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Are they like us, yet? Some thoughts on why religious freedom remains elusive for Aboriginals in North America

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Abstract
It is well-documented that European culture differs from that of Aboriginal culture. Perhaps one of the most striking differences is in the relationships and attitudes each group has towards land. For Europeans the land is a commemorative gift of the creator there to be exploited for economic benefit; for Aboriginal peoples, the land is also a gift but one that a continuing extension of the creator's immanence in which all things are related to one another. The one is an economic relation, the other a spiritual relation that denotes family. When two very different cultural systems encounter one another, there are bound to be clashes. Regardless, it is the overriding interests of the state that take precedence in countries where religious freedoms are constitutionally guaranteed – but such guarantees apply only insofar as the religions seeking freedom mirrors that of the dominate society. This paper explores these differences in relationships to land and how Aboriginal religious freedom suffers as a result, which has significant impacts on well-being and cultural continuity.

Keywords
Aboriginal, Indians, religion, spirituality, religious freedom, sacred land, USA, Canada, case law, worldviews.

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Disclaimer The opinions expressed in this paper are solely those of the author. They do not necessarily reflect the views or policies of neither the Department of Aboriginal Affairs and Northern Development Canada nor the Government of Canada nor any of its agencies.

Some commentators may wish to point out that the idea of vestigial states is pejorative. Indeed it is and it is used here, by me at least, as such and on purpose: It reflects how dominant societies usually look down upon their subaltern others. Tonya Gonnella Frichner (2010) in a recent submission to the permanent forum on Indigenous Issues at the United Nations provides a thorough albeit preliminary exposé of the Doctrine of Discovery as the foundation of violation of the human rights of indigenous peoples. Rooted in two Papal Bulls from the Fifteenth century (Dum diversas and Romanus Pontiex) the Doctrine of Discovery has since been institutionalized in the USA Canada and elsewhere and gave European Christian countries the right of conquest, sovereignty, and dominance over non-Christian peoples, along with their lands, territories and resources. The doctrine assumed that non-baptised individuals were non-human and thus merited no consideration in regard to their rights to hold land and resources. Justice Marshall invoked the Doctrine of Discovery in US Supreme court case Johnston v McIntosh (1823); in Canada Johnston was cited as justification as late as 1984's Guerin v. the Queen. Ross (2005, 69) writes that Esson, J,A, in the Westar case proposed a general rule derived from the British Columbia Court of Appeals decision in the Meares Island case that "the court should not grant an injunction if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region of the logging company." He further proposed as an exception, also derived from the same cased, that the court could nonetheless grant an injunction with regard to "particular sites which have unique qualities."

Those of us familiar with W.C. Smith's (1981) *The Meaning and End of Religion* know that European society only developed a word for 'religion' relatively recently. Smith describes a process of reification where the Latin *'religio'* progressively was abstracted to mean one of four things today: personal piety; an overt system of beliefs, practices and values as a) the ideal religion of the theologian or b) the empirical phenomenon of the lived tradition; and, c) a universal category such as in 'religion in general'. None of these understandings really work in the Aboriginal context, as opposed to the European one (and it may not work too well there). Indeed, for Smith, "nothing in heaven and earth" answers to the name 'religion' as it has come to be known in European society (Smith 1981, 4).

What is important for our purpose is that the European category of 'religion' developed in part as a means of distinguishing the things in the world that are 'sacred' from those that are 'secular'. This is important in terms of the contrast it helps establish, that is, the contrast between the European and (often idealized) Aboriginal worldviews, polemical as this contrast may be. Traditionally, many Aboriginal peoples did not separate religion or spirituality from the rest of life and, while this may be true also for most other cultures, effective rhetoric suggests a need to overstate to some extent the contrast of Aboriginal to European worldviews regarding a separation of sacred and secular. For instance, if a culture holds that the land as a whole is sacred, there would no need to separate out special locations or constructions as the central locus of ritual and practice. Many persons of the Christian faith are most likely to participate in spiritual activities, communally or as an individual, in a building or some specially sanctified ground like a cemetery. Rarely would they, officially at least, consider a mountain as a highly sacred place in need of protection for its spiritual significance alone. And while Aboriginal peoples distinguish between places of high spiritual importance from those of low spiritual importance (Ross 2005; Ruml 2009), ideologically at least they are not well known to suggest that any piece of land has no spiritual significance.

My point is that historical Aboriginal cultures did not have as marked a conceptual separation between sacred and secular, or between culture, language and identity, or between spirituality and the land on or through which it is expressed as did most European cultures. These things were and, for many contemporary Aboriginal peoples, are all interrelated in Aboriginal worldviews (McIvor 2009; Paper 2007). This was not so for most European colonists. Indeed, the colonial enterprise needed to be able to demarcate between what of the world was sacred and secular, civilized and uncivilized, in order to profit from the resources gained by conquest without incurring negative moral currency. There will be more discussion along these lines shortly.

What follows is a discussion of a number of complex interrelated issues, including the differences in general (not specific) worldviews, European definitions of what constitutes civilization, the relation of well-being to lands, and relevant jurisprudence in the USA and Canada as it pertains to Aboriginal freedom of 'religion'. While it may be true that Aboriginal peoples in North America are legally offered the same individual rights to religious freedoms as other citizens, the worldviews of Aboriginal peoples with particular regard to their interactions with the land is often, but not exclusively, different from the dominant Euro-American ones. This can and does result in legal barriers to Aboriginal peoples' expression of religious freedom especially when it pertains off-reserve lands, despite examples where the state worked more or less collegially with Aboriginal groups looking to express their spirituality on non-reserve lands (Ruml 2009).

This paper proposes that despite the fact that both Aboriginal and European worldviews regarding the relationship to land are tied to spiritual or religious histories and trajectories, as are the relative jurisprudence, historically the state-indigenous (legal) dialogue in this area has been mostly one sided, favouring the interests of the state over those of Aboriginal peoples. While this discussion covers only two national jurisdictions, given the trajectory of European legal history much of the background to such jurisprudence is generalizable to other national jurisdictions with indigenous populations that were colonized by Anglo-European cultures, even if specific state-indigenous relations took different paths.

The aforementioned relative degree of separation between secular and sacred in relation to land is an important point to consider further for several reasons, not the least of which is that those of us submerged in the European world view can best understand it in the abstract. Loftin (1989) and Ross (2005) inform us that European peoples do not understand or appreciate the centrality of sacred space. For Aboriginal persons land is not merely material, and nature is not merely natural. Both have spiritual dimensions and make up a sacred substance, which is the source, sustenance, and end of all cosmic life on which everything depends. If the spiritual is not distinct from the land, then taking the land is tantamount to prohibiting traditional spiritual experiences. Moreover, Aboriginal peoples often see land as both sacred and instrumental in value. (The Pluralism Project 2005; Ross 2005)

A further consideration is offered by McIvor who points out that

> Aboriginal concepts allow individuals to gain a deeper sense of identity and live a life of balanced reciprocity according to the traditional holistic cosmologies that still function in the modern age, thereby creating a pathway to health and wholeness (2009, 13).

Health and wholeness are directly experienced by many Aboriginal persons when on the land or in the bush. In reviewing numerous studies related to culture as a protective factor, McIvor (2009) notes that many authors argue that the relationship Aboriginal peoples have with the land shapes all areas of their lives (see also Ross 2005). Moreover, the belief that the land is alive contributes to mental and physical health or that a subsistence lifestyle is the core of wellness.

In discussing the relationship between land and mental health of Inuit peoples, Kirmayer, et al. (2008) for instance notes that Inuit are in constant transaction with the environment through mixed-economy activities. Despite exposure to Eurocentric views, the central importance of the land and animals in Inuit concepts of well-being persist. To the Inuit, the environment is not an impersonal, inanimate landscape but is alive and closely linked to personal memories. The land is also a constant reminder of cultural history; illness is perceived as a result of being separated from traditional lands for too long or not eating things of the land. There is broad agreement that being out of the community and on the land has a rejuvenating effect on mind and body. People use hunting, camping, and fishing as ways to regain a sense of well-being. Lack of access to the land may cause feelings of distress, disorientation, and anxiety. Depression is said to be the result of not being able to eat seal or beluga meat for extended periods of time. Being deprived of foods from the land is to be slowly drained of an essential element of health and well-being.

It is not only the Inuit that hold such views and it is not only health issues that are of concern to Aboriginal peoples. Government policies of sedentarization, in the name of promoting so-called 'civilization' and 'Christianization' have had innumerable negative impacts on many Aboriginal communities. The Eastern Cree (Tanner 2008; Adelson 2008; Hayes 1995), of Quebec's James Bay region, and the Stò:lō Nation of British Columbia (Carlson 2008) are but two examples of how such policies have virtually destroyed and supplanted traditional social structures, forms of governance, spirituality, family relations, social stability, and health as a direct result of lost opportunities to interact with the land and live the related spirituality (Tanner 2008; Adelson 2008; Hayes 2005; Carlson 2007; see also Simpson 2004). When the land is appropriated by state interests (government and corporate) it is 'humiliated', and since indigenous knowledge comes from the land, the people suffer. "Spiritual places are destroyed and with them…" opportunities to pass along cultural knowledge become fewer (Simpson 2004, 379). Such desacralisations of sacred sites is at the very least detrimental to the well being of the Indigenous communities that find a specific site sacred (Ross 2005).

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Modern nation-states are social and political constructions. Reservations in the USA and reserves in Canada are but one of the spatial manifestations of how colonial peoples labelled First Nations (Wilson and Peters 2005). In some respects the goal was to maintain a separation between the urban and the non-urban. In other respects it was about clearing the land for exploitation, development, and settlement as Europeans understood it – that is, the goal was to civilize the wilderness and the Indians living therein (Carleson 2007). The idea of a deep interconnection to the land is alien to a society recovering from feudal land systems and informed by Lockean notions of property ownership.

The spiritual foundations of indigenous knowledge and worldviews are of little interest to the dominant society because they often exist in opposition to its cherished worldviews and values. Thus there is little motivation on the part of the dominant culture to 'decolonize' relationships with Indigenous nations. In general, State powers remain committed to industrial development on indigenous lands (Simpson 2004) and thus claims that the land is sacred generally fall on deaf ears. It is an ongoing struggle where encultured persons see their sacred homelands diminished through encroachment, industrial activities, other forms of development (McIvor 2009; Ross 2005), and environmental concerns (Ross 2005). The European 'edifice complex' (Beaman 2002) makes it very difficult for those who do not share Aboriginal life experiences to understand the notion of sacred space outside of a church (see also Ross 2005). While this is a deliciously pithy yet simplistic characterization, it works as a nice segué to my next point.

That point is this: in following with the work of Timothy Fitzgerald (2000; 2007) and colleagues, European colonial powers recognized religions in far flung parts of the world only insofar as local traditions reflected the Christian model. In *The Ideology of Religious Studies*, Fitzgerald writes that "The construction of 'religion' and 'religions' as global, cross-cultural objects of study has been part of a wider historical process of western imperialism, colonialism, and neo-colonialism" (2000, 8). As such 'religion' as a construction is considered a category mistake, an over encompassing 'kind', developed by a nascent social science that reflects an ideological trajectory of the modern west. It is rooted in a specific historical period and cultural view – as part of the nineteenth century colonial period located in a secularizing Enlightenment, with emphasis on individualism and market capitalism.

A consequence is that what was recognized as 'religion' is limited to specifically Christian elements 'smuggled' into other cultures. The category of 'religion' imposes Western categories on non-Western peoples and societies, transforming them profoundly. What was considered validly religious, and still is – to the extent that the person making the proclamation is sensitized to this issue – is what characterizes Christianity as distinct from other religions, including Judaism and Islam: soteriology, including individual commitment to church and private assent to doctrine; and, an emphasis on the transcendent and transcendental and not on immanence (Fitzgerald 2000; 2007).

> The idea of religion as a private soteriological belief essentially separated from politics, or the idea of religious societies having essentially different purposes and characteristics from political societies, has become institutionalized in Western liberal democracies and exported through the processes of colonization to many societies where no such distinction was conceivable in the local language (2007, 235).

Such views on religion were articulated in English during the seventeenth century. As it developed, it was transformed into a conception of "secular, rational, political 'man.'" Central to this discourse was the development of "a notion of the secular as the nonreligious, the natural, the rational," which was considered the "superior ground from which to observe and order the world" (Fitzgerald 2007, 235). The fantasy of 'religions' as being about privatized personal choices is accredited as making possible the idea of making markets from aspects of nature, which was followed by the commodification of religions themselves.

Today such discourses on 'religions' remain current. They are generally unanalysed in public debates regarding nationalism, minority culture, ethnic identity, and the relation between democracy and non-Western world constructions. Fitzgerald's hypothesis is that the term 'religion' drifts between these different, contradictory ideas. Moreover, such colonial discourses about religions have been appropriated into rhetoric belonging to non-European languages. The consequences of which is an instability that "explains why discourses that represent 'religion' and 'politics' as natural aspects of all human societies, are not only analytically dubious, but ideologically volatile" (Fitzgerald 2007, 35-36).

This final point is reinforced by Chidester (2007) who notes that the failure to recognize indigenous forms of religion in Southern Africa was no mistake. Rather it was a method used to enter contested territories by representing them as empty spaces open for conquest and colonial domination. This is precisely the summary judgement rendered by Columbus upon arrival in North America (Beaman 2002; Paper 2007): there was no religion and no civilization to be found, as least as defined by European standards. What Chidester (2007) suggests Fitzgerald (2000, 2007) and others confirm: British colonial policy varied depending on the continent in which it was active. India and Japan had developed subsistence, governance, and economic systems more akin to that of Colonial Europe and, therefore, the people in those societies were 'obviously' both more human and closer to civilization than those of the Americas, Africa, Australia, and New Zealand.

In a yet to be published paper, Naomi Goldenberg (2010) offers the illuminating metaphor of vestigial states[1] as a way of describing what happens to colonized populations as the dominant society sets about its business of subsuming 'conquered' nations (or in our case, societies that gave up land in one way or another due to various pressures brought by colonization). The old nations are displaced by newer regimes but continue to function, after a fashion. What makes them vestigial, according to Goldenberg is that they have been 'neutered' (I understand 'neutered' in the sense that many Aboriginal societies lost the agency that comes with what some now call self-determination).

The history of Christianity is rife with examples of the creation of vestigial states through the displacement of one form of government by another. Often we find the old states imitating the newer states in order to gain some intelligibility, rights, and privileges granted by nation-states to what are recognized as 'religions'. Vestigial states support the dominant society in a number of ways and they act as a touchstone from which the dominant society can distinguish itself and, as needs be, imitate. But vestigial states tend to be restless and dissatisfied with the limitations placed on them. They are thus inclined to press the dominant state to cede more recognition and power in the public sphere, the courts, and in schools. Goldenberg (2010) goes on to note that often the power that vestigial states receive is similar to the position of women in patriarchal societies. In a sense they are emasculated and wish to assume nostalgia of their former power.

I agree with Goldenberg's metaphor to this point. However, it is here that I think more nuance is in order. The devolution of power to an emasculated vestigial state may not work so well in the Aboriginal context as compared to India and Japan, for instance. Most Aboriginal societies, with the exception of those decimated by the Conquistadors, did not command large professional armies following the European model, and did not have similar control over entire continents or significant portions thereof. Moreover, while there are similarities in how Europeans imagined women and Aboriginal peoples (i.e., as closer to nature, naïve, influenced by Satan, physical, sexually permissive, etc. [Daly 1990]), I argue that it would be more accurate to say that Aboriginal people were reduced to a child's role in European eyes or, at the very least, in its legal systems.

Yazzie (2007) confirms this when considering Justice Marshall's decision in the US Supreme Court case, *Cherokee Nation v. Georgia* (1831). Marshall wrote that Indian Tribes were seen as

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"domestic dependent nations" of the federal government in a "state of pupilage", whereby the relationship was defined as one between guardian and ward. Incidentally, the outcome of *Cherokee Nation v. Georgia* was to allow Georgia's state laws to supersede those of the Cherokee Nation and, in fact, abolish its laws. That is, it took away the Cherokee's ability to be self-determining and self-governing agents worthy of nation to nation agreements that treaties are by definition; the Cherokee Nation was reduced to a dependent, agentless child.

Children and youth in contemporary social science and legal rhetoric are seen as in development and in transition; physically, emotionally, and mentally immature and irresponsible; innocent and incapable of supporting themselves. Children and adolescents are seen as undecidables when engaging in activities belonging to adults, like pregnancy, which would make them independent and self-determining agents. As such they are seen as category mistakes, neither a child nor an adult, and represent a form of social pollution requiring separation from the rest of society (Fonda, et al. forthcoming).

In the case of Aboriginal peoples this separation has been literal and figural: they have been literally separated from dominant society through forced migration to reserves/reservations put aside for the purpose; and, they have been figuratively separated through stereotypes and discriminatory practices, which included making their spiritual practices illegal for more than half a century (Paper 2007), refusing the validity of their ontologies, epistemologies, and worldviews. Although Paper (2007) claims the law in Canada was never repealed, it was, in fact, removed from the 1951 version of the Indian Act resulting in what could be argued to be the equivalent of repeal. From all this we may conclude that Aboriginal nations were vestigial in the eyes of colonial powers and remain so for current authorities, political and judicial: they are seen as small (relative to the general population), of limited use, and rudimentary in terms of their religious, cultural, social, and economic development. More often than not, the dominant society labels them a 'burden' (cf., Paper 2007).

How did this situation come about? There are several different ways to answer this question, but here we will focus on how Europeans viewed Aboriginal peoples and culture/society from the perspective of jurisprudence. Loftin (1989) provides perhaps one of the most comprehensive reviews of American Supreme Court judgements regarding Native American quest for religious recognition up to 1989. In so doing he summarizes some of the dissimilarities between Aboriginal and European spiritual traditions. Anticipating Fitzgerald, Loftin justifies his exposé: "These dissimilarities have made the Native American tribal quest for religious freedom difficult because historically Anglos have not understood religions different from their own" (1989, 5; see also: Paper 2007; The Pluralism Project 2005; Beaman 2002; Ross 2005).

Loftin (1989) points out Aboriginal peoples do not separate religion from the rest of life or from the world. Loftin argues simplistically and strategically that in the Christian view the desired goal is achieving God's Kingdom, which is often characterized as located in the heavens, separated from this world, or waiting for Jesus to return and construct the Kingdom around the time of the apocalypse. Many forms of Christianity could be said to be confessional in nature, and the church sometimes imagined to be separated from political, racial, or geographical concern with (theological) concerns not often considered to be intrinsically related to other aspects of physical existence. These last two points underscore that the Christian focus has often been other worldly and not in the here and now.

Aboriginal spirituality is often tribal in scope, Christianity claims to be universal. Rhetorically, this is to say that only Hopi can live Hopi spirituality, but anyone can be Christian – albeit things are much more complicated than this given the adoption practices of some Aboriginal cultures (cf,. Ruml 2009), the openness of some Aboriginal spiritual traditions, and the fact that many Aboriginal peoples choose to follow a Christian path and others still walk both Christian and (neo/pan) traditional spiritual paths. More importantly, though, pre-contact Aboriginal spirituality was lived by all members of the group or tribe; it was often communal, whereas Christianity historically most often is a personal religion for

individuals, at least since the Protestant Reformation. The result is that religious freedom claims based on communal considerations are doubly disadvantaged, which is often the case for those Aboriginal societies whose lands are legally defined as collectively-owned. Nonetheless, communal claims do not resonate with the dominant religious view of the Christian mainstream and fall outside the framework for rights articulated in the USA. Things are a little different in Canada, whose constitution enshrines a notion of collective rights (Beaman 2002).

As previously noted, Christianity tends to be a religion of the word (with some exceptions), whereas Aboriginal spirituality is experiential. Finally, pre-contact and traditional Aboriginal spirituality was mainly pre or non urban and is attuned to the rhythms of nature (Loftin 1989; see also Yazzie 2007). Nature continues to be seen as sacred and attempts are still made to lessen the distance between themselves and the world; Christianity, in contrast, is urban – developing as it did along the silk route. In this context, urban life is seen as especially problematic and thus Christianity often stresses the next life, after death.

Such "distinctions have not been noticed by the courts, or when they have, they have been used to deny the legitimacy of Native American religions" (Loftin 1989, 6; see also Ross 2005). In the past, Aboriginal religious traditions were typically characterized by Europeans as either non-existent or primitive and superstitious. Moreover, Judeo-Christian values underscore much of the Anglo-American political order, showing the intimate connection between church and state. The legal, political, and economic North American (including some Aboriginal peoples) has adopted values of individualism, competitiveness, profit, speed, and efficiency. The relationship that law has with these ideas is especially close. All major areas of law place great emphasis on economic efficiency or wealth maximization. Property law is heavily influenced, too, by ideas of efficient resource use. Unfortunately, often Anglo-American notions of the public good tend to leave Aboriginal peoples out of the picture. "This omission is part and parcel of an ideology that is problematic religiously because it denies the humanity of Native Americans" (Loftin 1989, 8).

Loftin (1989) offers a critique of modern capitalistic economic theory as developed in Adam Smith's *The Wealth of Nations*. Smith's is an ethnocentric world view that perceived Native Americans as other than human. His economic theories are based in the notion of human origin and destiny. Integral to Smith's economics is his theory of progress, called the four stages theory. This theory reflects an idea new to his time, evolution. Smith's stadial theory of social evolution claims

> Humanity possesses a natural propensity to progress over time through four more or less distinct consecutive stages, each corresponding with different subsistence modes of hunting, herding, farming and capitalistic commerce. For Smith, a society based on capitalism had attained the way of life destined by Nature and was thus fulfilled. (Loftin 1989, 8)

It is important to note that Smith framed the four stages theory in terms of progress and not merely change.

> He [Smith] felt that society of merchants, governed by democracy and oriented by the sciences, was a better society than one based on hunting, herding and farming, although he did recognize that the world of commerce presupposed an agricultural surplus. Such a society was 'civilized' in contrast to the 'primitives' living in other cultures. (Loftin 1989, 8f)

In developing his four stages theory, Smith relied heavily on the voyage literature of the American Indians, who inhabited a land (and its raw materials) 'discovered' by Europeans. For Smith,

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civilization presupposes a division of labour, which presupposes a propensity for exchange born of a desire for material surplus. Here the 'savage other' comes into play: "Smith argues that humans have a natural desire to accumulate economic surplus; therefore, he says 'savages' are not fully human for they have not yet progressed into civilization based on desire for surplus" (Loftin 1989, 9).

Adam Smith is thus responsible for the view that humans are inherently greedy. However, a major difficulty with modern economics is that it centres on the "premise of infinite desire that is claimed to be shared by all human beings" that "goes hand in hand with the theory of social evolution because economics is a social science and social sciences are supposed to explain constitutive aspects of human beings" (Loftin 1989, 9). Smith's argument follows this kind of path: all humans have both infinite needs and greed, which leads to commercial and industrial economics. Implicit is the idea that all humans want a surplus of material wealth. But that premise is questionable. For example, Marshall Sahlins *Stone Age Economics* (1972) remains a classic statement on the economics of hunting-gathering peoples. It demonstrates that wealth is related to want and that wants can be satisfied in two ways: by producing a lot or desiring little. Europeans follow the former theory; 'primitive' Aboriginal peoples the latter. As Sahlins puts it: "'Want not, lack not'" (as cited in Loftin 1989, 10).

Loftin points to two further characteristics of modern capitalism that are problematic from Aboriginal worldviews: usury and profit. Usury is the practice of lending money at an exorbitant interest. It is a relatively recent innovation with Christian communities. In fact, Christianity did not sanction it for at least 1500 years – coincidentally, not until the discovery of the New World. Martin Luther advanced this view for Western Europeans as a means of promoting economic development. Until that time, Christians objected to the practice for religious reasons – Christian love extended to all persons, even enemies, meaning that every human was a brother. "Usury flew in the face of Christian brotherhood and created a universal 'otherhood' where each person was an other, not a brother" (Loftin 1989, 10; see also Beaman 2002 who points out that Aboriginal peoples are legally constructed as the 'other' in the USA and in Canada).

Usury rests on profit. The idea of profit is more or less universal, if we refer to the kind of profit that comes from each party's gain in acquiring something they need for the exchange of something less needed. Traditionally, humans bartered concrete goods with one another with each acquiring something of value. Items were made and exchanged directly. This was the case for Aboriginal peoples and for much of Western Europe until the Renaissance. Modern economics is different: production is much more abstract and impersonal. The volume is incredible and the exchange of goods and services lacks direct consideration of the people who receive them. "Production is mathematical; its goal is money, not humanity" (Loftin 1989, 10).

From Aboriginal spiritual perspectives this economics can be "worrisome, incomprehensible and inhumane." But capitalism has its rejoinder: creatures without infinite desire are not fully human – they represent the 'primitive' past on the way to civilization. Until humans became 'civilized' they were not complete humans. This primitive-civilized dichotomy is another core problem for American Indian law. The values inherent to the ideology of civilization are the roots for American Jurisprudence. Euro-Americans often believe that they 'conquered' Aboriginal peoples absolutely in the sense of "never accepting them in their own terms...as fully human – thus such great efforts to civilize them and convert them to Christianity" (Loftin 1989, 11).

The colonial treatment of land in North America is based in common law considerations of property as set forth by John Locke. Yazzie (2007) notes that from the beginning colonial powers in the USA (and Canada) enacted laws and policies that deprived Aboriginal peoples of their lands and limited traditional cultural practices. These laws, based on the Doctrine of Discovery, give property rights to the country that discovered a piece of land, it was used in the USA and Canada as a way of justifying

unilateral state ownership of indigenous lands and guardianship over indigenous peoples "because of assumed racial and cultural inferiority" (3).[2]

While Aboriginal societies had laws concerning property ownership, those laws did not resemble European ones sufficiently to be recognized. For instance, the Anglo legal tradition says that the land must have a sovereign who owns all land in the end and even fee simple title is only a possessory interest. The main difference is that Europeans possess lands individually and Aboriginal peoples communally. The implications of this "difference emerges when we get to the notion of ultimate ownership. Indian tribes agree that the sovereign owns the land; the issue concerns who is sovereign. For them, the sovereign is not human" but spiritual (Loftin 1989, 4). This is established in US case law (e.g., *Holden v Joy* 1872) where Supreme Court held that Natives assert that their title derived from the "Great Spirit to whom the whole earth belongs" (cited in Loftin 1989, 4). Because of the nature of this claim, no human being can own the land.

For many Aboriginal peoples, the land is seen as part and parcel of the Creator. It is primarily spiritual, not economic. Rather such Aboriginal peoples look to the spiritual realm for ultimate significance of their lands, of their relationship with the lands and with themselves. "Their relationship with the lands is therefore fundamentally and irreducibly spiritual" (Ross 2005, 2). Historically at least, Aboriginal peoples had a harmonious relationship with the land and many still do, with some notable exceptions such as, possibly, those that promote intensive resource extraction activities. In general, however, a significant number of Aboriginal peoples do not seek to use natural resources efficiently, as modern economics might define it, "but rather to unite themselves with the sacred" (Loftin 1989, 5). In such cases, the land is not for wealth maximization but for living in harmony. The relationship that most Europeans have with land is one of an economic function of exploitation.

Thus we find that the difference in worldviews, ideas of 'religion', social evolution, the notion of what makes for civilization and ultimate ownership of the land, as well as agricultural or industrial use of the land are most often the basis of the courts' approach to Aboriginal calls for religious freedom, which is intrinsic to land use. Inevitably, Aboriginal peoples' claims dealing with sacred space have been consistently minimized in the interest of compelling state claims (Ross 2005), which has resulted in the diminished interpretation of religious freedoms (Beaman 2002).

If we were to look at case law regarding the freedom of religious belief and practice in the USA and Canada, as Loftin (1989), Beaman (2002), Ross (2005) and the Harvard Pluralism Project (2005) have, we will find that these themes emerge time and again. We will also note the pragmatic character of the courts, that steadfastly side-step the thorny and difficult question of religious freedom in preference to taking paths of lesser resistance by relying on property law and other legal technicalities to resolve such questions, almost always in favour of the state's economic or environmental interests (Loftin 1989; Ross 2005; Beaman 2002; The Pluralism Project 2005).

As argued above, cases regarding religious freedom as related to lands have been, for Europeans, about secular issues such as access to resources, issues of power and control, population control, and social experiments. While some Aboriginal peoples may agree with this approach, many others see such questions as being about self-determination, agency, spiritual and cultural freedom, as

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well as identity and community. These goals are important for well-being (Ross 2005), especially when considering the findings of Chandler (1998, 2004, 2006a, 2006b, 2008) and colleagues regarding the impacts of 'cultural continuity' in reducing suicides among British Colombian First Nations. They also challenge the legal hegemony that supervises Aboriginal peoples. Moreover, McIvor (2009) reviews other studies that found that Aboriginal spirituality is a protective factor in suicide, and Waldram (1994; 1993) and others note that Aboriginal spirituality has significant impacts on substance abuse and preventing recidivism (See also: Fleming and Ledogar 2008; Brass 2008; Torres Stone, et al. 2006; Whitbeck, et al. 2004, 2002; Van Sickle, et al. 2003).

An ironic example of the Anglo-Christian-legal bias is the *American Indian Religious Freedom Act* (1978), which was passed by the US Congress in recognition of past suppression of traditional Native American Indian religious rights. It cites ignorance and insensitivity as two major reasons for encroachments on Native American Indian religious expression and seeks to remedy free exercise infringements within the limited scope of the federal agencies (see Ross 2005 for a detailed review of Canadian jurisprudence regarding access to sacred lands off reserve since 1982).

The majority of suits brought to bear under the Act have been concerned with sacred sites; and, "thus far [as of 1989] Native American's have yet to succeed" (Loftin 1989, 30). "In all those cases the free exercise claims were defeated on all theories, including appeals to American Indian Religious Freedom Act. This has led to the comment that the Act is toothless" (cf., Beaman 2002; Paper 2007; The Pluralism Project 2005). Curiously, this Act almost completely ignores scholarly studies of Native American religions, which seems strange if the goal is to right past wrongs based on ignorance (Loftin 1989).

To Loftin it may all come down to a question of how creation is viewed differently: as commemorative or as continuing. Christians see creation as commemorative; Aboriginals as a continuing process in which the creator is immanent (Paper 2007). Europeans perceive the creator as distinct from the creation. Yet this distinction is overdrawn. "And it is precisely the Act's tendency to stress differences over relationships that best reflect the Act's embodiment of civilized ideology" (Loftin 1989, 31). The tensions have to do with conflicts between two peoples with different core values, all within the context of conquest and colonialism.

Part of the problem is different epistemologies: many Aboriginal peoples are mythic peoples; many Europeans are historical. Aboriginal peoples "perceive connections across time and space and give their world a unity and timelessness that modern, civilized humanity does not see" (Loftin 1989, 32). Other problems include the Courts almost total reliance on Anglo-American perspective with Aboriginal perspectives are rarely heard (Ross 2005), that Aboriginal peoples must adopt foreign legal categories to adjudicate their claims, and that they are forced to use a language that does not embody their perspective (Ross 2005; see also Beaman 2002; The Pluralism Project 2005). There is also poor scholarship in legal circles, especially with regard to Native American religions and much of this scholarship is too theoretical does not address contemporary legal issues (Ross 2005; Loftin 1989). While there is plenty of other scholarly materials that can help, there is generally poor communication across disciplines, which prevents its application in the courts and elsewhere – consequently, legal experts often paint an inaccurate picture of Aboriginal religious traditions; and, the historical instability of federal Indian policy that has undergone a number of stages, including assimilation, elimination, reserves, and self-determination – leaving a litigation quagmire open to various interpretations (Loftin 1989).

The point is that statutes enacted during one period often maintain legal consequences in the later periods, even when the perspective on Aboriginal issues is very different. Moreover, it is quite possible that attempts to protect religious freedom in the USA using the First Amendment does as much harm as good to those interests by fixing spiritual practices and beliefs in written documents, subjected to public and often hostile scrutiny (The Pluralism Project 2005; see also Ross 2005 in regard to Canada).

In Canada the situation is similar, at least in terms of the court's response to the very limited number of cases based on section 2(a) of the Charter of Rights and Freedoms and petitions for interlocutory protections (Ross 2005). As Beaman (2002) points out, in Canada the tendency has been to characterize Aboriginal religious freedom cases in two ways: as either treaty rights pertaining to hunting and fishing or as related to Aboriginal title. Moreover, in both *Dick v the Queen* (1985, 2 SCR 309, 43) and in *Delgamuukw* (1997 3SRC, 1010) the court indulged itself in a debate on the nature of 'Aboriginality' or Indianness, even if the cases were formed around hunting and human rights or Aboriginal title, respectively. This led Beaman to conclude that

> The result of this tendency to characterize issues outside of a religious freedom framework is a desacralizing of Aboriginal life such that spirituality becomes an ancillary issue, reflecting a common perception of North American society that regulates spirituality and religion to the 'private' realm. It also commodifies Aboriginal expressions of spirituality by quantifying the amount and value of fish, wildlife, and property involved in the various rituals and practices (2002, 144).

Michael Lee Ross (2005) provides an alternate and highly detailed view on recent Canadian jurisprudence regarding off-reserve First Nations sacred sites. He describes two predominant strategies that have been employed: petitioning for interlocutory protection or for constitutional protections of such sacred sites. Unfortunately, First Nations' actions in the Canadian courts have not fared well at all, resulting from an apparent bias towards economic and/or environmental interests over the claim of sacredness and potential damages to nation, culture and community well-being. Ross does not claim that things are insurmountable. The courts would provide slightly better chances to Aboriginal claimants if they indulged themselves, for instance, in developing functionally equal understandings of Aboriginal perspectives regarding the sacredness of, use of, cultures attached to, and ethic of sacred sites as well as the potential community harm desacralising such sites may bring.

However, the Supreme Court of Canada (SCC) took some more steps that may in the long run provide hope for Aboriginal claims regarding sacred sites. In the *Haidia* and *Taku River* Decisions (2004) and in the *Mikisew Cree* decision (2005) the SCC held that the Crown has a duty to consult when it contemplates activities that may adversely impact potential or established treaty rights. In addition, the more recent SCC decisions of *Rio Tinto* (2009) and *Little Salmon Carmacks* (2010) allowed it to explain further that the duty to consult is a constitutional duty that involves the honour of the crown and must be met. "The context will inform what is required to meet the duty and demonstrate honourable dealings" (AANDC, 2011). Pragmatically, this has resulted in several directives for Canadian Federal officials in fair dealing with Aboriginal peoples:

- They must consult and they must do so early in any process.
- They must address Aboriginal concerns to avoid or minimize impacts on existing or potential claims resulting from federal activities and they must implement mechanisms that seek to address related interests, where appropriate.
- Consultation and accommodation will be carried out in a balanced manner that ensures timeliness; efficiency and responsiveness; is transparent and predictable; accessible, reasonable fair and flexible; founding in principles of good faith, respect and reciprocation; is respectful to the uniqueness of different Aboriginal communities and identity groups; and, includes accommodation, where appropriate. This directive includes consideration of traditional knowledge at least in cases pertaining to the *Species at Risk Act* and the *Canada National Parks Act* in regard to environmental assessments and land use disposal.

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- They must recognize that consultation is a crown duty and thereby name a lead department or agency.
- They must use and rely upon existing consultation mechanisms.
- They must coordinate consultation and accommodation activities with its partners (e.g., Aboriginal organizations, provinces, territories, and industry).
- They must carry out consultation and accommodation in accordance with its commitments processes involving Aboriginal groups, including developing and maintaining meaningful dialogue in support of building relationship with its partners (AANDC 2011).

While these principles are explicitly expected in cases of environmental assessments and regulatory processes, it might well be the case that such SSC directives will mean a wider application that could, at one point, encompass off-reserve sacred site claims.

This said, however, historically in the USA and Canada the courts isolate Aboriginal peoples as an 'exception' to be accommodated according to the interests of the state. Courts in both countries typically take a narrow view of what constitutes a religion requiring protection and "…First Nations people are more likely to be excluded from, than included in First Amendment and Charter of Rights and Freedoms protections" (Beaman 2002, 135). Moreover, while Esson's Rule[3] allows for exceptions in demonstrating the uniqueness of a specific site, no Canadian off-reserve sacred site has been afforded this uniqueness since the rule was established (Ross 2005).

Beaman also suggests three possible explanations for this state of affairs, which are compatible with those of Loftin (1989) and the general thread of discussion in this paper: the aforementioned framing of 'religion' based in the underlying Christian model (coupled with the fear of wilderness and a fundamental Christian belief in humanity's dominance over animals and nature making it difficult to perceive nature as sacred); the persistent difficulty in expanding the definition of what is religious and spiritual used by the dominant society's institutions, including the courts; and, the persuasive nature of the colonizing discourses where a benevolent dominant class permits religious freedom to vestigial states within its boundaries and where Aboriginal claims are perceived to be burdens on the economic interests of the state, similar to the economic burden of a ward to the guardian, or of a (foster) child to parent. Others are more direct in explaining this state of affairs: "The Canadian government understood that their Bill of Rights [sic], with regard to religious freedom, did not apply to Native American religions" (Paper 2007, 51).

Loftin (1989) provides a related view:

> The issues are stated within a legal context but ultimately point beyond to the realm of world view[s]. In the end the question is one of truth, reality and power. For Native American tribes, truth is mythological; for Anglo jurists it is logical. Reality is spiritual for traditional Native Americans, material for Anglo legalists. And finally, there is the question of power. It is often said that Anglos exercise a 'might makes right' philosophy and indeed they do. But the same is true for Native Americans. However, the two peoples perceive the locus of power to be quite different. Anglo legalists emphasize human, political power[,] while Native American tribes stress the power of the world that creates and

[3] Ross (2005, 69) writes that Esson, J,A, in the *Westar* case proposed a general rule derived from the British Columbia Court of Appeals decision in the *Meares Island* case that "the court should not grant an injunction if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region of the logging company." He further proposed as an exception, also derived from the same cased, that the court could nonetheless grant an injunction with regard to "particular sites which have unique qualities."

> sustains them. This difference in world view[s] is legally significant because tribes are the politically subordinated party in the dispute over religious freedom and may contest the dominant society only by employing the language of a foreign world (1989, 35).

Finally, the civilization ideology is paramount and it is divisive. It is "so ingrained as to be embodied almost without reflection, as a self-evident truth" (Loftin 1989, 35). Yet the fact that many people view Aboriginal cultures as inseparable from the land suggests that more research is needed regarding the link between traditional lands and mental and physical health (and not just for Aboriginal peoples). Federal and provincial/state governments have responsibilities to assist in cultural revitalization (McIvor 2009), responsibilities generated by such things as collusion with the Churches to break cultural continuity (Simpson 2004; Paper 2007) through the residential schools system (McIvor 2009), by making Aboriginal spirituality illegal for a time (which has resulted in some cases in an ongoing felt need to keep things 'underground', as it were), and through ignorant refusal of access to sacred lands thus limiting traditional Aboriginal religious freedoms because they are different from the Christian norm.

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