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I. INTRODUCTION

In the early 1990s, a ski hill developer proposed a ski resort development for an area known by the Ktunaxa Nation as Qat’muk. It is an area not covered by any land surrender treaty with Indigenous Peoples, but which British Columbia characterized as Crown land. The Ktunaxa had not objected to the use of the area for heli-skiing, but they objected to the ski resort development. The Supreme Court of Canada found that, by 2009, British Columbia had consulted with the Ktunaxa and accommodated their concerns by mandating a reduction in the size of the proposed resort.

Also in 2009, the Ktunaxa disclosed that Qat’muk was the home of the Grizzly Bear Spirit, which would leave if humans overnighted in the area. They said they had not disclosed this information earlier because of its secret nature. Despite this new information, by 2011, British Columbia decided sufficient consultation had taken place and permitted the resort to proceed. The Ktunaxa applied for judicial review of the decision, but were unsuccessful at first instance and at the Court of Appeal. At issue was whether the Ktunaxa Nation’s religious freedom rights were triggered. The Court of Appeal held that the protection of religious freedom did not extend

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** Partner, Olthuis Kleer Townshend LLP. Senwung Luk appeared on behalf of the Shibogama First Nations Council (“SFNC”) as an intervenor in the Ktunaxa Nation case. The views expressed here do not necessarily represent those of SFNC.
to “restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning.”

The majority of the Supreme Court of Canada found that section 2(a) of the Canadian Charter of Rights and Freedoms did not protect the Ktunaxa claim. They reasoned that while the Charter protects the right to hold beliefs and manifest those beliefs in worship, it “does not protect the spiritual focal point of worship”. The concurring minority, in contrast, found that the government’s decision infringed the Ktunaxa Nation’s religious freedom rights but that the infringement was reasonable.

This chapter argues that the exclusion of “spiritual focal points of worship” from the ambit of religious freedom could yield strange results inconsistent with the purposes of protecting religious freedom. This development is likely to have disproportionately onerous effects on Indigenous spiritual practices. We highlight these effects by putting the issue into the historical context of land grants made by colonial powers to dominant religious groups allied with the settler state. Such land grants were part of the pattern of colonial dispossession of Indigenous groups. We consider how these land grants have privileged settler religions, specifically majority settler religions that shared close links with the settler state. The effect is that settler religions can protect their religious spaces through property law, without having recourse to the Charter.

The framework articulated by the Ktunaxa majority for establishing Aboriginal title puts a heavy cost burden on Indigenous groups who may want to rely on an ownership claim to protect their land-based religious interests. To the extent that Ktunaxa suggests that religious groups in need of land to carry out their religious practices should rely on property rights rather than religious freedom, the approach privileges dominant groups over non-Indigenous religious minorities. As an alternative, we suggest that a more appropriate approach to reconciling religious freedom interests with the property interests of the Crown or of third

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1 Ktunaxa Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations), [2015] B.C.J. No. 1682, 2015 BCCA 352, at para. 73 (B.C.C.A.). The framing of the effect on the Grizzly Bear Spirit in terms of causing it to “leave” is drawn from the factum of the Ktunaxa Nation, which was in turn echoed in the Supreme Court judgment.


4 Id. Due to space limitations, we are not able to address the reasoning of the concurring judgment in this paper.
parties is to be found in the existing case law on the interaction of religious freedom and zoning regulations. The reasoning in the zoning cases is more conscious of the privilege enjoyed by dominant religions and more sensitive of the role that the Charter must play to ensure the equal protection of religious freedom in Canada. Finally, we suggest that land selection processes under modern treaty negotiations present yet another way to avoid conflict.

II. THE ANALOGY TO PROPERTY AND HISTORICAL PRIVILEGE

The Ktunaxa claim is challenging in part because it is based in the right to religious freedom but resembles a property claim. The Ktunaxa asserted their right to limit particular uses of land (overnight sojourns) in territory they did not claim to own. At first blush, some might bristle at the idea that one person’s religious practices could prevent another from using property (whether public or private) in an otherwise legal manner. What little authority exists on this question has gone against religious freedom claimants. For instance, when the users of a spiritual retreat centre opposed plans for a department store on neighbouring land, the Ontario Municipal Board (“OMB”) held that “freedom of religion does not extend to protect religious practices that could be affected by the mere presence of a nearby land use”, and the Divisional Court affirmed.

Like the OMB, the majority of the Ktunaxa Court held that the Ktunaxa claim was beyond the scope of the right to religious freedom. Unlike in the OMB case, there was no private landowner in Ktunaxa, though the Court reached a similar result on the basis of “public interest” in Crown lands. What seems to be driving this rule is a concern that an individual or group’s religious freedom interest will unjustifiably limit the freedoms of others, especially in relation to their property.

5 For an argument that international law should recognize collective Indigenous ownership based in part on religious freedom interests, see Bryan Neihart, “Awas Tingni v. Nicaragua Reconsidered: Grounding Indigenous Peoples’ Land Rights in Religious Freedom Case Note” (2013) 42 Denv. J. Int’l. Law & Pol’y [i]. The analogy to property is not perfect: “Property is inherently fungible in ways that sacred sites are not. To argue for property rights is to argue for something different than arguing for protection of the sacred, even if property rights might ultimately be a vehicle for that protection”: Dwight Newman, “Implications of the Ktunaxa Nation / Jumbo Valley Case for Religious Freedom Jurisprudence” in Religious Freedom and Communities (Toronto: LexisNexis Canada, 2016) 309, at 315 [hereinafter “Newman”].

For instance, if I believe that a Bible is a sacred object, that should not prevent another person from expressing their opposition to treating the object as sacred. I could not seek an injunction against someone who sought publicly to destroy a Bible as an act of protest on the basis of my own religious freedom. While I cannot stop you from destroying your Bible, I can stop you from destroying my Bible — not because of my religious freedom, but because of my property right in the Bible. And this is the nub of the majority’s reasoning: they do not want the religious freedom right, exercisable against the state, to be transformed into a species of property right, exercisable against all. While this may have a certain logical appeal, it also reveals the disproportionate impact of the Ktunaxa holding on Indigenous groups whose rights to the land are never presumed, but instead must be proven through lengthy and expensive litigation. This disproportionate impact seems especially pernicious given that Indigenous religious practices were long outlawed and subject to the state’s attempts to “exterminate [them] … through the devastating system of Indian residential schools.”

For much of the 20th century, engaging in certain Indigenous spiritual ceremonies was a statutory offence under the Indian Act.

In contrast, to the extent that dominant religious groups in Canada have any beliefs in the sacredness of a church or burial site, they will not likely need to rely on a religious freedom right to protect these lands, because they already own them. A good deal of those ownership rights can be traced to grants from the relevant state actors, resulting in a history of state-bestowed privilege relative to minority religious groups. To illustrate, the rest of this section examines some of the large initial land grants made by the French Crown to Catholic groups in New France and by the English Crown to Protestant groups in Upper Canada.

1. New France Land Grants/Settlement

The relationship between the French Crown and the Catholic Church was close, and the Catholic Church and various Catholic religious orders

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8 Indian Act, R.S.C. 1927, c. 98, s. 140.
9 Newman, supra, note 5, at 314.
10 We rely in this section on secondary materials because our purpose here is to make these histories known to those with an interest in law; we do not claim to have conducted original historical research.
played a large role in the settlement of New France. The “established churches aided the state in upholding order” and “the state used its power to back the authority of religious officials, establishing parishes, enforcing the collection of the tithe, and maintaining order at church ceremonies.” The state used its power to back the authority of religious officials, establishing parishes, enforcing the collection of the tithe, and maintaining order at church ceremonies. Reflecting the overlapping interests of religion and state, the Jesuits made efforts to attract new settlers. Though there was some competition for influence between church and state officials, “Church and state were not normally at variance in their views and aims.” The Church’s recognition of the state’s authority was often “a help rather than an obstacle to the Church”, as the state enforced religious dogma and provided financial support to the Church.

(a) Land Grants/Settlement

In return for their role in colonization, religious orders in New France were often the beneficiaries of large land grants from the French Crown. In the first half of the 17th century, when the Compagnie des Cent-Associés held the grant of New France, it attracted a small agricultural population made up in part of “servants indented to the Jesuits, Ursulines, or nursing sisters” and those who came “to the model Christian community established at Montreal in 1642 by the Société de Notre-Dame pour la conversion des sauvages.” The Compagnie “gave the Jesuits huge seigneuries”. When the Compagnie surrendered its charter in 1663, the French state continued to make many large land grants to churches and religious orders to “maintain the social position of the clergy”. As historian Marcel Trudel notes, “one quarter of the 7,985,470 acres granted during the French régime were given to the Church,” leaving the Church (including the religious orders) as the largest landowner in New France.

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14 William Bennett Munro, *Crusaders of New France: A Chronicle of the Fleur-de-Lis in the Wilderness* (New Haven: Yale University Press, 1920), at 127 [hereinafter “Munro”].
16 Dickinson & Young, supra, note 11, at 22.
17 Id., at 41.
18 Id.
19 See Munro, supra, note 14, at 128.
of this land was given to religious orders who “held a social mandate from the state for both education and hospitalization” (see Figure 1). The French Crown ended its practice of granting land to religious communities in the 18th century, at which point religious communities in need of land had to buy it, but those that already held property retained ownership.

![Figure 1: Seigniorial distribution in New France, circa 1745, with Church-held seigneuries in dark grey.](http://images.recitus.qc.ca/main.php?g2_itemId=2588)

Though control of the land that is present-day Québec passed from the French to the British with the Conquest of the 1760s, “the institutions introduced by France remained and were confirmed by the Quebec Act of 1774”. French colonists kept their property, and the terms of the 1760 Capitations of Quebec and Montreal specifically allowed the religious orders to retain their property. One major exception was the Jesuit Order, which saw itself dismantled and its land taken by the British Crown. This had mostly to do with the Jesuits falling out of favour in

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20 Marcel Trudel, *The Seigneurial Regime* (Hull: Canadian Historical Association, 1956), at 5-6 [hereinafter “Trudel, The Seigneurial Regime”].
Europe with both the French and Spanish Crowns, who respectively suppressed and expelled the Jesuits in the 1760s, during which time the number of Jesuits in Canada declined.\(^\text{26}\) There was debate among the British on how to handle the Jesuit properties in the 1760s,\(^\text{27}\) but by 1775 the Governor of Quebec received specific orders “that the Jesuits’ Society be dissolved and suppressed and that their estates and other possessions be vested in the Crown”.\(^\text{28}\) The Jesuits were eventually compensated through the \textit{Act Respecting the settlement of the Jesuits’ Estates}, which compensated the Jesuits in the amount of $400,000 for their lands.\(^\text{29}\)

\textit{(b) Montreal}

Looking at Catholic involvement in one particular place showcases the interconnectedness of religion and colonization. Montreal, the largest city in Quebec, owes its foundation to “la propagande des Jésuites”.\(^\text{30}\) Initially, the Jesuits were given lands constituting 11.2 per cent of the City, with the Bishop and Seminary of Quebec receiving 8.7 per cent, the Sulpicians 3.1 per cent, and the Grey Sisters receiving 0.5 per cent.\(^\text{31}\) The Sulpicians soon became the leading religious order in the city, having been “conceived almost simultaneously [with the city] in the mind of the seventeenth-century French theologian, Jean-Jacques Olier de Verneuil ... [who] became the principal supporter of La Compagnie de Notre-Dame de Mont-Réal”.\(^\text{32}\) In 1641, Louis XIII gave this Compagnie “the right to occupy Mont-Réal”, and they built “the first wooden church of Notre-Dame. In 1644 Jeanne Mance chose a spot two hundred yards inland for the site of the Hôtel-Dieu hospital. This move established the first two streets of Montreal.”\(^\text{33}\)

\(^{26}\) Dalton, \textit{supra}, note 24, at 5-6.
\(^{27}\) \textit{Id.}, at 5-7.
\(^{28}\) \textit{Id.}, at 19.
\(^{29}\) \textit{Id.}, at 162-63. \textit{Act Respecting the settlement of the Jesuits’ Estates}, 51-52 Vict., c. 13.
\(^{30}\) Salone, \textit{supra}, note 12, at 73.
\(^{31}\) Trudel, \textit{The Seigneurial Regime, supra}, note 20, at 6.
\(^{33}\) \textit{Id.}
The city’s growth proved slow in its first decade. “Sulpician priests arrived in New France in 1657 in response to an urgent request from Maisonneuve and Jeanne Mance, and established their first seminary.”34 Louis XIV then allowed the Paris Seminary of Saint-Sulpice “to buy the entire island of Montreal from its previous owners, the mercantile Compagnie des Cent-Associés”.35 In 1663, consistent with the wishes of settlers in Montreal,36 the Sulpicians became the Seigneurs de Montréal.37 This position obligated them to administer the city and entitled them to payments from the island’s other residents. “Montreal was one of the largest and certainly the richest seigniory in the colony, and one of the few owned outright by a religious community.”38 The Sulpicians established missions to spread their message to Indigenous Peoples, and engaged in planning out the city, creating a street grid and building a parish church, among other things.39 As Seigneurs, the Sulpicians were able to choose their preferred lands.40 They remained the Seigneurs of Montreal until the British conquest in 1760;41 as noted above, however, most religious orders in Lower Canada were allowed to retain their property under the terms of the Capitulation Treaties. The chapel of Notre-Dame-de-Bonsecours, for example, has been on the same land since 1675.42

2. Upper Canada

The history of the relationship between Protestant Christian denominations and the state authorities of Upper Canada is comparable to that of New France in many ways. First, the state used its claims to

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35 Toker, supra, note 32, at 7.
37 Toker, supra, note 32, at 7.
38 Id.
39 Pothier, supra, note 34, at 42.
40 Id., at 49.
41 Toker, supra, note 32, at 7.

landownership to enrich Protestant institutions and to provide them with the material conditions for establishing themselves and for expansion. Although New France was dominated by one denomination, in Upper Canada different Protestant denominations struggled with the dominance of the Church of England (Anglicanism), to which members of the governing class mostly belonged.

What follows is a discussion of the allocation of land by the settler government to Protestant churches in the foundational years of the colony of Upper Canada. Then, a specific example of one church, the Anglican Cathedral Church of St. James in Toronto, will demonstrate how one Anglican community came to have its right to a sacred space recognized in Canadian law.

(a) Lands Reserved for the Protestant Clergy

One-seventh of all land open for settlement in Upper Canada was made, by law, the property of the Protestant churches of the province. This can be attributed at least in part to the way in which the colony was conceived. The idea of the British colony of Upper Canada arose in the aftermath of the American War of Independence. In reaction to the rhetoric of democracy and equality that the American revolutionaries had used to rally British colonists in the Thirteen Colonies, the founders of the Upper Canada colony sought to build a society where everybody knew their place — and the Anglican Church was to have a central place in this process. Such an ideology was explicitly embraced in the Crown’s instructions to Governor James Murray, “to the end that the Church of England may be established … and that the said inhabitants may … be induced to embrace the Protestant religion … land would be set aside for the support of Protestant ministers and school masters”.43

From an English perspective, the most familiar role for the Anglican Church would have been for it to be the “established church”, just as it was (and is) in England, where the head of the Church and the head of state is the same natural person — the reigning monarch. The Church of

England has its own system of laws and courts whose jurisdiction is
recognized by the civil courts. The civil courts also recognize the power
of Church of England bishops to declare that certain parcels of land are
under the jurisdiction of Church law, and therefore no longer under the
jurisdiction of the common law. In the intimate relationship between
the state and an established church, a mutual regard for each other’s
interests can be expected.

In the aftermath of the American War of Independence, with the
British desire to build a new society that was more respectful of rank, the
Anglican Church sought to take charge of this process by becoming the
established church of the new colony. By endowing the Anglican Church
with property and power, the founders of Upper Canada sought to use it
to promote social stability.

Thus, the Constitutional Act 1791, the first constitutional document of
the government of Ontario, was made to ensure special privileges for the
religion of the new settlers. The relevant part of the Act begins with a
reference to the privileges that the Roman Catholic Church would enjoy in
Lower Canada, then declares “that it should be lawful for his Majesty … to
make such Provision out of the rest of the said accustomed Dues and Rights,
for the Encouragement of the Protestant Religion, and for the Maintenance
and Support of a Protestant Clergy within the said Province …”. The
privilege accorded to the Roman Catholic Church in Lower Canada thus
became a justification for the privileges to be accorded to the Protestant
churches in Upper Canada.

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44 See generally, E. Garth Moore, An Introduction to English Canon Law (Oxford:
45 Re St. John’s, Chelsea, [1962] 2 All E.R. 850, at 852 (Cons. Ct.); Moore, id., at 97-100;
The Parish and Cathedral of St. James, Toronto, 1797-1997 (Toronto: University of Toronto Press,
1998), at 3 [hereinafter “Cooke”]
47 Constitutional Act, 1791, s. 35.
The next section of the Constitutional Act, 1791 announced the royal intention to permanently appropriate lands to the Protestant clergy in proportion to the previous grants, and authorized further such appropriations in the future. Further, the Act provided that where land grants were made in the future, “there shall at the same Time be made, in respect of the same, a proportionable Allotment and Appropriation of Lands” to the Protestant clergy, thus maintaining the Protestant clergy’s one-seventh ownership of land in Upper Canada (see Figure 2). Protestant churches would use such lands for church construction, or to rent out to

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48 Id., s. 36.
tenant farmers so that funds could be raised to pay for the operation of the Protestant Church. The income from these “glebe lands” was dedicated to the financing of a particular Protestant church community.

Because the Constitutional Act, 1791 provided that these lands were for the support of a “Protestant Clergy” and did not further specify that the lands would belong specifically to the Anglican Church, the debate over who the “true owners” of these clergy reserves were — Anglicans, or other Protestant denominations such as Presbyterians, Methodists and Baptists — beset Upper Canada politics for decades. For instance, Lieutenant Governor Sir John Colborne endowed 44 Anglican rectories in Upper Canada with glebes taken from the Crown and clergy reserves in 1836, to the dismay of other Protestant denominations who were not favoured with such largesse.

The clergy reserves were finally secularized by Act of Parliament in 1854, which stipulated that the lands which remained in 1854 were to be sold and the funds raised divided among the municipalities of the province. By 1854, however, about 75 per cent of the clergy reserves had already been sold or otherwise disposed for the benefit of the Protestant churches, leaving the Protestant churches with a large endowment.

(b) St. James Cathedral, Toronto

Although the British settlement of York (Toronto) began in the early 1790s, an Anglican Church was not built in the town until 1807. This Anglican Church eventually became the Cathedral Church of St. James, but at the time was called the “Episcopal Church at York”.

In the 15 years prior to the construction of this first church, British settlers worshipped in a variety of government buildings, including the military headquarters at Fort York, the town jail, and the Parliament Buildings. This fluidity of places of worship of Protestants of early Toronto may be a sign of how tightly woven the colonial state of Upper Canada was to Protestant Christianity.

49 Gates, supra, note 43, at ch. 15 and 17.
50 Benn, supra, note 46, at 20.
51 Gates, supra, note 43, at 251.
52 Id., at 252.
53 Benn, supra, note 46, at 47-48.
54 Id.
55 Id., at 4-7.
The land on which St. James Cathedral was built was granted by the settler government of Upper Canada to the Anglican Church in 1797. Six acres northwest of what is now the corner of King and Jarvis Streets were given to the Church.\textsuperscript{56} Although the Church buildings themselves would not take up so much land, the rest of the land was glebe land and could be rented out or sold to provide financing for the construction of church buildings and operations.\textsuperscript{57} The parish church would then charge parishioners “ground rent” for the land on which their pews stood,\textsuperscript{58} thus deriving further income from land received from the government for free.

The government of Upper Canada provided financial assistance to the Anglican community in other ways. It paid for part of the salaries of the Anglican priest\textsuperscript{59} and the Anglican chaplaincy of the military and of the legislative council.\textsuperscript{60} It subsidized the construction of St. James Church, as well as that of the parsonage and rectory.\textsuperscript{61} When the government was gifting Protestant communities with glebe lands, St. James Cathedral received 800 acres, four times the usual allotment.\textsuperscript{62} St. James Cathedral also owned urban land, in what is now the east side of downtown Toronto.\textsuperscript{63} Glebe rent, along with other government moneys, was the predominant source of funding for the salary paid to Bishop John Strachan during his tenure as Anglican Bishop of Toronto.\textsuperscript{64}

\textsuperscript{56} Id., at 6.
\textsuperscript{58} Id., at 47.
\textsuperscript{59} Benn, supra, note 46, at 9.
\textsuperscript{60} Id., at 14.
\textsuperscript{61} Id., at 9.
\textsuperscript{62} Id., at 20.
\textsuperscript{63} Hayes, supra, note 57, at 48.
\textsuperscript{64} Id., at 41. The historical practice of the Canadian state has advantaged dominant settler religions relative to other minority religious groups as well. City plans are drawn around existing churches and cemeteries, while other groups have to fit their religious needs into existing municipal plans. A recent example occurred in Saint-Apollinaire, a small municipality near Quebec City. Members of the Quebec Islamic Cultural Centre were denied the zoning approvals required for a planned Muslim cemetery. Though the community eventually found an alternative solution with the support of Quebec’s Premier and Quebec City’s mayor, the events highlight how land-based interests of minority religious communities remain contingent on political support, while dominant groups can rely on property rights instead. Dia Dabby & Lori G. Beaman, “Diversity in death: A case study of a Muslim cemetery project in Quebec” in Russel Sandberg, ed., \textit{Interdisciplinary Approaches to Law and Religion} (Cheltenham: Edward Elgar Publishing, forthcoming).
III. UNEQUAL EFFECTS OF KTUNAXA ON INDIGENOUS SPIRITUALITY

On the face of the pre-Ktunaxa Supreme Court of Canada case law, it seemed that if the Ktunaxa Nation could prove their beliefs were sincere, they had a fairly strong case for demonstrating an infringement of religious freedom. The test for infringement of the right of religious freedom has been relatively stable since 2004. A claimant must establish (1) a sincere belief that (2) a practice or belief has a nexus with religion and (3) that some state action has interfered in a non-trivial way with their ability to act in accordance with the belief or practice. The Ktunaxa Nation claimed a sincere belief that their religious practices would be rendered meaningless if the Minister were to allow the ski hill to be developed as proposed. There is arguably some subtext in the majority decision that questions the sincerity of the Ktunaxa Nation, but that was not the basis for the decision. Instead, the majority held that the Ktunaxa claim was outside the ambit of section 2(a):

The state’s duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit ... the Charter protects the freedom to worship, but does not protect the spiritual focal point of worship ... the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

This development strikes us as likely to have a disproportionate impact on Indigenous spiritual beliefs relating to the sacredness of particular lands. As Natasha Bakht and Lynda Collins note, “one aspect of Indigenous cosmology that appears to transcend cultural and geographic boundaries is the veneration of certain natural areas as sacred sites.” Indigenous Peoples are also more likely than settler Canadians to have ancestors whose remains rest in specific locations within Canada.

66 See Ktunaxa SCC, supra, note 3, at paras. 30, 34-36.
67 Id., at para. 71 (emphasis added).
68 Bakht & Collins, supra, note 7, at 779.
Such locations are considered sacred in many cultures and call for protection under Indigenous legal traditions.\(^69\)

As such, Indigenous groups are far more likely to have religious practices tied to specific sites, which means that their “spiritual focal point of worship” is more likely to exist in the physical world and be subject to physical harms. One way to illustrate this is by asking what the “spiritual focal point of worship” is in other religious traditions. For many religious traditions with beliefs in an omnipotent god, that god is the focal point of worship. The majority’s approach implies that the state is under no obligation to protect that god, but that the state must justify infringements of a person’s ability to worship that god. Prohibitions on particular rituals, such as carrying a kirpan, must be justified, but if the state proposed to murder a god, this would not qualify as an infringement of religious freedom. The problem is that for Abrahamic faiths the possibility of killing a god is nonsensical because of the way that god is understood by most believers (at least in the present era).\(^70\) For most ritual purposes, it matters very little to Christians or Jews whether section 2(a) protects the spiritual focal point of their worship. It only matters for those with religious views like the Ktunaxa Nation, who believe that the actions of others can have spiritual consequences for themselves.\(^71\)

The *Ktunaxa* holding thus adds to the picture of which forms of religion are tolerable in the culture of Canadian constitutionalism. Benjamin Berger has argued that the Supreme Court’s case law on religious freedom sends the message that certain forms of religion are more compatible with the basic commitments of Canadian constitutional culture.\(^72\) This culture, writes Berger, understands religion as private, a matter of choice, and primarily individual. The Ktunaxa claim meets all these obstacles. That the claim attached to decision-making about Crown land brought the religious commitments into the public sphere. That the actions of others might have spiritual consequences for the Ktunaxa

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\(^{70}\) For many Christians, it is a tenet of their religious belief that the Roman state did in fact kill God, who incarnated in the form Jesus and lived among humans for 33 years.

\(^{71}\) See David Williams & Susan Williams, “Volitionalism and Religious Liberty” (1991) 76:4 Cornell L. Rev. 769.

treats religion as not only about a person’s own choices. That the claim was brought in the name of the Nation made it a fundamentally collective claim. 73 Ktunaxa can also be seen as demonstrating two further aspects of the Supreme Court’s understanding of religion. First, by separating the ritual from the object of the ritual, the Court showed a preference for religious practices that are not grounded in the material world, emphasizing a separation between the physical and spiritual. Second, the Ktunaxa claim troubles basic commitments of state sovereignty. The Ktunaxa argued that their religious beliefs created a limit on how others can behave, which threatened to occupy some of the state’s role as the producer of rules that bind others. 74

Looked at from the other direction, the conception of religious practice as private is also a form of privilege for dominant settler religions. Ironically, it is precisely because of public acts by the state, such as the endowment with choice lands and material resources as described by this paper, that these groups can make claims through private law concepts of property rather than public law concepts of religious freedom. Interlopers in the St. James Cathedral sacristy can be evicted as trespassers; no explanation of the sacristy as sacred space and the effects of interlopers on Anglican religious practice, and no appeal to section 2(a), need be made.

The likely unequal effects of the Ktunaxa Court’s approach suggest that it has charted a path for religious freedom inconsistent with the Charter’s own admonition that it be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”. 75 Since the early religious freedom jurisprudence under the Charter, the Supreme Court has held that part of the idea of religious freedom is that all should be equally free. In Dickson J’s (as he then was) words:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance

73 We note that the Supreme Court has shown movement towards accepting such claims in its more recent jurisprudence: Loyola High School v. Quebec (Attorney General), [2015] S.C.J. No. 12, 2015 SCC 12, at paras. 59-61, 92-94 (S.C.C.) [hereinafter “Loyola”].


75 Supra, note 2, s. 27.
upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.76

The Charter protects religious freedom because when the state unreasonably restricts the religious freedom of an individual or group, or unreasonably requires a person to act contrary to their conscientious beliefs,77 it does not treat them with the respect and concern demanded by their inherent dignity. And since all humans possess that inherent dignity in equal measure, all must have equal access to the protections of religious freedom.

The Supreme Court’s more recent jurisprudence on the state’s obligations of religious neutrality flow from the same idea.78 This is in part because the Court has found that the guarantee of religious freedom includes a duty of religious neutrality, which “requires that the state treat religious belief systems in an equal or even-handed manner — that it remain neutral in religious matters”.79 Richard Moon argues that the Court’s religious neutrality jurisprudence is motivated in part by its dual-faceted understanding of religion. “While religious commitment is sometimes described by the courts as a personal choice or … it is also, or sometimes instead, described as a central element of the individual’s identity.”80 On the latter account, “a judgment by the state that [a person’s] beliefs or practices are less important or less true than others may be experienced as a denial of his equal worth”.81

There are those who say that this argumentative manoeuvre confuses freedom with equality and leads to bad results. Mary Anne Waldron argues that, given the separate constitutional and quasi-constitutional protections of equality, freedom of conscience and religion cannot be justified on equality grounds alone.82 In her view, the Court has failed to justify how “a preference given to one religion could be, without more, a violation of freedom of religion” .83

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77 Id., at para. 121.
79 Moon, id., at xiii.
80 Id., at 20.
81 Id.
82 Mary Anne Waldron, Free to Believe: Rethinking Freedom of Conscience and Religion in Canada (Toronto: University of Toronto Press, 2013), at 72.
83 Id., at 42.
Unlike Waldron, we think the Court’s analysis on religious neutrality and equality is basically sound. Though the purpose of section 2(a) is not to combat discrimination, part of being a religiously free society means that no one’s choices are unreasonably constrained, as compared to others’ choices, by the interaction of their religious practices and state actions. Nevertheless, even if Waldron is correct that treating religious freedom as derived from equality amounts to a category mistake, the right of religious freedom must be agnostic about religious truth. A religious freedom right could hardly live up to its name if it applied only to Christian or monotheistic religions. Accordingly, when courts narrow the ambit of the religious freedom right such that it is likely to disfavour groups with particular sorts of spiritual commitments (i.e., the belief in the sacredness of particular places), the jurisdiction is less religiously free than it might have been.

A set of cases showing how the obligation of state religious neutrality applies at the intersection of religious freedom and property rights involves claims against municipal zoning by-laws. These cases illustrate a way for the courts to engage in interest-balancing in the context of land use disputes that better acknowledges the constitutional importance of religious belief. In such cases, a religious community typically owns property in a city that it wishes to use in a manner not permitted by the zoning rules, such as opening a place of worship in a residentially zoned area. Admittedly, there is an important contrast between these cases and Ktunaxa, in which the relevant community did not make a claim to exclusive occupation of the land. That said, zoning laws generally operate in the interest of the municipal community. They seek to harmonize the needs of private property owners, which may conflict, as well as the use of public property. Zoning rules operate to limit property rights in the name of the public good, as determined by municipal representatives. When religious communities challenge such rules, they effectively argue that their religious interests outweigh the public interest as articulated in a zoning by-law. If you owned a home adjacent to a proposed house of worship, you may feel that allowing for an exception to a residentially zoned area negatively impacts your property value and your ability to enjoy your property. The state, in evaluating such competing claims, is obliged to decide in accordance with Charter values.
The Court was faced with such a zoning case in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*. A congregation of Jehovah’s Witnesses sought to establish a Kingdom Hall but believed there was no suitably zoned land available for purchase. The congregation made an offer to purchase property in a residential zone conditional on obtaining a variance to the zoning by-law. The municipality refused the congregation’s request for the variance, explaining that the variance “would result in increased property taxes for neighbouring residents”. The congregation continued to search for properly zoned land but, when it concluded there was none available, made a new offer on land in a commercial zone conditional, again, on obtaining a zoning variance. This time, the municipality refused the request with no reasons. The congregation renewed its search, which again proved fruitless, and applied to the municipality for a variance a third time. This application was also refused, again without reasons.

When the Congregation sought a remedy from the Québec Superior Court, the Court found as fact that there were parcels of land available for sale in the appropriately zoned area, and held in favour of the municipality principally on this basis. At the Supreme Court, the majority of the Court allowed the congregation’s appeal, but on administrative law rather than Charter grounds.

The dissenting judgment of LeBel J. is of more interest for present purposes, as it addresses the congregation’s religious freedom claim. Justice LeBel held that because there was land available for purchase in the appropriately zoned area, there was no religious freedom violation. However, he also offered an analysis of the state’s duty of religious neutrality and what it requires of municipalities with respect to zoning for places of worship.

Although the case pre-dates the *Doré* Charter values framework, we think LeBel J.’s approach illustrates how such an analysis can be done. In LeBel J.’s view, public authorities have “a duty of religious neutrality that assures individual or collective tolerance, thereby safeguarding the dignity of every individual and ensuring equality for all”.

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85 Id., at para. 19.
87 *Lafontaine*, supra, note 84, at para. 23.
88 Id., at para. 72 (LeBel J., dissenting).
90 *Lafontaine*, supra, note 84, at para. 65.
settlers in Canada lived under a system in which the state was aligned with a particular church. However, “social realities prompted governments to give official recognition to the status and role of the Catholic church and various Protestant denominations. ... Thus, at the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations.”

Over time, “the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state”, with changing demographics, industrialization and urbanization all playing a role in this process. The result is that

it is no longer the state’s place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion’s members. The state must respect a variety of faiths whose values are not always easily reconciled. ... [The state] is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities.

When applied in the context of zoning by-laws, this duty of neutrality means that municipalities must structure their regulations “in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms”, but need not “provide assistance of any kind to religious groups or actively help them resolve any difficulties they might encounter in their negotiations with third parties in relation to plans to establish a place of worship.”

Justice LeBel went on to opine on what the municipality’s duty of religious neutrality would have required had there been no land available for purchase in an appropriately zoned area. He reasoned that “[f]reedom of religion includes the right to have a place of worship” because “[s]uch facilities allow individuals to declare their religious beliefs, to manifest them and, quite simply, to practise their religion by worship, as well as to teach or disseminate it.” The inability to construct a house of worship would amount to an infringement of the religious freedom right not “solely

91 Id., at para. 66.
92 Id., at para. 67.
93 Id., at para. 68.
94 Id., at para. 71.
95 Id., at para. 73.
attributable to the property owners who had refused to sell their land”. Rather, the infringement would “result not from the existence of the zoning by-law, but from the refusal to adapt it to evolving community needs in a situation in which no land was available in the zone set aside for the establishment of places of worship”. The difficulty in such cases resides in reconciling the state’s duty of neutrality with the recognition that “there may be situations in which an absolute application of this principle unduly restricts the free exercise of religion”. In other words, context is crucial. Where it would be impossible for a group to establish a house of worship, “freedom of religion can have no real meaning unless the public authorities take positive action”, i.e., amend the zoning by-law.

Sarah Morales argues that LeBel J.’s dissent ought to have been applied in the Ktunaxa case. We agree, and without duplicating her analysis, we offer the following additional justifications for the adoption of this view. First, LeBel J.’s general discussion of the duty of religious neutrality has been relied upon by a majority of the Court, and his conclusion flows quite directly from this discussion. Second, there is support in the case law for the proposition that a municipal board faced with an appeal of a zoning by-law is required to consider the constitutional right of religious freedom in its deliberation, and this is consistent with the current approach to constitutional rights in the administrative context. Third, LeBel J.’s analysis of zoning disputes was later applied by the Québec Court of Appeal in Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c. Val-Morin (Municipalité de), giving it additional authority.

Applying LeBel J.’s logic to the Ktunaxa facts helps put the case in a different light. Just as LeBel J. asked whether there was land available to meet the needs of the Jehovah’s Witness community in Lafontaine, we might ask whether there is alternate land to meet the needs of the

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96 Id., at paras. 75-76.
97 Id.
98 Id., at para. 79. At para. 81, LeBel J. was careful to note that while the Court could have “ordered the municipality to amend its zoning by-law, but we could not have imposed on the municipality our choice of location for the establishment of the appellants’ place of worship … the only possible remedy that would have been appropriate was an order to the municipality to review its zoning by-law so as to make land available to the appellants on which they could build their place of worship.”
100 Saguenay, supra, note 78, at paras. 71-72.
102 Doré, supra, note 89; Loyola, supra, note 73.
Ktunaxa Nation. Given the centrality of Grizzly Bear Spirit to the Ktunaxa Nation’s spiritual practice and the claim that the Grizzly Bear Spirit lives in Qat’muk and will leave if anyone overnights in the area, it is hard to see how any other land could be suitable for the Ktunaxa Nation’s spiritual purposes. Unless one takes the view that the Ktunaxa claim is insincere, which none of the courts in this case found, the religious freedom claim should have been made out on the parameters set by LeBel J.104 Moreover, in LeBel J.’s approach, there is room for the law to account for historical context and what interpretations of the right might lead to the state making it impossible for a group to practice their religion. And where the ability to engage meaningfully in a set of religious practices is completely negated, we are not convinced that the right of religious freedom has been proportionately balanced against the legislative objectives, or minimally impaired. We concede, however, that on current framings of section 1105 or proportionate balancing,106 there is more room for argument on this score. Our main concern in this paper has been to focus on the scope of the Charter right rather than the justification for its infringement.

IV. INHERENT PROBLEMS WITH THE “SPIRITUAL FOCAL POINT OF WORSHIP” TEST

In addition to the likely disproportionate impacts on Indigenous communities of the Ktunaxa decision, the exclusion of “spiritual focal points of worship” from section 2(a)’s protection raises challenges for some non-Indigenous spiritual practices. Consider, for example, the Christian Eucharist. The Eucharist commemorates the Last Supper of Christ. Christian ritual commemorates this meal through a breaking of bread, yet the commemoration has different meanings to different sects of Christianity. It is an article of faith among Catholics that the Eucharistic bread transubstantiates into the body of Christ, and that the Eucharist becomes the Real Presence of Christ, i.e., the spiritual focal point of worship.

Generally, for Protestant sects of Christianity, the Eucharist is only a symbolic commemoration of the Last Supper, and there is no doctrine of

104 Morales takes the same view: supra, note 99, at 296.
106 Doré, supra, note 89.
transubstantiation. One might therefore conclude that the Eucharist is not a “focal point of worship” for Protestants, while it is for Catholics. If this is so, it would seem that the logic of the Ktunaxa majority leads to the conclusion that the Eucharist is protected by section 2(a) for Protestants but not for Catholics. This is a paradoxical result, and we suggest this illustrates the difficulty of the “focal point of worship” test. Indeed, in using this as a test for what falls within section 2(a)’s protection, the majority of the Court seems to interject Canadian law precisely into the very theological inquiries it has sought to avoid.

These paradoxical and counterintuitive impacts to us suggest that the majority of the Court has set out a test that will be difficult to apply. What’s more, if the majority is concerned with religious freedom acquiring dimensions of a property right, that ship seems to have already sailed, at least in Quebec, where religious freedom is protected as between private parties. Amselem was a dispute among co-owners of a condominium-style complex in which balconies and terraces were allocated to the common portions. That the claimants in Amselem were allowed to erect their succoth on their balconies and terraces certainly had an impact on the property rights of others. One might argue that the impact on the co-owners was small, but the point is that the ritual was still protected even though it implicated property rights; that some infringements may be justified and others not is a separate question reserved for the proportionality analysis stage. Outside Quebec, the case law on zoning regulation discussed above provides another avenue by which the property rights of third parties can be affected. If the concern with recognizing certain religious freedom rights is the impact on others, the proportionality analysis is the correct place for the balancing of those interests, rather than foreclosing the recognition of those rights at the first stage of the test.

V. ANOTHER PATH FORWARD: A TREATY RELATIONSHIP

Reading both sets of reasons of the Supreme Court in Ktunaxa, one gets the sense that the conflict between Indigenous spiritual values and the interests of the Canadian state are somehow incommensurable, that

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108 Bakht & Collins, supra, note 7, at 781 argue that “the approval of commercial or industrial development on an Aboriginal sacred site without consent and compensation will generally be unjustifiable under section 1”.

conflicts between the two are inevitable. It is helpful at these junctures to recall a time-honoured vehicle for peaceable land-sharing between Indigenous people and settlers: the treaty relationship. For example, in Upper Canada Treaty 82, the Chippewas of Nawash Unceded First Nation convinced the Crown to agree that their burial ground adjacent to the city of Owen Sound should be protected as a reserve. Modern treaties have taken a more systematic approach. During treaty negotiations, which generally last years or decades, there is a land selection process by which the Indigenous community chooses certain lands to own in fee simple, while a larger portion of the land is designated as being subject to a co-management regime between the community and Crown governments. The drawn out land selection period allows for a community to identify lands with important spiritual interests that it elects to own in fee simple. This then would place the Indigenous sacred place at a similar level of protection as settler religious lands protected under fee simple. Unfortunately, in our view, Ktunaxa has weakened the negotiating position of Indigenous groups with spiritual attachments to the land, or at least forces them to articulate that attachment within the strictures of the jurisprudence under section 35 of the Constitution Act, 1982 instead of under the Charter.

Such thoughtful land selection negotiations have, by and large, not been a feature of how the Crown conducted historical treaty negotiations. And such a measured approach would have been a rare exception in the areas of Canada without treaties, such as most of British Columbia, where colonial governments operated as if the land was terra nullius. An urgent process of treaty renewal in the historical treaty areas, and treaty negotiation in the untreated areas, would set us on a course away from painful conflicts of the kind we saw in Ktunaxa Nation.

VI. CONCLUSION

The changes to the law of religious freedom in Ktunaxa are significant. We have argued that the new limits on religious freedom will be experienced disproportionately by Indigenous groups. One way religious groups can deal
with this newly constrained religious freedom right is by relying more heavily on their rights of property. In the historical context of land grants to Catholic and Protestant groups, facilitated by the dispossession of Indigenous groups, settler religions, especially majoritarian ones, are less likely to need Charter protection for their sacred places. We think this is inconsistent with the Charter’s underlying commitments to equal human dignity and multiculturalism. Moreover, we think that the changes in the law will be likely to pass mostly under the radar. If Indigenous groups shift their litigation strategies away from religious freedom, there will simply not be cases that demonstrate the problems wrought by the decision.