

Legal Words are Latent Thoughts:
Understanding Discourse
Around Aboriginal Religion in
Delgamuukw v. British Columbia

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Abstract: When Aboriginal issues involving Aboriginal religion come up in Canadian courts the religious aspects are avoided and pushed to the margins of the case and freedom of religion is not addressed. This article focuses on the Supreme Court case of *Delgamuukw v. British Columbia*, a land claims case where religion is again in the periphery, in order to determine how Aboriginal religions are being framed and conceptualized in court (by both the Court and by Aboriginal peoples). It will do so by examining the legal text surrounding the sacred oral traditions and histories of Aboriginal peoples, by investigating references the Court makes to Aboriginal religions, and by discussing the implications of the Aboriginal title discourse for Aboriginal religions. More generally, this article brings to attention some of the issues that Aboriginal peoples' religious traditions face in terms of freedom of religion in Canada.

Introduction

Religious freedom for Aboriginal religions¹ in Canada is

¹ I want to bring awareness to the fact that the terms “Aboriginal religions” are contentious. First, there are multiple terms used to refer to Aboriginal peoples in Canada, such as Aboriginal peoples and Indigenous peoples. Both of these terms refer to First Nations, Metis and Inuit simultaneously. Making the statement that Aboriginal peoples are in Canada rather than Canadian has implications on how one conceives of Aboriginal peoples in relation to the

something that Canadian courts have not dealt with explicitly under the *Canadian Charter of Rights and Freedoms*. When Aboriginal religious beliefs are brought up in court cases, they are typically dealt with as peripheral factors to the main disputes, namely, to hunting and fishing rights, land claims or treaty disputes.² Therefore, it is only through an examination of such types of cases – where religion is in the periphery – that an understanding of how Aboriginal religious beliefs come to be framed legally in courts (by both Aboriginal peoples as well as the bench) can be revealed. An example of this type of case, and the one which will be focused on here, is the Supreme Court case of *Delgamuukw v. British Columbia (Delgamuukw)*. In many ways *Delgamuukw* remains the standard on how issues of tradition, culture and religion come to be presented and dealt with in courts, making it a useful case study. Handed down in nineteen-ninety-seven, the *Delgamuukw* decision commenced as

Canadian government (Aboriginal people vary in the way that they conceive of themselves in this regard). I will use the former as to me it implies a more neutral view of this varying relationship. Another component of the debate surrounding these terms is that they are defined differently by the government of Canada and different Aboriginal groups (for a more in depth discussion on this see footnote 2 of Lori G. Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” *Journal of Church and State*. 44 (2002): 135. Given that the *Delgamuukw* case deals with an Aboriginal title claim brought forth by First Nations peoples, I will use these terms somewhat interchangeably but effort will be made to keep them distinct (the Court in *Delgamuukw* only uses the term Aboriginal). I will also pluralize the terms I use to account for the multiplicity and diversity of the groups encompassed in the term. Secondly, the term religion when referring to Aboriginal peoples religious beliefs in Canada is also disputed. Some have argued that the use of the term religion does not do justice to the religious beliefs of Aboriginal peoples as it is too limited in the way that it is commonly conceptualized (see Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 137). Despite my agreement with such statements I advocate that the definition of religion is what needs to be expanded and have decided to use the term religion in an effort to place Aboriginal peoples' religious beliefs on an equal footing to other religions around the world and also in order to avoid confusion in terms of what it is and what kind of protection it deserves in courts.

2 Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 136.

a title case, where a number of First Nations peoples³ in the interior of British Columbia sought title to a fifty-eight-thousand square kilometre section of land, and concluded as a case defining the boundaries of legal evidence where the oral histories of Aboriginal peoples became acceptable forms of proof in court. The *Delgamuukw* case implicitly draws First Nations religions into the discourse in two main ways, 1. because it deals with land and many First Nations have a religious connection to the earth⁴, finding particular lands or geographies to be sacred,⁵ and 2. through oral histories and traditions which are considered to be sacred to First Nations.⁶ The Court in *Delgamuukw* alludes to First Nations' religious beliefs towards the earth or particular lands in referring to Aboriginal peoples' "special interest in land" as "a *sui generis* interest that is distinct from 'normal' proprietary interests".⁷ The Court in *Delgamuukw* also makes unequivocal references to the sacredness of oral histories and oral traditions to Aboriginal peoples.⁸

3 The Gitksan and Wet' suwet'en nations.

4 For examples of religious relationship that some Aboriginal peoples have with land see Gordon Christie, "Delgamuukw and the Protection of Aboriginal Land Interests," *Ottawa Law Review* 32 (2000-2001): 89-90 & notes.

5 For Aboriginal peoples that see particular geographies as sacred see: John Borrows, "Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution," in *Law and Religious Pluralism in Canada*, ed. Richard Moon. (Vancouver: UBC Press, 2008), 161-191; Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts*, (Vancouver: UBC Press, 2005); and Jill Oakes, Rick Riewe, Kathi Kinew, and Elaine Maloney, eds. *Sacred Lands: Aboriginal World Views, Claims, and Conflict*, (Edmonton: Canadian Circumpolar Institute, 1998).

6 See David McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario*, (Waterloo: Wilfrid Laurier Press, 1999), 1-20.

7 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 125. For a discussion on '*sui generis*' and its meaning (means 'unique') see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002), 9. The claim that '*sui generis*' also refers to Aboriginal religious views towards the earth is made by James (Sakej) Youngblood Henderson, "The Struggle to Preserve Aboriginal Spiritual Teachings and Practices," in *Religious Conscience, the State, and the Law: Historical Contexts and the Law*, ed. John McLaren, Harold G. Coward. (Albany: State University of New York Press, 1999), 175.

8 *Delgamuukw*, 13, 14.

It would seem that First Nations religious views towards the earth as well as oral histories and traditions would be addressed more than they are in the case of *Delgamuukw*, given their relevance to Aboriginal land title claims. However, an attribute of courts is that they are able to (and do) frame cases in particular ways which enable them to avoid discussing particular issues while retaining an appearance of neutrality, what Mary Jane Mossman calls “characterization”.⁹ In regards to Aboriginal religions in the case of *Delgamuukw*, Lori Beaman has noted that this is in fact the situation where,

[T]he Supreme Court acknowledges the spiritual connection between the Wet'suwet'en people and their land as evidenced through a collection of sacred oral tradition or stories. Again there is discussion of a core of 'Indianness.' Yet the case is framed around establishing the existence of Aboriginal title.¹⁰

The tendency for courts to focus on particular aspects of a case while avoiding others is achieved through the particular wording of legal texts. In courts, language is used in particular ways, not only to “characterize” specific issues, but also to give the illusion of a single authoritative voice, which according to Rebecca Johnson masks the many voices present in cases which can be uncovered by focusing on the legal discourse.¹¹ In addition to this, Johnson and Marie-Claire Belleau have singled out “the intersection of law and language” as a focal point to bringing out some of these other perspectives and as a place to answer interdisciplinary questions surrounding law.¹² This paper will

9 Mary Jane Mossman, “Feminism and Legal Method: The Difference It Makes,” *Wisconsin Women's Law Journal* 3 (1987): 157-8.

10 Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 144.

11 Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and The Law*, (Vancouver: UBC Press, 2002), 58.

12 Marie-Claire Belleau and Rebecca Johnson, “I Beg to Differ: Interdisciplinary Questions about Law, Language, and Dissent,” in *Law, Mystery, and the Humanities: Collected Essays*, ed. Logan Atkinson and Diana Majury. (Toronto: University of Toronto Press Incorporated, 2008), 161.

focus on this law and language intersection in the case of *Delgamuukw* and will discuss the ways in which First Nations' religious beliefs were presented and dealt with in order to uncover how freedom of religion for Aboriginal religions is playing out in Canadian courts.

Why do courts avoid the subject of Aboriginal religions? What is at the root of this tendency? These questions have twofold answers as the decision is shaped by both the way in which the Aboriginal groups presented their cases and also by the way the courts frame them. In examining Canadian courts some conclusions can be drawn regarding their structural behaviour. When courts take on cases they do not generate decisions in a vacuum. New decisions instill law that is not only tied back to the original statute but also to past cases.¹³ In examining the continuity of court decisions, Eric Reiter argues that courts construct a narrative from fact that in turn becomes fact and is used to evaluate other cases, thus perpetuating a created narrative.¹⁴ Reiter's argument is not so different from the views of Carol Smart who finds that law, like science, appeals to and generates a notion of truth from which it garners power which it then applies to society.¹⁵ A result of the legal system's perpetuation of particular ways of dealing with cases is that, “[i]n the case of historically excluded groups, like the plaintiffs in *Delgamuukw*, the very creation of this narrative serves at once to exclude and to reinforce the exclusion” says Reiter.¹⁶ Aboriginal peoples are therefore continually marginalized by the state and the marginalization is justified by a 'law' that is conceptualized as truth or of a high moral standard.

In Canada, the legislation with the greatest impact on how events transpire around religion in court is the Nineteen-eighty-two *Canadian Charter of Rights and Freedoms*.¹⁷ Section

13 Mossman, “Feminism and Legal Method,” 149.

14 Eric H. Reiter, “Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond,” *Indigenous Law Journal* 8 (2010): 67-77.

Carol Smart, *Feminism and the Power of Law*, (London: Routledge, 1989), 9-14.

16 Reiter, “Fact, Narrative, and the Judicial Uses of History,” 67.

17 For clauses in the Charter that have to do with religion see Iain T. Benson,

2(a) of this legislation states that “2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion”.¹⁸ Despite such an enactment, along with s. 15 equality rights and s. 27's protection of multiculturalism, it has been argued that religious freedom rights offers more protection to some groups than to others, namely more protection goes to Christian groups than to minority religious groups, especially to the religious beliefs of Aboriginal peoples.¹⁹ In terms of freedom of religion, Aboriginal peoples' religious beliefs are, according to Lori Beaman, “legally constructed outside of the boundaries of religious freedom” in three main ways:

First, the religious landscape is dominated by mainstream Christianity, resulting in a narrow interpretation of religion and religious freedom. Secondly, legal claims are framed in the rhetoric of individual rights that ignores the systemic disadvantages suffered by Aboriginal peoples.... Finally, the legal construction of Aboriginal spirituality continues the legacy of European colonizers that treats first nations peoples as an 'abnormal' group to be either tolerated or accommodated by the benevolent 'normal' majority.²⁰

“The Freedom of Conscience and Religion in Canada: Challenges and Opportunities,” *Emory International Law Review*, 21 (2007): 123-124.

18 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

19 See Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion.”

20 Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 136. Beaman also notes more specifically in a footnote on the same page that:

The exclusivist approach by law in relation to Aboriginal spirituality is accomplished in a number of ways.... By specifically (quasi-) criminalizing activities such as hunting out of season, the law effectively prohibits some aboriginal rituals. In other cases, the law monitors and controls such activities.... Such criminalization has an historical context that ... includes, for example, the prohibition of the Sundance. Aboriginal spirituality is far enough removed from mainstream concepts of religion that

Not only are Aboriginal peoples in Canada failing to receive adequate protection for their beliefs but in addition to this, scholars such as Richard Moon have noted that the courts seem ambivalent as to whether there should be equality in the way that different religions are treated in Canada.²¹ In other words, there is no guarantee that all religions in Canada will get a comparable form of protection for their beliefs.

In terms of the role Aboriginal peoples play in the explanation for why Canadian courts may not be considering Aboriginal religious issues under a religious freedom rubric is that First Nations in Canada are themselves not framing their cases in this way. This may be because Aboriginal peoples have had little success in arguing for religious freedom in the past,²² because they do not view religion in the same way as courts do (they do not separate their religious beliefs from other parts of their lives/cultures),²³ and some Aboriginal peoples might not want to participate in the Canadian state's legal proceedings as they see it as an invalid exercise.²⁴ The result of Aboriginal peoples not clearly arguing for religious freedom is that courts also then do not have to address issues as religious freedom

it is also simply not covered by law. The all-encompassing nature of Aboriginal spirituality is a major challenge to the dominant view of religion. Finally, Aboriginal spirituality is pushed outside of the boundaries of legal protection when 'more important' social needs are identified, such as highways or the need to control illicit drugs.

21 Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms," *Brandeis Law Journal*, 41 (2003): 573.

22 Lori G. Beaman (Class Discussion, University of Ottawa, Ottawa, ON, February 3, 2011). See examples: *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332 and *Thomas v. Norris*, 1992 CanLII 354 (BC S.C.).

23 For religion's interconnectedness in Aboriginal life see both Ross, *First Nations Sacred Sites in Canada's Courts*, 3-4; and Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion," 137.

24 For a description that some Aboriginal people(s) have of 'nation-to-nation' with Canada see: Dale Turner, *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy*, (Toronto: University of Toronto Press, 2006), 4.

claims and can then discuss them in other less complicated ways. Finally, courts may also be choosing not to address Aboriginal religions under a religious freedom claim because such arguments may have more weight than other claims in court given the importance belief can have to an individual²⁵ which may create more difficulties for courts if they force concessions to be made to Aboriginal peoples (especially in the case of land or resources).

The following section will unpack some of the language surrounding First Nations religious beliefs in *Delgamuukw* and discuss some of its implications, whether intended or not by the Court.²⁶ First, it will examine the Court's use of the language surrounding oral histories and traditions (as religious language is most obvious here). Next, it will investigate how Aboriginal religions more generally arose in the text of the case. The final section will analyse some of the Court's discourse surrounding title and its consequences on Aboriginal religious traditions as they relate to land.

Language Surrounding Aboriginal Oral Traditions

In *Delgamuukw*, when referring to the oral histories and traditions of Aboriginal peoples in Canada, the Court uses clear religious language such as 'sacred' or 'spiritual', as seen in the following statements:

25 See importance of religion to identity in Moon, "Liberty, Neutrality, and Inclusion," 569.

26 This work is only part of the preliminary findings of a larger research project which examines the ways in which Aboriginal religions are framed in *Delgamuukw* by both Aboriginal peoples and by the Court in order to better understand the situation of religious freedom for Aboriginal peoples in Canada. This project uses a method of discourse analysis in its investigation of the *Delgamuukw*. The process involves coding the results thematically by paying attention to key terms. The discourse analysis methods used are based primarily on discourse analysis texts such as, Teun A. Van Dijk, "Principles of Critical Discourse Analysis," *Discourse & Society*. 4 (1993): 249- 283; in addition to being modelled after work which uses discourse analysis to look at religion and law such as, Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law*, (Vancouver: UBC Press, 2008).

[T]he Gitksan Houses have an 'adaawk' which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a 'kungax' which is a spiritual song or dance or performance which ties them to their land.²⁷

[T]he most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitksan and Wet'suwet'en people tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.²⁸

The language the Court uses regarding Aboriginal oral histories and traditions can be seen as depicting their sacred nature in two ways: 1. as being greatly respected within the Aboriginal communities and 2. as having religious content (in this case, religious views towards a particular piece of land). This type of depiction is consistent with the way in which Aboriginal peoples also seem to be viewing their oral histories and traditions.²⁹ The fact that the Court describes oral histories and traditions in such obvious religious terms points to the legal development of a clearer understanding of the significance of those oral histories and traditions in Aboriginal belief systems. This may be because they can be compared to the sacred texts of other religious traditions, most of which also had oral beginnings. On another note, the conceptualization of Aboriginal oral traditions or religious beliefs as 'spiritual' or as a form of 'spirituality' is potentially troublesome as this language may result in Aboriginal beliefs and religions eluding characterization as a 'religion' deserving of protection in court.

The acknowledgement of the religious aspect of oral histories and traditions however, appears to have little effect in

27 *Delgamuukw*, 13.

28 *Ibid.*, 14.

29 See McNab, *Circles of Time*, 1-20.

demonstrating the religious significance of the land to Aboriginal peoples as a part of their claim for title. Instead, the only oral histories and traditions (or parts of them) that are focused on are the parts that are deemed 'history' by the Court. The Court therefore misses the richness of these traditions which encompass more than religious and historical aspects.³⁰ Some scholars argue that the situation for how oral histories and tradition are used and received in court can improve through education and the aid of Aboriginal interpreters.³¹

While *Delgamuukw* appears to be an attempt to address some of the inequalities in Aboriginal people's struggle to attain Aboriginal rights by having to prove continuity of pre-contact practices to the present day, it may not be going far enough in its declarations. John Borrows argues that the Court's move to allow for the submission of oral histories and traditions as evidence actually subjects Aboriginal peoples' traditions to the scrutiny of non-Aboriginal peoples, which is exceedingly problematic given the extent of cultural misunderstanding on the latter's behalf.³² Reiter also sees shortcoming in the Court's statements, arguing similarly in regards to *Delgamuukw*, that the case, while containing "a pluralist understanding of the relationship between Aboriginal and non-Aboriginal evidence about the past",³³ also "firmly reasserts the authority of the dominant narrative and makes it clear that Aboriginal evidence must be made to fit

30 For a description of how rich oral traditions are see: Borrows, "Listening for a Change," 11.

31 In terms of education see Andie Diane Palmer, "Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*," *Alberta Law Review*. 38 (2000): 1047:

If we are to expect oral histories of Aboriginal Peoples to be given more consideration in Canadian courts, we must develop our educational system in such a way that it becomes unreasonable for a trial judge to be unaware of the workings of such orally-based legal traditions.

For discussion on Aboriginal peoples helping to interpret oral traditions see Borrows, "Listening for a Change," 31.

32 Borrows, *Recovering Canada*, 86-92.

33 Reiter, "Fact, Narrative, and the Judicial Uses of History," 73.

within it”.³⁴ Reiter supports his points by quoting Chief Justice Lamer who states that “the laws of evidence must be adapted in order that this type of [oral] evidence can be accommodated and *placed on an equal footing* with the types of historical evidence that courts are familiar with” and give them “due weight”³⁵ but also states in the case that “accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure”.³⁶ Reiter determines from this that “[a]ccommodation thus becomes a process of fitting in, of translating one's claims, one's evidence and one's history into the framework of the predominant narrative”.³⁷ Requiring Aboriginal peoples to submit their oral traditions to the structure of the more dominant group means they will not be dealt with in their own right. These issues that Reiter finds regarding accommodation have been previously picked up on by others, such as Beaman who has noted that, “[t]he language of accommodation rests on an assumption of a normal or mainstream and a benevolent dispensing of special consideration for those on the margins. It builds in inequality and maintains it”.³⁸ In addition to this underlying discord in accommodation, Michael Lee Ross questions altogether an approach of accommodation towards Aboriginal peoples in Canada by stating that “accommodation presupposes compatibility”.³⁹ Ross' statement points to the potential of incompatibility and raises the issue of a possible difference between the way Aboriginal peoples, the courts and larger Canadian society may be conceptualizing religion.⁴⁰ Thus the Court's decision in *Delgamuukw* is filled with both the possibility for change in terms of what can be used as evidence while also placing limitations on these allowances.

34 Ibid., 74.

35 Ibid., 74 citing *Delgamuukw*, 82, 87.

36 *Delgamuukw*, 82. Citing paragraph 49 of *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

37 Reiter, “Fact, Narrative, and the Judicial Uses of History,” 73-4.

38 Beaman, *Defining Harm*, 146.

39 Ross, *First Nations Sacred Sites in Canada's Courts*, 150.

40 Also been noted by Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 136.

Language About Aboriginal Religious Beliefs

In addition to its discussion of sacred oral traditions, the text of *Delgamuukw* includes a number of indirect comments and references to Aboriginal religions. It is noteworthy that the language used to refer to such factors typically puts religion under larger umbrella terms such as: “ceremony,” “tradition,” or phrases such as, “practice, custom or tradition”.⁴¹ An example of this is where the term 'traditions' is used to describe many actions including religious ones:

The *traditions* of the Gitksan and Wet'suwet'en peoples existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, and the right to occupy and control places of economic importance. The *traditions* also included the institution of the clans and the Houses in which membership descended through the mother and the feast system. They regulated marriage and relations with neighbouring societies (emphasis added).⁴²

Using this type of all encompassing language may be indicative of how Aboriginal religious beliefs actually are, that is, infused into all aspects of life where, according to Ross, “cultural elements (such as history, ethics, law, and politics) are intricately interwoven with their spirituality and religion” which is also tied to land.⁴³ Singling out religion in order to more forcefully claim

41 *Delgamuukw*, 80, 124, 140.

42 *Ibid.*, 70.

43 Ross, *First Nations Sacred Sites in Canada's Courts*, 3-4. The singling out of religion in this paper could, in this light, be viewed as problematic however, given the threats to Aboriginal religions, it seems a necessary focus to determine if improvements can be made. See threat to Aboriginal religions in the following: Ross, *First Nations Sacred Sites in Canada's Courts*; Henderson, “The Struggle to Preserve Aboriginal Spiritual Teachings and Practices,” 175; Marie Battiste and James [Sa'ke'j] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge*, (Saskatoon, SK:

a religious right might yield more for Aboriginal peoples but may simply not be in line with how they conceptualize the sacred. Another reason why Aboriginal groups may not be referring to religion or their beliefs explicitly is because some of their beliefs are intended to retain a degree of concealment where some knowledge “cannot be revealed completely to outsiders, or even to the rest of the community”.⁴⁴ In this regard, Ross makes a point in relation to First Nations sacred sites (which I believe can also encompass Aboriginal religious views more generally) that it is possible for Aboriginal religious beliefs to be protected without courts and larger society knowing the reasoning behind why they are considered sacred.⁴⁵ Nevertheless, the reluctance of Aboriginal peoples to bring religion to the fore of cases points to an ambivalence that results in religious arguments being peripheral or sometimes added on to cases as an afterthought resulting in them remaining under valued.⁴⁶

Another term in *Delgamuukw* that can be understood as referring to Aboriginal religious beliefs is the term “legends”.⁴⁷ The Court only uses this term in its discussion of types of Aboriginal evidence that were used in the case stating, “[s]ome of that evidence was not in a form which is familiar to common law courts, including oral histories and legends”.⁴⁸ The Court can be said to be referring to Aboriginal religions in its use of the term 'legends' because such a link can be made by looking at the subsequent case of *R. v. Vautour (Vautour)* in relation to the Mi'kmaq. In *Vautour*, the court cites a Chief who states that, “[o]ral traditions' encompasses the ceremonies, the stories, the songs, the dances and activities, prophecies and traditions of the Mi' kmaq people. And 'oral history' encompasses the stories of an individual in that individual's lifetime what they, have heard

Purich Publishing Ltd, 2000), 159.

44 Battiste and Henderson, *Protecting Indigenous Knowledge and Heritage*, 141; 140. For secret knowledge in relation to First Nations sacred sites see Ross, *First Nations Sacred Sites in Canada's Courts*, 144-5.

45 Ross, *First Nations Sacred Sites in Canada's Courts*, 158.

46 For examples of this see: Ross, *First Nations Sacred Sites in Canada's Courts*, 48, 51-2.

47 *Delgamuukw*, 5.

48 *Ibid.*, 5.

and what they have seen”.⁴⁹ It seems that 'legends' would fall under oral traditions which are intimately tied to Aboriginal religious beliefs.⁵⁰ Given this connection, the Court can be understood as opening the door slightly to the idea that Aboriginal religious beliefs could help Aboriginal peoples achieve their claims.

Unfortunately, the court's potential opening to Aboriginal religious beliefs as support for Aboriginal claims is not without issue. While the Court's use of the term 'legends' may in fact be appropriate when referring to aspects of Aboriginal religions, Aboriginal communities would need to be addressed on whether this is the case. In using the term, which can be seen as indirectly referring to aspects of Aboriginal religions, the Court's language comes off as demeaning as the general understanding of the term 'legends' is that they are stories where “untruth is told for truth”.⁵¹ Use of this term therefore holds not only a demeaning characteristic in asserting falsehood but it also has an imperialistic character when used by an outsider like the Court. In this manner the Court seems to be focusing on oral histories as true, from legends as false. While such separation may be necessary for the Court to establish the weight of the evidence, it may not be doing justice to Aboriginal perspectives which do not draw the same kinds of true-false distinctions in their oral traditions.⁵² By using the term 'legends' the Court may be belittling something of great religious significance and value to Aboriginal groups. A final point regarding the Court's use of the term 'legends' with its negative connotations becomes evident when its use is considered in other contexts. Would courts consider referring to parts of the Qur'an, the Tanakh, or Christian Bible as 'legends'?

49 *R. v. Vautour*, 2010 NBPC 39, 38.

50 Scholars also describe legends as being apart of Aboriginal oral traditions see Borrows, *Recovering Canada*, 89. For how religion and beliefs are tied together see Linda Dégh, “Legend and Belief: Dialectics of a Folklore Genre,” (Bloomington, IN: Indiana University Press, 2001).

51 Linda Dégh, “Legend and Belief,” 46.

52 See Thomas Flanagan, *First Nations? Second Thoughts*, (Montreal: McGill-Queen's University Press, 2000), 160-161.

Lastly in this discussion on the Court's use of language surrounding Aboriginal religions is how the Court is able to make judgements on religious significance for Aboriginal peoples. In *Delgamuukw*, the Court does this in its comments on the history of the Gitksan and Wet' suwet'en nations when discussing their historical occupation of the land at stake, seen in the following excerpt:

This occupation was mainly in or near villages on the Skeena River, the Bulkley River, where salmon, the staple of their diet, was easily obtainable. The other parts of the territory surrounding and between their villages and rivers were used for hunting and gathering for both food and ceremonial purposes. The scope of this hunting and gathering area depended largely on the availability of the required materials in the areas around the villages. Prior to the commencement of the fur trade, there was no reason to travel far from the villages for anything other than their subsistence requirements.⁵³

This statement first makes the claim that “the territory surrounding and between their villages and rivers were used for hunting and gathering for both food and ceremonial purposes”, both of which would likely have been very important for these First Nations at that time. The court continues on in its next sentence referring to this area. It is the Court's concluding remark of this paragraph which raises issue when it states that, “there was no reason to travel far from the villages for anything other than their subsistence requirements”. Not only does the Court seem to determine none of the Aboriginal peoples' historical uses of the land surrounding the villages to be significant, but it also only refers to sustenance needs through the term “subsistence” and remains silent on the ceremonial purposes of the areas. Through language in this section the Court erases the religious significance of the areas surrounding the villages. Furthermore,

⁵³ *Delgamuukw*, 10.

in working through how the territory in question has been used the Court seems to be determining how much land is really “needed” for these groups. Beaman has addressed this type of focus on land in relation to Aboriginal religious traditions by stating that it “commodifies Aboriginal expressions of spirituality by quantifying the amount and value of fish, wildlife, and property involved in the various rituals and practices”.⁵⁴ Such commodification is improper when dealing with Aboriginal religions as it fixes religious significance to a particular quantitative amount which may not only insult Aboriginal beliefs but may also not be how they determine value.⁵⁵ Unfortunately the act of commodifying the sacred also means the ability to regulate and restrict it.

Implications of Discourse Surrounding Title

Land, as a commodity, is regulated and this has significant implications for First Nations peoples whose religious views are often connected with land. When courts enforce land regulations they implicitly regulate on Aboriginal religions. An example of this in *Delgamuukw* is when Chief Justice Lamer states that, “aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place”.⁵⁶ Lamer then goes on to give examples of how this is

54 Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 144.

55 For a brief description of how some Aboriginal peoples view land 'ownership' for example see: Rodney Bobiwash, “The Sacred and the Profane: Indigenous Lands and State Policy,” in *Sacred Lands: Aboriginal World Views, Claims, and Conflict*, eds. Jill Oakes, Rick Riewe, Kathi Kinew, and Elaine Maloney. (Edmonton: Canadian Circumpolar Institute, 1998), 207; and Leroy Little Bear, “Aboriginal Relationships to the Land and Resources,” in *Sacred Lands: Aboriginal World Views, Claims, and Conflict*, eds. Jill Oakes, Rick Riewe, Kathi Kinew, and Elaine Maloney. (Edmonton: Canadian Circumpolar Institute, 1998), 18-9.

56 *Delgamuukw*, 128.

relevant to Aboriginal religions, stating that, “if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)”.⁵⁷ Together these statements on Aboriginal title can be argued to restrict Aboriginal religious views regarding the land or particular geographies within the title area. Accordingly, Aboriginal peoples are forbidden from using title land in a way that is inconsistent with the beliefs that were used to establish title. Although this seems to indicate that it is possible for Aboriginal religious views towards the earth to be used to establish title, it nevertheless restricts their land use afterwards. This results in a stagnant view of Aboriginal religious beliefs by the Court; a view that defines Aboriginal land use in relation to their religious beliefs at a particular time, thus not allowing for change. Furthermore, this stagnant view of Aboriginal religious beliefs towards the earth would be amplified if religion was used as evidence to establish title or an Aboriginal right.⁵⁸ Regulation of First Nations' lands through regulating title in this manner places unwarranted restrictions on how Aboriginal religions are legally viewed and how they are expected to act.

While the regulation of title has implications for Aboriginal religions, the infringement of title may have more obvious detrimental outcomes for them. In stating a list of potential reasons why Aboriginal title could be overruled by courts,⁵⁹ Chief Justice Lamer in *Delgamuukw* completely ignores

57 Ibid.

58 Borrows, “Living Law on a Living Earth,” 180.

59 Lamer's list of some of the reasons why courts can overrule Aboriginal title is listed at *Delgamuukw*, 165:

[T]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.

the religious damages that would ensue for Aboriginal peoples if their land was altered or taken away. Borrows states that these types of activities leading to the harming of Aboriginal religious beliefs could easily occur (and do) and would not only threaten their beliefs but he also views it as a continuation of the colonialist project towards Aboriginal peoples.⁶⁰ Regarding this subject of title infringement, the Court goes on to state that the Crown must always consult with Aboriginal peoples before infringing on their title rights and that,

[T]his consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation.⁶¹

These statements by the Court are not hopeful for Aboriginal peoples who seek protection for their sacred traditions as it is only the case that “full consent” *may* be required (emphasis added). Furthermore, although through consultations it is intended “that aboriginal interests be placed first” the reality is that “the fiduciary duty does not demand that aboriginal rights always be given priority”.⁶² These statements seem to contradict one another with the likely outcome that the non-Aboriginal Canadian's “rights” would be the ones given priority. Such an obvious ability to override Aboriginal title rights and allow for infringement of their religious freedom reveals the double standard that Aboriginal peoples face in this area which leads them to receive less protection of their sacred sites than other religions in Canada. This stems partially from a difference in conceptions of the sacred whereby Aboriginal peoples focus on land and geography rather than buildings or statues as Christians

60 Borrows, “Living Law on a Living Earth,” 183.

61 *Delgamuukw*, 168.

62 *Ibid.*, 162.

primarily do.⁶³ Following an analysis of how Aboriginal title is discussed in *Delgamuukw*, I am in agreement with Gordon Christie who determines that,

[T]he complete picture of Aboriginal title offered in *Delgamuukw*, one which includes the Court's discussion on the power of the Crown to infringe enjoyment to this title, rests on underpinnings which make the entire picture conceptually unstable and generally unacceptable (the Court's creation, Aboriginal title in Canadian law, is questionable both on moral and doctrinal grounds, and unacceptable in the eyes of Aboriginal peoples interested in preserving their spiritual connections to lands they conceive of as placed in their hands by the Creator).⁶⁴

Given the amount of control that the Crown will retain in relation to Aboriginal title land, it can be concluded that title itself is insufficient in terms of what Aboriginal peoples are really after in terms of land. So long as Aboriginal peoples do not have complete control over their land, or it is encroached upon, their religious traditions will remain threatened.

The Court in *Delgamuukw* suggests a remedy for infringement of Aboriginal title, stating, “fair compensation will ordinarily be required when aboriginal title is infringed”.⁶⁵ The Court however does not elaborate about what such compensation would entail only stating that “it is best that we leave those difficult questions to another day”.⁶⁶ Throughout the case there is no discussion of compensation or of harm (such as mental

63 Beaman, “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” 144-5. Here Beaman discusses the implications of the Canadian Christian majority on Aboriginal religions. Also, for issues in dealing with different views of the sacred see: R.C. Gordon-McCutchan, “The Battle for Blue Lake: A Struggle for Indian Religious Rights,” *Journal of Church & State*. 33 (1991): 790.

64 Christie, “*Delgamuukw* and the Protection of Aboriginal Land Interests.,” 115.

65 *Delgamuukw*, 169.

66 *Ibid.*

distress) or “irreparable harm” in relation to religion⁶⁷ caused by a desacralisation of or prohibiting access to Aboriginal sacred sites. This demonstrates little understanding of the seriousness of title infringements and destruction/loss of sacred lands for Aboriginal peoples. It also reveals the reluctance of the Court to wade into the complex discussion of how to compensate or if it is possible to compensate for lost land when it has religious significance.

Conclusion

An analysis of the *Delgamuukw* case illustrates that, although there is an underlying dialogue about Aboriginal religions (which can possibly be used in establishing legal claims), yet much is left to be done in terms of freedom of religion for Aboriginal religious traditions in Canada. The most difficult challenge for courts appears to be the ability to capture and adequately deal with the way in which Aboriginal peoples conceptualize religion which is currently contributing to the continued oppression of their religious traditions. A greater focus on developing the legal system's understanding of Aboriginal peoples, their traditions, religions, cultures and perspectives is needed. However, progress in understanding about Aboriginal peoples also needs to occur outside the courts as a court's understanding is often influenced by 'common sense' held in society.⁶⁸ For now, a place to start is in uncovering where there are misunderstandings and misinterpretations between the courts and Aboriginal peoples in an effort to reveal points where rectifications can be made. Finally, the hurdles that must be overcome by the courts are not merely deeply embedded views in legal practice but potentially some of the conceptual foundations upon which the Canadian legal system is built, which have rendered the system unable to adequately deal with Aboriginal religions and even be harmful to them.

67 Beaman, *Defining Harm*, 89.

68 For a discussion on on Canadian courts appeal to 'common sense' see Lori G. Beaman, *Defining Harm*, 13.

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