Higham, C. L. (2000). Noble, Wretched, & Redeemable : Protestant Missionaries to the Indians in Canada and the United States, 1820-1900. Albuquerque, N.M., University of New Mexico Press

Higham, C. L. (2003). "Saviors and Scientists: North American Protestant Missionaries and the Development of Anthropology." The Pacific Historical Review **72**(4): 531-559

Hill, C. (1972). The World Turned Upside Down: Radical Ideas during the English Revolution, London: Maurice Temple Smith

Hirschfelder, A. B. and P. F. Molin (2000). Encyclopedia of Native American Religions : An Introduction. New York, Facts on File.

HLRA (2003). "International Law as an Interpretative Force in Federal Indian Law." Harv. L. Rev. **116**: 1751-1773

Hoebel, E. A. (1940). The Political Organization and Law-Ways of the Comanche Indians, Menasha

Holler, C. (1984). "Black Elk's Relationship to Christianity." American Indian Quarterly **8**(1): 37-49

Holly, M "Navajo Criminal Justice: A Jungian Perspective" in Ross, J. I. and Gould, L. A. (eds) (2006). Native Americans and the Criminal Justice System. Boulder, Colo., Paradigm Publishers pp17-35

Horwitz, P. (1996). "Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2 (a) and Beyond, The." University of Toronto Faculty of Law Review **54**(1): 1-64

Houdyshell, M. (2006). "Environmental Injustice: The Need for a New Vision of Indian Environmental Justice." Great Plains Natural Resources Journal **10**: 1-16

Howell, R.G. and Ripley, R "The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)" in Bell, C. E. and Paterson R. K. (2008) Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press pp223-247

Hoxie, F. E. (1984). A Final Promise :The Campaign to Assimilate the Indians, 1880-1920. [Lincoln, Neb.], University of Nebraska Press

Hutchinson, C. (2007). "Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Residential Schools Provide Justification for Aboriginal Cultural Rights." Saskatchewan Law Review **70**: 425-458

Hutt, S. (2003). "If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans." N. Ill. UL Rev. **24**: 527-562

Idleman, S. (1993). "The Role of Religious Values in Judicial Decision-making." Indiana Law Journal **68**: 433-487

Inouye, D.K. "Discrimination and Native American Religious Rights" in Wunder, J. R. (ed) (1996). Native American Cultural and Religious Freedoms. New York, Garland Pub.pp1-19

Isaac, T. (2004). "First Nations Land Management Act and Third Party Interests." Alta. L. Rev. **42**: 1047-1060

Jackson, H. M. F. H. and Rolle, A. F. (1965). A Century of Dishonor. The Early Crusade for Indian Reform. Edited by Andrew F. Rolle,. Harper & Row: New York

- Jennings, F., H. Institute of Early American, et al. (1976). The Invasion of America: Indians, Colonialism, and the Cant of Conquest. Chapel Hill (N.C.), Published for the Institute of Early American History and Culture by University of North Carolina Press.
- Jensvold, S. (2001). "The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power." BYU J. Pub. L. **16**: 1-35
- Jocks, C. R. (1996). "Spirituality for Sale: Sacred Knowledge in the Consumer Age." American Indian Quarterly **20**(3/4): 415-431
- Joffe, P. (2010). "UN Declaration on the Rights of Indigenous Peoples." National Journal of Constitutional Law **26**(2): 121-228
- Johnson, R. (1991). "Fragile Gains: Two Centuries of Canadian and United States Policy toward Indians." Washington Law Review **66**: 643-718
- Johnston, D. (2001). "The Native American Plight: Protection and Preservation of Sacred Sites." Widener Law Review **8**: 443-461
- Josephy, A. M. (2002). 500 Nations : an Illustrated History of North American Indians. New York, Gramercy Books
- Kades, E. (2001). "History and Interpretation of the Great Case of Johnson v. M'Intosh." Law and History Review: 67-116
- Kagan, T. (2005). "Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach." University of Toronto Faculty of Law Review **63**: 1-43
- Kan, S. (1991). "Shamanism and Christianity: Modern-Day Tlingit Elders Look at the Past." Ethnohistory **38**(4): 363-387
- Keller, R. H. (1983). American Protestantism and United States Indian Policy, 1869-82. Lincoln, University of Nebraska Press.
- Kelsey, R. W. (1917). Friends and the Indians, 1655-1917. [With plates.], pp. xi. 291. Associated Executive Committee of Friends on Indian Affairs: Philadelphia
- Kersey, A. (1994). "The Nunavut Agreement: A Model for Preserving Indigenous Rights." Ariz. J. Int'l & Comp. L. **11**: 429-468
- Key, J. (2010). "This Land is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act." AFL Rev. **65**: 51-106.
- Keyes, G. M. (1958). "Civil Liberties and the Canadian Constitution." Osgoode Hall Law Journal **1**: 28-48.
- Kingsbury, B. (2001). "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law." New York University Journal of International Law and Politics **34**: 189-250

Korman, S. (2010). "Indigenous Ancestral Lands and Customary International Law." University of Hawaii Law Review **32**: 391-462

Kuruk, P. (2006). "Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States." Pepperdine Law Review **34**: 629-713

Kymlicka, W. (2008). "The Internationalization of Minority Rights." International Journal of Constitutional Law **6**: 1-21

LaDow, B. (2001). The Medicine Line : Life and Death on a North American Borderland. New York, Routledge.

Langford, M. (2003). "Minority Report: The Endorsement Test and Native American Religions on Federal Lands." First Amendment Law Review **1**: 119-154

Lash, K.T. "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle" in Brownstein, A.(ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp107-120

LaViolette, F. E. (1973) The Struggle for Survival; Indian Cultures and the Protestant Ethic in British Columbia [by] Forrest E. LaViolette. [Reprinted with additions, Toronto, Buffalo] University of Toronto Press

Laycock, D "Nonpreferential" Aid to Religion: A False Claim about Original Intent" in Brownstein, A.(ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp65-75

Laycock, D. (1995). "RFRA, Congress, and the Ratchet." Montana Law Review **56**: 145-170

Leach, J. (2005). "A Shooting Range at Bear Butte: Reconciliation or Racism." SDL Rev. **50**: 244-292

Leclair, J. (2006). "Federal Constitutionalism and Aboriginal Difference." Queen's Law Journal **31**: 521-535

Ledwon, L. (1997). "Native American Life Stories and "Authorship": Legal and Ethical Issues." American Indian Quarterly **21**(4): 579-593

Lee, S. (2000). "Government Managed Shrines: Protection of Native American Sacred Site Worship." Val. UL Rev. **35**: 265-308

Leigh, L. (1955). "Civil Liberties and the Canadian Constitution." Alberta Law Review **1**: 304-311

Levine, S. (1996). "Toward a Religious Minority Voice: A Look at Free Exercise Law through a Religious Minority Perspective." William & Mary Bill of Rights Journal **5**: 153-184

- Lewis, J. R. (1988). "Shamans and Prophets: Continuities and Discontinuities in Native American New Religions." American Indian Quarterly **12**(3): 221-228
- Llewellyn, K. Hoebel, E.A., et al. (1941). The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence. [With plates.], pp. ix. 360. University of Oklahoma Press:Norman
- Locke, J. and Laslett, T. P. R. (1970). Two Treatises of Government. A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett ... Second edition. (Reprinted with amendments.), Cambridge: University Press
- Loesch, M. (1993). "TheFirst Americans and the Free Exercise of Religion." American Indian Law Review **18**: 313-378
- Long, C. N. (2000). Religious Freedom and Indian Rights : the Case of Oregon v. Smith. Lawrence, University Press of Kansas
- Lopenzina, D. (2003). "'Good Indian': Charles Eastman and the Warrior as Civil Servant." American Indian Quarterly **27**(3/4): 727-757
- Macklem, P. (1984). "Freedom of Conscience and Religion in Canada." University of Toronto Faculty of Law Review **42**: 50-81
- Macklem, P. and Morgan, E. (2000). "Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awas Tingni v. Republic of Nicaragua*." Hum. Rts. Q. **22**: 569-602
- Mair, L. (1967). An Introduction to Social Anthropology. UK, Clarendon Press
- Mankiller, W. P. and M. Wallis (1993). Mankiller : a Chief and her People. New York, St. Martin's Press.
- Mansfield, J. (1986). "The Religion Clauses of the First Amendment and Foreign Relations." DePaul Law Review **36**: 1-40
- Manus, P. (2006). "Indigenous Peoples' Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States." British Columbia Environmental Affairs Law Review **33**: 1-86
- Marriott, A. (1945). The Ten Grandmothers, Oklahoma : Univ. of Oklahoma
- Marsh, G. (1992). "Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items." Ariz. St. LJ **24**: 79-133
- Martin, C. (1987). The American Indian and the Problem of History. New York, Oxford University Press
- Martin, J. W. (1991). "Before and beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion." Journal of the American Academy of Religion **59**(4): 677-701

- Masayesva, V "Epilogue" in Vecsey, C. (ed) (1991). Handbook of American Indian Religious Freedom. New York, Crossroad pp134-137
- McCauley, M. T. (2009). "Empowering Change: Building the Case for International Indigenous Land Rights in the United States." Ariz. St. LJ **41**: 1167-1204
- McConnell, M.W. "The Origins and Historical Understanding of Free Exercise of Religion" in Berg, T. C.(ed) (2008). The Free Exercise of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus ; Lancaster : Gazelle Drake Academic [distributor]pp84-98
- McDonald, A. (2004). "Secularizing the Sacrosanct: Defining Sacred for Native American Sacred Sites Protection Legislation." Hofstra Law Review **33**: 751-784
- McDonald, B. (2009). "How a Nineteenth Century Indian Treaty Stopped a Twenty-First Century Megabomb." Nev. LJ **9**: 749-774
- McGaa, E. (2002). Native Wisdom : Perceptions of the Natural Way. San Francisco, CA, Council Oak Books
- McGarvie, M. and Mensch, E. (2008). Law and Religion in Colonial America. Early America (1580-1815). Cambridge University Press, Cambridge
- McHugh, P. (1998). "Common-Law Status of Colonies and Aboriginal Rights: How Lawyers and Historians Treat the Past, The." Saskatchewan Law Review **61**: 393-429
- McKenna, M. C. (ed) (1993). The Canadian and American Constitutions in Comparative Perspective. Calgary, Alta., Canada, University of Calgary Press
- McLachlin, B. "Freedom of Religion and the Rule of Law: A Canadian Perspective in Farrow, D. (ed) (2004). Recognizing Religion in a Secular Society : Essays in Pluralism, Religion, and Public Policy. Montréal, McGill-Queen's University Press ; Chesham : Combined Academic [distributor].pp12-34
- McLaughlin, R. (1996). "Native American Graves Protection and Repatriation Act: Unresolved Issues between Material Culture and Legal Definitions, The." University of Chicago Law School Roundtable **3**: 767-790
- McLay, E et al "Alhut tut et Sul'hweentst [Respecting the Ancestors]: Understanding Hul'qumi'num Heritage Laws and Concerns for the Protection of Archaeological Heritage" in Bell, C. E. and Napoleon, V. (2008) First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp150-203
- McNeil, K "Judicial Approaches to Self-Government since Calder" in Foster, H., Webber, J et al.(eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp129-152
- McNeil, K "The Meaning of Aboriginal Title" from Asch, M. (ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press.pp 153-154

McSloy, S. (1996). "Because the Bible Tells Me So: Manifest Destiny and American Indians." St. Thomas Law Review **9**: 37-47.

Michaelsen, R. "Law and the Limits of Liberty" in Vecsey, C. (ed) (1991). Handbook of American Indian Religious Freedom. New York, Crossroad pp116-134

Michaelsen, R. (1985). "American Indian Religious Freedom Litigation: Promise and Perils." The Journal of Law and Religion: **3**: 47-76

Michaelsen, R. (1988). "Is the Miner's Canary Silent? Implications of the Supreme Court's Denial of American Indian Free Exercise of Religion Claims." The Journal of Law and Religion: 97-114

Mihesuah, D. A. (1996). American Indians : Stereotypes & Realities. Atlanta, GA, Clarity

Miller, B. G. (2001). The Problem of Justice : Tradition and Law in the Coast Salish World. Lincoln ; London, University of Nebraska Press

Miller, J. R. (1996). Shingwauk's Vision : A History of Native Residential Schools. Toronto ; London, University of Toronto Press.

Miller, J. R. (ed) (1991). Sweet Promises : A Reader in Indian-White Relations in Canada. Toronto, University of Toronto Press.

Miller, R. (2005). "The Doctrine of Discovery in American Indian Law." Idaho Law Review **42**: 1-122

Milloy, J. "The Early Indian Acts" in Miller, J. R. (ed) (1991). Sweet Promises : A Reader in Indian-White Relations in Canada. Toronto, University of Toronto Press

Milloy, J.S. "The Early Indian Acts: Developmental Strategy and Constitutional Change" in Miller, J. R. (ed) (1991). Sweet Promises : A Reader in Indian-White Relations in Canada. Toronto, University of Toronto Press pp145-156

Mills, B. and Ferguson, T (1998). "Preservation and Research of Sacred Sites by the Zuni Indian Tribe of New Mexico." Human Organization **57**(1): 30-42

Modak-Truran, M. (2004). "Reenchanting the Law: The Religious Dimension of Judicial Decision Making." Catholic University Law Review **53**: 709-816

Monahan, P.. (2006). Constitutional Law. Toronto, Irwin Law

Moon, R. (ed) (2008). Law and Religious Pluralism in Canada. Vancouver, UBC Press.

Moon, R. (2002). "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms." University of Louisville Law Review **41**: 563-574

Mooney, J. (1896). The Ghost-Dance Religion and the Sioux Outbreak of 1890. Washington, G.P.O

- Mooney, J. (1973). The Ghost-Dance Religion and Wounded Knee. New York,, Dover Publications
- Moore, D. (1996). "Religious Freedom and Doctrines of Reluctance in Post-Charter Canada." Brigham Young University Law Review: 1087-1140
- Morris, G. "Toward a Right to Self-Determination for Indigenous Peoples" from Wunder, J. R. (ed) (1996). Native American Sovereignty. New York ; London, Garland
- Morris, J. (1999). Lincoln : A Foreigner's Quest. London, Viking
- Morse, B. (1997). "Common Roots But Modern Divergences: Aboriginal Policies in Canada and the United States." St. Thomas Law Review **10**: 115-148
- Morse, B. W. (1991). Aboriginal Peoples and the Law : Indian, Metis and Inuit Rights in Canada. Ottawa, Carleton University Press
- Moses, L. G. (1985). ""The Father Tells Me So!" Wovoka: The Ghost Dance Prophet." American Indian Quarterly 9(3): 335-351
- Mullan, D. (2009). "The Duty to Consult Aboriginal Peoples- The Canadian Example." Canadian Journal of Administrative Law and practice **22**: 107-131
- Myers, H., Smith, C. et al. (2004). American Indian Law Deskbook. Boulder, Colo., University Press of Colorado
- Nafziger, J. A. (2006). "The Protection and Repatriation of Indigenous Cultural Heritage in the United States." Willamette Journal of International Law and Dispute Resolution **14**: 175-225
- Nakai, K. (2003). "When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?" Ariz. St. LJ **35**: 1283-1330
- Neal-Post, J. (1994). "Sacred Sites and Federal Land Management: An Analysis of the Proposed Native American Free Exercise of Religion Act of 1993." Natural Resources Journal **34**: 443-478
- Nell Jessup Newton et al. eds., (2005). Cohen's Handbook of Federal Indian Law. Newark, NJ, LexisNexis
- Nelson, J. (1989). "Native American Religious Freedom and the Peyote Sacrament: The Precarious Balance between State Interests and the Free Exercise Clause." Arizona Law Review **31**: 423-446
- Newcomb, S. (1992). "The Evidence of Christian Nationalism In Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power." New York University Review of Law & Social Change **20**: 303-337
- Newman, D. (2007). "You Still Know Nothin' 'Bout me: Toward Cross-Cultural Theorizing of Aboriginal Rights." McGill Law Journal **52**: 725-756

Nichols, R. L. (1998). Indians in the United States and Canada : a Comparative History. Lincoln, University of Nebraska Press

Nie, M. (2008). "The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands." Nat. Resources J. **48**: 585-647

Noble, B "Owning as Belonging/Owning as Property: The Crisis of Power and Respect in First Nations Heritage Transactions with Canada" in Bell, C. E. and Napoleon, V. (2008) First Nations Cultural Heritage and Law : Case Studies, Voices, and Perspectives. Vancouver, BC, UBC Press pp465-489

O'Brien, S (1991) "A Legal Analysis of the American Indian Religious Freedom Act" from Vecsey, C.(ed) (1991). Handbook of American Indian Religious Freedom. New York, Crossroad pp 27-43

O'Brien, S. (1995). "Freedom of Religion in Indian Country." Montana Law Review **56**: 451-484

Organick, A. (2009). "Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for US Tribes." U.C. Davis Journal of International Law and Policy **16**: 171-212

Pagden, A. (2008). Law, Colonization, Legitimation, and the European Background. Early America (1580-1815). Cambridge University Press, Cambridge.

Parker, C. (2001). "Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use, A." BYU Journal of Public Law **16**: 89-112

Pasqualucci, J. (2009). "International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples." Winconsin International Law Journal **27**: 51-98

Paterson, R. (2006) "Resolving the Material Culture Disputes: Human Rights, Property Rights and Crimes against Humanity." Willamette Journal of International Law and Dispute Resolution **14**: 155-174

Paterson, R.K. (2008) "Ancestral Remains in Institutional Collection: Proposals for Reform" in Bell, C. E. and Paterson R. K. (2008). Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press pp155-181

Patrick, J. (2006). "Church, State, and Charter: Canada's Hidden Establishment Clause." Tulsa Journal of Comparative & International Law **14**: 25-52

Pauley, R. (1966). "Some Aspects of the Canadian Bill of Rights: An American View." Osgoode Hall Law Journal **4**: 36-53

Paulus, A "The Emergence of the International Community" in Nijman, J. E. and Nolkaemper, A. (2007). New Perspectives on the Divide between National and International Law. Oxford, Oxford University Press pp216-250

Pavlik, S. (1992). "The U.S. Supreme Court Decision on Peyote in Employment Division v. Smith: A Case Study in the Suppression of Native American Religious Freedom." Wicazo Sa Review **8**(2): 30-39

Pepper, S "Taking the Free Exercise Clause Seriously" in Berg, T. C. (ed) (2008). The Free Exercise of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus ; Lancaster : Gazelle Drake Academic [distributor]. pp49-56

Pettipas, K. (1994). Severing the Ties that Bind : Government Repression of Indigenous Religious Ceremonies on the Prairies. Winnipeg, University of Manitoba Press

Pevar, S. L. (2004). The Rights of Indians and Tribes : the Authoritative ACLU Guide to Indian and Tribal Rights. Carbondale, Southern Illinois University Press

Pfeffer, L "Federal Funds for Parochial Schools? No" in Brownstein, A.(ed) (2007). The Establishment of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus Books pp142-150

Pianca, E. (2004). "Protecting American Indian Sacred Sites on Federal Lands." Santa Clara Law Review **45**: 461-492

Platzman, S. (1991). "Objects of Controversy: The Native American Right to Repatriation." Am. UL Rev. **41**: 517-558

Plaut, E. (2009). "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management." Ecology LQ **36**: 137-165

Pochop, S. (1991). "Employment Division, Department of Human Resources of Oregon v. Smith: Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections." SDL Rev. **36**: 358-381

Pommersheim, F. (1997). "Representing Native People and Indian Tribes: A Response to Professor Alegretti." Fordham Law Review **66**: 1181-1184

Porter, R. (1996). "Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies." Columbia Human Rights Law Review **28**: 235-304

Prucha, F. P. (1976). American Indian Policy in Crisis : Christian Reformers and the Indian, 1865-1900. Norman, Okla., University of Oklahoma Press

Prucha, F. P. (1978). Americanizing the American Indians : Writings by the 'Friends of the Indian', 1880-1900. Lincoln [Neb.] ; London, University of Nebraska.

Prucha, F. P. (1979). The Churches and the Indian Schools, 1888-1912. Lincoln ; London, University of Nebraska Press.

Prucha, F. P. (1986). The Great Father : The United States Government and the American Indians. Lincoln [Neb.] ; London, University of Nebraska Press

- Prucha, F. P. (2000). Documents of United States Indian Policy. Lincoln, University of Nebraska Press
- Prygoski, P. (1997). "War as the Prevailing Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism." Thomas M. Cooley Law Review 14: 491-531.
- Pryor, A. and Bailey, G. (1989). "An Indian Site-Specific Religious Claim again Trips over Judeo-Christian Stumbling Blocks." Journal of Land Use & Environmental Law 5: 293-322
- Ranow, R. (1982). "Religion: The First Amendment and the American Indian Religious Freedom Act of 1978." American Indian Law Review: 151-166
- Rhodes, J. (1991). "An American Tradition: The Religious Persecution of Native Americans." Montana Law Review 52: 13-72
- Richardson, H. J. R. (1940). Law and Status among the Kiowa Indians, New York
- Riley, A. (2005). "Straight Stealing: Towards an Indigenous System of Cultural Property Protection." Washington Law Review 80: 69-164
- Rivera, D. (2003). "Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution." Ariz. J. Int'l & Comp. L. 20: 443-489
- Robertson, L. G. (2005). Conquest by Law : How the Discovery of America Dispossessed Indigenous Peoples of their Lands. Oxford ; New York, Oxford University Press
- Rose, B. (1999). "A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses." Virginia Journal of Social Policy & the Law 7: 103-140
- Rosenstiel, A. (1983). Red & White : Indian Views of the White Man, 1492-1982. New York, Universe Books
- Ross, J. I. and Gould, L. A. (2006). Native Americans and the Criminal Justice System. Boulder, Colo., Paradigm Publishers,
- Ross, M. L. (2005). First Nations Sacred Sites in Canada's courts. Vancouver, UBC Press
- Rotman, L. (1994). "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility"(1994)." Osgoode Hall LJ 32: 735-783
- Rotman, L. (2003). "Crown-Native Relations as Fiduciary: Reflections almost Twenty Years after Guerin." Windsor YB Access Just. 22: 363-396
- Rugg, J. and Simone, A. (1990). "The Free Exercise Clause: Employment Division v. Smith's Inexplicable Departure from the Strict Scrutiny Standard." John's J. Legal Comment 6: 117-142
- Russell, S. (2008). "American Indian religion in the Iron House: Searching for 'some accommodation'." Contemporary Justice Review 11(3): 213-227

Salter, M. and J. Mason (2007). Writing Law Dissertations : An Introduction and Guide to the Conduct of Legal Research. Harlow, Longman.

Sanchez, V. (1997). "All Roads are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence." Hastings Women's Law Journal **8**: 31-78

Schmeiser, D. A. (1964). Civil Liberties in Canada, pp. xviii. 302. Oxford University Press: London.

Schragger, R. (2004). "The Role of the Local in the Doctrine and Discourse of Religious Liberty." Harvard Law Review **117**: 1810-1892

Sedler, R. (1988). "The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and The United States: A Comparative Analysis Case Western Reserve Journal of International Law **20**: 577-621;

Sewell, E. (1984). "The American Indian Religious Freedom Act." Arizona Law Review **25**: 429-472

Shanley, K. W. (1997). "The Indians America Loves to Love and Read: American Indian Identity and Cultural Appropriation." American Indian Quarterly **21**(4): 675-702

Shelton, Dinah (ed) (2004). Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (Oxford: Oxford University Press)

Sherry, S. (1997). "Religion and the Public Square: Making Democracy Safe for Religious Minorities." DePaul Law Review **47**: 499-517

Silverman, J. (1992). "The Miner's Canary: Tribal Control of American Indian Education and the First Amendment." Fordham Urban Law Journal **19**: 1019-1046

Sinclair, J. (1970). "The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights." Osgoode Hall Law Journal **8**: 599-620

Sisk, G. (2005). "How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases." University of Colorado Law Review **76**: 1021-1056

Skibine, A. (2009). "Exhibiting Culture: Museums and Indians. Culture Talk or Culture War in federal Indian Law?" Tulsa L. Rev. **45**: 89-109

Slattery, B "A Taxonomy of Aboriginal Rights" in Foster, H., Webber, J et al.(eds) (2007) Let Right be Done : Aboriginal Title, the Calder Case, and the Future of Indigenous Rights. Vancouver, UBC Press pp111-128

Smith, S. (1992). "The Rise and Fall of Religious Freedom in Constitutional Discourse." University of Pennsylvania Law Review **140**: 149-240

Soni, V. (2005). "Freedom from Subordination: Race, Religion, and the Struggle for Sacrament." Temple Political & Civil Rights Law Review **15**: 33-64

St. Germain, J. (2001). Indian Treaty-making Policy in the United States and Canada, 1867-1877. Lincoln, University of Nebraska Press

Stanley, G "Introductory Essay" in Getty, I. A. L. and Lussier, A. S. (eds)(1983). As Long as the Sun Shines and Water Flows : A Reader in Canadian Native Studies. Vancouver, University of British Columbia Press pp1-28

Stern, W. (2009). Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective). Rocky Mountain Mineral Law Foundation: Energy Development: Access, Siting, Permitting and Delivering on Public Land

Stewart, O. C. (1987). Peyote Religion : A History. Norman, University of Oklahoma Press

Stohr, G. (1999). "The Repercussions of Orality in Federal Indian Law." Arizona State Law Journal **31**: 679-703

Stokes, A. P. (1950). Church and State in the United States, etc. [With a bibliography and plates.], 3 vol. Harper & Bros: New York.

Strickland, R. (1975). Fire and the Spirits: Cherokee Law from Clan to Court, Norman: University of Oklahoma Press

Strickland, R. (1985). "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience." University of Kansas Law Review **34**: 713-755

Strickland, R. (1991). "Dances with Lawyers: Wolves, Judges, and other Medicine Men." Texas Law Review **69**: 995-999

Strickland, R. (1992). "Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony." Arizona State Law Journal **24**: 175-191

Strickland, R. (1997). "Wolf Warriors and Turtle Kings: Native American Law before the Blue Coats." Washington Law Review **72**: 1043-1062

Suagee, D. (1982). "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers." American Indian Law Review: 1-58

Suagee, D. (1996). "Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground." Vermont Law Review **21**: 145-224

Suagee, D. (1999). "The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity." Arizona State Law Journal **31**: 483-540

Suagee, D. and Trope, J. (2008). Protection of Native American Sacred Places on Federal Lands. Rocky Mountain Mineral Law Institute: Proceedings of the Rocky Mountain Mineral Fifty-Fourth Annual Institute

- Sucharitkul, S. (2002). "The Inter-Temporal Character of International and Comparative Law regarding the Rights of the Indigenous Populations of the World." The American Journal of Comparative Law: 3-31
- Sweeney, D. (1992). "Interlocutory Injunctions to Restrain Interference with Aboriginal Title-The Balance of Convenience." University of Queensland Law Journal **17**: 141-168
- Switlo, J. (2002). "Modern Day Colonialism-Canadas Continuing Attempts to Conquer Aboriginal Peoples." International Journal on Minority and Group Rights **9**(2): 103-141
- Talbot, S. (2006). "Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934." Wicazo Sa Review **21**: 7-39
- Tennant, C. and Turpel, M. (1990). "A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination." Nordic Journal of International Law **59**: 287-320
- Tepker Jr, H. (1991). "Hallucinations of Neutrality in the Oregon Peyote Case." American Indian Law Review **16**: 1-56
- Terrell, T. (2005). "Confronting the Legal Meaning of Religious Faith: Wringing Universal Values Out of Pluralism Itself." Emory Law Journal **54**: 337-355
- Thompson, T. (2009). "Getting Over the Hump: Establishing a Right to Environmental Protection for Indigenous Peoples in the Inter-American Human Rights System." Journal of Transnational Law and Policy **19**: 179-209
- Thorner, T "The Insane Exuberance of Generosity" in Thorner, T. and Frohn-Nielsen, T.(eds) (2003). A Country Nourished on Self-doubt : Documents in Post-Confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor). pp41-45
- Thorner, T. and Frohn-Nielsen, T.(eds) (2003). A Country Nourished on Self-doubt : Documents in Post-Confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor).
- Tinker, G. E. (1993). Missionary Conquest : The Gospel and Native American Cultural Genocide. Minneapolis, Fortress Press
- Tobias, John "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Miller, J. R. (ed) (1991). Sweet Promises : A Reader in Indian-White Relations in Canada. Toronto, University of Toronto Press. pp127-144
- Torgerson, J. (1988). "Indians against Immigrants: Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada." American Indian Law Review: 57-103
- Toronto Empire "The Evil Potlatch" (1893) from Thorner, T. and Frohn-Nielsen T.(eds) (2003). A Country Nourished on Self-doubt : Documents in Post-confederation Canadian History. Peterborough, Ont. ; Orchard Park, NY, Broadview Press ; Plymouth, UK ; Plymbridge (distributor)

Treat, J. (ed) (1996). Native and Christian : Indigenous Voices on Religious Identity in the United States and Canada. New York ; London, Routledge

Trope, J. (1992). "Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act." New York University Review of Law & Social Change **20**: 373-403

Trope, J. (1996). "Mending The Circle: A Native American Repatriation Guide." American Indian Ritual Object Repatriation Foundation, New York, NY

Trope, J. and Echo-Hawk, W. (1992). " The Native American Graves Protection and Repatriation Act: Background and Legislative History." Arizona State Law Journal **24**: 35-77

Tsosie, R. (2002). "Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights." Arizona State Law Journal **34**: 299-358

Tsosie, R. (2003). "Conflict between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians." Tulsa Law Review **39**: 271-312

Tsosie, R. (2003). "Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?" U. Pa. J. Const. L. **5**: 357-404

United States Department of the Interior and F. S. Cohen (1942). Handbook of Federal Indian Law, with reference tables and index. By Felix S. Cohen, etc, pp. xxiv. 662. Washington.

Valencia-Weber, G. (1994). "American Indian Law and History: Instructional Mirrors." Journal of Legal Education **44**(2): 251-266

Valencia-Weber, G. (2002). "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets." University of Pennsylvania Journal of Constitutional Law **5**: 405-482

Vecsey, C. (ed) (1991). Handbook of American Indian Religious Freedom. New York, Crossroad

Vecsey, C. "Prologue" in Vecsey, C. (ed) (1991). Handbook of American Indian Religious Freedom. New York, Crossroad pp7-25

Vicenti, C. N., D. Long, et al. (2004). "Religious Freedom and Native Sovereignty: Protecting Native Religions Through Tribal, Federal, and State Law: Panel Discussion." Wicazo Sa Review **19**(2): 185-197

Wacks, R. (2009). Understanding Jurisprudence : an Introduction to Legal Theory. Oxford, Oxford University Press

Wade, E. C. S., Bradley, A. W. et al. (1993). Constitutional and Administrative Law. London, Longman

Walsh, M. W. (1992). "The "Heathen Party": Methodist Observation of the Ohio Wyandot." American Indian Quarterly **16**(2): 189-211

- Walters, M. (2005). "The Morality of Aboriginal Law." Queen's Law Journal **31**: 470-520
- Ward, R. (1992). "The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land." Ecology Law Quarterly **19**: 795-846
- Ward, T. (2011). "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law." Northwestern University Journal of International Human Rights **10**: 54-72
- Washburn, K. K. (2006). "Federal Criminal Law and Tribal Self-Determination." North Carolina Law Review **84**(4): 779-855
- Watson, B. (2006). "John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery." Seton Hall Law Review **36**(2): 481-549
- Weinberg, P. (2007) "O Centro Espirita: The Supreme Court Raises the Spirits of the Free Exercise Clause." University of Dayton Law Review **32**: 385-403
- Wells, M. (1991). "Sparrow and Lone Wolf: Honoring Tribal Rights in Canada and the United States." Washington Law Review **66**: 1119-1137
- Wiessner, S. (2008). "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People." Vand. J. Transnat'l L. **41**: 1141-1176
- Wildsmith, B. (2001). "Vindicating Mi'kmaq Rights: The Struggle Before, During and After Marshall." Windsor YB Access Just. **19**: 203-240
- Wiles, J. (2010). "Have American Indians been written out of the Religious Freedom Restoration Act?" Montana Law Review **71**: 471-483
- Wilkins, D. (1992). "Who's in Charge of US Indian Policy? Congress and the Supreme Court at Loggerheads over American Indian Religious Freedom." Wicazo Sa Review: 40-64
- Wilkins, D. (1994). "The Cloaking of Justice: The Supreme Court's Role in the Application of Western Law to America's Indigenous Peoples." Wicazo Sa Review: 1-13
- Wilkins, D. (2008). Federal Policy, Western Movement, and Consequences for Indigenous People, 1790-1920. The Long Nineteenth Century (1789-1920). Cambridge, Cambridge University Press
- Wilkins, D. E. and Lomawaima, K. T. (2001). Uneven Ground : American Indian Sovereignty and Federal Law. Norman [Okla.], University of Oklahoma Press
- Willard, W. (1991). "The First Amendment, Anglo-Conformity and American Indian Religious Freedom." Wicazo Sa Review: 25-41
- Williams R.A. (1993). "Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World." West Virginia Law Review **96**: 1133-1164

- Williams, R. A. (1990). The American Indian in Western Legal Thought : the Discourses of Conquest. New York, Oxford University Press
- Williams, R. A. (2005). Like a Loaded Weapon : the Rehnquist Court, Indian Rights, and the Legal History of Racism in America. Minneapolis, MN, University of Minnesota Press
- Williams, T. (1995). "Cultural Perpetuation: Repatriation of First Nations Cultural Heritage." University of British Columbia Law Review **29**: 183-201
- Winslow, A. (1996). "Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites." Arizona Law Review **38**: 1292-1343
- Witte, J Jr. "The Essential Rights and Liberties of Religion in the American Constitutional Experiment" in Berg, T. C. (ed) (2008). The Free Exercise of Religion Clause : the First Amendment : its Constitutional History and the Contemporary Debate. Amherst, N.Y., Prometheus ; Lancaster : Gazelle Drake Academic [distributor] pp33-48
- Worthen, K. (1998). "The Grand Experiment: Evaluating Indian Law in the "New World"." Tulsa Journal of Comparative and International Law **5**: 299-334
- Worthen, K. (2001). "Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude." St. Thomas Law Review **13**: 239-258
- Wunder, J. (2000). "" Merciless Indian Savages" and the Declaration of Independence: Native Americans Translate the Ecunnaunuxulgee Document." American Indian Law Review **25**: 65-92
- Wunder, J. R. (1994). "Retained by the People" : A History of American Indians and the Bill of Rights. New York ; Oxford, Oxford University Press
- Wunder, J. R.(ed) (1996). Native American Cultural and Religious Freedoms. New York, Garland Pub.
- Yablon, M. (2004). "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land." Yale Law Journal **113**(7): 1623-1663
- Zellmer, S. (2002). "Sustaining Geographies of Hope: Cultural Resources on Public Lands." University of Colorado Law Review **73**: 413-520
- Ziff, B and Hope, M "Unsightly: The Eclectic regimes that Protect Aboriginal Cultural Places in Canada" in Bell, C. E. and Paterson, R. K. (2008). Protection of First Nations Cultural Heritage : Laws, Policy and Reform. Vancouver, UBC Press pp181-202
- Zimmerman, L. J. (1996). Native North America : Belief and Ritual, Spirits of Earth and Sky. London, Duncan Baird Publishers
- Zion, J. and Yazzie, R. (1997). "Indigenous Law in North America in the Wake of Conquest." Boston College International and Comparative Law Review **20**: 55-84

Zion, J.W. "Justice as Phoenix: Traditional Indigenous Law, Restorative Justice and the Collapse of the State" in Ross, J. I. and Gould, L. A. (eds) (2006). Native Americans and the Criminal Justice System. Boulder, Colo., Paradigm Publishers pp51-67

WEBSITES

Bulls Burning	www.bullsburning.itgo.com
Earth Spirit Community	www.earthspiritcommunity.blogspot.com
First Nations in British Columbia	www.fnbc.com
Indian and Northern Affairs Canada	www.ainc-inac.gc.ca
Indian Law Resource Center	www.indianlaw.org
Indigenous Portal	www.indigenousportal.com
International Court of Justice	www.icj-cij.org
International Criminal Court	www.icc-cpi.int
International Indian Treaty Council	www.treatycouncil.org
International Law Association	www.ila-hq.org
Library and Archives Canada	www.collections.canada.gc.ca
National Parks Service	www.nps.gov
Navajo Courts	www.navajocourts.org
The Canadian Encyclopedia	www.thecanadianencyclopedia.com
The Gallup Independent	www.gallupindependent.com
The Judicial Branch of the Navajo Nation	www.navajocourts.org
United Nations Educational, Scientific and Cultural Organization	www.unesco.org
United Nations High Commissioner for Refugees	www.unhcr.ch
United Nations Office of the High Commissioner of Human Rights	www.ohchr.org
United Nations	www.un.org
United States Constitution online	www.usconstitution.net/const.html
United States Mission to the United Nations	www.usun.state.gov

APPENDICES

A) Methods and Methodologies

Methods and Challenges

This research was library-based, both at the university and electronically. Without a direct, live and immediate informant there is of course the danger that research can become “a post-colonial ventriloquism of speechless subalterns” with Indians as “objects rather than subjects of study.”¹ There is perhaps no conclusive answer to this criticism, except to confirm that a generous hearing was given to native legal and cultural scholars. Perhaps of greater relevance was the danger that the use of semi-structured interviews would have imported an asymmetry, as the inquiry was part-historical, and thus some voices have been forever stilled. Moreover, selecting individual tribes for a more detailed and ethnographic study would have been partial, superfluous and incomplete as there are several hundred tribes on the North American continent. The study is in any case one of conflict with the dominant legal systems and must therefore focus on that point of contact and corresponding jurisprudence, rather than a more detailed, theoretical and intra-tribal enquiry.

As Geertz remarks, there is also a danger that any study of Indian religions is incomplete without an immersion in indigenous languages as spiritual concepts may have no English equivalent.² Indeed, “any student of Eastern religions without knowledge of Sanskrit, Chinese or Japanese would not be taken seriously.”³ To situate any study within its rightful place in the overall culture one perhaps needs to reside within the community “as a relative.”⁴ However, as mentioned previously, this is not a pure study of Indian religions but a treatment of them in the majoritarian legal system, and any description of

¹ Feldman, A. (2000). "Othering Knowledge and Unknowing Law: Oppositional Narratives in the Struggle for American Indian Religious Freedom." Social & Legal Studies 9(4): 557-579 575

² Geertz, A. W. (1996). "Contemporary Problems in the Study of Native North American Religions with Special Reference to the Hopis." American Indian Quarterly 20(3/4): 393-414, 397

³ *ibid*

⁴ Jocks, C. R. t. (1996). "Spirituality for Sale: Sacred Knowledge in the Consumer Age." American Indian Quarterly 20(3/4): 415-431, 424

beliefs and practices will only be intended to illustrate differences between mainstream faiths and to highlight difficulties with the dominant jurisprudence.

One of the main practical challenges was the imbalance between the amounts of material available in the two countries. In the United States the academic discipline of Indian Law dates from the earlier Cohen handbook of the 1940s, whereas in Canada, Indian Law was not deemed a serious subject for study until the 1970s. There is also less jurisprudence, even accounting for the disparity in population. For example, Morse found, in a study of 1995 litigation, much less on Indian issues in Canada: only 48 aboriginal cases compared to 399 in the United States,⁵ despite the populations in Canada and the United States being 0.75 million (1.9% of the population) and 2.2 million (0.9% of the population) respectively.⁶ Despite this, sufficient material was found to enable comparisons to be made in the areas covered. Had this thesis required an exhaustive treatment of all Indian rights, rather than an illustrative comparison of Indian religious freedom, this would have posed a greater problem.

A significant limitation is perhaps the ethnicity of the author (white European), a matter over which I have no control. Indeed it must be admitted that “non-Indians can know *about* Indians but can never assume that they know what it means to *be* Indian.”⁷ There is a general debate over the legitimacy of those “made powerful by colonial history presuming to speak for those marginalised by colonial history.”⁸ A plea of disinterest is only partially convincing as many academics, and indeed putative doctorates, have considerable financial and professional interest in the discipline. Yet being Indian is not *necessarily* a sign of authority although it is a unique standpoint.⁹ It imports an “embodied authenticity” but not an exclusive voice.¹⁰ Furthermore, regarding any inquiry as illegitimate that does not involve one’s own culture would reduce any thesis to the level of “autobiographical confession.”¹¹ A balance must be struck, and sufficient engagement with

⁵ Morse, B. (1997) *op.cit.*, p140.

⁶ Morse, B. (1997) *op.cit.*, p121

⁷ Zimmerman, L. J. (1996). Native North America : Belief and Ritual, Spirits of Earth and Sky. London, Duncan Baird Publishers p7.

⁸ Bucko, R “Religion” in Biolsi, T. (ed) (2004). A Companion to the Anthropology of American Indians. Malden, MA, Blackwell Pub. pp171-196, 173

⁹ Bucko, R (2004) *op.cit.*, p173

¹⁰ Grimes, R. L. (1996). "This May Be a Feud, but It Is Not a War: An Electronic, Interdisciplinary Dialogue on Teaching Native Religions." American Indian Quarterly 20(3/4): 433-450, 444

¹¹ *ibid* p436

the native voice, although written, will avoid what Pommersheim describes as “Indian Law Liberalism,”¹² a non-Indian attitude which assumes that it knows what is best for Indians without listening to their perspective. Ultimately, the research into another’s culture must be undertaken with “humility and open ears.”¹³

As for a European purporting to comment on North American jurisprudence, sometimes the topography can only become clear when viewed from a distance.

Methodologies

The framework of inquiry is Historical and Comparative, with a qualified contribution from anthropology, whereas the perspective is Realist, or more accurately a form of Realism which is as yet without name, but which I have tentatively labelled Critical Indigenous Legal Theory. As described in the Introduction, this is an amalgam of Critical Legal Studies, Peri-Colonialist study, Critical Race Theory and American Legal Realism.

Historical

“Even more than other domains of law the intricacies and peculiarities of Indian Law demand an appreciation of history.”(Justice Blackmun)¹⁴

There is perhaps no domestic legal discipline in North America that is more dependent on a historical inquiry than Indian Law. Indeed, the historian’s intervention can be decisive: the outcome of the *United States v. Sioux Nation*¹⁵ case, which determined the Black Hills controversy, turned on the unearthing of a letter by historian Fred Nickleson in 1975 that had been written by President Grant 100 years before.¹⁶ The letter described Grant’s secret withdrawal of protection of the Sioux homeland, which had originally been promised in the *Fort Laramie Treaty* (1868), in favour of permitting exploitation by gold prospectors. Similarly, in the case of *Harjo v. Kleppe*¹⁷ both sides agreed to use Angie Debo’s

¹² Pommersheim, F. (1997). "Representing Native People and Indian Tribes: A Response to Professor Alegretti." *Fordham Law Review* 66: 1181-1184

¹³ Grimes, R.L. (1996) *op.cit.*, p437

¹⁴ *South Carolina v. Catawba Indian Tribe inc.*, 476 U.S. 498, 511 (1986)

¹⁵ *United States v. Sioux Nation*, 448 U.S. 371 (1980)

¹⁶ Valencia-Weber, G. (1994). "American Indian Law and History: Instructional Mirrors." *Journal of Legal Education* 44(2): 251-266, 260.

¹⁷ *Harjo v. Kleppe* 420 F.Supp. 1110 (D.D.C. 1976)

seminal histories of the Creek Nation as accepted fact.¹⁸ When historical accounts are used to such an extent then the Indians' concept of a cyclical time frame, where ancestors and the living reside and the past and present co-exist is especially relevant; the past not merely informing but determining the present.

Much of the development of Indian Law can indeed only be understood by a contextualised history. For example, the Marshall Trilogy of cases must be situated in the context of the Cherokees' vain attempts to resist the ethnic cleansing policy of the Jacksonian presidency. Similarly, the introduction of the Courts of Indian Offenses in the United States and the Potlatch laws of Canada must be viewed alongside the assimilation policies of both countries in the late Nineteenth Century.¹⁹

The contribution of history is of course also seen in aspects of the Common Law, in particular the interpretation and application of historical precedent to contemporary judicial determination. Yet Indian Law requires almost a double-retrospect. It is the fact that it is both heavily driven by case law *and* dependent on history evidentially that distinguishes it from other elements of North American legal theory in its reliance on the past.

These factors require the historian to sometimes undertake an unfamiliar task. As McHugh remarks, "the common lawyer [is] concerned with problem-solving in the present, the historian with problem-solving in the past."²⁰ The historian may be uncomfortable with a role as forensic rather than academic historian;²¹ with an adversarial rather than inquisitorial use of history.²² Unlike the lawyer, whose quest is for courtroom finality and ultimate resolution, the historian usually proffers a qualified opinion, not intended for calcification by "laches, estoppel, *res judicata*and *stare decisis*."²³

Indian legal theory embraces (Relativistic) Historicism. The Canons of Construction were developed as a judicial tool to emphasise and privilege the Indians' contemporary understanding of Nineteenth Century treaties, particularly as they were

¹⁸ "And Still the Waters Run" and "The Road to Disappearance" from *ibid*

¹⁹ See generally Prucha, F. P. (1976) *op.cit.*, Pettipas, K. (1994) *op.cit.*; Cole, D. and I. Chaikin (1990) *op.cit.*,

²⁰ McHugh, P. (1998). "Common-Law Status of Colonies and Aboriginal Rights: How Lawyers and Historians Treat the Past, The." Saskatchewan Law Review 61: 393-429, 394.

²¹ Valencia-Weber, G (1994) *op. cit.*, p263

²² *ibid* p261

²³ *ibid* p264

drafted in a foreign language and according to an alien legal culture.²⁴ Of course Relativistic Historicism has been mobilised to excuse and even justify much injustice in the American past, *Plessy v Ferguson* and the contemporary acceptability of “separate but equal” being one example.²⁵ Yet its use as an aid to contextualisation, rather than as retrospective doctrinal *apologia* can inform the present, and can be used to that extent.

Thus we may see how history can provide more than just a picturesque backdrop to Indian Law but can actually be integral and determinative in modern litigation. Similarly, any academic study of the development of Indian Law would be impossible if not situated within a fully contextualised history. The evolution of Indian Law treated as an arid “history of law” in isolation would tell but half the story.

Anthropology

“Into each life, it is said, some rain must fall. Some people have bad horoscopes others take tips on the stock market. McNamara createdthe Edsel. Churches possess the real world. But Indians have been cursed above all other people in history. Indians have anthropologists.”(Vine Deloria)²⁶

Anthropologists have been a mixed blessing for the Indians. In some respects the preservation of cultural data is invaluable, but if this comes at the cost of an alien intrusion and ultimate control of sacred knowledge by the outsider, then some argue it would be better lost forever.²⁷ There is moreover an attempt often to fossilize the Indian, particularly in regard to religion, which is an attitude that can be shared by the dominant society at large. The U.S. *American Indian Religious Freedom Act*, although laudable in intent, discussed the preservation of their “traditional religions,”²⁸ thus perhaps marginalising the syncretic tradition of the Native American Church, a mixture of traditional use of sacramental Peyote and Christianity.²⁹

²⁴ Myers, H., Smith, C. et al. (2004). American Indian Law Deskbook. Boulder, Colo., University Press of Colorado. p17

²⁵ Balkin, J. (2005). "Wrong the Day It Was Decided: Lochner and Constitutional Historicism." Boston University Law Review **85**: 677-725.

²⁶ Deloria, V. (1969) *op.cit.*, p78.

²⁷ Bucko, R “Religion” in Biolsi, T. (ed) (2004) *op.cit.*, p172

²⁸ 42 U.S.C. s1996

²⁹ Stohr, G. (1999). "Repercussions of Orality in Federal Indian Law, The." Arizona State Law Journal **31**: 679-703, 702

This is what Martin would describe as the “discourse of the disappearing Indians.”³⁰ In particular, an over-reverence and uncritical reliance on texts that deal solely with the purified and traditional forms of Indian spirituality and that holds simply that “savages dance out their religion.”³¹ This is typified by the “canonical status”³² afforded the *Black Elk Speaks* memoir, which neglected the fact that Black Elk had been a practising Catholic for 20 years. Indeed, Black Elk is reputed to have been baptised into three denominations.³³ Yet his “conversion” to Christianity was not a replacement of his traditional spirituality but more of a co-existence, and his ecumenism was not of someone who practised two separate traditions, but rather attempted their integration.³⁴ This study, as far as it described Indian spirituality, focused on religious practices of aboriginal people, not solely on practices that have existed *ab origine*.

There is also the danger that, just as chronological primitivism proposes a nostalgic view of human life as necessarily better in the past, so does cultural primitivism consider indigenous culture as some lost idyll.³⁵ This attempt to preserve an Indian culture in aspic is typified by the occasionally retouched photographs of the famous photographer Curtis, one example being the removal of an alarm clock between two Piegan Indians.³⁶ Geertz has suggested that such primitivism is perhaps an attempt to assuage Christian guilt and reconcile the “age-old myth of man’s fall from Paradise.”³⁷ Indian communities were regarded as “Edenic communities of untainted purity but primitive backwardness.”³⁸ The Christian longs for his “lost purity and looks for it in a far-distant time or place.”³⁹ This

³⁰ Martin, J. W. (1991). "Before and beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion." *Journal of the American Academy of Religion* 59(4): 677-701, 678

³¹ Aitken, B. (1930). "Temperament in Native American Religion." *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 60: 363-387, 363.

³² Martin, J.W (1991) *op.cit.*, p678

³³ Holler, C. (1984). "Black Elk's Relationship to Christianity." *American Indian Quarterly* 8(1): 37-49, 39

³⁴ *ibid* p41

³⁵ Geertz, A. (2003). "Ethnohermeneutics and Worldview Analysis in the Study of Hopi Indian Religion." *Numen*: 309-348.

³⁶ Martin, C. (1987). *The American Indian and the problem of history*. New York, Oxford University Press.p182

³⁷ Geertz, A (1996) *op.cit.*, p406

³⁸ Tinker, G. E. (1993). *Missionary Conquest : The Gospel and Native American Cultural Genocide*. Minneapolis, Fortress Press.p19

³⁹ *ibid*

modern phenomenon contrasts with Nineteenth Century European self-confidence and arrogance which was responsible for much of the Christianization process. Of course, Indians would simply prefer to be left alone, neither converted nor romanticised, so both extremes must be avoided.

This is not to completely deny the relevance of anthropology. Like the historian, the anthropologist is often integral to the litigation process thus importing a considerable responsibility which may be unfamiliar and discomfoting. Innocent and theoretical musings on cultural practices may be crystallised into legal doctrine and precedent. As McNeil remarks, anthropological evidence of the indigenous use of land in Canada at first contact has been used to determine not just the *existence* of such a right but also its *extent*.⁴⁰ Similarly, in the United States anthropological evidence is often decisive when tribes are claiming federal recognition as it must be demonstrated that the tribal entity “comprises a distinct community and has existed as a community from historical times to the present.”⁴¹

Comparative

“If the Great Spirit had desired me to be a white man he would have made me so in the first place. He put in your heart certain wishes and plans, in my heart he put other and different desires. Each man is good in his sight. It is not necessary for eagles to be crows.”
(Sitting Bull)⁴²

One aim of this thesis was to provide something of practical use for indigenous communities in North America. To this end, a comparative approach can emphasise different trajectories and undermine the “taken for granted” development of jurisprudence in one country.⁴³ This can have practical benefits in terms of cross-fertilisation between jurisdictions of successful legal strategies and in the search for common ground solutions.

On the other hand, a comparative approach adds to the complexity and range of the inquiry which will inevitably involve a lack of some detail and may involve the sacrificing of analysis for description. Furthermore, a comparative treatment may be seen as an artificial posture of originality which may conceal other weaknesses of the thesis with

⁴⁰ McNeil, K “The Meaning of Aboriginal Title” from Asch, M. (ed) (1997). Aboriginal and Treaty Rights in Canada : Essays on Law, Equity, and Respect for Difference. Vancouver, UBC Press. pp153-154

⁴¹ C.F.R. s83.7 (b)

⁴² Deloria, V. (1973) *op.cit.*, p205

⁴³ Salter, M. and Mason, J. (2007). Writing Law Dissertations : An Introduction and Guide to the Conduct of Legal Research. Harlow, Longman. p189

the various elements being treated alongside, rather than as an integral whole.⁴⁴ There seems to be no satisfactory refutation of these concerns except to suggest that, on balance, the benefits of a cross-border dialogue and potential importation of strategies prevail over these difficulties.

In addition to the overall comparative treatment between Canada and the United States, this study had several other comparisons: there were treatments of the different worldviews of the Indian and Western peoples, together with their differing religious traditions, and a general comparison between liberalism and tribalism. The different relationships of spirituality and legality were assessed within each culture and also how Indian religious traditions fared within majoritarian jurisprudence, both in comparison to other minority religions, and mainstream Judaeo-Christian traditions. Although there have been at least two quantitative studies on the comparison of the success of minority religions in North American litigation this study was mainly qualitative.⁴⁵

B) Genocide

The Residential Schools as Death Camps

Although the question of whether there was actual physical genocide was not the main enquiry of this thesis, the number of children that perished in the schools must be mentioned. The death rate for Indian children in US schools has not been comprehensively documented and in practice children were often sent home to die, thus forming part of reservation statistics.⁴⁶ Data for individual schools may be extrapolated: In the first year of the Carlisle school, 21 out of 136 died; between the years 1881 and 1894 only twenty-six out of 73 Shoshone and Arapaho pupils at Carlisle, the Genoa Industrial School and the Santee Indian boarding schools *survived*.⁴⁷ Indeed, William McConnell a BIA inspector commented in 1899 that, "The word 'murder' is a terrible word, but we are little less than murderers if we follow the course we are now following after the attention of those in

⁴⁴ *ibid* p190

⁴⁵ Sisk, G. (2005). "How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases." *University of Colorado Law Review* 76: 1021-1056; Brent, J. (1999). "An Agent and Two Principals: US Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act." *American Politics Research* 27(2): 236-266.

⁴⁶ Churchill, W. (2004) *op.cit.*, p34

⁴⁷ *ibid* p35

charge has been called to its fatal results.”⁴⁸ The main killer was Tuberculosis, with a Smithsonian Institution Study of 1908 concluding that only one out of every five children was entirely free of the disease. The causes were poor diet, sanitation, overcrowded accommodation, and lodging the sick with the healthy.⁴⁹ Later in 1924 an American Red Cross report was so damning in its findings as to the health of the pupils that it was conveniently buried by the Commissioner Charles Burke.⁵⁰

Reverend Annett describes the equivalent Canadian schooling system as a systemized extermination camp.⁵¹ Approximately fifty per cent of students passing through the system died for a total of approximately fifty thousand dead.⁵² Many of the bodies have never been recovered. Forcible sterilization of adolescents, widespread sexual abuse, rape, medical experimentation, deliberate infection with tuberculosis, torture, mental cruelty and general degradation were some of the techniques used.⁵³ Legislation passed as late as 1933 in British Columbia and 1928 in Alberta permitted the sterilization of any residential school inmate.⁵⁴ In 1920 British Columbia made it compulsory for native children to attend residential schools; this was despite the territorial government’s acknowledgment that the death rate was higher than non-native schools.⁵⁵ The *per capita* basis of funding encouraged the admission of unhealthy children: “the existence of the school is made to depend on the Government Grant, and if the healthy children cannot be secured then the unhealthy are taken, to the destruction of all.”⁵⁶ Dr Josef Mengele is reputed to have honed his skills on residential school native children in collaboration with the notorious Montreal psychiatrist Ewen Cameron at the Upjohn and Bayer laboratories in Ontario.⁵⁷

⁴⁸ *ibid* p36

⁴⁹ *ibid* pp35,36

⁵⁰ *ibid* p36

⁵¹ Annett, K. “Hidden from History: The Canadian Holocaust” in Thorner, T. and Frohn-Nielsen T. (2003) *op.cit.*, p408

⁵² Miller, J. R. (1996) *op.cit.*, p133

⁵³ Annett, K. (2003) *op.cit.*, in Thorner, T. and Frohn-Nielsen T. (2003) *op.cit.*, p405

⁵⁴ *ibid* p408

⁵⁵ *ibid* p408

⁵⁶ Presbyterian Head of Missions in 1909 from Miller, J. R. (1996) *op.cit.*, p132

⁵⁷ Annett, K. (2003) *op.cit.*, in Thorner, T. and T. Frohn-Nielsen (2003) *op.cit.*, p416

The last government residential school closed in 1983.⁵⁸ The Canadian Government of Jean Chretien issued an apology on January 7 1998 and set aside a “healing fund” of \$350 million for victims of the schools.⁵⁹ This was primarily intended to compensate for the sexual and physical violence, rather than the cultural destruction and provided a Common Experience Payment.

International Law on Genocide

The problem with the list of seemingly protective International Law documents in Chapter 11 is that they are either soft law and unenforceable, such as UN declarations, or that the United States and Canada are not parties to the relevant conventions.⁶⁰ Similarly, indigenous peoples often lack legal personality to pursue their interests in international fora. Thus International Law on Indigenous Peoples sets at best a framework for determining more substantive rights, at worst it is a mere vacuous exhortation.

Yet International Law is not completely redundant, should there indeed be a relevant ratified and implemented treaty or alternatively where the issue is so grave as to constitute *jus cogens* Customary International Law. The *Genocide Convention* is one example of implemented law as well as its undoubted *jus cogens* status.

Nazi attempts to extinguish large sections of non-Aryan Europeans during the Second World War provided the stimulus for the adoption of the United Nations *Genocide Convention* (1948). Article II, lists the five activities that constitute genocide: “killing members of [a national, ethnical, racial, or religious group, as such]” (IIa) “Causing serious bodily or mental harm to members of the group” (IIb) ; “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” (IIc) ; “Imposing measures intended to prevent births within the group” (IId) ; and “Forcibly transferring children of the group to another group.” (IIe)

In the context of native residential schools, described in Chapter 5, arguably all five elements of article II were committed by the United States and Canada. For our purposes article IIe, the forcible transfer of children to residential schools was definitely

⁵⁸ Thorner, T. and Frohn-Nielsen, T. (2003) *op.cit.*, p404

⁵⁹ Government of Canada “Statement of Reconciliation” from Thorner, T. and T. Frohn-Nielsen (2003) *op.cit.*, p418

⁶⁰ Such as the ILO conventions and the American Convention on Human Rights

pursued and any, not all, of the activities constitute genocide.⁶¹ As Curcio remarks, the school attendees could also have claims, under II(a), II (b) and II (c), that there was deliberate killing, the infliction of serious bodily injury or mental harm, as well as general conditions of their confinement which deliberately inflicted conditions of life “calculated to bring about physical destruction in whole or in part.”⁶² Evidence for an organized killing programme is perhaps controversial. The infliction of mental harm is more easily demonstrable by the suppression of languages, religion and identity together with a systematic denigration of their culture. As for inflicting “conditions of life calculated to bring about physical destruction” the lodging of the sick with the well was a policy that was pursued in order to maximise revenue due to the *per capita* system, even though it was well understood that this spread diseases such as tuberculosis.

Forced sterilisation, in violation of II (d), was also carried out on adolescents. Indeed, in the United States a systematic campaign of forced sterilization of adult Indian women began in the 1930s and continued until much later: it has been estimated that between the early 70s and early 80s more than 42% of women of childbearing age were involuntarily sterilized.⁶³

Of course the *Convention* cannot be applied retrospectively to actions before 1948, although it is possible that the prohibition against genocide was Customary International Law before then, as evidenced by the Nuremberg Principles. In any case, the North American Governments continued such activities long after 1948.

Lemkin, who coined the term genocide, originally included “cultural genocide” or “ethnocide” in the definition: “a coordinated plan of different action aiming at the destruction of essential foundations of the political and social institutions, of culture, language, national feelings, religion.”⁶⁴ Canada and the United States lobbied successfully

⁶¹ Chrisjohn, R.D. et al “Genocide and Indian Residential Schooling: The Past is Present” in Griffiths, A. and Wiggers, R. (eds) (2002). Canada and International Humanitarian Law : Peacekeeping and War Crimes in the Modern Era. Halifax, Centre for Foreign Policy Studies p3.

⁶² Curcio, A. (2006) *op.cit.*, p114

⁶³ Glauner, L. (2001). "The Need for Accountability and Reparations: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans." DePaul Law Review 51: 911-961, 939.

⁶⁴ Chrisjohn, R.D. et al (2002) *op.cit.*, p4. Any litigation aimed at cultural loss is debateable as it has limited relevance as a cause of action in tort. Indeed there is limited recognition of communal loss by the individualistic paradigm of tort (Hutchinson, C. (2007) *op.cit.*, p427) Oxaal suggests the primary tort of intentional infliction of mental suffering as a potential basis of compensation for cultural loss. However, at the moment, an action in negligence for mental suffering relies on a primary physical injury which cultural loss does not constitute.(Oxaal, Z. (2005) *op.cit.*, p388.) In *Plint (W.R.B. v. Plint* (2003), [2004] 235 D.L.R. (4th) 60) the BCCA rejected an attempt at aggravated damages for loss of culture (in a sexual abuse case) as this

against this inclusion hoping to restrict the definition to mass killing, which would give them an excuse to disavow the *Convention* on the grounds that such action was already punishable by domestic law.⁶⁵

Canada's parliament voted in 1952 to bring its laws into line with the *Convention* yet only two of the prohibited acts found their way into Canadian law. The sections of the Canadian Criminal Code that implemented the *Convention* do not include: "Causing serious bodily or mental harm", "Imposing measures intended to prevent births", and "Forcibly transferring children."⁶⁶ The Customary Law nature of the *Convention* arguably circumvents these omissions.

The United States ratified and implemented the *Convention* by the *Genocide Convention Implementing Act of 1988 (Proxmire Act)*,⁶⁷ with two reservations requiring firstly, U.S. consent to the jurisdiction of the International Court of Justice and secondly, making the Convention subject to the U.S. Constitution.

The U.S. reservations have been criticised as being at odds with the purpose of the treaty and thus legally unacceptable. However, due to the potentially *jus cogens* nature of the law against genocide, the *Proxmire Act* is arguably irrelevant.⁶⁸ Furthermore, obligations are *erga omnes*.⁶⁹ As a matter of International Law the United States is bound internationally by its signing and ratification of the *Convention* so although a domestic prosecution may be impractical any competent tribunal would suffice. Yet finding a tribunal to which the United States has accepted jurisdiction and in which Indians would have *locus standi* is not straightforward. It would be a brave country indeed that sought a prosecution of a government official or church member who happened to be in transit in its country on the

was regarded as a violation of the tort principle of placing the victim in the state absent the tort. The rationale being that attendance at residential school would have resulted in cultural loss in any case and that the sexual abuse was the main head of damages. Of course the true comparator would be the difference in cultural loss from attending an on-reserve day school and the forcible removal to a residential school. By contrast, in *Re Indian Residential Schools*, [2000] 9 W.W.R. 437, (Alta. Q.B.), the court remarked "I cannot find with certainty that the pleadings concerning the alleged indoctrination . . . into the Roman Catholic faith are doomed to failure." (para 452)

⁶⁵ *ibid* p5

⁶⁶ *ibid* p6

⁶⁷ 18 U.S.C. § 1091 (1994).

⁶⁸ Curcio, A. (2006) *op.cit.*, p111.

⁶⁹ Glauner, L. (2001) *op.cit.*, p913.

basis of the Universal Jurisdiction that attaches to genocide.⁷⁰ Canada has however accepted the jurisdiction of the ICC.⁷¹

As for any defence of limitation periods the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* has not been ratified by the United States or Canada but it is arguably *jus cogens* Customary International Law.⁷² Additionally, Indians could argue that any limitation period has not begun, or that the harm is ongoing due to intergenerational effects, or that the failure to redress the harm is actually a harm in itself.⁷³

In summary, both countries' unforgiveable treatment of Indian boarding school children arguably amounts to at least one, if not all five, definitions of genocide. Should the governments' conduct not be regarded as secular genocide, the history of the treatment of Indian religion both sides of the border has undoubtedly amounted to spiritual genocide.

⁷⁰ Aust, A. (2005) *op.cit.*, p46

⁷¹<http://www.icc-cpi.int/Menus/ASP/states+parties/Western+European+and+Other+States/Canada.htm> [accessed 14 February 2012]

⁷² Curcio, A. (2006) *op.cit.*, p122.

⁷³ *ibid* p123