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Abstract

This article addresses issues surrounding the way in which law apprehends religion in the judicial context. The first part of the article proposes the notion of legal fiction as a theoretical lens through which to view the law's apprehension of religion. It is argued that this highlights and articulates a useful set of ideas about the social-symbolic process of the law's interaction with religion. The second part of the article applies these theoretical ideas through an in-depth discussion of three cases: Ktunaxa Nation v. British Columbia, Multani v. Commission scolaire Marguerite-Bourgeoys, and Bentley v. Anglican Synod of the Diocese of New Westminster. The discussion of these cases demonstrates the descriptive and critical possibilities of reframing the law's apprehension of religion in terms of legal fiction.

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WHAT IS THE LAW SPEAKING ABOUT when it speaks about religion? Religion is very difficult to define.[1] Despite this, in the legal context, religion is defined time and again, whether conceptually for legislative purposes (*e.g.*, anti-discrimination legislation, charitable status) or concretely for adjudicative purposes (*e.g.*, a religious freedom claim, or another legal conflict involving a religious dimension). The question that I explore in this article is how we should approach—descriptively and critically—the way in which the law speaks about religion in the context of litigation.[2]

I am not going to explore the definition of "religion" as a category in law, such as was offered by the Supreme Court of Canada (SCC) in the *Syndicat Northcrest v Amselem* ("*Amselem*") decision.[3] Others have already addressed this, although perhaps there is still room for more to be said.[4] Rather, I will examine the process by which the law apprehends religion in particular situations. Although the broad definition of religion used in the jurisprudence may overlap with the process of apprehending religion in a particular case, my concern here is to understand and

1. See *e.g.* Craig Martin, "Delimiting Religion" (2009) 12 Method & Theory in the Study of Religion 157.
2. I qualify "law" here as the law of the state, not the concept of law more generally. This is an important qualification because there are multiple modes of legality, including religious law, which I am not discussing here.
3. 2004 SCC 47 at para 39 [*Amselem*].

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

4. See *e.g.* Lori Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (UBC Press, 2008) 192.

articulate something about the process of apprehension itself.[5] Looking closely at this process has some important implications for the way that we describe and critically respond to how religious claims are dealt with in a court of law.

It is almost trite to say that there is a gap between the law's apprehension of religion and the lived experience of religious groups. How the law describes religion or frames a religious claim fails to capture the fullness of what is really going on for those committed to a religion. Paying attention to lived religious experience in analysing the law's intersection with religion is part of a developing cultural and phenomenological methodology. As Elizabeth Shakman Hurd explained, "The category of lived religion is meant to draw attention to the practices that fall outside the confines of religion as construed for purposes of law and governance."[6] Likewise, Benjamin L. Berger has shown that the law's interactions with religion are based on a particular conception of what religion is, filtered through the law's own way of seeing the world.[7] When the law apprehends religion, religion is formatted to fit into the institutional, conceptual, and functional structure of the law. Following a similar approach, Perry Dane has suggested—I believe quite rightly—that the relationship between religion and the state is best understood as an "existential encounter," so that what is at stake "is not merely a set of legal doctrines or policy prescriptions, but something deeper and more constitutive."[8]

Some scholars have described this gap in the law's apprehension of religion essentially as a *mis*conception of religion.[9] But, I believe that the situation is not this simple. To see the law's apprehension of religion as *merely* a misconception presumes that there must be congruence between the internalities and externalities of law (*i.e.*, between law and religious experience). Congruence, however, is elusive, and fails to consider the "deeper and more constitutive" forces at work in the interaction between law and religion. Some studies, for example, have traced the way in which the activity of the law impacts how religious individuals

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5. The level of influence and interdependence between broad conceptions of the category "religion" and the process of law apprehending religion in specific instances is an interesting question but will be left for future investigation.
6. *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press, 2015) at 13.
7. *Law's Religion: Religious Difference and the Claims of Constitutionalism* (University of Toronto Press, 2015) at 147-48 [B Berger, *Law's Religion*].
8. "Master Metaphors and Double-Coding" (2016) 53 San Diego L Rev 53 at 55.
9. See *e.g.* Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005); Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017), ch 1.

and communities experience religious life—framing religious claims in legal terms has a particular effect on religious self-understanding.[10] This means that the law's conception of religion cannot be described merely as a misunderstanding or a distorted understanding of religion; given the way that legal processes can affect religious self-understanding, law is, in a peculiar and important way, *constituting* lived religious experience.[11] The gap between the law's apprehension of religion and the lived experience of religion is not neat and tidy. Attending to the process underlying the interaction between the two matters enormously. This is why I speak in this article of the law's "apprehension" of religion, which gestures towards the active force of coming to know something through the socially rich and integrative process of apperception.[12]

Peter L. Berger, in his classic work *The Sacred Canopy*: *Elements of a Sociological Theory of Religion*,[13] described religion as an intricate part of the social world which participates in an ongoing conversation with the various actors and institutions within society.[14] Social reality, from this view, is essentially dialectical, which means that social ideas are constructed by people in a collective effort, but those ideas, once constructed, also feedback to affect the way that people understand the world. Social reality organizes, regulates, and gives meaning to people's lived experiences—in this way, society provides a *world* that is *real*. The dialectic of social reality involves the interaction between social institutions. Religion and law, as two foundational social institutions, are engaged dialectically in a conversation that creates and is created by the social world. The multivalent interaction between individual, institutional (and communal), and broader social conceptions and meanings that produce the social world—social reality—is rich

10. See *e.g.* Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39 Queen's LJ 175 (Kislowicz demonstrated the influence of state law norms on religious law norms—the state law process affects religious self-perception (via description) of their obligations).
11. See generally Ananda Abeysekara, "The Un-translatability of Religion, the Un-translatability of Life: Thinking Talal Asad's Thought Unthought in the Study of Religion" (2011) 23 Method & Theory in the Study of Religion 257.
12. See Alfred Schutz, "Symbol, Reality and Society" in *Collected Papers I: The Problem of Social Reality* (Martinus Nijhoff, 1962) 287. The notion of apperception is not discussed in this paper, but rather is offered here as a point of context for framing the thesis and analysis of the paper.
13. (Anchor Books, 1967).
14. What follows in this paragraph is my own summary understanding of P Berger's theory. See especially *ibid*, ch 1, 2. For further elaboration of this social theory of knowledge, see *e.g.* Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treaties in the Sociology of Knowledge* (Anchor Books, 1967). See also John R Searle, *The Construction of Social Reality* (Free Press, 1995).

and complex. The subject of this article is but one snippet of this grand social interactive dialectic: I refer to this as the law's apprehension of religion, as shown particularly in the judicial context.

I use the term "apprehension" intentionally, to signal the process by which something is incorporated into the conceptual framework of the law. The law's apprehension of religion is, in many ways, paradigmatic of the way in which the law relates to the world more generally. Everything that the law approaches must be "apprehended" in legal terms and for legal purposes. In a general sense, then, the law's apprehension of religion is not unique. The process of the law's apprehension of reality is ubiquitous. However, the particularities of religion as a foundational social institution and symbolic form of meaning[15] gives the law's apprehension of religion a peculiar prominence insofar as it provides a clear image of the inner workings of the law and offers great descriptive and critical potential.[16] At a basic conceptual level, the process of the law's apprehension of religion engages the "constitutional imagination"[17] of our legal system.

How, then, are we to describe and evaluate the law's apprehension of religion? Benjamin Berger has argued that the law, like religion, is a culture bound by its own unique symbolic, linguistic, aesthetic, and conceptual coordinates.[18] From this view, it is problematic when legal actors (and legal analysis) presume that the law sits "above the fray" of culture (and its particular limitations).[19] This means that when we think about the law's apprehension of religion we are not dealing with an object or essence of "religion" that exists separately and apart from the structuring power of the culture or discourse of law.[20] In this way, the law's apprehension of religion points to a formative process, a socially constructed

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15. See *e.g.* P Berger, *supra* note 13.
16. Similarly, see Benjamin L Berger, "Religious Freedom in Canada: A Crucible for Constitutionalism" (2018) 1 Quaderni di Diritto e Politica Ecclesiastica 111 [B Berger, "Religious Freedom"].
17. See Martin Loughlin, "The Constitutional Imagination" (2015) 78 Mod L Rev 1 at 3, 12.
18. See B Berger, *Law's Religion*, *supra* note 7 at 17.
19. *Ibid* at 12. B Berger's argument echoes discourse theory insofar as in a discourse, the facts and concepts in discussion are prefigured by the discourse itself; the discourse is the entire field in which facts become objects of analysis. See *e.g.* Tim Murphy, *Representing Religion: Essays in History, Theory and Crisis* (Equinox, 2007) at 6. As Murphy states, "[d]iscourse is constitutive not only of the domain which can treat as a possible object of (mental) perception. It is also *constitutive* of the concepts it uses to *identify the objects* that inhabit that domain and to *characterize the kinds of relationships* they can sustain with one another") [emphasis in original], citing Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press, 1973) at 31.
20. See also Abeysekara, *supra* note 11.

reality, rather than to an abstract quality of "truth" that is either possessed or lost. Ignorance of this, as we will see in the cases discussed later, skews our understanding of and ability to critique the law. Concomitantly, legal actors ought to be cautious (and humble) when approaching a religious claim, aware of the cultural force of law.[21]

Placing the social-interactive process of apprehending religion in law at the centre of our attention helps us think and talk differently about religious claims in law. We can see the law's apprehension of religion as an expression of the social and political values, and the functional purposes, that the law embodies. This shifts our attention away from referring in law to external ideas about what is 'true' and 'real' religion, and towards reflecting on the ways that the legal and religious are knit together within the larger social world.

In this article, I argue that the law's apprehension of religion can be thought of in terms of legal fiction. Legal fictions are not simply about treating facts fictionally, "as if" they were something other than they are, in order to solve a legal problem. Although this is the basic form of a legal fiction, it really is only the tip of the iceberg. At the core, legal fictions are a mechanism of legal reasoning that reflects the central elements of social interaction, the dialectics of social reality, and the like, as sketched out above. It is this process side of legal fictions that I argue is most helpful for thinking and talking about the law's apprehension of religion.

This article's analysis begins by examining the gap between the law's apprehension of religion and the lived experience of religion. This occurs in two stages. First, I look at a concrete case that demonstrates the challenge that the courts face when apprehending religion in law. The case is *Bentley v Anglican Synod of the Diocese of New Westminster* ("*Bentley*").[22] In this case, the court addresses a dispute over Anglican church property that engages contrary arguments about the true nature of Anglicanism. This case vividly portrays the challenge that the courts face when they apprehend religion in law, and it sets the course for the remaining analysis of the article. Second, I turn to the idea of legal fiction and argue that it can help us more fruitfully address the gap in the law's apprehension of religion. Legal fiction frames the law's apprehension of religion not in terms of a rigid "true" or "false" correspondence between law and lived religion but rather in terms of the purposes and goals of the law. Legal fiction also provides categorical limitations to the law's apprehension of religion. A legal

21. For further discussion of the virtue of judicial humility, see B Berger, *Law's Religion*, *supra* note 7 at 170-77.

22. 2010 BCCA 506 [*Bentley* CA], aff'g 2009 BCSC 1608 [*Bentley* SC (TD)].

fiction (such as the law's apprehension of religion) does not operate in isolation but involves a deep overlap and exchange with other forms of social meaning (religion). Legal fiction proves to be a very helpful tool for defining the terms of engagement between the law's apprehension of religion and the reality of lived religion. It allows us to utilize the descriptive and critical analytic possibilities of the social-interactive ideas mentioned above within a legal analysis of the law's interaction with religion.

In the second half of the article, I turn to use the lens of legal fiction to view and analyse the law's apprehension of religion in three recent cases. First, I return briefly to look at the *Bentley* decision, and reflect on the application of the discussion of legal fiction to that case. I then look at the older *Multani v Commission Scolaire Maurgerite-Bourgeoys* ("*Multani*")[23] decision, which shows that the way the law apprehends religion involves a complex intersection between different forms of meaning within the law. Finally, I turn to the recent *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* ("*Ktunaxa Nation*")[24] decision, which demonstrates a more abstract apprehension of religion in law, and the effects of approaching religious and spiritual meaning in a way that divides the subject and object of belief. Together these cases help flesh out what it means to view the law's apprehension of religion as a legal fiction, and they demonstrate the descriptive and critical possibilities of reframing the law's apprehension of religion in this way.

I. EXPLORING THE GAP IN THE LAW'S APPREHENSION OF RELIGION

A. *BENTLEY—ANGLICANISM VS ANGLICANISM*

The *Bentley* case decided by the British Columbia Court of Appeal was about a dispute over Anglican church property that centred around an ongoing contestation within the global Anglican Communion. Cases like this often produce discussions about the principles of state neutrality and religious institutional autonomy.[25] But for the purposes of my analysis, I am more interested in the apparent gap that exists between the way that the BC Court of Appeal apprehended the Anglican religion and the real lived experience of the Anglican Communion. I argue that the *Bentley* decision brings into sharp relief

23. 2006 SCC 6, [*Multani*].
24. 2017 SCC 54 [*Ktunaxa Nation* SCC].
25. See *e.g.* Victor M Muniz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52 Osgoode Hall LJ 1049; Laborde, *supra* note 9.

the challenge, if not impossibility, of capturing the dynamism and complexity of religious organization in legal terms.

By way of background, over the past 20 years there has been significant discussion regarding the place of same-sex relationships within the global Anglican Communion.[26] These discussions relate to a much larger contestation within the global Anglican Communion, which has complex historical, theological, and political elements.[27] This contest has created tensions and fissures within the global Anglican Communion that some have described as a "crisis."[28] These tensions have bubbled over in Canada, with a number of Anglican congregations breaking away from the legally established and historically recognized hierarchical authority structure of the Anglican Church of Canada (ACC) because of the controversial theological and liturgical developments occurring within some ACC dioceses.[29]

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26. The question of the Church's stance on same-sex unions was discussed during the Anglican Communion's 1998 Lambeth Conference. See Anglican Communion, "The Lambeth Conference Resolutions Archive from 1998" (9 August 1998), online (pdf): <www.anglicancommunion.org/media/76650/1998.pdf> [perma.cc/E3QS-ZSNV]. The 1998 Lambeth Conference affirmed that same-sex couples should be cared for by the Church (*ibid* at resolutions I.10c, d); the Church's teaching on human sexuality and family relationships should not be changed from its traditional understanding as monogamous and heterosexual (*ibid* at resolution I.10b); and the blessing of same-sex unions should not be authorized (*ibid* at resolution I.10e). There was deep disagreement over the issue of human sexuality at the 1998 Lambeth Conference. See Anglican Communion, "Called to Full Humanity - Section 1 Report: Subsection 3 - Human Sexuality" (1998), online: <www.anglicancommunion.org/resources/document-library/lambeth-conference/1998/section-i-called-to-full-humanity/section-i10-human-sexuality?author=Lambeth+Conference&year=1998> [perma.cc/GC8C-XC82]. The Lambeth Conference is the primary international gathering of Anglicans in the global Church community and one of the four "Instruments of Communion" of the Anglican Church. See Anglican Communion, "Instruments of Communion," online: <www.anglicancommunion.org/structures/instruments-of-communion.aspx> [perma.cc/55C8-FSPK] [Anglican Communion, "Instruments of Communion"].
27. See Paula D Nesbitt, "Engaging Religion in a Contested Age: Contestations, Postmodernity, and Social Change" (2020) 81 Sociology of Religion 142 at 147-51 (providing a summary overview of the dispute).
28. Miranda K Hassett, *Anglican Communion in Crisis: How Episcopal Dissidents and their African Allies are Reshaping Anglicanism* (Princeton University Press, 2007).
29. See *e.g. Delicata v Incorporated Synod of the Diocese of Huron,* 2013 ONCA 540, aff'g 2011 ONSC 4403. Regarding the organization of the Anglican religion, see Anglican Communion, "Structures," online: <www.anglicancommunion.org/structures.aspx> [perma.cc/YPE7-9PD4]; The Anglican Church of Canada, "How We are Organized," online: <www.anglican.ca/about/organization> [perma.cc/7TW9-VZ5E]. Individual churches form parishes, and parishes are subdivisions of a diocese. Dioceses are the fundamental administrative unit of the Anglican Church. Bishops are the leaders of dioceses and carry broad responsibility both locally (to appoint and oversee priests and their parishes) and globally (to attend and participate in the Lambeth Conference, which is the regular meeting of the Anglican Church). Dioceses are grouped into Provinces. Provinces and

The story leading up to the *Bentley* decision goes at least as far back as the 1998 Lambeth Conference (the primary gathering of the global community of Anglicans that occurs every ten years), which had the question of same-sex relationships within the Church on the agenda.[30] At that time, the Conference affirmed a conservative approach to same-sex relationships.[31] As the situation in some of the Canadian dioceses moved towards a progressive position, the global Anglican Communion reaffirmed the Resolutions of the 1998 Lambeth Conference.[32] Many of the global Anglican territories became frustrated with the traditional leadership institutions in the Anglican Communion, including the Archbishop of Canterbury, and their unwillingness (or inability) to address the progressive developments happening in Canada and the United States. A large portion of the global Anglican community responded with their feet, so to speak, by creating the Global Anglican Future Conference (GAFCON), which met in Jerusalem in 2008 as an alternative gathering to the Lambeth Conference occurring at the same time.[33] GAFCON settled on an Anglican confession that clearly excluded the progressive developments in Canada and America.[34]

Things came to a head in Canada in 2002 when Bishop Ingham of the diocese of New Westminster in British Columbia decided to authorize the liturgical blessing of same-sex relationships. A group of priests walked out of the New Westminster diocesan meeting when the decision was reached, which signalled the breaking apart of the diocese. This produced a flurry of events that led to the *Bentley* case.[35] The growing divide within the global Anglican Communion, mentioned earlier, has led to the establishment of the Anglican Church in North

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their leaders (usually called Archbishops) have various administrative roles in the global Anglican Communion (including participating in the Primates Meeting and in the Anglican Consultative Council). Provinces have some authority to regulate and guide the individual bishops and dioceses within a designated territory, but the central units of administration are the dioceses and their respective bishops.

30. See the Anglican Communion, "Instruments of Communion," *supra* note 26.
31. See *Bentley* SC (TD), *supra* note 22 at para 67.
32. See *e.g.* Anglican Communion News Service, "A Statement by the Primates of the Anglican Communion meeting in Lambeth Palace" (16 October 2003), online: <www.anglicannews.org/news/2003/10/a-statement-by-the-primates-of-the-anglican-communion-meeting-in-lambeth-palace.aspx> [perma.cc/75H2-664A].
33. See GAFCON, "About GAFCON," online: <www.gafcon.org/about> [perma.cc/U2L9-37LU].
34. GAFCON, "The Complete Jerusalem Statement" (22 June 2008), online: <www.gafcon.org/resources/the-complete-jerusalem-statement >; and GAFCON, "The Jerusalem Declaration" (29 June 2008), online: <www.gafcon.org/resources/the-jerusalem-declaration>.
35. For a description of the history of the dispute, see *Bentley* SC (TD), *supra* note 22 at paras 7-171.

America (ACNA), which describes itself as a new "Province-in-formation" that overlaps with the geographical territory of the ACC and the Episcopal Church of America.[36] Included in this Province is the Anglican Network in Canada (ANiC), which purports to be a new diocese. The four congregations represented in the *Bentley* conflict were some of the first congregations to break away from the ACC and constitute the ANiC.[37]

The question for the Court in *Bentley* was whether the church property of the congregations remained with the dioceses or should go with the individual congregations breaking away from diocesan authority. At the heart of the dispute were arguments about the foundation and organization of the Anglican religion, which centred on the question of whether Anglicanism is grounded in doctrines and a communal identity that transcends its local organizational structure. The disagreement over the nature of Anglicanism shaped the legal arguments used and the decisions of courts. In other words, at the heart of the *Bentley* decision is the law's apprehension of the Anglican religion.

The idea of Anglicanism relied on by the plaintiff congregations led them to frame their argument in terms of trust law. They claimed that the church property was held in trust for the purposes of Anglican ministry, not simply at the discretion of the bishops.[38] For the plaintiffs, the reference to "Anglican ministry" in the founding documents of the ACC referred to a history and community that transcended the geographical territory of the particular bishops and the Province of the ACC. For the defendant diocese to digress from the global Anglican perspective on same-sex relationships, the plaintiffs argued, was a breach in its trust obligation to remain faithful to Anglicanism. The property should therefore follow the congregations in order to preserve its use in accordance with historical and global Anglicanism.

The defendant diocese argued that the clarity of incorporation and organizational structure of the Anglican churches and dioceses in Canada provided sufficient basis to determine the ownership and use of Church property.[39] According to them, the organizational documents spelled out a well-defined hierarchical and territory-based system of authority tied primarily to the dioceses and secondarily to a national association. As such, the theological

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36. For an outline of the history leading to the creation of the ACNA Province and the ANiC diocese, see Anglican Network in Canada, "Realignment in the Communion: *A Canadian Chronology*," online: <www.anglicannetwork.ca/our-genesis> [perma.cc/SUQ3-ZLVD].
37. See *Bentley* SC (TD), *supra* note 22 at paras 1-6.
38. *Ibid* at para 172ff.
39. *Ibid* at paras 211ff.

and communal aspects of Anglicanism referred to by the plaintiffs were in fact embedded within organizational structures of the local diocese and the ACC. The internal processes of this organizational structure allowed for the progressive development of the diocese objected to by the plaintiffs. Hence, the property should remain within the diocese.

The decisions of the courts, both at trial and on appeal, sided with the diocese and refused the claim of the departing congregations to excise and bring the property with them. The courts adopted a view of Anglicanism that focused on the integrity of the local organization of the Anglican Church rather than on the international and abstract dimension of the Anglican Communion.[40] The Court of Appeal found that the parish properties were indeed being held in trust "for the purpose of Anglican Ministry"[41] but agreed with the trial decision that the highly structured nature of the ACC distinguished this case from other cases involving trusts and the use of religious property.[42] The Court did not think that "Anglican worship" or "Anglicanism" could be separated from the notion of the episcopal authority of the ACC, and found that Anglicanism is quintessentially hierarchical and operates generally independent of the global Anglican Communion.[43] The formalized authority of the hierarchy of the Anglican Communion appears only within the different Provinces (of the church) and their dioceses. This means that the participation of the ACC in the global Anglican Communion does not depend on a structure of authority standing above the ACC. The ACC (and its constituent dioceses) is ultimately autonomous and entitled to decide for itself whether to approve same-sex blessings and risk causing schisms in the global Anglican Communion.[44]

The Court of Appeal went on to adopt a territorial understanding of the Anglican Church structure, and found that it was antithetical to consider Anglican ministry in Canada in a congregation that has withdrawn from the authority of its diocese and bishop.[45] The Court admitted the possibility that the plaintiff congregations might indeed be in communion with the global Anglican Church, but did not presume to have the ability to speak to this.[46] Rather, the Court held that "Anglican ministry in Canada" meant "as defined by the ACC."[47]

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40. See *ibid* at para 256; *Bentley* CA, *supra* note 22 at para 74.
41. *Bentley* CA, *supra* note 22 at para 65.
42. *Ibid* at para 69.
43. *Ibid* at para 74.
44. *Ibid*.
45. *Ibid* at para 75.
46. *Ibid* at para 76.
47. *Ibid* at para 74.

Interfering with this clearly established territorial governance by bishops would inject uncertainty in the internal affairs of the ACC and likely produce more conflict than it would resolve. The Court specifically said that the law should not be used to permit the continuance of Anglican congregations that have removed themselves from the authority of a geographically established bishop in favour of the authority of a foreign bishop, because to do so would be unprecedented and (presumably) disruptive.[48]

The Court of Appeal framed the challenge of its judgment as trying to bring "two ships passing in the night" within speaking distance of each other.[49] This statement was intended to reflect the distance between the parties. But I think it applies just as well to the gap between the Court's approach to the case and the lived experience of Anglican communities in Canada and elsewhere. It is true that in order to decide the legal question at issue in *Bentley*, it was necessary for the Court to adopt some basic premises about the nature of Anglicanism. This task proved to be quite challenging. How was the court to fit the square peg of an abstract universal notion of Anglicanism (claimed by the plaintiffs) into the round hole of the clearly defined organizational instruments and authority structures of Anglicanism that exist in Canadian law (emphasized by the defendant)? But the challenge actually involved something more than that. How could the courts give a full account of the larger dispute of the global Anglican Communion in its decision on the individual *Bentley* case? To use an analogy, how could the courts relate its examination of a small cross-sectional tissue sample to the living organism from which it was taken?

The challenge, and perhaps impossibility, of the task faced by the courts becomes clearer in light of how the conflict in the Anglican Communion has evolved following the *Bentley* decision. As time has passed, the fracturing apart of the global Anglican Communion has become more and more apparent. GAFCON has become increasingly successful in calling for a disciplinary response to certain progressive liturgical innovations. For example, in 2016, the Episcopal Church of America was suspended for a period of three years from participating in various aspects of the international Anglican Communion;[50] likewise, in 2017,

48. *Ibid* at para 75.
49. *Ibid* at paras 52, 61.
50. Anglican Communion, "Walking Together in the Service of God in the World" (11-15 January 2016), online (pdf): <www.anglicancommunion.org/media/206035/Communiqu%C3%A9_from_the_Primates_Meeting_2016.pdf> [perma.cc/DT6B-QTEM]. As an aside, it is not clear what follows after the 3-year suspension because the Primates did not convene for a formal meeting in 2019, and might not meet for a longer period of time due to the COVID-19 pandemic.

the Scottish Episcopal Church was also suspended.[51] The same may eventually happen to the ACC, as it continues to support liberal interpretations and practices regarding marriage.[52] The alienation of the Episcopal Church of America, the Scottish Episcopal Church, and the possibility of the same happening to the ACC, undermine an important aspect of both the trial and appellate court decisions in *Bentley*. The trial court noted and relied on the fact that the ACC was still fully active within the global Anglican Communion.[53] Witnessing the growing fissure (albeit very gradual and slow) between the ACC and the global Anglican Communion indicates that perhaps the plaintiffs were correct to say that the ACC is out of step with "Anglican ministry."

A similar point may be made regarding the Court of Appeal's focus on the fact that the Anglican Church in Canada is fundamentally a "government by bishops."[54] The Court of Appeal relied on the clearly defined geographical and hierarchical authority structure of the ACC.[55] Although the ACC sends its bishops to participate in activities of the global Anglican Communion, the Court of Appeal did not think this meant that the ACC is beholden to any authority other than its own local diocesan governmental organization. The question, then, is whether the growing recognition of the ANiC and the ACNA in the global Anglican Communion jeopardizes the Court of Appeal's conclusion that "[i]t is antithetical to the nature of Anglicanism to contemplate 'Anglican

51. Anglican Communion, "God's Church for God's World" (6 October 2017), online (pdf): <www.anglicancommunion.org/media/311326/communiqué-primates-meeting-2017.pdf> [perma.cc/GYR4-NUUB] [Anglican Communion, "God's Church"].
52. Recently there was an effort to amend the ACC Canon law definition of marriage to include same-sex unions. A motion to this effect was passed at the General Synod of the ACC in 2016. See Anglican Church of Canada, "General Synod 2016 Resolution A051-R2: Amendment to Canon XXI (On Marriage in the Church)" (July 2016), online (pdf): <www.anglican.ca/wp-content/uploads/a051-R2.pdf> [perma.cc/549A-HYX4]. The resolution required a second reading and vote at the next General Synod in 2019. The resolution was ultimately defeated at the 2019 General Synod, narrowly falling short of the 2/3 majority support needed to pass. See Anglican Church of Canada, "General Synod Resolution A052-R2: Motion for a Second Reading of Amendment to Canon XXI (On Marriage in the Church)" (2019), online (pdf): <gs2019.anglican.ca/wp-content/uploads/A052-R2-vote-results.pdf> [perma.cc/SZR5-DUQB]. The Bishops of the ACC issued a media statement affirming the shared commitment to allow individual dioceses and jurisdictions to continue celebrating same-sex marriage according to their own contexts and convictions. See Anglican Church of Canada, "A Message from the House of Bishops of the Anglican Church of Canada to General Synod 2019" (2019), online: <gs2019.anglican.ca/atsynod/a-message-from-hob> [perma.cc/27VH-QHS2].
53. See *Bentley* SC (TD), *supra* note 22 at para 260.
54. *Bentley* CA, *supra* note 22 at para 76.
55. *Ibid* at para 74.

ministry' in a parish that has withdrawn from the authority of its diocese and bishop."[56] This geographically-based view of Anglican territorial jurisdictions clearly has resonance within the Anglican tradition.[57] However, ANiC and ACNA currently operate geographically parallel to the diocese and provinces of the ACC. It is possible that they will never be fully accepted in the Anglican Communion,[58] but their recognition among the popular majority of the global Anglican Communion (in GAFCON) suggests that the territorial exclusivity of the "government of bishops" may not be quintessentially Anglican after all.

Having said all of this, it is not clear what legal effect should be given to these broad developments within the global Anglican Communion. There were compelling reasons for the courts to focus their analyses on the local level. The properties in question had concrete physical locations, which were registered locally. This frames the legal analysis quite naturally within the locally enacted structures of the Anglican Church of Canada—*i.e.*, in the hands of the local bishop. Although the use of local property could be directed by a source external to the local territory, in order for that to happen, it is necessary for the link between the local property and the foreign directorship to be clear and unambiguous. This is precisely where the Court of Appeal sided with the ACC. The documents and instruments available to the Court for defining the ownership and use of the property provided a link between the property, the individual congregations, and the local bishop. The local diocese was connected through its own governing documents with the national association of the ACC. That, however, is where the linkage ended. The Court of Appeal found that the connection between the local property of the congregation and the historical and global Anglican Communion referenced by the plaintiffs was not strong enough to supplant the well-defined authority of the local bishop.

The Court of Appeal's perspective has support from within the global Anglican Communion itself. The then Archbishop of Canterbury, Dr. Rowan Williams, said that there is no central authority for settling disputes within the Anglican Communion. Even the joint perspective of church leaders does not constitute a "supreme court"; the "communion" of the Church is rooted more in

56. *Ibid* at para 75.
57. For a discussion on the importance of respecting territorial integrity with "consent and courtesy," and avoiding "cross-border interventions", see Anglican Communion, "God's Church," *supra* note 51.
58. ACNA is not recognized as a Province in the Anglican Communion. See *ibid*.

joint action than doctrine.[59] It might well have been reasonable for the courts to take the position that their role is not to sort out the church's self-identity question, but to decipher the most practicable identity of the church for the purposes of applying Canadian law (*i.e.*, managing the property rights at stake in the case). On the other hand, although there is no centralized mechanism for discipline, there is an undeniable sense that the global Anglican Communion is a unity. The actions of each part affect the others. This has generated an unmistakable will of the Communion to press through differences and disagreements to continue to walk together.[60]

What, then, are we to do with the courts' apprehension of Anglicanism? It clearly does not reflect the complexity of the lived reality of religion for Anglicans at either the local or the global level. Does it matter that Anglicanism was portrayed by the courts in a state much firmer than the lived experience of the Anglican Communion might allow? It would perhaps be irrational to expect that the view of Anglicanism employed by the courts could adequately capture the full dynamism and complexity of an international and ancient organization like the Anglican Church. After all, "Legal analysis depends on the flattening of complexity, on the selection of material dimensions of experience and the deemed irrelevance of others."[61] Despite any of its analytic strengths or weaknesses, the *Bentley* decisions clearly show the persisting tension between the law's conception of religion and the dynamic and evolving world of religious life.

The important point to take from *Bentley* is not as prosaic as to say that there may be no final solution to the challenges presented by the law's apprehension of religion. Instead, it calls for a renewed way of thinking and talking about the process by which the apprehension occurs, which would consider and respond appropriately to the challenges and complexities involved. The descriptive and critical possibilities made available through the notion of legal fiction, which I

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59. "Archbishop of Canterbury's statement at the final press conference of the Primates' Meeting" *Anglican Communion News Service* (16 October 2003), online: <www.anglicannews.org/news/2003/10/archbishop-of-canterburys-statement-at-the-final-press-conference-of-the-primates-meeting.aspx> [perma.cc/MD7M-D54M].

60. "Archbishop Welby briefs ACC members on the Primates' gathering and meeting" *Anglican Communion News Service* (8 April 2016), online: <www.anglicannews.org/news/2016/04/archbishop-welby-briefs-acc-members-on-the-primates-gathering-and-meeting.aspx> [perma.cc/MKN5-HEYV].

61. B Berger, *Law's Religion*, *supra* note 7 at 26. In the same place Berger referred to Bruno Latour's memorable idea that trying to access the world through law is like "trying to fax a pizza." Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Polity Press, 2010) 268.

will turn to in the next section of the article, provide a way to step forward in this direction.

II. LEGAL FICTION—FRAMING THE PROCESS AND LIMITATIONS OF LAW'S APPREHENSION OF RELIGION

Given the gap between lived religion and the law's apprehension of religion, legal fiction presents itself as a way to view the intersection between law and religion. But what it means to call law's apprehension of religion a legal fiction is not self-evident and requires investigation and explanation. The idea of legal fiction is somewhat contentious in the academic literature.[62]Although there is some general agreement about the key elements of a legal fiction, and there is a growing sense of agreement about the meaning of those elements, there is not as clear of a consensus regarding the function and utility of legal fictions. In spite of this, the emerging notion of legal fiction is very helpful for understanding the law's apprehension of religion.

Lon Fuller offered the following definition of legal fictions, which reflects a commonly held view of some of their key elements "A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[63] There are variations of this definition, but its core elements have remained generally intact. Pierre J.J. Olivier, for example, suggested that Fuller's definition, along with the other Anglo-American writers on the topic (like Jeremy Bentham, Sir Henry Maine and Jerome Frank), did not add anything unique to the earlier ideas of the Roman "Commentators" of the fourteenth and fifteenth centuries and the continental tradition.[64] Olivier's definition of legal fiction, which he developed from a broad analysis of the history of the idea, does not differ significantly from Fuller's, except to further restrict the scope of its application: "Under legal fiction, I understand an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or provable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption

62. A thorough discussion of legal fictions from multiple perspectives can be found in Maksymilian Del Mar & William Twinning, eds, *Legal Fictions in Theory and Practice* (Springer, 2015).
63. Lon L Fuller, *Legal Fictions* (Stanford University Press, 1967) at 9.
64. *Legal Fictions in Practice and Legal Science* (Rotterdam University Press, 1975) at 36-37.

being permitted by law or employed in legal science."[65] Or, in other words, a legal fiction treats something "as if" it is something else for the purposes of law.

Taking this definition of legal fictions as a starting point, I argue that there are three elements central to the idea of legal fiction, which are particularly useful for helping us think about the law's apprehension of religion: (1) legal fictions are *functional* conceptions of things developed by the law specifically to enable the law to achieve its purposes and goals; (2) legal fictions are *socially interactive* because they typically arise in relation to different conceptions of things as developed in other social institutions; (3) legal fictions are *limited* insofar as they must not be confused with the objective reality of things, and they must remain aware and respectful of other conceptions external to law as well as the processes by which these external conceptions are created.

These elements of legal fiction provide a unique vantage point for understanding and evaluating the law's apprehension of religion.[66] They allow us to take seriously the idea that law has a special role in constructing religion within the legal context, while also recognizing the complex interaction between the legal conception of religion and the external reality of lived religious experience. As Lon Fuller noted, "The fiction…forces upon our attention the relation between theory and fact, between concept and reality, and reminds us of the complexity of that relation."[67]

In what follows I will elaborate on two implications of viewing the law's apprehension of religion as a legal fiction, which flow from these elements of legal fictions. First, I describe the way that legal fictions are a socially constructive tool that operate where different views of reality and systems of meaning cross over each other. From this view, the gap between the law's apprehension of religion and lived religion is not a divergence from "fact"—in that it is either true or false—but rather is a social institutional construction meant to achieve a specific purpose. Likewise, legal fictions point us towards the importance of community and the relationship between communities in the law's apprehension of religion. Secondly, I sketch some of the conceptual limitations of legal fictions in relation to other constructions of meaning. Legal fictions are an instance of a foundational process of creating social knowledge and meaning, which I describe

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65. *Ibid* at 81.
66. A brief note of clarification. I am not arguing that law should be thought of as a fiction, although I do find the idea plausible and full of theoretical potential. The use of legal fiction here is more circumscribed, offering a different point of view from which to reflect on the gap between law and religion.
67. Fuller, *supra* note 64 at ix.

as a social-symbolic process. I argue that this reveals an ethical dimension to the legal fiction of law's apprehension of religion.

In terms of the function of legal fictions within the law, legal fictions are sometimes portrayed as unnecessary and problematic for the function of law. Jeremy Bentham's disdain for legal fictions is famous. He went so far as to claim, "It has never been employed but to a bad purpose…It has never been employed but with a bad effect."[68] For those less negative, fictions might serve a purpose, although only for a short time. They occupy a very small part of the territory of legal reasoning, representing the limitations of human language and reasoning in building clear and distinct laws—either of deficiency in terms of the purpose of the law or in terms of the language of everyday experience.[69] Legal fictions are eventually, and as a matter of course, outgrown and fall out of use.[70]

Others claim that legal fictions are a central part of the epistemological structure of law, which is to say that they are not an historical remnant or a transitory tool but central to the function of law and legal reasoning.[71] This is not to say that particular legal fictions are permanent, but rather that the cycle of the formation and passing of legal fictions reflects a central part of law.[72] A popular

68. John Bowring, ed, *The Works of Jeremy Bentham*, vol 9 (William Tait, 1843) at 77. In this same chapter Bentham rattled off such a series of harsh criticisms against legal fictions that it was difficult to pick which one to include. The substance of his objection to legal fictions is that they fly in the face of utilitarian reasoning, and hence can (and only ever are) used to perpetuate a situation of social organization and distribution of advantages, which supports the few at the expense of the many. See *ibid* at 78 (representing this sentiment in the statement that legal fictions enable "[government functionaries] with the greater efficiency and to the greater extent, to make sacrifice of the universal interest to their several particular and sinister interests").
69. See Olivier, *supra* note 64 at 109-10.
70. See *e.g.* Fuller, *supra* note 63 at 70, 117-18; Olivier, *supra* note 64 at 108.
71. See *e.g.* Geoffrey Samuel, "Is Law a Fiction?" in Del Mar & Twinning, *supra* note 62, 31 at 51. As Samuel notes, "[t]he theorist provides a fictional ('as if') model for the judges within which the judges employ fictional ('as if') images to relate law to social fact, this social fact itself resulting from an 'as if' construction operating both within and without the facts." Also see Frederick Schauer, "Legal Fictions Revisited" in Del Mar & Twinning, *supra* note 62, 113 at 126. For Schauer, "[t]he examination of legal fictions, therefore, is not simply an examination of an epiphenomenal and quaint feature of legal reasoning. Rather, it is an entry into the difficult problem of legal truth."
72. See *e.g.* RA Samek, "Fictions and the Law" (1981) 31 UTLJ 290, in which the author argues that the temporariness of the legal fiction—the constant birth and death of legal fictions—is a part of a cycle of meaning formation that is central to the law. For Samek, "[t]he birth of a fiction inevitably leads to its death. A new dogma replaces the old, and the whole process starts all over again….The stability of law is an illusion, and so is the lawyers' fixed belief that it can be reformed from within. Law, like the fictions which it employs, is a means to a social end, not an end in itself" (at 317).

idea along these lines is that the legal fiction is a mechanism for the evolution of the law as legal institutions and principles encounter and respond to new situations. Legal fictions have been described as a way for judges to creatively probe possibilities for the future development of the law by artificially extending a legal rule to encourage reflection on the possibility of a more permanent solution.[73] A fiction might be used as a tool of equity, to help soften what would be the otherwise harsh result of applying a legal rule.[74] A legal fiction might also be used as a way of incorporating a new reality into the existing legal system (for example, the fiction that a ship is a person).[75]

The most compelling account of legal fiction, in my view, was provided by Lon Fuller, who shows how legal fictions operate as a pragmatic tool central to the evolution of the law, necessitated by the confluence of the limitations and the universal aspirations of law. They arise in order to reconcile a specific legal result with some premise or postulate about the law.[76] Law is a comprehensive system that cannot simply allow gaps to exist in its structure or to admit that some things are outside of its reach.[77] But the law is constantly confronting a world that is different, and legal fictions arise as the law adapts itself to this external reality. Fictions are like "the cement that is always at hand to plaster together the weak spots in our intellectual structure."[78] In other words, "fictions are, to a certain extent, simply the growing pains of the language of the law."[79] Through legal fictions the law asserts its structure over an unruly world, providing an alternate form of reality through which the law is able to address the world.

Fuller's analysis of legal fictions helps us to understand that the gap between the law's apprehension of religion and the lived reality of religion reflects a more pervasive struggle between the concepts/theory of law and the reality/facts external to law.[80] From this point of view, the gap between law's apprehension of religion and lived religion is both a problem *and* a foundational feature of legal meaning. Fuller argued that the law's fictions are not a "counterfeit of external

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73. See Maksymilian Del Mar, "Legal Fictions and Legal Change" (2013) 9 Int'l J Law in Context 442.
74. See *e.g.* Douglas Lind, "The Pragmatic Value of Legal Fictions" in Del Mar & Twinning, *supra* note 62, 83 at 102-03 (discussing the example of constructive eviction).
75. See *ibid* at 95-96.
76. Fuller, *supra* note 63 at 51.
77. *Ibid* at x-xi.
78. *Ibid* at 52.
79. *Ibid* at 21-22.
80. *Ibid* at xi.

reality" but rather "an instrument which enables us to orient ourselves in this world of reality."[81]

Fuller's idea of legal fiction is emulated in the law's apprehension of religion. As noted in the *Bentley* case, there is a persistent gap between lived religion and the law's apprehension of religion. By positing a particular view of religion in law, the law is enabled to act in relation to religion. But Fuller noted that "[a] formal rule, no matter how firmly rooted its foundations may be in reality, tends to gather about itself a force not entirely justified by its foundations. It crystallizes and formalizes the truth it expresses."[82] For this reason, Fuller argued that fictions must be treated with a certain tepidity. He went so far as to say that they must ultimately "drop out of the final reckoning" because "[w]e must not suppose that the "thing" [the fiction] is something more than the sum-total of its properties."[83]

The challenge of making sense of the gap in the law's apprehension of religion may be tied to some potential misunderstandings about the nature and value of fictions and their relation to truth. Not everyone agrees that legal fictions are necessarily false, and there are many different views regarding what the falsity of a fiction entails.[84] Problems arise when we take the law's fiction and treat it as if it is the *only* reality, when fictions gain a gravity and sense of reality beyond the limited scope for which they were created and utilized. Fuller's account of legal fiction underscores that law's apprehension of religion is false in a very specific sense of falsity.

One way to think about this is in terms of the distinction between a fiction and a metaphor. A metaphor is an attempt to express the true qualities of an object by equating it to something that symbolizes those qualities.[85] The difference is between ontological reality and social reality. A metaphor (like other

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81. *Ibid* at 105.
82. *Ibid* at 46.
83. *Ibid* at 117.
84. See *e.g.* Karen Petroski, "Legal Fictions and the Limits of Legal Language" (2013) 9 Intl J Law in Context 485 (reprinted in Del Mar & Twinning, *supra* note 62, 131); Kenneth Campbell, "Fuller on Legal Fictions" (1983) 2 Law & Phil 339. The notion of falsity has great potential for defining and delimiting the idea and use of legal fictions. See *e.g.* Olivier, *supra* note 64 for an extensive discussion of what constitutes a legal fiction.
85. Olivier, *supra* note 64 at 67. There is, though, ambiguity regarding what counts as "qualities," and how they are identified. For example, rather than seeing the physical trait of live birth as the attributed "quality," it could instead be understood to be an object that symbolizes the quality of holding a legal right (like the stone symbolizes hardness, coldness, et cetera.). In this way the legal fiction "the unborn child was born alive" is no different than the example of the metaphor "she has a heart of stone." Olivier discusses both examples, *ibid* at 65-68.

abstract legal notions) makes a statement about the reality of the object, whereas a legal fiction makes a statement about the object in relation to its treatment at law, a social institution. But, if the social facts of law are considered to be real, even in a sense different than physical ontology,[86] then the legal fiction could be understood as an attempt to make a *truthful* description of the object *within the reality of law*.

Legal fictions need only be false in a more general sense if one form of reality is privileged over others. This view of fictions has been taken up by other scholars. Kenneth Campbell, for example, challenged the idea that legal fictions are false, arguing that fiction is based on different classifications of fact rather than on an objective notion of truth.[87] In a similar vein, Karen Petroski argued that it is problematic to juxtapose fiction with a presumed other "reality" to which the law must conform.[88] For her, the law creates its own reality, and in this way it should not be treated as false. The reality of law must be recognized and wrestled with in its complexity. Holding fast to the idea that legal fictions are false in a more general sense renders the nature of the reality of law more difficult to ascertain. If law is real and has real effects on people's lives, then legal fictions cannot depend on factual falsity because that would mean they are not "real."

This helps to make sense of the gap between law's apprehension of religion and the reality of lived religion. If the law's constructions must be true, both in relation to law's own purposes as well as in relation to an independent factual reality, then squaring these two forms of reality becomes very difficult. It is better to recognize that legal fictions, including the law's apprehension of religion, like other legal structures, help to constitute the reality of law. Recognizing this connection between legal fiction and the construction of law's reality explains the importance of insisting on the limitations of legal fictions. As Nancy J. Knauer noted, "[A] fiction can…become dangerous when the force of its constitutive power is ignored. When this occurs, the label of fiction works a denial and removes from memory important lessons regarding the law and the fragility of the human experience."[89] Legal fictions must therefore always be framed in relation to the limited reality of the law.

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86. See Searle, *supra* note 14.
87. *Supra* note 84.
88. *Supra* note 84. Others making a similar argument against the privileging of one form of reality include Samek, *supra* note 72, and Lind, *supra* note 74.
89. "Legal Fictions and Juristic Truth" (2010) 23 St Thomas L Rev 1 at 8.

Truth and falsity of legal fictions are related to the *function* of legal fictions within the law.[90] Douglas Lind described this as a pragmatic approach to truth and reality.[91] Simply stated, for a fiction to be true and real it must work satisfactorily *for us*.[92] Pragmatic value, for Lind, is given by us to our raw experiences (to the world as we find it) in light of the problems, interests, and purposes that we have in mind.[93] Legal fictions, such as the law's apprehension of religion, are evaluated in terms of the pragmatic value they provide specific to our legal interests, purposes, and goods. In other words, they are socially constructed through the life of a legal community. As a result, the truth and reality of legal representations are constantly in flux. Even though they are tied to our actual experiences they never reach a point of absoluteness or finality. They are always being built upon. The virtue of fictions is their humility and tentativeness; they do not take themselves to be settled or immovable.[94]

In this way, legal fictions remind us about the tentative nature of law in its relation to religion.[95] Law creates its own fictional image of religion. The gap between this fiction and other accounts of the reality of religion are not a matter of truth or falsity, in an objective sense, but reflect the purposes of the reality of law. This gap is not a matter of truth or falsity because the law's reality is not necessarily meant to be a true reflection of external reality, but rather is guided by its own ends and purposes.

The idea that the "'truth" of a fiction is grounded in the reality and purposes of the law must be qualified, however. The truth and value of a fiction is not entirely distinct from the world existing separately from the social reality of law. There must be a connection—and a tension—between the legal understanding of what is true and real and the ordinary, or external, ideas of what is true and real, or else the law would be rendered incapable of influencing and guiding people's behaviour.[96] As Schauer explained:

> Legal fictions are thus parasitic on a gap between legal language and all-things-considered sound results. Without this gap we would be unable to understand the idea of a legal rule, and unable to understand the way in which law, however technical at times it might get, must remain tethered to the language in which it is written, and thus tethered to the language of the linguistic community in which

90. Lind, *supra* note 74 at 99.
91. *Ibid* at 84.
92. *Ibid* at 89-90.
93. *Ibid* at 90.
94. Samek, *supra* note 72 at 313-14.
95. *Ibid* at 317.
96. Schauer, *supra* note 71 at 126.

> the legal system exists. Were it otherwise, there would be no need for law. More importantly, were it otherwise, there would be no legal truth, no legal falsity, and, quite simply, no possibility of law at all.[97]

This points to another important dimension of viewing the law's apprehension of religion as a form of legal fiction, which is that it reframes the law's encounter with religion as a criss-cross of realities.[98] What makes a legal fiction fictional is not its relation to the truth, but the fact that the "truth" of the fiction claimed within the law collides and conflicts with the "truth" claimed somewhere outside of the law. More precisely, a legal fiction is a legal proposition that collides with an alternate proposition from another *system* of meaning—it is a collision between systems of meaning.[99] What is at issue is not the objective true or real meaning of a thing, like a religious belief or experience, but the *interaction* between different ideas about the meaning of the thing.

In other words, legal fictions are not unconstrained. The emphasis that I have placed on the purposes and reality of the law as the basis for the law's apprehension of religion does not mean that the law can conceptualize religion in any way it likes. The gap between the law's apprehension of religion and the external experience of religion cannot be framed in terms of truthful correspondence, but rather must be seen in terms of the interaction between the law's reality and religious reality. The gap is an expression of this interaction. Although the value of the law's apprehension of religion is not fully determined by its correspondence with the "reality" of religion, it is still tied to that external reality.

This is particularly salient to the law's apprehension of religion, given the inherent difficulty in defining religion, both as a conceptual category and in terms of the core elements of a specific belief, practice, or venerated object.[100] Religion is less an objective thing than it is a form of individual and communal meaning bound up in the life of a tradition. When law apprehends religion, it grapples with ideas and forms of meaning that are grounded in a distinct social reality. As we will see later in the discussions of the *Ktunaxa* and *Multani* cases, religious objects and ideas cannot be separated from their religious traditions. To do so fails to grapple with the fact that legal fictions are a part of the social reality of law that

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97. *Ibid* at 127.
98. See Lind, *supra* note 74 at 97, 99.
99. *Ibid* at 94.
100. See, *e.g.* Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press, 1993) at 29. As Asad notes, "[t]here cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive process."

overlaps with the social reality of religion. The problems that arise when treating religious objects and ideas in terms other than as elements of religious tradition are numerous, some of which will be elaborated upon below. The point that I would like to emphasize here is that to do so is a fundamental misunderstanding of the process by which law apprehends religion—the emerging legal fiction interweaves with the religious form of meaning. This is crucial for understanding the legal fiction as a mechanism of legal reasoning.

More generally, the tension between legal meaning and external reality found in legal fiction is connected to a foundational process of human understanding. Recall that, as Fuller argued, the world of legal ideas, which is in tension with the real world, is not a counterfeit of external reality but "an instrument which enables us to orient ourselves in this world of reality."[101] In this way, the process represented by legal fictions points to a fundamental trait of human reasoning.[102] It is a process of assimilating the unfamiliar with what is already known—an adaptation of human understanding.[103] Even though fictions are untrue in one sense, they are also real insofar as they enable all that can be known to us within the field of law.[104] In similar terms, Hans Kelsen described the work of legal fiction as a process of making sense of *actual reality*: "[A] fiction is characterized both by its end and by the means through which this end is reached. The end is the cognition of the actual world; the means, however, is a fabrication, a contradiction, a sleight of hand, a detour and passage of thought."[105] For Kelsen, fiction is the cognitive process of thought that "takes a detour in knowing its object…a detour in which it consciously sets itself in contradiction to this object; and be it only in order

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101. Fuller, *supra* note 63 at 105.
102. *Ibid* at 94.
103. *Ibid* at 65. Lind agrees, pointing out that *truth* is comprehensive and that new truths must be brought into accord with existing truths, either replacing or adjusting the whole system in order to accommodate the new (Lind, *supra* note 74 at 91-92).
104. Fuller, *supra* note 63 at 121. In particular, Fuller writes that

> [o]ur concepts…are the constructs of our minds which facilitate thought by rendering comparison en masse possible. As all thinking proceeds through analogy and comparison, thought will be speeded up if we can group related phenomena into units convenient for comparison. But these constructs must be seen as instruments of thought only; we must treat them as servants to be discharged as soon as they have fulfilled their functions. They are foreign elements which may be inserted into the equation provisionally to render computation simpler, but which must be dropped from the final reckoning.

105. Hans Kelsen, "On the Theory of Juridical Fictions: With Special Consideration of Vaihinger's Philosophy of the 'As If,'" translated by Christoph Kletzer in Del Mar & Twining, *supra* note 62, 3 at 4.

to better grasp it."[106] This "detour" and turning away from reality represented by legal fiction is necessary for apprehending and understanding reality at all.

This foundational process of meaning formation that lies at the heart of legal fictions is an instance of what is described elsewhere as the creation of symbolic forms of meaning. The process of forming symbolic meaning affirms much of what we have already noted about legal fictions. But it also brings focus towards the way that the law's engagement with reality through legal fictions—in particular with religious reality—is a *dialectic* encounter between the legal and religious.[107] The significance of this is that it offers further insight into the nature of legal fictions, in terms of their power as well as their limitations.

Symbols, by definition, involve a gap between the sign and the thing to which the sign refers.[108] The symbolic, as a form of meaning, is basically an in-between realm—the images humanity interposes between itself and reality function to separate humanity from the world and to simultaneously bring the world closer.[109] The symbolic object acts upon the subject since the subject can only access the world through the mediation of the symbolic object.[110] By objectifying meaning in a concrete sign, symbolic meaning gains a power of its own—not simply as a reflection of existing reality, but as containing its own unique and formative power.[111] The interpenetration between subject and object through the mediation of the symbol creates a permanent and enduring thing that we are capable of apprehending.[112] Individual symbols do not have meaning as isolated units. Rather, their meaning is tied to what Ernst Cassirer called "symbolic forms" of meaning. Science, mythology, religion, art, language,

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106. *Ibid* at 5.
107. Ernst Cassirer, *The Philosophy of Symbolic Forms, Vol 1: Language*, translated by Ralph Manheim (Yale University Press, 1953) [*PSF* 1] at 93.
108. See *e.g. The Oxford English Dictionary,* 3d ed (Oxford University Press: 2010) sub verbo "symbol". The second definition of "symbol" in the Oxford English Dictionary is "a thing that represents or stands for something else."
109. Ernst Cassirer, "'Spirit' and 'Life' in Contemporary Philosophy" in Paul Arthur Schilpp, ed, *The Philosophy of Ernst Cassirer: The Library of Living Philosophers Vol IV* (The Library of Living Philosophers, 1949) 855 at 874. See also Thomas Meisenhelder, "Law as Symbolic Action: Kenneth Burke's Sociology of Law" (1981) 4 Symbolic Interaction 43 at 44-46.
110. Cassirer, *PSF 1*, *supra* note 107 at 107 and 112. Cassirer argued that reality is always only accessible through symbolic forms of meaning and that acquiring a sign is really what constitutes the first step toward knowledge of the nature of a thing.
111. See Deniz Coskun, *Law as Symbolic Form: Ernst Cassirer and the Anthropocentric View of Law* (Springer, 2007) at 193.
112. Cassirer, *PSF 1*, *supra* note 108 at 89. For a similar description of the dialectic process at the foundation of social reality, see also P Berger, *Sacred Canopy*, *supra* note 13, and P Berger & Luckmann, *supra* note 14.

and law are all examples of different symbolic forms. Each instance of symbolic meaning reflects a symbolic form.[113] It is in this way that symbols are part of the foundation of human knowledge and the reality of human existence.[114]

This dialectic process of symbolic meaning—and hence also of legal fictions—involves a risk. Cassirer noted that the creation of symbolic meaning tends to "imprint its own characteristic stamp on the whole realm of being and the whole life of spirit,"[115] and by doing so it tends to undermine other forms of symbolic meaning.[116] In other words, if one form of symbolic meaning comes to be thought of as true and real, then other forms of symbolic meaning become less real. From this view, legal fictions walk a fine line: Although they are necessary for knowing and confronting reality, they may also come to be seen as something more than they are and so dominate the way that reality is understood. The risk is not simply about the meaning of one particular object, but the possibility of seeing the object differently. If a legal fiction displaces other possible ways of understanding an object, then the legal form of meaning displaces or undermines other non-legal forms of meaning. The legal fiction then colonizes our understanding.

What is at stake, then, in the law's apprehension of religion, is the persistence of the religious form of meaning within the law's domain. The theory of symbolic meaning underscores the importance of preserving an awareness of the power and the limits of legal fictions. It is crucial to remain aware of the way in which the law's apprehension of religion involves an interaction between legal and religious ways of knowing. Without this awareness of religious forms of meaning, including the social-symbolic process it involves, the legal form of meaning reflected in the law's apprehension of religion will take on a totalizing force. Evaluating the legal fiction of law's apprehension of religion is not about uncovering the true essence of religion, but about understanding the function of the law's conception of religion within the law *and* considering the relationship between it and the religion's own conception of itself. A crucial part of this is that the legal and religious are both deeply social forms of meaning. Both are formed through the symbolic process of meaning formation, and the intersection between them must

113. *Ibid* note 107 at 86.
114. See Meisenhelder, *supra* note 109 at 44-46.
115. Cassirer, *PSF 1*, *supra* note 108 at 81. Cassirer writes, "True human knowledge can nowhere dispense with symbols and signs; but it is precisely this that characterizes it as human." Also see Ernst Cassirer, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (Yale University Press, 1944), at 25-26.
116. *Ibid* at 113-14.

recognize and preserve the process of their interaction. The law's apprehension of religion must not displace the meaning produced within the religious context.

From this view, the intersection between the legal and religious forms of meaning is a kind of *relational* encounter, which carries an ethical dimension.[117] Robert Cover described the creation of legal meaning as "[entailing] the disengagement of the self from the 'object' of law, and at the same time requir[ing] an engagement to that object as a faithful 'other.'"[118] In the same way, a symbol is a statement connected to an "other"—just as a fiction is connected to another system of meaning—but they also contain some distance from the "other," which leaves them with a sort of interdependence.[119] As such, a legal fiction must recognize and sustain the external reality and meaning of the thing to which it relates. In terms of the law's apprehension of religion, the law's conception of religion must not occupy a position of exclusivity or dominance in relation to religious meaning. Although the law's apprehension of religion is *for* the purposes of the law, it must nevertheless remain faithful in its relation to lived religious life and the religious form of meaning.

The law's apprehension of religion will always seem insufficient in relation to the *reality* of religion because the law is a different form of meaning oriented towards different purposes than religion. The law does not concern itself with religion *qua* religion—as a brute social fact—but as an object of legal reality. With this in mind, it would be inappropriate to try to square the law's apprehension of religion with the lived reality of religion. The goal instead should be to understand the law's limited view of religion in its functional (and symbolic) context. As I have argued, this points beyond the conceptual specifics of the law's apprehension of religion as an object, and instead towards the *process* of the interaction between law and religion. As James MacLean observed:

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117. For further discussion of the implications of a relational model to the interpretation of constitutional rights more generally, see Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev Const Stud 1. Despite the thematic overlap, my analysis is quite different than Nedelsky's. Nedelsky proposed that rights should be interpreted and applied in a way that foregrounds how law structures relationships and fosters the kinds of relationships that we value relationships through the language of rights. This, for her, makes judicial review of constitutional rights claims a kind of democratic discourse and source of institutional accountability.
118. Robert Cover, "Foreword: *Nomos* and Narrative" (1983) 97 Harv L Rev 4 at 45.
119. Gabriel Motzkin, "Cassirer's Philosophy of Symbolic Forms: A Foundational Reading" in Jeffrey Andrew Barash, *The Symbolic Construction of Reality: The Legacy of Ernst Cassirer* (University of Chicago Press, 2008) 73 at 86.

> We can see then how we need our abstractions; they are useful constructs, tools. The problem arises when we begin to think of them as real, when we forget that they are symbols pointing to and participating in a reality beyond them. But we have forgotten how to think beyond the 'things' arrested from experience.[120]

To view the law's apprehension of religion as a legal fiction is, therefore, a kind of reminder. The law's apprehension of religion is inevitably a reductive view of religion. But this enables law to wrestle with religion in law, and to address through law an important part of human experience that deeply affects peoples' lives. Apprehending religion in the law gives voice to religion in the discourse of law. But it is also crucial to keep a critical view of the law's apprehension of religion, to ensure that the fictional creation of religion in law is not taken to be separate from the processes of interaction by which law constructs its own reality (including through its interaction with religion). In order to guard against mistaking the law's apprehension of religion for religious reality, it is necessary to identify the fictional quality—including its social-symbolic processes—that is at the forefront of the analysis of the law's encounter with religion.

To briefly recap, reorienting the law's apprehension of religion in terms of legal fiction opens up a set of ideas that are extremely helpful. It prioritizes the constitutive aspect of the social interaction between law and religion rather than particular claims of "truth" that are thought to distinguish them. It highlights the ways that fictions are for particular communities, in particular situations, and towards particular purposes. It also recognizes that law's apprehension of religion is necessarily limited and incomplete. Although the law's apprehension of religion is not dependent on external understandings of religion, it is nevertheless intertwined with them. As a legal fiction, the law's apprehension of religion carries the risk of crystalizing its own view of reality as the objective truth of reality. Allowing this would betray the "ethical" dimension of fictions as a form of symbolic meaning, as it would undermine the relational interdependence between different forms of meaning—legal and religious—and inhibit the process by which legal and religious meanings are created in the first place.

III. THEORY IN ACTION—USING LEGAL FICTION AS A LENS TO ANALYZE CASES

In response to the argument so far, this section will examine three case examples through the lens of legal fiction. First, I will briefly return to the *Bentley* case to

120. James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Routledge, 2012) at 86.

explore what the notion of legal fiction offers to the previous analysis of the case. This will, of course, be a fairly short reflection, which leads into a more detailed discussion of the *Multani* and *Ktunaxa Nation* decisions. In all of these cases, we see the courts struggling with how to fit religious meaning into the analysis of the guiding principles of law. This common struggle appears in different guises in the cases, and each inflects the earlier discussion of legal fiction and the social-symbolic process at play in the law's apprehension of religion.

The purpose of this section is twofold. First, it is to show the descriptive and critical potential of using the notion of legal fiction, as a mechanism of legal reasoning, to analyze cases that involve the law's intersection with religion. Secondly, the discussion of these cases concretizes the process and the limitations of law's apprehension of religion as legal fiction. The lens of legal fiction reminds us of the social interactive dimensions at work in the law's apprehension of religion.

A. BENTLEY—*THE IMPORTANCE OF JUDICIAL RESTRAINT*

The earlier discussion of *Bentley* focused on the gap between the law's apprehension of religion and the lived experience of religion. I suggested that the challenge of the gap is unavoidable. It is helpful to remind ourselves of this now so that there is no misplaced expectation that the lens of legal fiction will somehow resolve the gap. This reminder also draws attention to one of the most important takeaways from the discussion of legal fictions: The apprehension of Anglicanism in *Bentley* should not be evaluated in terms of its accuracy in representing what Anglicanism really is. As a legal fiction, the courts' view of Anglicanism is a feature of the law's reality; it is a mechanism of legal reasoning that is meant to achieve the purposes of the law. The apprehension of Anglicanism in *Bentley* must be understood *for what it is* and what it means within the law's reality.

It is also crucial to acknowledge that the legal fiction of Anglicanism has a real effect on the Anglican religion. The court's refusal in *Bentley* to grant the departing congregations any part in the church property has profound financial implications for both sides of the dispute. More importantly, the decision effectively sets the path for the future of Anglicanism in Canada. The departing congregations are now legally sanctioned through *Bentley* as an essentially non-Anglican faction that broke away from the true Anglican Church in Canada. This profoundly affects the possibilities for the future evolution of the relationship between the ACC and the ANiC, effectively crystalizing the differences between the two. If, on the other hand, the Court of Appeal in *Bentley* had adopted the plaintiff's more abstract view of Anglican ministry, it would have set in motion a fairly radical rearrangement of the Anglican Church in Canada. The authority

of the bishops would have been subjected to a higher orthodoxy, which would empower local congregations in a way that would change the governance of Anglicanism in Canada. Whether one agrees with the result of *Bentley* is beside the point. In either case, the decision of the court has a profound influence on the development of Anglicanism in Canada, which is mediated through the legal fiction of Anglicanism that the court adopted.

The fact of the influence of the law on the evolution of the religious community should not be surprising in light of the earlier discussion of legal fictions, and it is not itself a basis to reject the *Bentley* decision. The law plays a constructive role in relation to religion, which means that religion—here, the Anglican religion—is not simply discovered by the law. Whenever a court seeks to apprehend religion in order to make a decision, it is, in a way, *creating the very thing that it sets out to discover*.[121] The legal fiction of Anglicanism in *Bentley* is *true* in a very specific sense, which is to say that it is for the purpose of resolving the conflict before the court.

It is also important to remember that a legal fiction does not spring from nowhere, but it emerges from the interaction between legal and religious forms of meaning. That is to say, the court's constructive role is not carried out in isolation, but dialectically with religion. In *Bentley*, the court's apprehension of Anglicanism emerges in response to the ideas of Anglicanism brought before the court. The court's decision is, and it must be understood to be, about some of the deep ambiguities within the Anglican religion. The court's job is not to resolve these ambiguities but to translate them into the language of the law for the purposes of deciding the case. When doing this, the court must be mindful of the dialectic encounter between its decision and the lived experience of the Anglican religion, and ensure that the law's reality does not assume a totalizing posture in relation to the religious meaning of Anglicanism (and the process of meaning formation within the religious tradition). This is, in terms of legal fiction, to preserve the falsity of the court's apprehension of Anglicanism, ensuring that the fiction is understood to be false in the technical sense discussed above.

This means that although the Court of Appeal in *Bentley* was right to confidently assert its fiction in order to achieve its ends, it should also have conscientiously avoided settling or setting aside the ambiguities of Anglicanism in the process of making its decision. As mentioned earlier, the court seems to have failed to do this, which can be seen in the fairly definitive language it used to describe Anglicanism. Although the court seems to be trying to preserve the autonomy of Anglican communities to control the way they appear in law,

121. I am indebted to Christopher Lund for this phraseology.

its decision goes beyond what was necessary to decide the matter and ends up constructing an overly robust view of the Anglican religion. The effect of the judgment on the future of Anglicanism in Canada, particularly the relationship between the ANiC and the ACC, is therefore more pronounced than is necessary. A lack of judicial awareness of this effect is an example of the risk that comes along with legal fictions: The law's meaning may strongly influence how something is understood outside of the judicial context. In this case, the law's apprehension of Anglicanism displaces the development of the meaning of Anglican worship that otherwise occurs within the Anglican religion.

Drawing attention to these elements of the law's apprehension of religion should inspire a level of caution in the judicial office whenever the court must engage with a religious idea when making a legal decision.[122] Had the court's decision been framed more tentatively, avoiding statements about the true nature of Anglicanism, the totalizing force of the decision may have been mitigated. Preserving the ambiguities of Anglicanism within the law's apprehension of Anglicanism would serve two ends: It would keep the religious community active in constructing its own meaning and maintain the law's interaction with religion as a dialectic between different systems of meaning.

B. MULTANI—*THE DEVELOPMENT OF LEGAL MEANING THROUGH THE APPREHENSION OF RELIGION*

Many of the concerns raised in relation to the *Bentley* case can also be seen in the *Multani* case, although in different ways. In *Multani*, we witness the Court struggling over how to capture the Sikh kirpan in law. In this case, the SCC addressed the refusal of a public-school board to grant religious accommodation to a Sikh boy that would have allowed him to bring his kirpan—in this case, a large metal dagger—to school. The case was decided through a *Charter* analysis of whether the school board's decision to refuse to accommodate the religious practice of carrying a metal kirpan violated Multani's religious freedom, and whether that limit to his religious freedom could be justified under section 1

122. Benjamin L Berger made a similar argument in relation to the cultural paradigm of the constitutional rule of law, arguing that adopting a cultural lens for examining the law's intersection with religion increases our awareness of the cultural force exerted by the law and should inspire a judicial attitude of humility. See, *e.g.* B Berger, *Law's Religion*, *supra* note 7 at 103-04, 170. Also see B Berger, "Religious Freedom," *supra* note 16.

of the *Charter*.[123] When the court's decision is viewed through the lens of legal fiction, we see a cogent example of the interactive process of the formation of legal meaning, which in this case involved the intersection between legal, social, and religious conceptions of reality. The way that conflicting or competing meanings are brought and held together in dynamic tension is at the heart of a legal fiction. Looking closely at the *Multani* decision (primarily the majority reasons), we see the theory of legal fiction in action. The failure of the Court to be fully aware of the process of creating a legal fiction helps to explain some of the difficulties I identify with the decision. *Multani* is therefore an example of the process of creating legal fictions, which develops our understanding of the law's apprehension of the legal fiction of religion and how courts might use it.

The Court in *Multani* sought to navigate between the religious meaning of the kirpan and other social perceptions caused by its physical attributes. The kirpan in question was an imposing object—a 20 cm metal knife.[124] The school board's argument against allowing the kirpan in school was that it was objectively dangerous, that it symbolized violence, and that its presence would have a poisoning effect on the safe environment of the school.[125] Competing against this understanding of the kirpan was its religious meaning. Sikhs carry kirpans as an integral part of their religious practice.[126] According to the evidence of the appellants, Sikhism teaches pacifism and respect for other religions and emphasizes that the kirpan is never to be used as a weapon or to hurt anyone; for Sikhs, the kirpan is a symbol of mercy, kindness, and honour, and would never be used for violence.[127] The Court held that maintaining a reasonable level of safety in school did not require a total ban on carrying kirpans in school.[128] It was thus unreasonable for the school board to reject the accommodation agreement

123. It should be noted that this analysis followed that in *Doré v Barreau du Québec*, [2012] 1 SCR 395, where the Court held that in evaluating administrative decision-making the standard of review is reasonableness and not the test in *R v Oakes*, [1986] 1 SCR 103 (applying s 1 of the *Charter*). The new *Doré* analysis and the old analysis used in *Multani* (the *Oakes* test), although distinct, are in "conceptual harmony" because both work the same "justificatory muscles" of proportionality (*ibid* at paras 5 and 57).
124. *Multani*, *supra* note 23 at para 87.
125. *Ibid* at paras 37, 55, 71.
126. This is a central tenant of the Sikh faith along with uncut hair (under a turban), carrying a wooden comb, wearing a kaccha undergarment and a steel bracelet. These "Five Ks" of the orthodox Sikh faith (kesh, kangha, kara, kaccha and kirpan) were noted in *ibid* at para 36. See also, SikhNet, "Who are Sikhs? What is Sikhism?" (last visited 17 September 2020) online: <www.sikhnet.com/thesikhs>.
127. *Multani*, *supra* note 23 at paras 36 and 37.
128. *Ibid* at para 67.

reached by the appellants and the school for Mr. Multani to carry his kirpan under restricted conditions (sheathed, and sewn into a cloth envelope).

What makes this case remarkable is not the result reached by the Court, but how the Court struggled with the religious meaning, physical features, and other social perceptions of the kirpan in the process of giving it legal meaning. The Court tied these various elements together under the law. Viewing this through the lens of legal fiction helps us see the Court's decision as a process of knitting the various physical and social features of the kirpan (its religious and social symbolic meaning, as well as its physical features) together into the reality of the law. Ultimately, the Court reconciled the divergent views of the kirpan by describing the kirpan in the language of constitutional values—of diversity, tolerance, and respect. The emerging image of the kirpan wove together the understandings of individuals (Sikhs and students) and different groups (Sikh communities and schools) through the story of legal constitutional values. As a result, the kirpan became a fiction within the law of multiculturalism and religious freedom, which the Court said required respect and accommodation from everyone within the law's world.

If we break down the majority analysis in *Multani* and examine how the process of forming the legal meaning of the kirpan works, we will see that the decision is an excellent example of the rich intersection between different forms of meaning that occurs with a legal fiction. In this sense, the *Multani* decision is a positive example of the law's apprehension of religion as a legal fiction. However, the decision suffers from a lack of consistency in its treatment and a lack of transparency in the assertion of legal meaning in the process of synthesizing the various meanings within the legal fiction of the kirpan. As a result, the legal fiction produced in the law's apprehension of the kirpan fails to recognize the active role played by the Court and its understanding of legal constitutional values, and so fails to respect one of the fundamental limits of legal fictions—to prevent one form of meaning from dominating the scope of what is understood to be real and true. Put slightly differently, the Court's apprehension of the kirpan was offered as a way to resolve the tensions surrounding the different forms of meaning given to the kirpan. But, as was seen in the earlier discussion of legal fictions, legal fictions do not resolve or transcend these tensions. Imagining that a legal fiction can do this is to misunderstand the legal fiction as something more than it really is. Legal fictions are grounded in the tensions between different meanings of the thing (in this case, the kirpan) and, in a sense, depend on these different forms of meaning to remain alive.

Both the majority and minority opinions of the Court recognized the intersection between the religious and physical meanings of the kirpan in deciding the case. For the majority, Justice Charron described the kirpan as "a religious object that resembles a dagger."[129] Likewise, the minority described the kirpan as "while a kind of 'knife,'…above all a religious object."[130] The clear use of "fictional" language to frame the law's apprehension of the kirpan is noteworthy here, as is the initial prioritization of the religious meaning of the kirpan. Finding for the majority that there was a violation of Mr. Multani's religious freedom, Justice Charron said that it would be wrong to focus entirely on the physical characteristics of the kirpan.[131] The fact that the kirpan was a large (and potentially dangerous) knife did not mean that it could not be protected as a matter of religious freedom. On the other hand, the Court also noted that despite its "profound religious significance," the kirpan "also has the characteristics of a bladed weapon and can therefore cause injury."[132] The physical features of the kirpan established a rational connection between banning the kirpan from school and the legislative goal of fostering reasonable safety in school. These two aspects of the kirpan collided at the stage of evaluating whether a total ban from school "minimally impairs" young Gurbaj Multani's religious freedom, or whether it was possible to accommodate him in a way that did not impose an undue burden on the school (and fellow students).[133]

The question for the Court was what to do with this collision between the religious and physical aspects of the kirpan. What legal salience should be given to the religious meaning of the kirpan for the appellant, Gurbaj Multani, and how does this fit with the risks of allowing the kirpan into school? In other words, what *is* the kirpan within the law's reality? Framed this way, the answer is a legal fiction, because it stands between multiple contradictory claims about the meaning of the kirpan.

The Court struggled to navigate between the competing meanings. According to the school board, there was a risk that the kirpan would be used for violence and

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129. *Ibid* at para 3.
130. *Ibid* at para 98.
131. See *ibid* at para 37. As Justice Charron notes "[t]he question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan."
132. *Ibid* at para 49.
133. *Ibid* at para 52. The Court held that the constitutional standard of "minimal impairment" (part of the proportionality analysis established in *Oakes*, *supra* note 123) requires "reasonable accommodation" (where the argument of "undue hardship" comes from).

that this possibility would negatively affect the school environment.[134] Regarding the risk that the kirpan would be used for violence, the Court noted that there was no evidence that the appellant, Gurbaj Multani, posed such a risk.[135] The Court went on to note some very broad evidence showing that there were almost no recorded incidences of Sikhs using their kirpans for violence.[136] In particular, the Court noted that there have been *no* reported incidents of a kirpan being used for violence in an Ontario school over the last 100 years.[137] This remarkable fact was attributed to the Sikh understanding of the kirpan as a symbol of peace that was not to be used for violence. For the Court, this evidence showed that there was no support for a total ban of kirpans from school on the basis (as tendered by the school board) that "kirpans are inherently dangerous objects."[138]

From these observations, it appeared that the Court was setting up to say that in spite of the physical design of the kirpan, the religious beliefs of Sikhs could be trusted, such that in the eyes of the law, a kirpan in the hands of a Sikh is not dangerous and poses no risk to the public. Instead, the Court appealed to other contextual factors that mitigated the risk that the kirpan could be used for violence. In particular, the Court relied on the fact that the kirpan was rendered inoperative under the conditions of accommodation imposed by the Superior Court.[139] The Court also insisted on the importance of environmental context for determining reasonable restrictions on kirpans. The ongoing relationship between Mr. Multani and the school was important for evaluating the risk involved in carrying the kirpan. This unique feature of the school environment distinguished other contexts, like courtrooms and airplanes, where bans on kirpans have been judicially upheld.[140]

On the surface, these factors seem like sensible and pragmatic parts of the decision. As long as the harmful potential of the kirpan is neutralized—as the Court found it was in this case (both in terms of the conditions imposed on Mr. Multani to carry the kirpan, as well as on the statistical non-violent usage of kirpans in the hands of a Sikh)—then there is no reason to prohibit it in school.

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134. *Multani*, *supra* note 23 at para 55.
135. *Ibid* at para 57.
136. *Ibid* at paras 59-61.
137. *Ibid* at 59.
138. *Ibid* at para 67.
139. *Ibid* at para 98. In the concurring words of the minority decision, the kirpan was "almost totally stripped of its objectively dangerous characteristics."
140. See *ibid* at paras 63-66. The Court distinguished *Hothi v R*, [1985] 3 WWR 256 *[Hothi*], which prohibited bringing a kirpan into an assault trial; and *Nijjar v Canada 3000 Airlines Ltd* (1999), 36 CHRR D/76 (CHRT) [*Nijjar*], which prohibited a kirpan on an airplane.

From this view, some danger can be tolerated, but not too much. While the Court was satisfied that the danger was neutralized based on the facts of the case, they were not satisfied that the conditions would be met elsewhere.

However, it does not seem that a pragmatic solution was what the Court was after. The Court returned in its reasons to insist on the importance of the religious symbolic meaning of the kirpan in response to the second "minimal impairment" argument put forward by the school board. Relying on expert evidence (from a psychologist) that the presence of the kirpan in school would poison the school environment, the school board alleged that to allow Multani to carry the kirpan would send the message that weapons are a legitimate way to resolve conflict and would incite feelings of unfairness towards Sikh students.[141] The Court responded to this argument by saying that religious tolerance is an important value in democratic society and schools have a special role in instilling this value in students.[142] The attitude that disregards the symbolic religious value of the kirpan because of its physical features stifles the promotion of multiculturalism, diversity, and respect for those who are different.[143] As such, "[a] total prohibition against wearing a kirpan to school undermines the value of this religious symbol."[144] The possibility (or probability) that the kirpan would incite this type of response from students was not a reason for banning it. Instead, it exposed people's ignorance of Sikhism. The Court saw the negative perception of the kirpan as a call to the education system to double its efforts to promote awareness of different cultures and religious traditions so that people would know that a kirpan is not a weapon for a Sikh, but a symbol of peace.

It is helpful to note that the kirpan, as an object with symbolic religious meaning, does not speak for itself. As Suzanna Mancini noted, "Symbols do not have a univocal significance…the significance attributed to [objects] reflects the culture, the beliefs, the choices of those who see them."[145] The "reality" and meaning of the kirpan is always mediated through people in the community, whether that be Sikh individuals and their community, or the risky and dangerous meaning perceived by other students and the school. The same is true for the Court's apprehension of the kirpan in law. The Court's statement, quoted above, that a total ban on the kirpan undermines its value, should be seen not just in

141. *Multani*, *supra* note 23 at paras 70-74.
142. *Ibid* at para 76.
143. *Ibid* at para 78.
144. *Ibid* at para 79.
145. "The Power of Symbols and Symbols of Power: Secularism and Religion as Guarantors of Cultural Convergence" (2009) 30 Cardozo L Rev 2629 at 2655.

terms of the Sikh religion but also in terms of the law's reality. In the course of making its decision the Court apprehended the kirpan, and in doing so gave it value *for us* in the law.

To see the law's apprehension of the kirpan as a legal fiction reminds us that the "reality" and meaning of the kirpan given by the law does not stand separate and apart from the process by which meaning is given to it in these different contexts. This intersection between different forms of meaning is, of course, one of the central features of legal fiction discussed earlier. Legal fictions appear where there is a collision between different systems of meaning, created by different communities, that provide different meanings for the thing at issue. Here, we see a collision between the forms of meaning provided by the school, by the Sikh faith, and by the law.

There is another layer of complexity here because the law's apprehension of the kirpan involved the intersection not just between the meanings of the school and the Sikh religion, but also of the values of the law itself. In order to determine the legal meaning of the kirpan—to apprehend it in the law, and to set the law's response to the conflict in the *Multani* case—the various other meanings (religious and otherwise) were subsumed into a higher order of meaning established in the law. The Court's analysis showed that, for the purposes of law, the kirpan does not only represent what Sikhs believe (peace, non-violence, et cetera.), nor what other common members perceive. Instead, the Court cast the kirpan as a symbol of the constitutional values of multiculturalism, tolerance, diversity, and respect. This settlement of the meaning of the kirpan is oriented around what the kirpan means "for us" and for the purposes of the law, within the social context of the Canadian political and legal tradition.

This is precisely the kind of collision and knitting together of different forms of meaning described in the earlier discussion of legal fiction. The trouble with the Court's analysis is that it did not display any real awareness of, or reflection on, the interactive process at play in its decision between these various meanings and the meanings and purposes of the law. In order to fully articulate the meaning of the legal fiction of the kirpan established here, the Court would have to clarify the purposes of the law in order to show how the diverging perceptions of the kirpan are drawn together to achieve something "for us."

The successive shift from the Sikh tradition's understanding of the kirpan, to a pragmatic risk analysis, and then back to a reassertion of the value of the religious meaning of the kirpan, is somewhat mystifying. It shows a complex series of layers and tensions between the various sources of meaning that informed the apprehension of the kirpan in the law. Although the Sikh religious tradition

was mentioned by the Court, it was not engaged with in any depth.[146] This would be consistent with the *Amselem* principle that the concern of a court of law is not to determine the Sikh tradition's understanding of the kirpan, and that the legally salient source of the kirpan's meaning should be the disposition of an individual's inner self.[147] However, the Court referred to the Sikh tradition, not to evaluate the sincerity of Mr. Multani's beliefs, but to elaborate on and develop the democratic and constitutionally protected values of multiculturalism and religious tolerance. The negative perception of the kirpan and what it represents (a symbol of violence) was also recast in reference to the same constitutional values.

The pragmatics of law and the ideological purposes of the constitutional values present in the Court's analysis stand at odds with each other. If the law's purpose is pragmatic, then it would seem unnecessary to say that the failure to accommodate Multani's kirpan in school was an affront to multiculturalism and religious diversity. The evidential facts that reduce the dangerousness of the kirpan should carry the day. But if the law's purpose is to promote and advance constitutional values, then it is not clear what role the evidence of Sikh non-violent use of the kirpan should have. Simply relying on evidence of safety without further explanation suggests that multicultural and religious tolerance depend on the physical risks and dangers of the culture and religion in question. From this perspective, even though culture and religion "win," they actually lose, given that the decision to tolerate the carrying of a kirpan is not due to its cultural or religious meaning but despite it. This seems to undermine the ideological goals of multiculturalism and religious accommodation.[148]

The trouble is not that the religious meaning was considered alongside the dangerous physical features of the kirpan, nor that the law integrated the religious meaning and other social perceptions of the kirpan into a unified order

146. The Sikh understanding of their religious practices and identity, which includes carrying the kirpan, has evolved through a rich (and contested) historical tradition. See generally Harjot Oberoi, *The Construction of Religious Boundaries: Culture, Identity, and Diversity in the Sikh Tradition* (University of Chicago Press, 1994). See also Pauljit Bhandal, "Problems with the Current Interpretation of Section 2(a) of the *Charter*" (2019) [unpublished, on file with author].

147. See *Amselem*, *supra* note 3 at para 43.

148. See B Berger, *Law's Religion*, *supra* note 7 at 158-59. Berger observes, albeit in a slightly different context:

> Even if I am successful in my religiously motivated claim, culture was irrelevant to the legal conclusion. If my position is legally acceptable, it is so despite my cultural commitments and only to the extent that I was capable of stripping my claim of the terms that make it meaningful to me in the first place. The "win" is not a product of cross-cultural understanding; rather it turns on the successful suppression of the dimension of culture.

of constitutional meaning. Rather, the problem is that the Court did not provide the conceptual grounds in its reasons for the connection it drew between the physical characteristics, the individual subjective meanings, and the collective meanings given to the kirpan. Instead, we were left with the mere *assertion* of the law's constitutional framework to coordinate the physical, cultural, social, and religious dimensions of the case. This fails to explain how the different meanings at stake relate to each other and how the intersection between them could lead to the production of, and possible articulation as, a form of legal meaning.

Had the Court in *Multani* openly addressed the kirpan as a legal fiction, it could have offered a more coherent account of its decision. Rather than shifting back and forth somewhat confusingly between different factors related to the kirpan and then asserting the constitutional values as primary, the notion of legal fiction would have made it possible to acknowledge these tensions and relate them to the legal fiction of the kirpan. The court's reasoning would be less troubling because it would then be seen as constructing the legal fiction of the kirpan for its own purposes rather than trying to find and assert something of what is really real about the kirpan. Distinguishing the legal fiction of the kirpan as a symbol of multiculturalism from the external truth and reality of the kirpan would have preserved the integrity of the Court's reasoning, as it would hold the Court's view of the kirpan in dynamic tension with the various lived experiences of those connected to the kirpan—the religious Sikh community and those in the school. This is precisely what legal fiction recommends. The legal fiction of the kirpan must retain the dynamic tensions of the intersection between different meanings and communities. It synthesizes these meanings within the reality of the law and for the law's purposes; however, the synthesis is only tentative and must be seen as such.

The Court's failure to engage in *Multani* with the terms of interaction between different forms of meaning when apprehending the kirpan shows the importance of taking the interactive process of legal fiction into account within legal analysis. This is evident in the challenges the Court encountered when trying to hold the different forms of meaning together in a coherent legal analysis. It is also evident in the way that that the Court's apprehension of the kirpan left the matter beholden to a world structured by the law and out of the reach of critical reflection. Approaching the law's apprehension of religion in light of the nature and limits of legal fiction, as discussed earlier, brings the interaction between meanings to the foreground and allows us to recontextualize and reflect on the appearance of religion within the law's reality. This is an important step towards

a better understanding and deeper engagement with the legal adjudication of religious claims.

C. KTUNAXA NATION—*DIVIDING THE SUBJECT AND OBJECT OF FAITH*

In *Ktunaxa Nation*, we see the Court struggling to find a way to make sense of a land-based dimension of an Indigenous spiritual claim within the framework of religious freedom jurisprudence. The big question that the Court needed to address was how to fit an object that is the source of religious meaning—here, the Grizzly Bear Spirit believed by the Ktunaxa to reside in a particular geographical location—within the law's conception of religion as protected in section 2(a) of the *Charter*.[149] This question parallels the *Multani* case insofar as it touches on the way in which the law's apprehension of a particular religious object does not happen in isolation from a much more complex interaction between legal and religious forms of meaning. But the Court's approach to answering the question in *Ktunaxa Nation* was unique. Here, the Court distinguished between the subject and object of religious belief and refused protection of the latter within the scope of religious freedom. I argue that this solution highlights a deficiency in the Court's understanding of the process of law's apprehension of religion. In particular, by separating the subject and object of belief, the Court portrayed religion in static terms, which divorced Ktunaxa beliefs from the reality of the lived Ktunaxa religious experience. On the one hand, this made the matter easy for the Court to dispense with. On the other, it left the Court unable to fully engage with the religious claim. Not only did this exclude protection for the Ktunaxa religious claim, but it also hid the intersection between legal and religious forms of meaning at stake in the case. The legal form of meaning is asserted over the religious without allowing an opportunity to reflect on and engage with either the Ktunaxa conception of its religious beliefs or the underlying basis of the law's conception of religion.

The *Ktunaxa Nation* conflict arose when the British Columbia (BC) government approved a proposal to develop a year-round ski resort in the Jumbo Valley of the east Kootenay Mountains. The Jumbo Valley is located within the traditional territories claimed by the Ktunaxa Indigenous communities and is known to them as Qat'muk, which is the place where the Grizzly Bear Spirit lives. There was a long and drawn-out process of reviews, studies, and discussions beginning in 1991, leading to the approval of the development plan in 2011.[150]

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

150. *Ktunaxa Nation* SCC, *supra* note 24 at para 13.

The Ktunaxa were involved from the earliest stages and constantly resisted the development throughout the process. They expressed concern about the effects of the development on the land and on local animals (especially the local grizzly bear population). Their resistance was grounded in a sense that the land is sacred and contributes to the cultural and religious life of the Ktunaxa communities. When the development was approved, Ktunaxa sued. They argued that the approval violated their 2(a) religious freedom and section 35 rights (under the duty to consult). A key premise of their claim was that the proposed development in Qat'muk would drive the Grizzly Bear Spirit away and, hence, decimate the spiritual lives of the Ktunaxa people.

For the Ktunaxa, the spiritual value of the land is a fact of the nature of the land itself and is intricately connected to the religious beliefs of the Ktunaxa people. As one affiant explained, "spirits like Grizzly Spirit have their own places. The Creator has put them here with us to help us lead happy lives in this world. Their places are not our places. We cannot treat these places any way we want… To destroy a spirit's place, to make it unsuitable to the spirit, would make the spirit homeless."[151] For the Ktunaxa, the land is not empty but has a nature, a spirit, with value and interests of its own. For the Ktunaxa, their religion is dependent on the land. The Qat'muk valley is a spiritual anchoring point for the community. One affiant declared that "Qat'muk provides for our Ktunaxa culture security in the present and continuity of that spiritual and cultural security into the future. It enables Ktunaxa citizens collectively to renew and continue, and in certain cases individually to tap into deep and anchored roots in the world as Ktunaxa."[152]

For the SCC, these two dimensions of the Ktunaxa claim—that the land has religious significance on its own and that the religion of the community depends on the land—could not be held together but had to be separated. The majority of the SCC agreed with the lower courts to uphold the approval of the development and refuse to protect the spiritual interest claimed by the Ktunaxa.[153] The central

151. *Ktunaxa Nation* SCC, *supra* note 24 (Factum of the Appellant at para 22).

152. *Ibid* at para 27.

153. *Ktunaxa Nation* SCC, *supra* note 24 at paras 8, 115. See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 [*Ktunaxa Nation* SC (TD)], aff'd 2015 BCCA 352 [*Ktunaxa Nation* CA]. Both the Supreme Court of British Columbia (BCSC) and the Court of Appeal of British Columbia (BCCA) upheld the government approval of the development plan, refusing to protect the Ktunaxa spiritual claim. The focus of both the BCSC and BCCA was that religious meaning could be used to restrict or guide others in the otherwise lawful use of land. The BCSC held that section 2(a) of the *Charter* does not confer a right to restrict the otherwise lawful use of land on the basis that such use would result in loss of meaning to religious practices carried on elsewhere (*Ktunaxa Nation* SC (TD), at para 296). The BCCA held that section 2(a) of the

dictum of the SCC decision was to distinguish between the subject and object of religious belief and to clarify that religious freedom does not extend to protect the object of belief—it protects only the freedom to hold or to manifest a belief: "In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship."[154]

Dividing the subject and object of religious belief had a significant effect on the way that the Court construed the Ktunaxa religious claim. The majority framed the Ktunaxa claim as "not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, [the Ktunaxa] seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it."[155] It is interesting to note that the Court here did not deny that the Grizzly Bear Spirit might be present in Qat'muk. Rather, this *spiritual fact* was treated as irrelevant because the freedom protected in section 2(a) is entirely concerned with the freedom to hold and manifest belief. Belief here is distinguished from the spiritual facts on which belief is based. What is protected is *the ability to try* to derive spiritual meaning from an object and the *ability to pursue* spiritual meaning, not the spiritual meaning itself. Belief, therefore, is portrayed as the triumph of the subject and what the subject is able to derive from the object of belief. The Court conceptualized religious freedom in a way that severs the beliefs of individuals from the objects of those beliefs.

This is a legal fiction about the nature of religious belief. Dividing the subject and object of faith, as the majority did, apprehended the religious dimension of the Ktunaxa claim separate from the social-symbolic process by which that religious meaning is created. Protecting subjective belief and excluding protection for the object of belief denies the possibility of religious meaning persisting external to the believing subject, which the Ktunaxa said was their experience. As discussed earlier, the process by which symbolic meaning is created suggests that symbolic objects—like religious objects—actually do take on a level of reality and autonomy separate from the subjects that give them meaning. Individuals and their religious communities vest objects with religious symbolic meaning. Once the symbolic meaning is created, it gains a life and force of its own. Religious objects in turn influence the beliefs of the individuals who vested the object with

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Charter does not apply to protect the subjective meaning of a religious community when the subjective meaning depends on others being required to act (or refrain from acting) in a manner consistent with a belief that they do not share (*Ktunaxa Nation* CA, at paras 73-74).

154. *Ktunaxa Nation* SCC, *supra* note 24 at paras 70-71.

155. *Ibid*.

religious meaning.[156] This is not to say that religious objects are above subjects, because to do so would fetishize objects. Rather, it is to emphasize the dialectic process of engagement between subjects and objects of faith.

The Court's decision to divide subjects and objects of belief rather drastically isolates and flattens the idea of religion and religious meaning within the law. The only reality that matters is the reality of the free subject; the only thing that is sacred is what the individual can make sacred on her own. This undoubtedly is tethered to a particular, and popular, view of the philosophical commitments of liberal democratic order.[157] There is no acknowledgement or engagement with this in the judicial analysis. Instead, the fictional division of the subject and object of belief is taken as true and natural to religion. The intersection between the legal and Ktunaxa forms of meaning in the law's apprehension of religion is overlooked, and the result is a fairly stark privileging of the legal conception of religious belief. As a result, the religious claim of the Ktunaxa is apprehended as non-religious for the purposes of section 2(a) of the *Charter*.

Touching on this point, Justice Moldaver argued in dissent that protecting only the believing subject, divorced from the religious meaning of religious objects, is nothing more than a formal protection of empty gestures and hollow actions.[158] Justice Moldaver said that it must be recognized that the law's interference with religion cannot be seen through only one particular vision of what counts as religious "belief": "To ensure that all religions are afforded the same level of protection under section 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices."[159] Failing to do so, in his view,

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156. For a thorough discussion of the dialectics of symbolic meaning and ritual in the context of religious formation, see especially Asad, *supra* note 100, ch 1. For an extensive and illuminating study of the function of symbolic meaning in relation to the Christian religious experience, see CJC Pickstock, "The Ritual Birth of Sense" (2013) 162 Telos 29; Louis-Marie Chauvet, *Symbol and Sacrament: A Sacramental Reinterpretation of Christian Existence*, translated by Patrick Madigan, SJ & Madeline Beaumont (The Liturgical Press, 1995). This dynamic in religion is also reflected in the law. For a discussion of this in relation to legal language and interpretation, see Roderick A Macdonald & Jason MacLean, "No Toilets in Park" (2005) 50 McGill LJ 721.

157. For two cogent articulations of the intersection between the philosophical and legal theories in this regard, see Ronald Dworkin, Religion Without God (Harvard University Press, 2013); Laborde, *supra* note 9. See also Rafael Domingo, "The Dworkinian Religion of Value" (2014) 29 JL & Religion 526 (commenting on Dworkin's theory of religion and its connection to religious freedom jurisprudence).

158. *Ktunaxa Nation* SCC, *supra* note 24 at para 130.

159. *Ibid* at para 128.

excludes non-Western religious experiences from the protection offered under section 2(a) of the *Charter*. In particular, Indigenous religions, with their unique attachments to land, will have no place in constitutional protections for religious freedom.[160]

Although Justice Moldaver's argument shifted from focusing solely on the subject to also include the object of religious belief, it still neglected another crucial element of law's apprehension of religion as a legal fiction: the *process* by which the law's apprehension of religion involves an interplay between legal and religious forms of meaning. This can be seen in his reference to the *Amselem* dicta that "it is the religious or spiritual essence of an action" that attracts protection under 2(a).[161] Focusing on religious "essence" posits a new focal point for religious protection. It is no doubt a step forward to see religion as something more than the beliefs of individuals, as also including cultural and symbolic attachments. However, objectifying religion as some sort of cultural phenomenon that has to be apprehended and protected in its own unique terms actually reinforces the problem identified with the majority decision. The majority saw religious freedom as a formal protection for subjective pursuit of belief, whereas Justice Moldaver saw religious freedom as a substantive protection for a more robust sociological phenomenon that includes rituals and practices alongside beliefs. Both apprehend religious meaning in static terms, and both portray this conception of religion as somehow natural to the religious element protected in the *Charter*.

The static view of religion affects not only the way that religion is conceptualized but also the way that law is able to engage with religion in reasoning towards a solution to the conflict.[162] This can be seen in two key points that did not factor into the Court's analysis of *Ktunaxa* as significantly as one might have expected. First is the fact that the Ktunaxa religious claim was raised extremely late in the consultation process.[163] Second is the fact that the development site in the Qat'muk was previously developed and used for mining.[164] The questions that these facts raise have to do with the evolution of the Ktunaxa religion in relation to the Qat'muk. Although the SCC majority recognized that religions are able to evolve with time, specifically in relation to the late revelation of the

160. *Ibid* at para 131.
161. *Ibid* at para 130, citing *Amselem*, *supra* note 3 at para 47.
162. For a similar line of argument about a flattened view of religious reasons for particular religious actions, see Blair Major, "Translating the Conflict over Trinity Western University's Proposed Law School" (2017) 43 Queen's Law Journal 175.
163. *Ktunaxa Nation* SCC, *supra* note 24 at paras 6, 35-43.
164. *Ktunaxa Nation* SC (TD), *supra* note 153 at paras 19 and 280. The Court of Appeal and Supreme Court did not mention the mine in their reasons.

impact that the development would have on the Ktunaxa religion,[165] they did not (and could not) engage with this evolutionary process within the parameters they set for themselves. It is noteworthy that most of the Ktunaxa did not know or understand that the development would *expel* the Grizzly Bear Spirit from Qat'muk and *destroy* their religious beliefs.[166] This is connected to the other important point, which has to do with the previous use of the Qat'muk. The site of the proposed ski development was previously developed and used for mining, and the area is regularly used for a range of activities.[167] The Ktunaxa claim did not set out clearly why the current development and activity would destroy the Ktunaxa religion when the previous mining development and current skiing activity did not. The fact that the Grizzly Bear Spirit and the Ktunaxa religion survived both the previous mining development and the ongoing skiing activity might indicate that they could also survive the development of the ski resort.

Introducing the ideas discussed earlier regarding legal fiction would allow the courts to engage more fully with what is at stake for religious individuals and communities. Specifically, the court would be attuned to the social-symbolic process by which religious meaning is created and evolves, and how the law's apprehension of the religious claim is intertwined with this. The point is not to hold the Ktunaxa religion to an objective standard by which it reasons through its religious claims, but rather, to be able to work the dynamism of individual and communal religious belief with the condition of the land into the legal evaluation of their religious claim. Instead of dismissing the Grizzly Spirit as an irrelevant fact, perhaps it should be made the focus of the legal analysis, like the kirpan was in the *Multani* decision. In other words, the Court could have treated the Grizzly Bear spirit as a fiction where law and religion meet, and their different forms of meaning intersect. Of course, the Court would have to be mindful of the lessons learned in the *Multani* and *Bentley* cases, keep its statements about the legal fiction of the Grizzly Spirit tentative, and clearly appreciate the temporary and passing nature of the fiction.

What we see instead is both the majority and minority of the Court avoiding the challenges of the criss-cross interaction between law and religion, settling instead for a static view of religion that is more readily assessed and managed in the law. The result is an assertion of the law's concerns over and against the religious experience of the Ktunaxa. This privileging of the social reality underpinning

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165. *Ktunaxa Nation* SCC, *supra* note 24 at para 69.
166. *Ibid* at para 99. This is inferred by the Minister's argument that the Late-2009 claim is "weak."
167. *Ktunaxa Nation* SC (TD), *supra* note 153 at para 280.

the law is precisely what the earlier discussion of legal fiction warned against. Portraying section 2(a) of the *Charter* as interested in and capable of accounting for and protecting only subjective religious belief, as the majority did, nullified the Ktunaxa understanding of the continuity between human life and nature, instead positing the individual as the sole source of religious meaning and agency.

The minority decision asserted the predominance of the law's reality more subtly. I already mentioned that focusing on religious objects also sees religion as a static phenomenon. The privilege of the law's reality comes through much stronger later on in Justice Moldaver's reasoning when discussing the balancing of the minister's statutory objectives with the Ktunaxa claim.[168] Remarkably, Justice Moldaver found that the Ktunaxa religious claim—that its religion will be destroyed by the ski development—was outweighed by the objective of the BC Ministry to administrate and dispose of Crown land in the public interest.[169] The reason offered was because granting the Ktunaxa claim "would effectively transfer the public's control of the use of over [fifty] square kilometres of land to the Ktunaxa," which would "undermine the objectives of administering Crown land and disposing of it in the public interest."[170] In other words, since the Ktunaxa claim threatened the exclusive authority of the Minster over the land, it jeopardized the Minister's public interest objective. Framed in such stark and absolute terms exposes a gap between the Ktunaxa interest and the public interest. For Justice Moldaver, the gap cannot be crossed. Both the public interest and the Ktunaxa claim are immovable positions. All the Court can do is make a choice about which one to support.

Simply making a choice between public interest and the religious claim, as two static alternatives, does not adequately address the complex relationship between legal, religious, and other social and institutional meanings. Why could the Ktunaxa claim not be understood as a function of public interest?[171] Or, why not see the calculus of the public interest as including the preservation of the Ktunaxa religion? Considering these integrative possibilities would require a frame of reference for viewing the religious claim and the ministerial objective in terms that go beyond a static view of religious life and the sovereignty of law. This is precisely what the perspective of legal fiction provides.

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168. *Ktunaxa Nation* SCC, *supra* note 24 at paras 145-55.
169. Justice Moldaver outlined the statutory objectives of the Ministry. See *ibid* at para 145.
170. *Ibid* at para 152.
171. See Dwight Newman, "Implications of the *Ktunaxa Nation* / Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, ed, *Religious Freedom and Communities* (LexisNexis, 2016) 309.

The *Ktunaxa Nation* decision reveals a failure of the Court to adequately recognize the social-symbolic process of religious meaning formation. It also shows a lack of judicial awareness of the privilege given to a particular conception of reality in the evolving doctrine of religious freedom.[172] It is necessary to find a way to bring the law's apprehension of religion forward to become a point of reflection and justification within the judicial process. I argue that the lens of legal fiction enables judicial recognition of the social and institutional processes and related limits of the law. Such recognition does not undermine the purposes of the law but brings the law alongside the social and institutional processes of religion. Indeed, it may actually enhance the quality and the legitimacy of the justifications provided by the courts, especially in religious freedom cases. This would no doubt have been true in the *Ktunaxa Nation* decision, which seemingly discounted Indigenous religious claims from the constitutional protection of religious freedom.

Legal fictions are not only about objects. The abstract conception of religion in law is, in itself, a legal fiction. We see this clearly in the *Ktuanxa* decision, where the court narrowed the scope of what is protected by religious freedom to exclude the claim made by the Ktunaxa Indigenous claimants. A key part of this was the distinction drawn by the court between the believing subject and the object of their belief. This particular view of what constitutes "religion" for the purposes of religious freedom is a legal fiction, and there is a discernible gap between it and the lived religious experience of the Ktunaxa people. This essentialized and static view of religion has two effects. First, in clearly missing the mark of what constitutes religious belief as a symbolic form of meaning, the decision nullifies an important dimension of the process by which religions form their own meaning. Secondly, the essentialized view of religion neutralizes the fictional nature of the law's apprehension of religion and places these elements outside the reach of judicial discourse.

The result is that the law's apprehension of religion fails to capture what is an otherwise obvious religious element to the claim. This negatively affects the ability of the Ktunaxa to bring their religious claims to law, robbing them of the opportunity to engage in legal argument regarding the purposes of law. It also negatively affects the depth of engagement available to the law—and the judiciary—regarding the religious claim. If the claim regarding the life of the Grizzly Bear spirit were conceptualized as a legal fiction, then the court could actively engage with the Spirit *as a legal fiction*, criss-crossing the legal and

172. See Natasha Bakht and Lynda Collins, "'The Earth is our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62 McGill LJ 777.

religious systems of meaning. This might enable the court to develop a much more robust analysis and response to the Ktunaxa claim, which may actually engage the Ktunaxa people in terms that they can understand and internalize in their own symbolic form of meaning (instead of the stilted response given by the Court). This, of course, is subject to the imperative that the law's apprehension of the Great Bear Spirit must not negate the complex social-symbolic processes connected to the religion of the Ktunaxa people. Instead, seeing the law's apprehension of the religious claim as a legal fiction would enliven the court's interaction with the Ktunaxa and develop a clearer connection between the religious and legal orders of meaning.

IV. CONCLUSION

The law's apprehension of religion cannot capture the fullness and complexity of religious life. In this article, I argue that we are better off recognizing this fact and incorporating it into legal analysis in a meaningful way. The suggestion that I put forward to this end is that the law's apprehension of religion should be viewed through the lens of legal fiction. Doing this reframes the relationship between law's conception of religion and the lived experience of religious life. It shows that the correspondence between these two is not a matter of truth or falsity but rather a complex criss-crossing of social realities, and the collision of different forms of meaning. In this way, legal fiction points to a foundational aspect of human understanding in the creation of symbolic forms of meaning. This, I suggest, allows us to describe and evaluate the law's apprehension of religion functionally, not in terms of the specifics of what is or is not apprehended in law, but in terms of the *process* of the apprehension itself.

A key element emerging from this analysis is the idea that legal fictions—especially the legal fictions of religion, religious beliefs, and objects—manifest the intersection between different systems of meaning. Separating religion (whether religious objects, beliefs, or other meanings) from their traditions betrays the way in which legal fictions are necessarily embedded in the criss-cross of social realities. Treating religion in law as an object with objectively discernible meaning rather than as a living tradition hides the law's role in *constructing and giving meaning to religion within the reality of law*. This gives the impression that religion really is as the law apprehends it. Placing the law's apprehension of religion "above the fray"[173] like this neutralizes any discussion of it in terms of the ethical demands

173. B Berger, *Law's Religion*, *supra* note 7 at 12.

and the limitations of the interaction between the law and religion. In other words, it allows the law to exert its symbolic power—via the apprehension of religion—in total disregard of religious meaning, the social processes of meaning formation within religion, and the intersection between religion, law, and other social forms of meaning. Viewing the law's apprehension of religion as legal fiction combats this tendency by exposing it and opening it to scrutiny.

The analysis of the *Ktunaxa Nation*, *Multani*, and *Bentley* decisions demonstrated, in a preliminary way, what it looks like to recast the law's apprehension of religion in terms of legal fiction. *Multani* displayed how the law's apprehension of religion involves a complex and dynamic interweaving of meanings together within the frame of constitutional reality. The legal construction of meaning is itself caught up in the process of the social construction of meaning, which centres on the law's encounter with other forms of meaning (such as the religious). *Ktunaxa Nation* demonstrated that legal fictions may operate at a broader level of conceptualizing religious beliefs and are not restricted to objects of belief. Legal fictions play an important role in the law's apprehension of religious belief, and if utilized properly, may dramatically expand the horizon of meaning available within the legal analysis of religious freedom. *Bentley*, which started off this article's analysis, revealed the challenge of facing the gap in the law's apprehension of religion. It also contains one of the most important general lessons of legal fiction: Although the law's apprehension of religion must be viewed in terms of the law's purposes, not measured by the "truthfulness" of its correspondence to lived religious experience, the law must nevertheless apprehend religion with a healthy measure of humility and restraint.

The courts will apprehend religion through the lens of legal reality, which causes distortions, confusions, and challenges. But, as long as our view of the law's apprehension of religion is framed in terms of legal fiction, these challenges are not insurmountable. Legal fiction and the attending social-symbolic process of meaning formation provide an opportunity for a deeper and richer discussion and analysis of the law's apprehension of religion. It enables a description of both the legal and the religious perspective, and it opens the door to incorporate into legal analysis the interactive development of legal and religious meaning. This is not to say that the idea of legal fiction provides a complete solution, but it does offer a crucial step forward in the way we understand and evaluate the judicial treatment of religion and the law's interaction with religion more generally.