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BOOK REVIEW SYMPOSIUM

Raising Indigenous Religious Freedom to a Higher Standard: Michael McNally's *Defend the Sacred* and the Canadian Legal and Legislative Landscapes

Defend the Sacred: Native American Religious Freedom beyond the First Amendment

By Michael D. McNally. Princeton: Princeton University Press, 2020. Pp. 400. $99.95 (cloth); $26.95 (paper); $26.95 (digital). ISBN: 9780691190891.

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What is clear from Michael McNally's *Defend the Sacred: Native American Religious Freedom beyond the First Amendment*, and my own, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today*, is that the specific constitutional religious freedom mechanisms, either via the First Amendment in the United States or section 2(a) of the *Charter of Rights and Freedoms* in Canada, currently offers little support for Indigenous peoples.[1] While the legal and legislative cultures are different in both countries, the colonial legacy of the dispossession of Indigenous lands, the protestant Christian undertones of the construction of religion in the courts, and the misunderstanding of Indigenous religions render those traditions without constitutional protection. Thankfully, there are other legislative and legal mechanisms engaged by Indigenous peoples in both countries that have resulted in some positive outcomes.

However, despite successes on, for example, Indigenous religious practice in prisons[2] and the repatriation of ancestors,[3] cases such as *Lyng*, *Smith*, *Navajo Nation*, and *Standing Rock*, in the United States,[4] and *Ktunaxa Nation* in Canada,[5] demand answers to the questions of why Indigenous

[1] Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019).

[2] McNally dedicates an entire chapter to this subject (69–93). For more on the Canadian context, see James Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Toronto: University Press, 1997).

[3] McNally deals with this subject regularly throughout his book. For more on the Canadian context, see Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: University of British Columbia Press, 2009).

[4] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988); Employment Division v. Smith, 494 U.S. 872 (1990); Navajo Nation v. United States Forest Service, 535 F.3d 1058 (9th Cir. 2008). For the current state of litigation by the Standing Rock Sioux Tribe over the Dakota Access Pipeline, see "The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline," Earthjustice, accessed September 23, 2021, https://earthjustice.org/features/faq-standing-rock-litigation.

[5] Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations), 2017 SCC 54, [2017] 2 S.C.R. 386.

religious freedom is so elusive and how Indigenous religious freedom might be secured—questions that McNally and I both seek to address in our geographically situated monographs.

As for the latter question, McNally suggests that international Indigenous rights mechanisms, such as the United Nations Declaration on the Rights of Indigenous Peoples, or UNDRIP,[6] may help to elevate U.S. domestic law, including religious freedom, "to a higher standard." This includes drawing on the discourse of peoplehood—a concept that already resonates in federal Indian law—and bringing the discourse of culture out from its current residence in legal footnotes (261).

Despite the differing legal and legislative landscapes, there are a number of commonalities that emerge when considering Indigenous religious freedom in the United States and Canada, from the shared experience of colonialism and the use of *religion* as a weapon to the quasi-sovereign status of federally recognized Indigenous communities. And both countries have, if reluctantly, endorsed UNDRIP.[7] Thus, in seeking to address the two central questions, there is value in a cross-border conversation despite the inevitable uniqueness and nuance of each state. Neither McNally nor I engage in such dialogue with any depth in our books, so I open the conversation here.

The collective right to religious freedom and the collective rights of Indigenous peoples more generally are central to Canadian law. The *Constitution Act* of 1867, responsible for the establishment of Canada, includes special rights for Catholics and Protestants in the realm of education.[8] More recently, in *Loyola High School v. Quebec*, the Supreme Court of Canada expressed, "The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith."[9] The court acknowledged that "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions."[10] The court also affirmed "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom."[11] *Loyola* revolved around the teaching of Catholic values at a Catholic high school in Quebec. The court found that a state requirement to teach religion in a more secular fashion was a violation of the section 2(a) rights of the Catholic community whose children attended that school: a victory for Catholics in the courts. Under section 35 of the Constitution, Aboriginal rights were recognized and affirmed in 1982.[12] Aboriginal rights, defined not in the text of the Constitution but in the jurisprudence since their recognition, includes the protection of cultural rights, which includes

[6] UN General Assembly, Resolution 61/295, Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (Sept. 13, 2007).

[7] As McNally points out, both Canada and the United States endorsed UNDRIP with reluctance in 2010 (259); see also Shrubsole, *What Has No Place*, 173–74.

[8] *Constitution Act*, 1867, 30 & 31 Victoria, c. 3, § 93 (U.K.). These collective rights were also reaffirmed in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, *being* Schedule B to the *Canada Act*, 1982, c. 11, § 29 (U.K.). For more on the history of religion in the confederation of Canada, see Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (Montreal: McGill-Queen's University Press, 2014).

[9] Loyola High School v. Quebec (Attorney General), 2015 SCC 12, [2015] 1 S.C.R. 613, para. 94; see also Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551, para. 137; Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, para. 182.

[10] *Loyola*, [2015] 1 S.C.R. 613, at para. 64.

[11] *Loyola*, [2015] 1 S.C.R. 613, at para. 67.

[12] *Constitution Act*, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 35(1) (U.K.). The recognition of the pre-existence of Indigenous rights is echoed in Felix Cohen's influential handbook on federal Indian law where he brought the quasi-sovereign nature of Indigenous rights into focus in the United States (234).

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religion.[13] These rights cannot be expressed individually, as noted in the *Sundown* decision.[14] However, under both frameworks, the articulation of these rights as collective in nature have not always found success on matters of religion.

While collective rights under both section 2(a) and section 35 may hold more legal weight and come with special recognitions, as is the case under section 35, they do not overcome the challenges associated with diverse populations in a colonial secular liberal democracy. From a legal and philosophical perspective, two of these challenges can be defined as an incommensurability of choices and options and cultural incommensurability.[15] In law, incommensurability of choices and options refers to the situation where a court is asked to weigh two things against each other that may not be measurable in such a fashion—for example, religion and economy. Cultural incommensurability, defined broadly in this context, refers to the inability of a court to understand and evaluate cultural components outside of the court's own cultural context. The *Oakes* test allows for the infringement of any *Charter* right that can be demonstrably justified in a free and democratic society.[16] In this respect, the claimant does not need to prove a substantial burden, the state needs to justify infringement. This nuance makes little difference for Indigenous peoples since the justification of an infringement is predicated upon the degree of impact a government action or law has on the exercise of belief or practice as understood by the state and the courts. In the few *Charter* cases on Indigenous religious freedom, the courts consider how industry and religion may be balanced after misunderstanding the cultural context within which the claimants exist. In the British Columbia Court of Appeals decision in *Ktunaxa Nation*, the court, citing *Loyola*, declared that protection of the entirety of Qat'muk would be an unfair burden on the rest of society. The presiding judge suggested that the Ktunaxa would be imposing their religion on anyone who entered the territory.[17] In the only other Indigenous religious freedom case after the patriation of the Constitution, the British Columbia Supreme Court suggested that the Saulteau could continue to hold their intellectual stewardship on the peaks of Mount Monteith and Beattie Peaks though "geographically constricted" while drilling was allowed to commence lower on the mountains.[18]

Under section 35, the *Sparrow* test also permits for the infringement and limiting of Aboriginal rights. Given the special status of Indigenous peoples under section 35, these infringements must be substantial and compelling while upholding the fiduciary responsibilities of the Crown to Indigenous peoples.[19] In this sense, the standard for infringement is higher under section 35, but still possible. And the crux of the problem is that the state plays the dual role of mediator and interested party in deciding what infringements can be justified and what accommodations are proportional and acceptable.[20] Often Indigenous communities make the claim that state representatives did not adequately

[13] See Brian Slattery, "The Generative Structure of Aboriginal Rights," in *Moving Toward Justice: Legal Traditions and Aboriginal Justice*, ed. John D. Whyte (Saskatoon: Purich, 2008), 20–48.

[14] R. v. Sundown, [1999] 1 S.C.R. 393, para. 36.

[15] For a more extensive investigation into the challenge of the incommensurability of options and choices and cultural incommensurability, see Shrubsole, *What Has No Place*, 15–17.

[16] R. v. Oakes, [1986] 1 S.C.R. 103, paras. 68–70.

[17] Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations), [2015] BCCA 352, 78 B.C.L.R. 5th 297, para. 73. The Ktunaxa Nation case centered around the building of a ski resort on Qat'muk, home of the Grizzly Bear Spirit for the Ktunaxa. Negotiations between Glacier Resorts Ltd., the state, and the Ktunaxa effectively ended in 2009, when an elder communicated that there was no middle ground in the negotiation and that no permanent structure could be erected at Qat'muk. The government approved the ski resort permit and concluded that consultation and accommodations had been sufficient.

[18] Cameron v. Ministry of Energy and Mines, 1998 CanLII 6834 (B.C.S.C.), para. 251.

[19] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1077.

[20] Shrubsole, *What Has No Place,* 131–61. The 2014 *Tsilhqot'in* decision confirmed that Aboriginal Title significantly strengthened the mandate for Indigenous consent, but even lands held in title may be subject to state interference for compelling reasons. Tsilhqot'in Nation v. British Columbia, [2014] SCC 44, [2014] 2 S.C.R. 257, at para. 2.

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understand or take into consideration the significance of a particular space in the decision to grant what Indigenous communities understand to be inadequate accommodations.[21]

Under section 35, Indigenous peoples are given a seat at the table, much as they are in the United States. And as in the United States, consultation is not decision-making power. One of the notable nuances of this constitutional protection of Aboriginal rights is that, at their foundation, Aboriginal rights are about reconciling Crown sovereignty with the preexistence of Indigenous peoples on the same territory.[22] This is not unlike, what McNally calls, "The paradox of Cherokee Nation v. Georgia" (229). Thus, the recognition and affirmation of Aboriginal rights is also the recognition and affirmation of Crown sovereignty.

One of the unique challenges in Canada, which the American Indian Religious Freedom Act and the Native American Graves Protection and Repatriation Act, among other legislative initiatives, have sought to address in the United States, is the fact that religious freedom discourse tends to ignore the unique features of Indigenous religions and the history of colonialism. Indigenous peoples do not get to be, legally speaking, Indigenous peoples under the *Charter* right to religious freedom. This means, most importantly, that the legacy of colonialism and the preexistence of Indigenous peoples on the lands at the center of certain cases is not of importance in judicial decisions, which significantly inhibits the strength of those cases. In the *Cameron* decision cited above, Justice Taylor clearly distinguished between Aboriginal rights and the section 2(a) right: "Here the [Kelly Lake Cree Nation] does not point to any established or affirmed rights in the context of aboriginal rights or title. The assertion of the freedom of religious practice is a discrete issue that relates to all Canadian citizens."[23] For its part, Canada's Supreme Court seems to be moving toward awareness of this unique challenge for Indigenous religions in its 2017 decision in *Ktunaxa Nation*. In response to the majority reasoning that the object of belief is not protected under section 2(a),[24] the minority reasoning explained, "In this context, state action that affects land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of section 2(a) of the *Charter* to substantial elements of Indigenous religious traditions."[25] However, the minority reasoning agreed with the majority decision to dismiss the Ktunaxa section 2(a) claim for essentially the same reasons as cited in the British Columbia Court of Appeals' *Ktunaxa Nation* decision, noting the immense burden the protection of such a large section of "public lands" would have on the rest of society.[26] *Ktunaxa Nation*, the only case of Indigenous religious freedom to come before Canada's Supreme Court following the patriation of the Constitution in 1982,[27] is disappointing, but not without a measure of hope. Legal culture, like all cultures, is not static.[28] While section 2(a) currently offers no protection for Indigenous peoples, it may if standards are raised to meet some of the challenges to which the court seems to be becoming aware.

Indigenous peoples have preferred section 35 on matters related to religious freedom. Aside from the quasi-sovereign status affirmed under the constitutional framework, the rhetoric of cultural rights has proven to be far less restrictive than the protection of belief and

[21] See *Cameron*, 1998 CanLII 6834, at para. 227; Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations), 2017 SCC 54, [2017] 2 S.C.R. 386, para. 84.

[22] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 57.

[23] *Cameron*, 1998 CanLII 6834, at para. 161.

[24] *Ktunaxa Nation*, [2017] 2 S.C.R. 386, at para. 70.

[25] *Ktunaxa Nation*, [2017] 2 S.C.R. 386, at para. 121.

[26] *Ktunaxa Nation*, [2017] 2 S.C.R. 386, at paras. 150–55.

[27] Jack and Charlie v. The Queen is another Canadian Supreme Court case considering Indigenous religious freedom. Despite being heard in 1985, the case dealt with a dispute over off-reserve, out of season hunting for a religious ceremony that occurred prior to the patriation of the Constitution and the establishment of the s. 2(a) right. See Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332.

[28] For more on the changing understanding of religion in Canada's courts, see Shrubsole, *What Has No Place*, 29–49.

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the manifestation of belief under section 2(a).[29] *R. v. Van der Peet* clarifies, Aboriginal rights are concerned with protecting the distinctive cultures of Indigenous peoples. The decision broadly understands culture to encompass practices, customs, and traditions that are more than incidental or occasional.[30] McNally is conscious to the challenges of reified cultural rights for Indigenous peoples, appropriately citing both Ronald Niezen and Karen Engle, whose concerns resonate in the Canadian context (284).[31] Cultural rights under the Aboriginal rights framework must trace their roots to the time prior to contact with European colonizers.[32] This significantly limits what can be considered for protection given the realities of the impacts of colonialism on Indigenous religions and the fact that, as Vine Deloria notes, the canons are not closed.[33]

While still rooted in assertions of Crown sovereignty, one of the more promising elements of Aboriginal rights is their *sui generis* nature. Since Aboriginal rights are about the reconciliation between the Crown and Indigenous peoples, the fiduciary duty of the Crown demands that it take into consideration Indigenous perspectives on the nature of Aboriginal rights rather than reading those rights simply through a common law perspective.[34] Although this assertion is recognition of the cultural location of legal systems and the need for inquiries into cross-cultural understanding and dialogue, Indigenous cultures have a space, if limited by the quasi-sovereign status of Indigenous peoples, in the very fabric of Canadian law, and not merely as a subject of its protection. Of course, it remains the purview of the state to determine whether consultation and accommodation has been sufficient based on the state's understanding of the impacts of any given government action. Much like section 2(a) protections for Indigenous religions, section 35 protections have been limited despite the broader construct of culture that lies at the foundation of Aboriginal rights.

McNally reminds us that while there are immense challenges, there are also possibilities present in contemporary colonial states for Indigenous religious freedom. It seems clear that the incommensurability of options and choices, cultural incommensurability, a quasi-sovereignty that privileges state sovereignty and decision making (coupled with the colonial legacy of the dispossession of Indigenous lands), and the general lack of inclusion of Indigenous religions under specific constitutional frameworks for religious freedom are challenges that persist in both Canada and the United States. Yet Canada recognizes the importance of collective rights, if limited, the importance of cultural rights for Indigenous peoples, if limited, and the place of Indigenous perspectives in the interpretation of the law, if only in principle. Suffice to say, the law could stand to be raised to a higher standard. How then might legal standards be raised befitting of Indigenous peoples?

The emerging international Indigenous rights movement has begun to gain legislative and legal traction in Canada. This traction has been spurred by the final reports of the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls, both of which recommended implementation of UNDRIP.[35] The B.C. government has enacted the *Declaration on the Rights of Indigenous*

[29] *Ktunaxa Nation*, [2017] 2 S.C.R. 386, at para. 63.

[30] *Van der Peet*, [1996] 2 S.C.R. 507, at paras. 55–56.

[31] See Karen Engle, *Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, 2010); Ronald Niezen, *The Rediscovered Self: Indigenous Identity and Cultural Justice* (Montreal: McGill-Queens University Press, 2009).

[32] *Van der Peet*, [1996] 2 S.C.R. 507, at para. 44.

[33] Vine Deloria, Jr., *For This Land: Writings on Religion in America* (New York: Routledge, 1999), 157.

[34] *Sparrow*, [1990] 1 S.C.R. 1075, at 1078.

[35] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), 193; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b* (Ottawa: Privy Council Office, 2019), 177.

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Peoples Act[36] and the federal government's *United Nations Declaration on the Rights of Indigenous Peoples Act* came into effect in June 2021.[37] Notably, these legislative initiatives do not enshrine the language of UNDRIP in Canadian law, but rather call on the government to implement UNDRIP in consultation and cooperation with Indigenous peoples to address discrimination, injustice, and promote mutual understanding and respect.[38] In principle, while these statutes do not implement the text of UNDRIP, they do establish a basis for engaged conversations on what constitutes mutual understanding (that is, addressing cultural incommensurability), which could lead to greater recognition in balancing societal or state interests with Indigenous rights and may even lead to initiatives and legal decisions that make the constitutional protection of religious freedom a reality for Indigenous peoples.

Various courts have begun to engage with claims strategically aligned with support from UNDRIP. It is important to note that international instruments are only enforceable in Canada if they have been implemented through domestic law.[39] On this point, the Supreme Court of Canada wrote, "Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[40] As early as 2012, the Federal Court acknowledged that UNDRIP may be used "to inform statutory interpretation."[41] The following year, the same court wrote, "When a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured. . . . Indeed, while [UNDRIP] does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values."[42] In 2015, the Federal Court clarified that while UNDRIP may have an impact on the interpretation of statutes, it does not have an impact on the constitutional order, including how the duty to consult is interpreted.[43] However, in March 2021 the British Columbia Court of Appeals agreed that UNDRIP could be raised as an important contextual factor in assessing whether state actions were constitutionally appropriate.[44] The Canadian Supreme Court has yet to comment on the relevancy of UNDRIP on constitutional matters.[45]

While such early court decisions come with some ambiguity, there have been others that point toward signs of hope in the potential impact of UNDRIP. The Canadian Human Rights Tribunal, responsible for hearing cases related to the Canadian Human Rights Act, was very critical of Canada's decision to treat non-status Indigenous children differently than status children.[46] On this, the tribunal wrote: "[The] Panel finds that . . . various domestic and international legal instruments . . . [including *UNDRIP*] all support the inherent self-determination right of First Nations to identify their citizens and members outside the narrow lens of the *Indian Act*. In particular, this approach is consistent with protecting First Nations individual and collective human rights as articulated in the *UNDRIP* and other relevant international

[36] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.

[37] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess., 43rd Parl., 69–70 Elizabeth II, 2020–2021, S.C. 2021, c. 14.

[38] Bill C-15, s. 4–6.

[39] See Francis v. The Queen, [1956] S.C.R. 618, 621.

[40] Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, para. 70.

[41] Canada (Human Rights Commission) v. Canada (Attorney General), [2012] FC 445, [2013] 4 FCR 545, para. 353.

[42] Simon v. Canada (Attorney General), [2013] FC 1117, para. 121.

[43] Nunatukavut Community Council Inc. v. Canada (Attorney General), [2015] FC 981, para. 99.

[44] Yahey v. British Columbia (Attorney General), [2021] BCCA 127, para. 15.

[45] Somewhat strangely, the only mention of UNDRIP in a Supreme Court of Canada decision came in 2001, when the court contemplated whether a Mohawk of Akwesasne, an Indigenous community across the U.S.-Canada border, should pay border tax. The court cited an early draft of UNDRIP, the International Labor Organization Convention No. 169, and a comparable document at the Inter-American Commission of Human Rights before denying the claim. See Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911, paras. 80–83.

[46] This case centered on what is known as Jordan's Principle. Children who qualify under Jordan's Principle receive services and resources specifically for Indigenous children. The tribunal has been instrumental in reformulating this principle in reference to UNDRIP.

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instruments, section 35 of the *Constitution Act, 1982*, and the quasi-constitutional *CHRA*. It is consistent with Canada's public commitment to implement the TRC recommendations, rebuild a Nation-to-Nation relation with First Nations, and advance reconciliation."[47] While the government has some disagreement with other assertions made by the tribunal, it has affirmed their support for membership of Indigenous communities to be defined by the communities themselves.[48]

Stepping beyond commentary on Indigenous rights and legislation specifically related to Indigenous peoples, the Ontario Court of Justice cited both articles 5 and 11 of UNDRIP, recognized the impact of colonialism, and cited Indigenous self-determination in a restorative justice sentencing decision that returned an Indigenous man to his community.[49] Collective rights and cultural rights featured heavily in these decisions, which found their footing, in part, in UNDRIP. To date, in these limited cases, it appears that UNDRIP is helping to support cross-cultural understanding and, by doing so, increase awareness of the importance of the security of Indigenous cultures, potentially limiting the ability of the state to justify practices that may inhibit those cultures. While the question of whether UNDRIP will have an impact on the constitutional order remains unknown, the courts have demonstrated some favor for legislative interpretations that privilege Indigenous self-determination.

Why bother with the framework of *religion* when *culture* seems to resonate with higher standards for Indigenous religious freedom? Anecdotally, religion may not have the same rhetorical value that it does in the United States, but religious freedom does provide protections that extend beyond those afforded by Aboriginal rights, as noted above.[50] The commentary in *Servatius v Alberni School District No. 70* provides insight on the potential impact of UNDRIP on the *Charter* right to religious freedom. In this 2020 decision of the British Columbia Supreme Court, the lower court considered the claim of a parent and her children who argued that their section 2(a) rights were violated when smudging was allowed to take place in the public school classrooms of the children. The judge dismissed the claim outright, suggesting that no violation of their section 2(a) right had taken place.[51] The court did not need to contemplate the justification for infringement because no violation had occurred, so this case is important in what it reveals about the *potential* for the impact of UNDRIP in section 2(a) cases rather than what it *actually* does at this time. The lower court explained:

> In its summary report, the T[ruth and] R[econciliation] C[ommission] issued "calls to action" in order to redress the legacy of residential schools and advance the reconciliation process, including a call to build student capacity for intercultural understanding, empathy, and mutual respect, and a call for implementation of the [UNDRIP]. In the week following the completion of the hearing of this case, the Declaration on the Rights of Indigenous Peoples Act . . . received royal assent. Section 3 of this Act provides that in consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of the province are consistent with UNDRIP. For the purposes of our case, it is notable that UNDRIP includes the right for Indigenous peoples to "manifest, practise, develop and teach their spiritual

[47] First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), [2020] CHRT 20, para. 135.

[48] Indigenous Services Canada, "Joint Statement by Ministers Miller and Lametti on the Filing of a Judicial Review before the Federal Court, March 13, 2021, https://www.canada.ca/en/indigenous-services-canada/news/2021/03/joint-statement-by-ministers-miller-and-lametti-on-the-filing-of-a-judicial-review-before-the-federal-court.html.

[49] R. v. Francis-Simms, [2017] ONCJ 402, para. 48. Both articles 5 and 8 of UNDRIP address the participation in and maintenance of culture. See UN General Assembly, Resolution 61/295, Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (September 13, 2007).

[50] In my book, I explore the differences between section 2(a) and section 35 claims related to religion. Section 2(a) may be more favorable for claims that cannot be easily connected to the collective and for those claims rooted in post-contact practices and traditions. See Shrubsole, *What Has No Place*, 78–99.

[51] Servatius v. Alberni School District No. 70, [2020] BCSC 15, para. 122.

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> and religious traditions, customs and ceremonies" (Article 12(1)); the right to "the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information" (Article 15(1)); and the right to "promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, [and] practices" (Article 34).[52]

While this is a lower court ruling and the statement above did not play a factor in the decision, it is important because it demonstrates the possibility for the language of cultural rights and collective rights, as articulated in UNDRIP, to potentially raise the value and priority Indigenous religions deserve in a way that affects not only legislation but the constitutional protection of religious freedom itself. In other words, McNally may be correct that collective rights and the rhetoric of culture as articulated in UNDRIP may help to raise the standards for Indigenous religious freedom in the United States as we may infer from early indications in Canada.

McNally concludes with the story of the establishment of the Bears Ears National Monument in 2017, noting that these success stories attract fewer headlines because they operate within the nation-to-nation relationship rather than in the often-adversarial location of the courts (32). McNally reminds us, "Making the legal claims is often necessary to creating conditions favorable to such agreements, but the making of the legal claims is a means, not an end in itself" (296). Ultimately, raising the standards of religious freedom requires a more general cultural shift in society whereby non-Indigenous peoples, including lawmakers, government ministers, and judges, understand and recognize the importance of a nation-to-nation relationship without the fear and hesitancy that seems to come with such a notion. In such a culture, one would hope, the courts would be needed far less.

In response to the Convention of Biological Diversity's Aichi Biodiversity Targets of 2010, Canada set its own goals in 2016.[53] While two of the targets deal specifically with Indigenous peoples, the preamble to the targets expressly calls for the "meaningful, full and effective participation" of Indigenous peoples.[54] Importantly, the establishment of these targets and goals led to the formation of the Indigenous Circle of Experts, one of three central bodies responsible for working toward the pursuit of target one,[55] which reads: "By 2020, at least 17 percent of terrestrial areas and inland water, and 10 percent of coastal and marine areas, are conserved through networks of protected areas and other effective area-based conservation measures."[56] In its 2018 report, the Indigenous Circle of Experts proposed the implementation of Indigenous Protected and Conserved Areas, or IPCAs, based largely on the principle of Free, Prior, and Informed Consent as articulated in UNDRIP.[57] IPCAs are Indigenous-led conservation efforts that move toward "true reconciliation," an acknowledgement of international law, and "an exercise in cultural continuity on the land and waters," while raising Indigenous rights, among other features.[58] The government has committed to IPCAs, and related projects as it moves toward its 2025 goal of the conservation of 25 percent

[52] *Servatius*, [2020] BCSC 15, at para. 37, citing United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, and the final report of the Truth and Reconciliation Commission.

[53] Melanie Zumba et al., "Indigenous Protected and Conserved Areas (IPCAs), Aichi Target 11 and Canada's Pathway to Target 1: Focusing Conservation on Reconciliation," *Land* 8, no. 1, (2019), article 10, https://doi.org/10.3390/land8010010.

[54] Ministry of Environment and Climate Change, *2020 Biodiversity Goals and Targets for Canada* (2016), https://publications.gc.ca/collections/collection_2016/eccc/CW66-524-2016-eng.pdf.

[55] "Background," Pathway to Canada Target 1, Conservation 2020, https://www.conservation2020canada.ca/the-pathway/.

[56] Ministry of Environment and Climate Change, *2020 Biodiversity Goals and Targets for Canada*.

[57] Indigenous Circle of Experts, *We Rise Together: Achieving Pathway to Canada Target 1 through the Creation of Indigenous Protected and Conserved Areas in the Spirit and Practice of Reconciliation*, March 2018, 5, https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf.

[58] Indigenous Circle of Experts, *We Rise Together*, 5–6.

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of Canadian land.[59] Most recently, the Ktunaxa, who were unable to find security for Qat'muk in the courts, entered the planning process to protect Qat'muk as an IPCA[60]—a victory for the Ktunaxa.

Indeed, the pursuit of religious freedom stretches far beyond the First Amendment and section 2(a) of the *Charter*. It is clear from the Canadian context that international Indigenous rights discourse has real potential to raise the standards for Indigenous religious freedom in whatever forum it is pursued, even if it is not named as such. The ever-present reminder of colonialism, enshrined in assertions of Crown sovereignty, as deeply rooted in Canadian law as collective rights and the cultural rights of Indigenous peoples, shows no signs of departure. That said, the legal and legislative cultures of Canada seem to be coming into awareness of the importance of a nation-to-nation relationship and the ideals and legal standards set forth in UNDRIP. This may help to address, in part, the challenges of cultural incommensurability and the incommensurability of options and choices as experienced in the courts, but it may also lead to more legislative initiatives such as IPCAs that do not call on the judiciary to mediate Canada's relationship with Indigenous peoples.

[59] For a list of the Target One Challenge initiatives, including IPCAs, see "Canada Target 1 Challenge," Government of Canada, last modified May 4, 2021, https://www.canada.ca/en/environment-climate-change/services/nature-legacy/canada-target-one-challenge.html.

[60] Tessa Byars, "Jumbo Valley to Remain Wild after Permanent Retirement of Development Rights," *Patagonia Works*, January 18, 2020, https://www.patagoniaworks.com/press/2020/1/21/jumbo-valley-to-remain-wild-through-permanent-retirement-of-development-rights.

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