APPROACHING THE UNFAMILIAR: HOW THE RELIGIOUS WAYS OF ABORIGINAL PEOPLES ARE UNDERSTOOD IN *DELGAMUUKW V. BRITISH COLUMBIA* (1997)

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Abstract

This thesis will explore how the Supreme Court of Canada understands and frames the religious ways of the Gitksan and Wet'suwet'en First Nations peoples, in the case *Delgamuukw v. British Columbia* (1997). The case started as a land claims case but at the Supreme Court level it became about whether Aboriginal oral knowledge could be used as historical evidence in a Canadian court of law, in particular for this dispute, as an aid for First Nations peoples to establish title to their traditional territories. The Court decided that Aboriginal oral knowledge could be used as evidence. This thesis does five things: 1. It examines some of the tools that can be used to examine and evaluate how the religious ways of Aboriginal peoples are discussed in law in Canada. Here it focuses on using a broad understanding of religion as "lived" to understand religion. It also establishes a social-scientific method of discourse analysis, drawn from a number of sources, to evaluate legal documents. 2. This thesis explores the socio-legal context in Canada in which Aboriginal peoples and their claims need to be understood. Here the presence of European and Christian views that are still present in society and social institutions in Canada and the way they affect how Aboriginal religious ways are understood is determined. The characteristics of law that make it difficult for Aboriginal claims to be understood and handled adequately in court in Canada are also investigated. 3. The third aspect that this thesis focuses on the markers of the religious ways of Aboriginal peoples in the *Delgamuukw* case and how are they understood in the Canadian socio-legal context. Here there is discussion of oral knowledge, land, crests, feasting and totem poles and what each might mean for the Gitksan and Wet'suwet'en peoples and how the legal system might have trouble handling them. 4. Analysis of the *Delgamuukw* case is the fourth part of this thesis. How the law understands and frames the religious ways of the Gitksan and Wet'suwet'en peoples in the *Delgamuukw* case are

investigated. It is determined that the Court downplayed the religious ways of Aboriginal peoples (by "writing out", by using vague language to refer to it or by not mentioning it at all); it did not do justice to Aboriginal beliefs by labeling oral knowledge as "sacred"; the *Delgamuukw* decision fell short of really treating oral knowledge as equal to other forms of historical evidence by excluding oral knowledge with religious content; legal adjudicators made pronouncements on the religious uses of land for the Gitksan and Wet'suwet'en and finally; land was quantified, regulated and title was diminished by the ability for the court to infringe on it. What these actions by the Court suggested about how it understands religion and the religious ways of Aboriginal peoples where also contemplated. It was noted that the law characterized issues and used language in particular ways to avoid discussing religion, to discount it as evidence, and used a Christian understanding of religion to comprehend Aboriginal religious ways, which did not do justice to their beliefs. 5. The last part of this thesis questions whether there other ways in which the law, and the majority of non-Aboriginal peoples in Canada, could come to better understand and handle the religious ways of Aboriginal peoples than they did in the *Delgamuukw* case. It determines that there are a number of indications that suggest that this is possible including, the unique historical situation of Canada, the teaching and communication skills present in many Aboriginal communities, the space opened surrounding the inclusion of oral knowledge as evidence in law, increasing dialogue with Aboriginal communities, and the current revaluation of history. Nevertheless, there is also an ambivalence on behalf of the law regarding whether or not it will go in the direction that could view Aboriginal religious ways in alternative ways which could result in a better understanding these ways on their own terms. The thesis concludes that according to analysis of the *Delgamuukw* case, law has difficulty understanding and handling the religious ways of Aboriginal peoples in Canada.

Table of Contents

Thesis Committee ii
Abstract iii
Table of Contents v
Acknowledgements viii
Prelude ix

CHAPTER I **Introduction** **1**
1.1 Introduction 1
1.2 Terminology 5
1.3 Broad View of Religion 10
(a) Religion Without an Institution 10
(b) The Diver Religious ways of Aboriginal Peoples 13
(c) The Interconnectedness of Aboriginal Religious Ways 15
(d) Religion in Constant Flux 15
1.4 Methodology and Method 16
(a) What to Analyse 18
i) Discourse Analysis of all Parts of the Case 18
ii) Discourse Analysis of that which is Present and Not 19
(b) General Discourse Analysis 20
(c) What to look for in Conducting Discourse Analysis 22
i) Language Reflecting Emotion or Particular Views 23
ii) Social Construction by the Court 24
iii)Language Reflecting Social Happenings 25
iv)General Factors Regarding Language Use 26
(d) Discourse Analysis and Power 27
(e) Translating Methodology Into Method 28
1.5 Positionality 29
(a) Insider/Outsider Perspectives 29
(b) Parallels in Studying the Other 31
(c) How to View Those in the *Delgamuukw* Case 33
1.6 Thesis Outline 34

CHAPTER II **The Socio-Legal Context of *Delgamuukw*** **37**
2.1 Introduction 37
2.2 Aboriginal Peoples and History in Canada 39
2.3 (De)Colonisation of Christian/European Views in Canada 42
2.4 Characteristics of the Legal System that Affect Aboriginal Claims in Court 47
(a) The Preamble 48
(b) Law's View of Religion 50
(c) The Language of Law 51
(d) The Characterizing Ability of the Law 52
(e) Language to Disempower or Devalue in Court 54
(f) Societal Views Influence Legal Decisions 55
(g) Constraints on Actors in Law 56

	(h) The 'Truth' of Law	57
	(i) Law as "Juridogenic"	59
	2.5 Chapter Conclusion	65
CHAPTER III	**Demystifying the Unfamiliar**	**67**
	3.1 Introduction	67
	3.2 Referring to Religious Factors in *Delgamuukw*	69
	3.3 Aboriginal Oral Knowledge	70
	(a) Adaawk	72
	(b) Kungax	73
	(c) Handling Oral Knowledge in Court	74
	3.4 Land as the Religious Way of Aboriginal Peoples	78
	(a) Land and Identity	80
	(b) Aboriginal Views Towards Land and Legal Approaches	82
	3.5 Crests, Feasting and Totem Poles	88
	(a) Crests	89
	(b) Feasts	90
	(c) Totem Poles	93
	(d) Legally Understanding Crests, Feasting and Totem Poles	95
	3.6 Secrecy's Broad Impact in Court and Outside of it	96
	3.7 Chapter Conclusion	97
CHAPTER IV	**Analysis of How the Religious ways of the Gitksan and Wet'suwet'en are Dealt Understood in *Delgamuukw***	**99**
	4.1 Introduction	99
	4.2 The Ways Language is Used to Downplay Religious Elements	100
	(a) Referring to Religious Factors in Less Than Descript Ways	101
	i) What a Vague Reference to Religion Indicates About Law	104
	(b) Feasting Noted But Not Discussed	106
	i) What the Treatment of Feasting Reveals About the Court	109
	(c) Treating Totem Poles and Crests as Lesser Forms of Oral Knowledge	110
	i) What This Treatment of Totem Poles and Crests Suggests Regarding Law	111
	(d) "Writing Out" the Ceremonial Aspect of Land	112
	4.3 Oral Knowledge	113
	(a) Referring to Oral Knowledge as 'Sacred' and What it Says About Law	113
	(b) Discounting Religious Parts of Oral Knowledge	114
	i) What This Distinction Says About the Legal System	117
	4.4 Land and Title	123
	(a) "Writing Out" the Ceremonial aspect of Land/	123

	Quantification of Land and What it Says About Law	
	(b) Regulating Land and What This Indicates About Law	127
	(c) Infringement	129
	i) Infringement's Implications and What it Reveals About Law	131
	4.5 Chapter Conclusion	133
CHAPTER V	**Working Towards Familiarity**	**135**
	5.1 Introduction	135
	5.2 Canada's Unique Historical Situation	135
	5.3 Communication and Teaching Skills Present in Aboriginal Communities	138
	5.4 The Introduction of Possibilities Surrounding Oral Knowledge	141
	5.5 Increased Dialogue	142
	5.6 Histories are Being Reviewed and (Re)Written	144
	5.7 Chapter Conclusion	147
CHAPTER VI	**Conclusion**	**149**
	6.1 Introduction	149
	6.2 Summary	149
	6.3 Conclusion	156
Appendix 1	**Why Aboriginal People Are Not Frequently using s.2(a) of the *Charter***	**158**
Appendix 2	**Coding Process**	**164**
Bibliography		167

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Prelude[1]

In 1984 the Gitksan and Wet'suwet'en peoples started a lengthy court process to obtain title to their 58, 000 square kilometer section of land in the interior of British Columbia, Canada. These groups together comprise of about 7850 people, about 5403 Gitksan peoples and 2447 Wet'suwet'en peoples (British Columbia 2011). The majority of these peoples live on the disputed territory which is also inhabited by a number of other Aboriginal groups and more than 30,000 non-Aboriginal peoples (Eudaily 2004, 156). In this land claim, the First Nation peoples tried to use their oral knowledge as historical evidence in court to obtain title. The lower courts did not allow these forms of historical knowledge as evidence. The First Nation groups appealed this decision, which resulted in oral knowledge being eventually contemplated for use as evidence in law by the Supreme Court of Canada in *Delgamuukw v. British Columbia* (1997). Despite oral knowledge now being permitted as evidence in Canadian courts, the Supreme Court, stating that the wrong evidence was produced to establish title, dismissed the original land claims dispute. In order to situate the following thesis, this prelude lists those involved in the case and then states the main facts and findings of the Supreme Court decision.

Appellants:

1. Gitksan Hereditary Chiefs
2. Wet'suwet'en Hereditary Chiefs

Technically, it was *Delgamuukw*, also known as Earl Muldoe, who was suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw (and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve Wet'suwet'en Houses). Because the factum from the appellants was from the Gitksan and Wet'suwet'en peoples I refer to them as the appellants in the case.

Respondents:

1. Her Majesty the Queen in Right of the Province of British Columbia (also known as the Province of British Columbia)

[1] The material mentioned in this prelude comes from the introduction to the Supreme Court case, *Delgamuukw v. British Columbia*, (1997) 3 S.R.C. 1010. Date: December 11, 1997.

2. The Attorney General of Canada

Interveners: 1. The First Nations Summit
2. Musqueam Indian Band
3. West Bank First Nation
4. The BC Cattlemen's Association and Others
5. Skeena Cellulose Inc.
6. Alcan Aluminum Limited

There are five questions that were pondered by legal adjudicators in the *Delgamuukw v. British Columbia* (1997) case and I address each in order. The Justices first questioned "(1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government", and the answer was yes, the pleadings did. The Justices did not rule on the land claims issue stating that it was because the evidence the First Nations groups presented was for ownership and jurisdiction and not for title. The Aboriginal claims had been changed to an attempt to obtain title at the Supreme Court level. For this reason a new trial (but preferably a form of negotiation) was suggested by Chief Justice Lamer to settle the land claims issue.

The adjudicators then asked, "(2) what was the ability of this Court to interfere with the factual findings made by the trial judge[?]" It was determined by the Justices that the Court was able to interfere in the decisions made by lower courts because lower court judges assessed oral knowledge incorrectly.

The Court in *Delgamuukw v. British Columbia* (1997) then asked the question, "(3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof[?]" The Justices then outlined what Aboriginal title was, stating that it could be held for a number of reasons. They also stated that it was "*sui generis*" which meant that it was held communally, it cannot be sold or transferred, only the crown could extinguish it,

it comes from historical occupation, and finally, it is related to Aboriginal ways that form an integral part of their distinctive cultures. The Justices stated that title was limited in a number of ways, such as that Aboriginal peoples cannot use it for other things than what it was established for and if Aboriginal peoples did want to they would first have to make the land into non-title land. It was also noted that title could be infringed upon by the Canadian state for purposes such as development (resource extraction, building of roads, dams, pipelines, etc.). The Justices noted that title is protected under s. 35(1) of the *Canadian Constitution Act 1982*, which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". It is protected in a similar way to the protection of Aboriginal rights under this section. The Court then noted what was required for proving title, noting the following: the claim is identified precisely, the area of the claim has been clearly delineated, there has been continued occupation and use of the land since before contact with Europeans, and that the Aboriginal group making the claim still occupies and uses the land in a "traditional way" and it "is of central significance to them".

The Justices then questioned, "(4) whether the appellants made out a claim to self-government", and they felt unable to determine whether this was the case because of the mistakes made by lower court judges.

Finally, the legal adjudicators asked "(5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*", and it was determined that the province was not able.

What is important for my thesis on how the religious ways of Aboriginal peoples are understood and translated by law in the *Delgamuukw* case is that the case mentions Aboriginal

oral knowledge, crests, totem poles and feasting as a means for Aboriginal peoples to show their connection to the land they are claiming. In addition to this the relationship that the Gitksan and Wet'suwet'en peoples have with the claimed land is deemed to be a religious one. These elements, including land, pertain to the religious ways of the First Nations appellants and therefore the way they are discussed and translated in law can demonstrate the way law understands Aboriginal religious ways and religion more generally in Canada.

CHAPTER I - INTRODUCTION

It is June 20th 1997 and Delgamuukw, a Gitksan hereditary chief (also known as Earl Muldoe) stands tired, perched from a mountain lookout point, peering north out over a vast area of heavily forested land with numerous mountains, large valleys and flowing waterways. Just three days ago he was in front of the Supreme Court where he represented himself, his people and other First Nations groups in the area, in an attempt to have the Court understand the significance of this land for them. He closes his eyes and can feel the warm sun on his face. He breathes in the cool clean air and exhales. The air carries the faint smell of forest trees and moss while also transporting the noise of the nearby stream and the constant movement in the woods. He feels at home here; the land provides his livelihood and that of his family; it is a part of him and his people. Opening his eyes and turning south he spots a cluster of houses being built over an area that has been clear-cut of trees and frowns, thinking of how first, Europeans and now their descendants have destroyed or 'taken away' portions of this land. While land cannot really be owned by anyone, European colonisers and their descendants treat it as if it can, sectioning land off, prohibiting entry and use, selling it, building on it, depleting it of its resources and then moving and doing the same elsewhere. They treat it as if it is an object, not as something powerful, living and worth respecting and protecting. These people do not think of how this land was the home of Delgamuukw's ancestors, providing him comfort, peace and a feeling of connectedness to them and to the past at every moment he is on it. Nor that it is also his nation's future. While Delgamuukw and some of his community feel that perhaps some of the land will one day need to be developed for economic reasons there is also a strong, almost gravitational pull towards maintaining their connection with it, in recognition of and to honour its importance. It is where Delgamuukw comes from, it sustains him and to it he will return just as his community's ancestors have, and his people and their future generations will. To not recognize its power and not to honour it could result in misfortune for Delgamuukw and his nation. Staying connected with the land is what insures the survival of his people's future generations. Turning to start the hike back home Delgamuukw lets out an exasperated sigh. Will the Justices understand the importance of this land to us? He wonders. Will they see that our stories (both oral and physical forms) are the only thing we have to make our claims? Or will we lose yet again? With months to wait before a decision, all Delgamuukw can do is be hopeful.

1.1 - INTRODUCTION

It is not difficult to imagine that this might be how Earl Muldoe and the Gitksan and Wet'suwet'en[2] peoples, who live side by side in the northwestern part of the interior of British Columbia, Canada, feel about their traditional territories and reflect on the *Delgamuukw* dispute. They have lived in this area since before British Columbia became a province, since before anyone from Europe stepped onto what has since become known as North America. The region

[2] The spelling of these names vary in a number of places, I have therefore decided to use the spelling that was used in the *Delgamuukw v. British Columbia* (1997) case and its facta.

is 58, 000 square kilometers of heavily forested land and does in fact contain numerous mountainous areas and large valleys. For the Gitksan and Wet'suwet'en peoples who occupy it, this land, as well as having resource value for them, also has a deeper meaning. Their land is tied to their identity, it is their life source, their connection to their ancestors and to the spirits, and it is the basis of much of their worldview. With fear of losing more of their land, in 1984 these First Nations groups began a long court battle to gain title to their lands. They found, however, that they had to engage in a legal process where they were outnumbered, where the language was not their own, a place that utilized culturally unfamiliar laws and that was not set up in their favour. Over the years, as the dispute moved through the legal system, it turned away from the land claims issue and became more about the technicalities of valid evidence. The result was that the Supreme Court of Canada (hereafter "Court") eventually contemplated, whether Aboriginal peoples should be allowed to use their oral knowledge as a form of evidence in a Canadian court of law. While the legal adjudicators decided that Aboriginal peoples could use their oral knowledge as evidence in court, it sidestepped the Gitksan and Wet'suwet'en land claim issue entirely, suggesting that it be negotiated outside of court or that a new trial commence. This case has become known as the *Delgamuukw v. British Columbia* (1997) case (hereafter, *Delgamuukw*).

This thesis will not discuss the land dispute that started the case, nor will it address the legal arguments, relevant laws or precedents raised by the opposing parties regarding whether oral knowledge should be used as evidence in court. As a religious studies scholar I will focus instead on how the case understands and handles the religious ways of Aboriginal peoples, and how in particular the law envisions their religious ways. Examining how the disputing groups and the Court discuss, frame and make comments in the case reveals each party's understanding

and treatment of these religious ways. I chose the *Delgamuukw* case to examine because in the document's mentioning of oral knowledge, land, crests, feasts and totem poles, it is possible to discern how the religious ways of Aboriginal peoples are framed in law. In Canada there are numerous Aboriginal cases that include religious content because the religious ways of Aboriginal peoples permeate all aspects of their lives (Pettipas 1994, 51; Ross 2005, 3-4; Beaman 2002, 137). *Delgamuukw*, however, is distinct in several ways and is one of the most recent to contain a number of useful criteria. It is a Supreme Court case and therefore the decision is intended to be exemplary for other instances and demonstrative of clear legal principle. It is a case between First Nations peoples and the state, which provides a unique view into how the state (and potentially the dominant narrative in society) treats Aboriginal peoples and their religious ways. The First Nations groups in the case did not argue for freedom of religion; this allows for a more nuanced view of how the law understands the religious ways of Aboriginal peoples as legal adjudicators' subconscious views on the subject may become visible. It was a case deemed revolutionary for advancing Aboriginal rights in Canada which therefore allows for an examination of how far the law actually went in this regard. The *Delgamuukw* case established and remains the standard of how Aboriginal oral knowledge is allowed to function as evidence in court and therefore remains relevant. Finally, the case is useful as Aboriginal religious ways come into play in a number of respects in the case, such as, through discussion of Gitksan and Wet'suwet'en oral knowledge, land, crests, feasting and totem poles. Furthermore, although a thorough discussion of Aboriginal religious freedom in Canada is beyond the scope of this thesis, *Delgamuukw's* comments on the religious ways of Aboriginal peoples provides a small window into that issue. Because Aboriginal peoples rarely argue directly for freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*[3] (hereafter "*Charter*")

[3] This section of the charter states that, "Everyone has the following fundamental freedoms: (a) freedom of

and there is a subsequent dearth of such cases to examine in this regard[4], *Delgamuukw's* comments in the absence of many are noteworthy.

My thesis addresses the following five main questions: 1. What are some of the tools that can be used to examine and evaluate how the religious ways of Aboriginal peoples are discussed in law in Canada? 2. What is the socio-legal context in Canada in which Aboriginal peoples and their claims need to be understood? In particular, how have the European and Christian views held by colonisers and their descendants affected the construction of the Canadian state (constitution, institutions, etc), the decolonisation process and particularly the legal system in regards to Aboriginal peoples? 3. What are the markers of the religious ways of Aboriginal peoples in the *Delgamuukw* case and how are they understood in the Canadian socio-legal context? What might the religious elements in the case mean for the Gitksan and Wet'suwet'en peoples and how might the legal system have trouble handling them? 4. How does the law understand and frame the religious ways of the Gitksan and Wet'suwet'en peoples in the *Delgamuukw* case? What does the decision's language suggest about how law (and potentially the majority of non-Aboriginal Canadians) conceptualize religion and the religious ways of Aboriginal peoples in Canada? 5. Are there other ways in which the law, and the majority of non-Aboriginal peoples in Canada, could come to better understand and handle the religious ways of Aboriginal peoples than they did in the *Delgamuukw* case?

My thesis will demonstrate that the *Delgamuukw* decision purposefully downplayed the religious ways of Aboriginal peoples in the *Delgamuukw* land dispute (by "writing out"[5], by

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conscience and religion".

[4] For my understanding of why Aboriginal peoples might not be arguing for freedom of religion under s. 2(a) of the *Charter* see appendix 1. This piece was not included in the body of my thesis as it verges on legal analysis which I am not trained to pursue.

using vague language to refer to religion or by not mentioning it at all). It shows that while the *Delgamuukw* decision has taken positive steps towards handling Aboriginal worldviews and religious ways, by accepting that oral knowledge can be used as evidence in court, it falls short of really treating oral knowledge as equal to other forms of historical evidence. It does this by potentially excluding oral knowledge with religious content. This thesis also illustrates how the legal adjudicators make pronouncements on the religious uses of land for the Gitksan and Wet'suwet'en and finally, how land regulation and Aboriginal title is problematic for the religious ways of Aboriginal peoples in Canada. In these ways the law in *Delgamuukw* showed its difficulty understandings and handling the religious ways of Aboriginal peoples.

This chapter will discuss my choice of terminology used in this thesis. It will then note the broad view of religion that I have used in my research. Next, it outlines my methodology and method of discourse analysis and finally it examines my position in conducting my research on how the religious ways of Aboriginal peoples were handled in the *Delgamuukw* case.

1.2 - TERMINOLOGY

In her discussion of method, Carol Smart comments that, "we also need to think more rigorously about how we compose our writing and convey our sociological imaginations to the reader through the text" (2009, 305). A consequence of my extensive focus on language and discourse in this thesis is that I now have a hyperawareness of it and have therefore carefully chosen the terms that I myself use to discuss my work. I have therefore thought rigorously about which terms to employ in my work and have chosen to use the terms "religious ways",

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[5] By "writing out" I mean that the court literally writes out the religious in an instance in the case in a matter of three sentences. The first states the religious significance of land, the second perhaps alludes to it while the third leaves it out entirely. Discussion of this "writing out" occurring in the *Delgammukw* case is presented in chapter 4.

"Aboriginal peoples", "Aboriginal peoples in Canada", and "oral knowledge", despite the existence of competing terms. My reasoning for which follows.

The term "religion" when referring to Aboriginal peoples' religious beliefs in Canada is disputed. I agree with Lori Beaman who has 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 (2002, 137). The word "spirituality" is therefore often used to describe the religious ways of Aboriginal peoples in Canada. Using "spirituality" however can be problematic, as it has been used in other ways throughout history. Mark Nation and Samuel Wells mention how in the 1950s the term "spirituality" was used to refer to beliefs that were non-Christian (its use can therefore reveal colonialism) and to talk about philosophy, factors they think those using the terms should be aware of (2000, 67). Although the *Delgamuukw* documents do use the term "spirituality" in reference to Gitksan and Wet'suwet'en beliefs, I will use the terms "religious" and or "religious ways" throughout this thesis. The term "religious" either alone or as part of the term "religious ways" will be used instead of "spirituality" in order to avoid confusion of what it is and whether it deserves protection under the *Charter* (using "religious" over "beliefs" or "spirituality" to me invokes the principles of freedom of religion)[6]. My use of "religious" therefore is intended to indicate that Aboriginal beliefs/spirituality should be part of an expanded definition of "religion", especially in how the law in Canada has come to understand the term. The term "religious" also appears more encompassing and allows for the discussion of many beliefs that are not necessarily tied to a particular religion. "Religious ways"

[6] I also use the term "religious", which is similar to "religion", because I would like to emphasize its status as one of the world's religions. This problem was noted by Bryan Cummins and Kirby Whiteduck (1998, 7) who state that,

> Because First Nations' religions lack the codification of the 'Great Traditions', i.e., Christianity, Judaism, Islam, they have historically been relegated to the status of 'folk religions' at best and pagan and heathen at worst. By denying them the status of the 'Great Traditions' it becomes easier to dismiss their legitimacy *in toto* and the significance of their sacred sites in particular. Where is it written that this is a sacred burial ground?

is terminology used by anthropologist Marie-Francoise Guédon (2012; see its use 1994, 39-70). The use of "religious ways" allows me to get past some of the difficulties of choosing between "spirituality" and "religion" as it reflects the fact that most of the religious ways of Aboriginal peoples in Canada today are drawn from both historically Aboriginal spiritual practices as well as various Christian traditions (see Beaman 2002, 137; examples: James 1999, 280-281; McMillan 2002, 301). Conversely, Aboriginal "spirituality" could refer solely to traditional Aboriginal practices and therefore not accounting for Aboriginal peoples' Christian beliefs. In using these terms, "religious ways", I am aware of their social implication. Most Aboriginal peoples would not employ these terms (nor separate out religious elements form others) and their use can therefore be seen to an extent as a continuation of colonialism. Any language used to discuss religion in terms of Aboriginal beliefs will have this problem (noted as well with the term "spirituality" above). However, in order to discuss religion one must use terms and as noted above I have given extensive consideration to the ones I use in an effort to limit the issues they carry with them (as eradication is impossible).

Aboriginal peoples in Canada can be referred to in numerous ways including "Native", "Indigenous", and "Aboriginal". These terms (especially "Native"[7] and "Aboriginal") typically refer to First Nations, Metis and Inuit peoples simultaneously. "Indigenous" is a term used more commonly in international contexts to refer to Aboriginal peoples collectively around the world (Smith 1999, 7). In Canada the term "Aboriginal" is used most frequently by the state, judges in courts (the *Delgamuukw* decision only uses the term "Aboriginal"), and in Canadian scholarship involving Aboriginal peoples (even by First Nation scholars such as John Borrows, James (Sakej) Youngblood Henderson and Mary Ellen Turpel). Given that the *Delgamuukw* case was

[7] The term "native" is more relevant in the American context where "Native American" is commonly used to refer to Aboriginal peoples.

raised by First Nations peoples regarding an Aboriginal title claim, I will use these two terms "First Nations" and "Aboriginal" somewhat interchangeably (especially when discussing particular aspects of the case). The term "Aboriginal", however, will be used when making statements that could be relevant to all three groups encompassed by the term. When possible I will refer to the relevant Aboriginal groups by name. The term "people", in reference to various Aboriginal groups, will almost always be pluralized. Linda Tuhiwai Smith states that the term "peoples" in "indigenous peoples" is pluralized to account for the plurality between indigenous groups (1999, 7). Similarly, my pluralizing of "people" will refer not simply to the difference of Aboriginal peoples in different parts of the world, but most significantly for this thesis, to their differences within very close proximity to one another (such as in the same country, province or region) and even within their own communities.

My thesis will refer to Aboriginal peoples as being "in" Canada rather than being "Canadian". The terminology used here has implications for how Aboriginal peoples are viewed in relation to the Canadian state and how they view themselves. The terms are defined differently by the Canadian state and by different Aboriginal groups[8]. I will refer to Aboriginal peoples as being in Canada as it implies a more neutral view of the variety of relationships that Aboriginal peoples individually or as groups may have with the state.

I will use the terms "oral knowledge" when referring to what has often been labeled Aboriginal "oral histories" of "oral traditions". This allows me to remain outside of the dispute as to what is "true" or "history" (as "oral history" has been commonly conceptualized) and what is "false" or not historical (as "oral tradition" has sometimes been referenced). Aboriginal

[8] For a more in depth discussion on this see footnote 2 of Beaman, 2002, 135

peoples do not make such distinctions of “true” and “false”, see discussion on this in chapter 3. “Oral knowledge”, meaning oral history/oral tradition, can encompass many different types of orality that Aboriginal societies employ or have employed in the past, including physical objects, songs, and dances.

In this thesis I will put the terms ‘sacred sites’ and ‘sacred’ in apostrophes to draw awareness to my consciousness in using them, as they are somewhat problematic. These terms are an issue because for Aboriginal peoples there is often no delineation of the sacred or religious because it flows into all aspects of life (Ross 2005, 3-4; Beaman 2002, 137; Stonechild 1994, “Foreword”). Furthermore, while certain sites may have more religious significance, my understanding of the religious ways of Aboriginal peoples is that they have a religious connection with the entirety of land (Bobiwash 1998, 206; see also Petch 1998, 192 and Borrows 2008, 163; see discussion in chapter 3), and therefore only noting the sacredness of particular areas does not do justice to their beliefs. To me the terms “sacred sites” or “sacred” also implies that there is an area or things that are “profane” or not sacred; because this is not the way Aboriginal peoples understand religion (and is more of Christian understanding of religion), I therefore attempt not to use it and will draw attention to it when I do.

The use of precise language and carefully selected terms, as well as attention to inclusions and omission in my thesis itself, allows me to apply that same standard in my analysis of the factors in the *Delgamuukw* decision. Such analysis will yield understanding regarding how the religious ways of the Gitksan and Wet’suwet’en peoples are thought about and handled in Court and imagined by Canadian law and society.

1.3 - BROAD VIEW OF RELIGION

This section outlines the broad view of religion that I take in my research on the religious ways of Aboriginal peoples and how they are handled and translated in the *Delgamuukw* case. It largely focuses on the benefits of viewing religion as lived, noting that lived religion allows for religion to be defined without an institution, it better captures the diversity of the religious ways of Aboriginal peoples, it helps to understand the interconnectedness of the religious ways of Aboriginal peoples, and finally allows for an understanding of religion as being constantly in flux. This broad view of religion allowed me to better comprehend the religious ways of Aboriginal peoples and how they were handled and translated adequately (or not) by law in the *Delgamuukw* case.

1.3(a) – RELIGION WITHOUT AN INSTITUTION

To come to a more accurate understanding of what is considered religious for Aboriginal peoples (particularly the Gitksan and Wet'suwet'en peoples) and to analyse my research findings, I use a very broad definition of religion; I view religion as "lived". Lived religion focuses more on how people are practicing and blending their religious beliefs rather than on how religion is determined by a religious institution (Orsi 2005; McGuire 2008). Robert Orsi argues that lived religion is worthy of study as he finds it to be what is real for practitioners (2005, 10). Meredith McGuire claims that lived religion is the most important aspect of peoples' religious lives (2008, 213). Orsi only examines the lived religions of people who practice (or practice variances of) traditions that are more institutionalized, namely Catholicism. Meredith McGuire's work is therefore useful as it moves past Orsi's in that she examines the more conflictual or controversial religious practices of people. Some of the practices she comments on are affiliated with a particular religious tradition but may also include other religious practices

that are not associated with it (or are prohibited by it). She also looks at gardening or cooking as religious practices; activities which many could regard as not being religious at all. Other examples of similar lived religion scholarship include Rebecca Kneale Gould's examination of the religious significance of homesteading for those who do it (1997, 217-242). Nancy Ammerman has also observed how the lack of a theology or church attendance of Golden Rule Christians could lead many to determine that they are not religious despite them being so in many ways (1997, 196-216). Lived religion scholarship shows that religious institutions need not be involved with religion when conceptualized as that, which is lived. Lived religion pushes the boundaries of what has historically been considered to be religious. It allows for a variety of practices to be included into the religion category including officially recognized religious practices, those practices that people find to be religiously or spirituality significant for them (even ones often conceptualized as mundane) and what some would label "popular religions" and even "superstitions" or "cults". A view of religion as lived allows for religion to be what is meaningful for a particular individual or group.

Paul Heelas and Linda Woodhead's Kendal Project showed that practices that are not officially recognized by a particular religious tradition are still important religiously for many individuals and for study (where adherence can even be quantified to a large degree) (2005). The Kendal Project, which quantified religious and spiritual experiences as being equally measurable and equally valid forms of belief, is relevant for my work as it dispels some of the debate over distinctions between using the term "religion" and the term "spirituality" when referring to Aboriginal religious beliefs. A view of religion as lived can encompass both "religion" and "spirituality" into its definition as well (see McGuire 2008, 6) and is therefore also useful given my previous contemplation over which to use as terminology in my thesis. A broader, more

inclusive definition of the religious ways of Aboriginal peoples allowed for in a perspective of religion as lived, could help those less familiar with such ways (the Canadian state and the majority of non-Aboriginal society) to come to an understanding and recognition of their significance for Aboriginal peoples. Lived religion is also broad enough to properly include the religious ways of Aboriginal peoples as equally religious to any more established, well-known or institutionalised traditions.

Canadian law has also found lived religion to be useful in terms of understandings religion. In the Supreme Court case *Syndicat Northcrest v. Amselem* (2004) religion was determined to be what one "sincerely believes" (para 46). In *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006), where the court had to decide whether a Sikh boy could carry a *kirpan* (ceremonial dagger) prescribed by this tradition to school. In the decision the Judge determined that the boy could because he sincerely believed that it was necessary for him to do so according to his religion. It follows that if a view of religion as lived is used by judges in courts (as determined that it should be in *Amselem* and employed in *Multani*) to analyse their cases then Aboriginal religious beliefs should be correctly understood as deserving the same kind of protection (and same degree) as any other religious or sincerely held beliefs in Canada. As will be described later, this is not the case for Aboriginal peoples. An example of the law not understanding religion as lived and therefore limiting religious freedom is examined by Winnifred Fallers Sullivan in the American context where she notes that religious freedom cannot really be protected by law through religious freedom legislation or the constitution because law defines religion too narrowly, largely as being tied to a religious institution (2005,

138)[9]. Sullivan argues that this is a problem as most Americans have religious practices that are not tied to an institution. In the case she examines, regarding what a cemetery owned by a town will allow to be placed over graves, the cemetery is unhappy with anything vertical being placed on the graves and it, along with the law, essentially decides that placing vertical objects on the graves is not religion but more a matter of decorating (2005, 10, 17-18, 35). Sullivan notes that this view of religion limits the religious freedom of these individuals as the placing of statues, flowers, crosses, etc on graves is an expression of religion and therefore religious (2005, 35-37). The situation Sullivan describes shows the limitations on religious freedom that occur when religion is not seen as lived and defined only in relation to an institution or 'orthodoxy'.

1.3(b) – THE DIVERSE RELIGIOUS WAYS OF ABORIGINAL PEOPLES

A further advantage of lived religion is that it allows for Aboriginal religious ways to be understood for what they are, diverse. As discussed further in chapter 2, many Aboriginal peoples in Canada today practice elements of Christianity in addition to their traditional beliefs. Michael McNally shows this in describing how a Christian hymn tradition was introduced to Aboriginal peoples and how it later became fused into their religious practices and made their own (1997, 133-159). McGuire would call this blending/bricolage (2008, 188). The religious ways of Aboriginal peoples in this manner, like lived religion, challenges the unitary idea of religion where one can only exclusively practice one tradition and what it prescribes (McGuire 2008, 186). Similarly, William Closson James' understanding of religion shows that many people may follow different religious traditions (or aspects of different religious traditions) for distinct parts of their lives, giving the example of someone being born Shinto, marrying Christian and dying Buddhist (James 1999, 279). He argues, for example, that some Aboriginal Cree

[9] Beaman (2010) has examined whether Sullivan's argument hold true in the Canadian context and finds that they do not fit the Canadian system equally well for a number of reasons.

people practice their traditional beliefs in addition to Christian ones at times, which is not (in most cases) considered a synthesis but rather a compartmentalisation (1999, 281). Cornelius Jaenen and James call this "religious diamorphism" (1985, 185; see also James 1999, 281). James notes that this compartmentalization likely occurs for many Canadians as they live a pluralist society (1999, 284) Jaenen notes that in fact "[p]robably all individuals hold beliefs which are mutually contradictory but these produce no behavioural crises so long as they remain compartmentalized" (1985, 193). James also notes that it may not just be a compartmentalisation of different religions but rather a compartmentalisation between one's religion and their culture or non-religious worldviews (1999, 284). His description of this religious diamorphism within Cree communities in Canada allows us to easy envision it happening in other Aboriginal communities as well. Although some Christian practices may have been appropriated by or incorporated into Aboriginal religious traditions, this does not mean that Aboriginal people conceptualize religion in the same way as Christians do (or as the majority of American or Canadian society does). In fact, it appears that Aboriginal peoples do not see religion in the same way that larger Christian society does and this may be part of the reason for why they do not present their religious ways in courts in the same fashion as the majority of non-Aboriginal peoples in Canada commonly do. Lived religion is also useful in trying to break past these commonly held understandings of religion. According to McGuire, lived religion should try to understand a practitioner's beliefs "on their own terms, rather than in terms of our own cultural assumptions" (McGuire 2008, 103) and histories (Orsi 2005, 191). The religious ways of Aboriginal peoples do not appear to have the same kind of organization as Abrahamic traditions and therefore, a view of religion as lived and as diverse (whether compartmentalized or

synthesized with other beliefs), may offer one of the best ways to understand Aboriginal religious traditions.

1.3(c) – THE INTERCONNECTEDNESS OF ABORIGINAL RELIGIOUS WAYS

Another benefit that may result from viewing religion as lived is that according to McGuire and Gould (who discuss healing practices and homesteading beliefs respectively) lived religion can encompass holistic beliefs and understandings. It is even broad enough to encompass Orsi's view of religion as a series of relationship between people and places and heaven and earth over time (2005, 3). McNally also seems to agree, noting that discussing Aboriginal hymns with those who sing them reminded the singers of what they and others have lived through, including sometimes the pain of loss (1997, 150). This holistic view of interconnectedness, in which religion is allowed to permeate many facets of life, is especially important when thinking about the religious ways of Aboriginal peoples, as this is how many Aboriginal peoples view religion (for a discussion of this see chapter 3). Lived religion allows for the interconnectedness of the religious ways of Aboriginal peoples to other facets of their societies to be adequately addressed. This is important given the degree to which religion is woven throughout their societies and the impact this has on how they understand legal processes, what they are after in court, and how they present their claims in the *Delgamuukw* case and elsewhere.

1.3(d) – RELIGION IN CONSTANT FLUX

Orsi and McGuire’s view of religion as lived also acknowledges that religious traditions are constantly evolving and never stagnant (1997, 13; 2008, 12). Aboriginal peoples in Canada are less likely to have their religious ways viewed this way under Canadian law because they are

more likely to pursue their claims involving their religious ways under s. 35(1) of the *Canadian Constitution Act* 1982[10] (hereafter "*Constitution*") rather than s. 2(a) of the *Charter* (Woodward 1989, 14-6 to 14-7); for more discussion on this see Appendix 1). Under s. 35(1) of the *Constitution* Aboriginal traditions are subjected to the distinctive culture test (established by the Court in *R. v. Van der Peet* (1996)), which results in them having to prove that their practices have continued consistently from pre-contact time until the present. John Borrows finds this disturbing, given that it "requires a static view of Aboriginal societies" (2008, 180). It results in Aboriginal ways having to remain the same since before European contact and gives little protection to beliefs formed after colonisation. Law would therefore better handle the religious ways of Aboriginal peoples if it recognized that all religion is in constant flux and "lived" rather than just religion under s. 2(a).

This section of my thesis illustrated how a broad view of religion (especially as "lived") could be helpful in terms of coming to a better understanding of the religious ways of Aboriginal peoples. Such comprehension will aid in my analysis of how the religious ways of the Gitksan and Wet'suwet'en peoples were understood and framed in the *Delgamuukw* case.

1.4 – METHODOLOGY AND METHOD

I will be using a sociological methodology in my analysis of the *Delgamuukw* case. This methodology seems the most suitable in seeking answers to my questions regarding the decision. A sociological perspective allows me to focus on the interaction between Aboriginal peoples and the state (specifically law) in terms of religion, rather than examining a particular tradition, its beliefs, practices and rituals. A sociological approach also allows me to use social scientific

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[10] This part of the *Constitution* states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

methods of discourse analysis, which seems more appropriate given that my analysis is of information collected from particular documents[11]. A more sociological method also allows for a layered analysis of my topic. As stated by Smart,

> Sociological work ... is more inclined to tolerate a greater range of potential meanings and also to appreciate that meanings are not stable. Thus new approaches are emerging which analyse both transcript data and visual data in terms of the meanings they evoke rather than for a hidden or underlying meaning. If we accept that there is not a fixed or core meaning behind what is said or drawn or depicted, then looking for (various) traces of meanings in the words used or the images created seems a fruitful way forward. (2009, 303)

Sociology's openness to various forms of meaning is therefore useful for my research project as there are layers of meaning in the *Delgamuukw* case and some of the results are potentially different from what could be gleaned from other methods of analysis. To determine how the religious ways of the Gitksan and Wet'suwet'en peoples were addressed by the appellants, respondents and interveners and also how they were discussed and handled by the Court in the *Delgamuukw* case I will employ social scientific methods of discourse analysis. I will anlayse the case as well as the factum submitted by the appellants, the respondents, and the interveners. A discourse analysis approach enables me to capture some of the nuances of how the Justices in *Delgamuukw* handle the religious ways of the Gitksan and Wet'suwet'en peoples and Aboriginal peoples more generally. I found feminist scholarship to be particularly useful as it focuses on power relations and situations of inequality. This fits well with the questions I pose and is relevant to situations involving Aboriginal peoples who have often found themselves in

[11] I did not want nor need to conduct interviews as I was examining how the Court imagines and deals with the religious ways of Aboriginal peoples. I was not focusing on how the First Nations groups thought the Court dealt with (or should have dealt with) their beliefs, nor on how they saw their own traditions (although some of this comes out in their factums, which in terms of my project can be discussed). Furthermore, often times as a non-Aboriginal person (an even if Aboriginal and a member of the community) it is difficult to conduct ethnographic research with Aboriginal communities.

situations of inequality with the rest of Canada and with the Canadian state[12]. One such feminist scholar, Carol Smart, argues that researchers in sociology "are increasingly realizing that methods are themselves also a means of knowledge co-construction" which "means beginning to see methods as fluid and capable of changing shape depending on their specific purpose or circumstances" (2009, 305). The fluidity of methods described by Smart implies that methods can be tailored to specific projects or parts of them to generate a better understanding of the issue. In light of these comments I have chosen to build my discourse analysis method by drawing on work from a number of sources. The factors of discourse analysis that were relevant to my work will be address next, they include: what to analyse (the whole case, what is present and not present), an overview on how to conduct discourse analysis, what to look for in conducting discourse analysis (emotion or particular views reflected in language, language to socially construct meaning, a reflection of social happenings, and general factors in language use), and finally discourse analysis and power. These are the factors that I will focus on in my analysis of the *Delgamuukw* case, especially in regards to Aboriginal oral knowledge, Aboriginal views towards land and Aboriginal crests, totem poles and feasting. An evaluation of such factors will enable me to determine how such elements are presented to the Court and how the Court comes to understand and translate them in its decision.

1.4(a) – WHAT TO ANALYSE

1.4(a)i - DISCOURSE ANALYSIS OF ALL PARTS OF A CASE

Marie-Claire Belleau and Rebecca Johnson note the importance of paying attention to all aspects of a case including the concurring and dissenting opinions (2008, 145-166). While the

[12] More social scientific feminist analyses of law that I have based by methodology on have been employed by Mary Jane Mossman (1987), Carol Smart (1989), Rebecca Johnson (2002), Belleau and Johnson (2008) and Lori Beaman (2008) who employed such a method specifically in regard to a legal case involving religion.

Delgamuukw case does not have dissenting opinions, it does contain concurring opinions, which will be considered. Belleau and Johnson's comments are however not only useful for examining concurring and dissenting opinions but for analysing the entirety of cases as well. They state:

> It seems clear enough that attempts to grapple with the power of law – in its authoritative and dissenting forms – require close attention to and understanding of the power of language. There are many puzzles to consider. What do dissenting judicial texts desire (or require) of us as readers? What questions do they ask? In what directions do they point? What Courses of action do they suggest? How do they focus our attention in some places and not in others? How do judges use language to shore up or revolutionize specific understandings of legal concepts like 'the family', 'the corporation' or 'consent?' How do judges set up the facts, describe the context, and elaborate the consequences? How do they characterize the parties, identify agents, describe the threats to be avoided, the choices to be confronted, and the prizes to be won? How do they articulate and disarticulate 'reality', rending visible the voices and values that are muted or absent in the opposing reasons? And then, do judges do all this differently when writing in dissent than when writing for the majority? These are pressing questions to be explored, questions whose answers may be found at the intersection of law and language. (2008, 166)

Such thought provoking questions stimulate an examination of all parts of a legal case focusing on the language used in law. The quote above highlights that judges have a significant amount of power and control in terms of how they address the particular aspects of cases. The next chapter will discuss how judges can play an active role in this process. It is useful to focus on all parts of a legal decision and not only the main decision in a judgement as the dissenting and concurring opinions can provide insight into what is occurring in the rest of the document.

1.4(a)ii - DISCOURSE ANALYSIS OF THAT WHICH IS PRESENT AND NOT

Norman Fairclough notes that one should examine the "paradigmatic aspect of language" where he notes that, "paradigmatic aspect of language, in accordance with the usual grammatical sense of 'paradigm', concerns the range of alternative possibilities available, and the choices that are made amongst them in particular texts" (2001, 240). Lori Beaman comments on this type of silence stating that, "[d]iscourses create systems of possibility", noting that in conducting

discourse analysis, "[w]hen one analyzes the discursive process, that which is excluded from the bounds of the possible must be attended to as thoroughly as that which is included" (2008, 36). Both Fairclough and Beaman note to focus on what is possible in terms of discourse. What is possible should not only be thought about in terms of the particular language used but also in terms of the alternative decisions that could have made or how things could have been understood differently. This is particularly pertinent to my research, as the appellants and respondents, in addition to the Justices in the *Delgamuukw* decision, remain, in many regards, silent on religion despite it being present in the case (such as in using vague language to refer to the religious ways of Aboriginal peoples or in failing to discuss feasting, see chapter 4).

1.4(b) – GENERAL DISCOURSE ANALYSIS

Stephanie Taylor defines discourse analysis as "the close study of language in use" (2001, 5)[13]. She explains "the process of analysis" in detail, stating that one should approach this analysis with "blind faith" that something will come of it and "involves going over the data again and again" (2001, 38-39). In my case the "data" is the *Delgamuukw* case and the facta of the appellants, respondents and interveners. She states that in conducting discourse analysis, "[a]s possible patterns emerge, it is useful to note them but continue searching" (2001, 39). The data will then be coded/categorized and overlap will be examined and finally one "searches for patterns in language in use, building on and referring back to the assumptions she or he is making about the nature of language interaction and society and the interrelationships between them" (2001, 39).

[13] According to Taylor, there are four different approaches to discourse analysis. The first examines "the variation and imperfection of language as a system". The second "focuses on the *activity* of language use, rather than the language itself". The third investigates "patterns in the language associated with a particular topic or activity". The final approach "look[s] for patterns within much larger contexts, such as those referred to as 'society' or 'culture'" (2001, 7). Taylor notes however that these approaches are not separate and rather blend into each other in many ways.

More specifically, in terms of an approach to discourse analysis Fairclough suggests that, "[t]exts need to be analyzed both **paradigmatically** and **syntagmatically**", while I have noted the paradigmatic aspect of language above, Fairclough notes that "[t]he syntagmatic aspect of language concerns the organization or 'chaining' of words together in structures (e.g. phrases or sentences)" (2001, 240) . He notes that this process focuses on representing, relating, identifying, and valuing (2001, 241). It also includes linguistic aspects to examine such as, 1. the organization of the language in the text as well as its structure – examination of the whole. 2. combinations of clauses – words that link. 3. simple sentences – focusing on action, voice, mood, modality, etc. 4. examining words – vocabulary, relations, meaning, metaphors, etc (Fairclough 2001, 241-242).

Jean Carabine provides guidance for more specific discourse analysis in relation to power in her discussion of discourse analysis using a Foucauldian perspective. Her approach allows a more adequate analysis of power relations, particularly in groups that have been subjected to repression of some form and groups facing inequalities. She states that,

> [t]o understand discourse we have to see it as intermeshed with power/knowledge where knowledge both constitutes and is constituted through discourse as an effect of power. If our study of discourse is to be more than a study of language, it must look at also the social context and social relations within which power and knowledge occur and are distributed. (2001, 275)

This type of analysis of the *Delgamuukw* case allows for an examination of the language as well as the social and historical aspects associated with First Nations peoples and their religious ways in Canada. Carabine also states that, "Foucault sought to trace the development of knowledges and their power effects in order to reveal something about the nature of power/knowledge in modern society" (2001, 276). He did this, she notes, through a process called genealogy which

"is concerned to map those strategies, relations and practices of power in which knowledges are embedded and connected" (2001, 276). Carabine then gives a summary of the method for Foucauldian genealogical discourse analysis, which I can use as a useful step-by-step process in my work:

> 1. select your topic .... 2. know your data – read and re-read. .... 3. identify themes, categories and objects of the discourse. 4. Look for evidence between inter-relationship between discourses 5. Identify the discursive strategies and techniques that are employed 6. Look for absences and silences 7. Look for resistances and counter-discourses 8. Identify the effects of the discourse 9. Context 1 – outline the background of the issue 10. Context 2 – contextualize the material in the power/knowledge networks of the period. 11. Be aware of the limitations of the research, our data and sources. (2001, 281)

While similar to the approaches to discourse analysis mentioned above this method focuses to a greater extent on power relations.

Finally, van Dijk states, in his comments on critical discourse analysis', that "discursive and cognitive structures must in turn be embedded in a broader social, political or cultural theory of the situations, contexts, institutions, groups and overall power relations that enable or result from such symbolic structures" (1993, 259). In other words, as part of the analytic process, it is important to consider how various social and historical aspects contribute to one's findings. Carabine also noted this in the paragraph above. The next chapter examines such historical and socio-legal contexts surrounding the *Delgamuukw* case specifically regarding how unfinished decolonisation has affected how the religious ways of Aboriginal peoples are treated in courts and in Canada more generally.

1.4(c) – WHAT TO LOOK FOR IN CONDUCTING DISCOURSE ANALYSIS

A number of factors that came up in my review of the literature on discourse analysis that should be noted in texts while conducting discourse analysis are as follows: when emotions or

particular views are evident, social construction of particular notions, language reflecting what is going on socially at the time, and general factors regarding language use. These elements will be elaborated on below.

1.4(c)i – LANGUAGE REFLECTING EMOTION OR PARTICULAR VIEWS

Belleau and Johnson, who work specifically on discourse analysis in law, indicate a number of factors to focus on in conducting discourse analysis in terms of emotion that can be revealing of the feeling held by legal adjudicators. They state, in the following two quotes,:

> It is not just a matter of attending to expressive language, or of focusing on 'hot' emotions like anger or outrage. One can also attend to 'colder' emotional states (like disgust or indifference); scrutinize less overtly expressive uses of language, including the structure of judgements, and textual silences; understand something of the tonality of the texts produced in majority and dissenting space; explore the ways that the text weaves together reason and emotion; look closely at the intersection of law and language; consider multiple avenues of inquiry, and methodological approaches. (2008, 152)

> How does the text draw on language's ability to capture, deploy, and convey passion and emotion? Here, the issue is not just the presence of 'hot' and 'cold' words, but of how texts express the facts, how stories get set up, how characters are (and are not) presented, how the stage is set to foreground an eventual outcome. Attend not only to the 'rich' texts – to those that soar with passion and ring with rhetoric – but also to those that feel flat, because 'flatness' is not necessarily a failure of judicial writing skill. Flatness of characters and of tone can press our affiliations in a variety of directions. By giving (and denying) personality to protagonists, the tonal character of a story can be made to shift. So too, the moral centre of a story. (2008, 154)

That Belleau and Johnson draw attention to the cooler emotional states including aspects such as "textual silences" or the "flatness" in tone is particularly useful as it seems that these aspects of the documents could be more easily overlooked. Such attention should not only be paid to legal decisions and the way judges might feel about various factors but also to the facta of a case as well.

1.4(c)ii - SOCIAL CONSTRUCTION BY THE COURT

In her discussion of Foucauldian genealogical discourse analysis, Carabine notes that Foucault's work discusses the concept of normalization stating that, “discourses convey messages about what is the norm and what is not. In effect they establish the norm” (2001, 277). Law is no exception where according to Belleau and Johnson, in legal decisions, “[i]n his or her reasons, the judge sketches out the dimensions of the legal and social worlds, articulates the social and legal standards against which behavior will be measured” (2008, 146). In law this establishing of “the norm” can be seen as social construction. Johnson illustrates how the Court did this in the *Symes* case to socially construct gender (2002, 131). In conducting discourse analysis on legal texts, Belleau and Johnson therefore note the importance of focusing on the words of legal adjudicators where they way be socially constructing views on a matter in society. For instance, they say to

> [w]atch also for the ways texts meaning through the deployment of symbols. Are judges evoking prototypes, or attempting to break through typesets? How does a text rely on ideas of 'the ordinary,' 'the normal,' 'the average,' 'the reasonable,' the typical'? What does the text tell us about 'the good mother,' 'the ordinary barroom brawl,' 'the average domestic dispute'? How does a text engage with or attempt to disengage coded meanings? Does a text encode new layers of meaning into old words, making those words do a different kind of political work? (2008, 154)

Judges partially cannot avoid this as they “are called upon to merely to settle the claims of particular litigants, but also to participate in the stabilization and/or reimagination of the world in which we live” for which they must provide “reasons” which inevitably establish norms (2008, 146). It is however important to note that it is occurring to be aware of the arbitrariness of some definitions and statements and to be conscious of the ways in which elements could have been thought about or handled differently.

Relevant specifically to the religious ways of Aboriginal peoples and how they are handled in the *Delgamuukw* case is Beaman's comment that the law constructs an idea of a 'normal' religion (Christianity) in relation to 'abnormal' religion or the religious ways of Aboriginal peoples (among others) (2002, 138). Similarly, in her focus on "power relations as they play out at the intersections of discourses" (2008, 3), Beaman discusses the cases involving a teenage girl who sought and was denied the right to reject blood transfusions for leukemia on the grounds that transfusions were against her beliefs as a Jehovah's Witness. Beaman investigates how boundaries such as adult/child, good citizen/bad citizen, healthy body/sick body, and normal religions/abnormal religions, among others were framed in court. How such normalization and the use of binaries occurs in the *Delgamuukw* case, such as in law's social construction of religion or history will be discussed further in chapter 4.

1.4(c)iii – LANGUAGE REFLECTING SOCIAL HAPPENINGS

In his discussion of critical discourse analysis, Fairclough notes that in this type of analysis, texts or discourses can reflect social elements. For him, "what is going on socially is, in part, what is going on interdiscursively in the text" (2001, 240). He states that this type of analysis,

> seeks to discern connections between language and other elements in social life which are often opaque. These include: how language figures within social relations of power and domination; how language works ideologically; the negotiation of personal and social identities (pervasively problematized through changes in social life) in its linguistic and semiotic aspect. (2001, 230)

This is essentially what gives me the ability in my own work to analyze text and then make statements on how the religious ways of Aboriginal peoples are treated in a legal context and in in Canada. The next chapter explains why law reflects social views in its discussion of how views held in society can influence legal decisions.

1.4(c)iv – GENERAL FACTORS REGARDING LANGUAGE USE

It is important to note generalities regarding language that may affect what is found through discourse analysis of any text. For instance, according to Nigel Edley, "when people talk, they do so using a lexicon or repertoire of terms which has been provided for them by history" (2001, 190). Therefore certain terms or ways of understanding that are a product of history are embedded in speech/text which results in different terms used at different points in time. Certain terms used may therefore simply be a reflection of the way people talked and the particular words used at that point in history. Language however, evolves. Examples of this are the changes in terms used to refer to Aboriginal peoples over time. Today the use of terms that were once used to refer to Aboriginal peoples, in for example the 1600s, are no longer acceptable and considered now to be derogatory whereas in the 1600s they might have been the only terms in existence to refer to Aboriginal peoples. The use of particular terms of understandings cannot be held to today's standards of what kind of language is appropriate, they must be considered in their own time. Despite the fact that history may play a large role in the use of particular terms at particular times in history, it cannot always exonerate the use of derogatory or disparaging language. This is especially the case in instances where the use of precise language is necessary and much deliberation has gone into the creation of certain discourses or texts, such as in legal decisions.

On a related note, Johnson finds that, "[l]anguage is the product of historical negotiations, with all the ensuing implications about power, and it cannot be seen as just a neutral mechanism for describing an extant reality" (2002, 194). Similarly, Carabine finds that one must also

consider who wrote particular texts and what types of interests they reflect (2001, 305-306)[14]. Thus power relations are also reflected in language and will be considered in the *Delgamuukw* case (for example see chapter 2 and 4 for discussion on potential "constraints" on the Court which could equally be called "motivations").

The multiplicity of languages is another factor to consider regarding the use of language in court. For instance, there may be unforeseen effects when an adjudicator's first language is not the language in which the case was argued. Such as first language English speakers adjudicating French cases and visa versa. Another difficulty is that Aboriginal peoples may understand their ways (including religious ones) in non-English or non-French terms that do not easily translate or that lose meaning when translated into one of the official languages of Canada. Aboriginal peoples are often forced to use particular language that is not their own in legal contexts (see discussion on this in the next chapter).

1.4(d) - DISCOURSE ANALYSIS AND POWER

Teun A. van Dijk's model for critical discourse analysis, is "specifically interested in power *abuse,* that is, in breaches of laws, rules and principles of democracy, equality and justice by those who wield power" and where the injustice is "supported or condoned by other group members, sanctioned by the courts, legitimated by laws, enforced by the police, and ideologically sustained and reproduced by the media or text- books" (1993, 255, 268)[15]. I will consider whether van Dijk's views of critical discourse analysis specifically in terms of power

[14] One might also think of the role that gender might play as discussed by Yates 2001, 127.
[15] Similarly, Fairclough discusses the potential media spin (255). If a media spin is added to a particular text is possible that this is the spin that society receives which in turn may influence a Judge's opinion (see chapter 2 for discussion on societal views influencing legal decisions).

abuse by law is what occurred in the *Delgamuukw* decision. In terms of power abuse reflected in discourse, van Dijk comments that,

> occasional, incidental or personal breaches of discourse rules are not, as such, expressions of dominance. This is the case only if such violations are generalized, occur in text and talk directed at, or about, specific dominated groups only, and if there are no contextual justifications other than such group membership. If these, and other conditions, are satisfied, an act of discourse impoliteness may be a more or less subtle form of sexism, ageism, racism or classism, among other forms of group dominance. The same is true for variations of intonation or tone, lexical style or rhetorical figures. (1993, 261)

While this statement may be true for many types of discourse, in terms of discourse in legal situations it is my view that what appear to be "breaches of discourse" are likely instances of the exercise of dominance. This is because much time and thought is put into writing legal judgements and the language is considered and intended, as it effects not only those involved in the case but sets precedent for similar issues in the future. Furthermore, legal judgements have an impact on how society comes to understand and evaluate particular factors and situations.

This section outlined the method of discourse analysis that I use in my analysis of the *Delgamuukw* case. In terms of how to use a discourse analysis method, it noted, what to analyse in the case, it gave a general description of how to conduct discourse analysis, it then focused on the specifics of what to look for in analysis, and finally discussed how best to think about power in doing discourse analysis.

1.4(e) – TRANSLATING METHODOLOGY INTO METHOD

Making use of the general instructions on how to conduct discourse analysis, in addition to watching for instances in language use mentioned above, I used these methods to code and to analyse my findings of the *Delgamuukw* case, the facta of both the appellants and respondents, as well as that of the interveners. My coding and analysis process involved reading and rereading

the aforementioned documents multiple times, in addition to the use of an elaborate colour-coding scheme through which extensive categorization of various themes and key terms was indicated. The specifics of this process are outlined in Appendix 2 of this thesis. This process was paramount in illustrating how the religious ways of the Gitksan and Wet'suwet'en peoples (and Aboriginal peoples more generally), among other related factors, were framed by the appellants, respondents and interveners in the *Delgamuukw* decision and how such views were translated by law.

1.5 – POSITIONALITY

Orsi states that researchers have to acknowledge their own position in relation to the subject or object of study (2005, 14). It is partially for this reason that I am addressing my position. This section will first address the issue of being outside the community one studies, it will then examine some parallels between cautions that Edward Said mentions in studying what he calls "orientals" (or people from the middle east) and how Aboriginal peoples have historically been studied[16], and finally how to view those involved in the *Delgamuukw* case.

1.5(a) – INSIDER/OUTSIDER PERSPECTIVES

As an outsider to Aboriginal communities it seems that perhaps I have no place in discussing how Aboriginal beliefs are framed in Court. However, others disagree. In fact, Said argues that being an outsider should not in itself preclude someone from doing research (1979, 322). He does not advocate for an insider's perspective over an outsider's one in undertaking research projects (1979, 322). Similarly, Orsi does not see a problem with being an outsider because to him, "religious studies is an outsider's discipline by definition" (Orsi 2005, 192).

[16] Said did his research on western conceptions, research of, etc of peoples who live in what he called the "near east" and not Aboriginal peoples but the comments he made were easily used in the relationship that non-Aboriginal peoples have with Aboriginal peoples in the Canadian context.

From this perspective, everyone who studies religion is an outsider even when one is studying their own tradition (2005, 161) (unless perhaps the inquirer is studying themself). There are however difficulties and potential problems in terms of studying the other, which both Said and Orsi have suggestions on how to lessen while improving one's scholarship.

Said suggests that some of the issues with studying the other could be overcome by being more attentive to the particular issues that he mentions and "opening oneself to what one studies", by being critical of one's method (1979, 327; Smith agrees 1999, 40), and by "us[ing] one's mind historically and rationally for the purposes of reflective understanding and genuine disclosure" (1979, xxiii)[17]. I have attempted to do these things in my thesis. For Orsi, in order to study the other one has to suspend their beliefs and look at their beliefs in relation to the beliefs that they are studying (2005, 199). It also requires a suspension of the ethical, says Orsi (2005, 203). The researcher must get past othering their object or subject of study, by coming to an understanding of difference through interaction (2005, 198, 3; 1997, 18, 16)[18]. As I am not doing ethnographic work for this thesis, my understanding of the religious ways of Aboriginal peoples will come from focusing on the factum submitted by the First Nations groups in the *Delgamuukw* case (what they say and how they act) as well as scholarship on the religious ways of Aboriginal peoples in Canada. In an effort to come to an understanding of the way law handles the religious

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[17] Said wonders "whether indeed there can be a true representation of anything, or whether any and all representations, because they *are* representations, are embedded first in the language and then in the culture, institutions, and political ambience of the representer" (1979, 272). In other words, Said seems to think there will be shortcomings to all research but finds that there are ways to limit these shortcomings.

[18] Overcoming the othering that Orsi describes may in some cases be more difficult. For example, non-Aboriginal peoples are often discouraged from engaging with Aboriginal peoples in terms of study (Aboriginal communities are often unwilling or dislike those coming into their communities for purposes of study). This could result in Aboriginal peoples continually being othered. Aboriginal scholars who study their communities are perhaps an exception to this, although Smith notes that it is even sometimes difficult for them (1999, 5, 137-140). Nevertheless, if othering continues, it could be detrimental to the ability of Aboriginal peoples to freely practice and maintain their beliefs. There are of course limits to the knowledge an outsider can or should know and one should be respectful of Aboriginal customs of secrecy (see chapter 3).

ways of Aboriginal peoples I will be using numerous sources (other cases and scholarship) as a type of cross reference to gain a better understanding of the *Delgamuukw* case. Furthermore, my objective is not to explain the particular beliefs of Aboriginal peoples but rather to understand how their beliefs are being treated and translated by law. I am able to avoid the issue of being an insider or outsider largely by focusing primarily on a Court case and its documents rather than focusing on understanding particular Aboriginal beliefs and practices.

1.5(b) – PARALLELS IN STUDYING THE OTHER

Said points out a number of issues and prejudices in what he calls “Orientalist” society that are similar to views and conceptions of the ways in which Aboriginal peoples have historically been understood and studied in the Canadian context. Firstly, Said argues that “Orientalism ... is knowledge of the Orient that places things Oriental in class, court, prison, or manual for scrutiny, study, judgement, discipline, or governing” (1979, 41). Aboriginal peoples have been subject to similar treatment. During colonial times Aboriginal peoples were deemed barbaric, backwards, uncivilized, and inferior and were studied and treated as specimens by colonisers. Presently, Aboriginal peoples are still gravely misunderstood and some of the views towards them from colonial times appear to remain in various forms. Said’s work suggests that the Other should not be studied as an object or subject in an isolated context. He seems to advocate for including investigations of history, prejudices, power relations, and politics in research as well as focusing on more than one aspect of study (1979, 305). Smith agrees, stating that research involving Aboriginal peoples should not address them as the problem (aka “the Indigenous problem”) but focus on other aspects such as social context and structural issues (1999, 92). It is for this reason that chapter two outlines some of the historical difficulties that

Aboriginal peoples have faced in Canada and also focuses particularity on how their religious ways have been handled in court (or misunderstood, see chapter 3).

Another problem Said mentions in terms of studying the other is not letting people from the part of the world he is discussing speak for themselves or interpret where they come from for themselves as they are deemed unable (1979, 289). He describes “Orientalists” throughout history speaking for “Orientals” and interpreting “the Orient”. Not allowing peoples to speak for themselves and be involved in the interpretation of their societies has also historically been a problem for Aboriginal peoples in Canada. It is perhaps becoming less of an issue with increasing numbers of publications by Aboriginal peoples and ethnographic work done in their communities. In my research of the *Delgamuukw* case I have included Aboriginal scholarship and perspectives and also taken into account the First Nations facta and intervener documents by Aboriginal groups submitted to the Supreme Court of Canada. This was in effort to let Aboriginal peoples speak for themselves, as Said suggests in studying the other (1979, 293).

In terms of who research is done for, Said argues that for Orientalists research is done on “the Orient” to relate back to the West (1979, 336), and is one sided. An example of this is when Said mentions research by Mr. Lane studying Ahmed where it was a “one- way exchange: as *they* spoke and behaved, *he* observed and wrote down” (1979, 160). Smith (1999) also raises this and references Said stating that during colonial times research was “classified and then represented in various ways back to the West, and then, through the eyes of the West, back to those who have been colonized” (1999, 1-2). To prevent this from happening Smith urges the “reporting back” or sharing of research with the people involved (1999, 15-16). She also recommends “sharing knowledge” which means sharing “the theories and analyses which inform

the way knowledge and information are constructed and represented" and to "demystify" and "decolonize" (1999, 15-16). Keeping this in mind, other than writing my thesis and then attempting to get parts of it published, and/or presenting it at conferences, somehow sharing my work with the Gitksan and Wet'suwet'en peoples would be ideal.

1.5(c) – HOW TO VIEW THOSE IN THE *DELGAMUUKW* CASE

A final situation in terms of positionality and method worth pondering is how to view oneself in relation to those involved in the case, especially actors that one might disagree with or have a grudge against from the outset (such as the Court which is made out to be the "bad guy" in the next chapter). While van Dijk suggests undertaking research from the perspective of the group or person who has had injustice committed against them (1993, 261), I employ the positioning of Johnson who examines all parties as if they are friends. She states, "to treat someone as friend is not to treat them uncritically. It is, rather, to pay attention to what they say and do, to look for the best in their actions, and to think critically about their shortcomings" (2002, 190, see also 178). By focusing on each party as a friend Johnson finds she is able to see the constraints placed upon all actors and better understand the position of each. In the end she is able to examine the case not to see who should have won but rather to find out what can be learned (2002, 178). I attempt to use this approach in an effort to see what can be determined regarding the religious ways of Aboriginal peoples in the *Delgamuukw* case.

This section examined my position as an outsider to the group that I am studying (despite the fact that I am not studying the Gitksan and Wet'suwet'en directly), it also presented some of the ways of overcoming and avoiding issues with studying the other, and finally it discussed how to view those involved in the *Delgamuukw* case when conducting research related to it.

1.6 - THESIS OUTLINE

This chapter has unveiled my thesis project, questions and thesis statement. It then discussed the terminology used in this thesis, noting my reasoning for using the terms "religious ways of Aboriginal peoples in Canada". The broad view of religion that I take in this thesis was then noted, focusing mostly on the benefits of viewing religion as lived. Next, I stated my methodology and method of discourse analysis which drawn from a number of sources. I then outlined its use focusing on what parts of discourse and text it suggests to analyse, how to analyse data, what to look for in an analysis and finally how discourse analysis focusing on power is useful for my research. Finally, I discussed my position as a researcher noting my position as an outsider, how to best study the other and what view point I should take in regards to those in the *Delgamuukw* case.

After setting up my thesis project in the previous chapter, the next chapter gives a very brief historical overview of the situation of Aboriginal peoples in Canada, noting that history should be understood from the perspectives of both Aboriginal peoples and Europeans (and their descendants). It notes the differences in these two groups' understandings of first encounters. The chapter takes the position that the decolonisation process has not been fully completed, which then segues into a discussion of the lingering effects of Christianity and European views in the socio-legal context in Canada which make up the dominant narrative on many issues that effect the religious ways of Aboriginal peoples. Finally, it examines characteristics inherent in the legal system that has resulted in it being unable to properly understand and adequately handle Aboriginal peoples and their religious ways.

The religious ways of Aboriginal peoples that are difficult for Canadian courts to understand and handle are then addressed in chapter three, which outlines how the religious ways of Aboriginal peoples arise in the *Delgamuukw* case. It outlines how each religious aspect: oral knowledge, views towards land, crests, feasting and totem poles are understood as religious by the Gitksan and Wet'suwet'en peoples. It then tries to understand these religious ways in the previously mentioned socio-legal context. Here it comments more generally on Aboriginal worldviews and how they differ from those of the majority of non-Aboriginal society in Canada, who is primarily Christian, and how law grapples with these religious ways.

Chapter four examines potentially problematic aspects of how the Court understands and frames the religious ways of the Gitksan and Wet'suwet'en peoples in *Delgamuukw*. It argues that the Court may be purposefully vague in referring to the religious ways of these First Nations peoples (by "writing out" religious aspects, referring to them vaguely or not mentioning religion at all); that a Christian understanding of religion may have been used to evaluate oral knowledge and in addition to this value judgements may have been made regarding oral knowledge that has religious components; that the Court determined the extent of the religious use of land for the Gitksan and Wet'suwet'en peoples rather than letting them establish it themselves; and that by Aboriginal land use was quantified, restricted and title was limited by the Court which negatively affect the religious freedom of these Aboriginal groups.

The fifth chapter examines whether there are other ways that law and the majority of non-Aboriginal peoples in Canada could come to better understand and handle the religious ways of Aboriginal peoples than what occurred in the *Delgamuukw* case. It argues that there are other ways because of Canada's unique position historically, in addition to the skill that many

Aboriginal groups have in teaching and communicating, the space that has been opened regarding understanding Aboriginal oral knowledge, the dialogue that exists between Aboriginal society and the Canadian state and finally, because a revaluation and (re)writing of history is occurring. These factors will be addressed in the fifth chapter.

The final chapter summarizes the way in which Aboriginal peoples (and particularly their religious ways) have been treated in the Canadian socio-legal context and particularly by the Canadian legal system. It also summarizes how the legal system has had trouble understanding and handling the religious ways of Aboriginal peoples. This chapter then gives a summary of what I have found in the *Delgamuukw* case in terms of how the religious ways of Aboriginal peoples are presented to their Court and then translated by it. Finally it notes how the Court, the state and the dominant narrative in non-Aboriginal society, could have or could come to understand the religious ways of Aboriginal peoples differently. It shows that the *Delgamuukw* case is an important example of uncovering how the religious ways of Aboriginal peoples are understood and framed in law, which can indicate the boundaries of their religious freedom in Canada.

CHAPTER II – THE SOCIO-LEGAL CONTEXT OF *DELGAMUUKW*

2.1 - INTRODUCTION

The colonisation of Aboriginal peoples by Europeans on the land that would later become Canada is well documented (Ray (1996), Treaty 7 Elders and Tribal Council, et al (1997), McMillan and Yellowhorn (2004), Dickason and McNab (2009)). Europeans treated Aboriginal peoples in Canada with severe brutality in the form of a number of different abuses, some of which have continued until quite recently and even until today. Today the reverberations of colonisation can be noted for example in the economic disparities that exist between the majorities of both Aboriginal and non-Aboriginal communities in Canada. This can be understood as a human rights violation according to Asad who expands the idea of human rights violations to include suffering caused by economic issues in addition to more common understandings such as torture and physical pain caused by militaries or other groups (2003, 127-128). He finds that generally violent acts towards the individual are classified as human rights violations but that there is a disconnect between abuses inflicted on the masses of a state and its classification as a human rights violation (2003, 127). This expanded definition of a human rights violation captures the suffering of Canada's Aboriginal peoples and is disturbing in light of Canada's international development work and condemnation of the maltreatment of peoples by other countries.

It is important to remember past and current abuses as they have an effect on how Aboriginal peoples in Canada relate to the Canadian state and to non-Aboriginal society. Remembering also serves as reminder to never subject populations to the atrocious acts that colonisers and many of their descendants committed against Aboriginal groups. These abuses that resulted from colonisation are beyond the scope of this thesis. This chapter will examine the

context for which the religious ways of Aboriginal peoples have come into the Canadian legal system in the *Delgamuukw* case. The assault of Aboriginal peoples due to colonisation, its effects and existence in current forms was mentioned, as it is part of this context. Abuses within as well as outside of the courts have shaped relationships between Aboriginal peoples, the Canadian state and non-Aboriginal society in Canada since first contact.

This chapter focuses on a number of ways that the colonisation of Aboriginal peoples stills strongly resonates today, specifically those affecting Aboriginal religious ways. It argues that colonisers understood their interactions with Aboriginal peoples in early contact times in Christian ways and that these Christian perspectives made their ways into Canadian institutions. Colonisation masked equally valid Aboriginal perspectives and resulted in them not being reflected in Canadian institutions. Joanne Benham Rennick and David Seljack call the Christian/European views embedded in Canadian institutions "residual Christianity" (2011). This, "residual Christianity" has resulted in a number of problems for how the religious ways of Aboriginal peoples, and Aboriginal peoples more generally are understood and handled by Canadian institutions such as law. Such characteristics are inherent in the Canadian legal system and result in the continued colonisation of Aboriginal peoples in cases such as *Delgamuukw*. Accordingly this chapter investigates the socio-legal context of the *Delgamuukw* case by first exploring history and the role that Aboriginal peoples have played in understanding it and in building Canada's *Constitution*. It will then address how the "residual Christianity" in Canadian institutions and Canada's Christian majority affect the religious ways of Aboriginal peoples in Canada. Finally, the chapter will turn to how Christian/European understandings have influenced Canada's legal system, focusing on characteristics of law that impact how the religious ways of Aboriginal peoples (and Aboriginal claims more generally) are treated in court. This section will

discuss factors such as, the preamble to part I of the *Constitution*; law's view of religion; language used in courts; "characterization of the issues" in court; how societal views influence court decisions; constraints on the actors in court; the 'truth' making capacity of law; and finally, the "juridogenic" nature of law.

2.2 –ABORIGINAL PEOPLES AND HISTORY IN CANADA

> *The spirituality in Europe's formal religious acts, such as the adoration of the cross and the rituals of possession, was also performed in its laws and the mixture of scientific investigation, paternalism, and disdain with which Europeans first greeted indigenous people. Christianity is to Europe what the transformer stories are to the indigenous west coast of North America. Indigenous rationality rested on the transformer myths as European rationality and assumed superiority rested on Christian mythology.*
>
> - John Lutz (2007, 41)

The above quote describes how early encounters between Aboriginal peoples and Europeans were given religious and cultural understandings by both groups. At the time of contact, many Aboriginal peoples saw Europeans as a "variety of spirits that could take human form" (Lutz 2007, 36). These Aboriginal understandings have become known as transformer stories. At the same time for Europeans "Christian spirituality and the eighteenth-century understanding of God and man's relationship to him underlay the whole enterprise" (2007, 39). Lutz states that "Christianity is to Europe what the transformer stories are to the indigenous west coast of North America. Indigenous rationality rested on the transformer myths as European rationality and assumed superiority rested on Christian mythology" (2007, 41). Lutz attributes the relative peacefulness of the first encounters to both actors' own religious understandings of the situations (2007, 41).

Unfortunately this peacefulness did not last. Europeans quickly declared themselves to be superior to Aboriginal peoples and asserted their 'authority' over them, eventually setting up a

whole country based on only their understanding of the world, which was heavily influenced by Christianity. Through their own constructs, such as constitutionalism, Europeans justified disempowering Aboriginal peoples and destroying their cultures and populations. James Tully states that,

> [t]he great tragedy of the modern constitutionalism is that most European philosophers followed Hobbes and turned their backs on dialogue just when non-European peoples were encountered and dialogue and mediation were needed to avert the misunderstanding and inhumanity that followed. (Tully 1995, 116)

Here Tully points to an inherent inequality in the Canadian constitutional system, where European and Christian understandings of the world were used to rule people who had very different understandings of it, not only religiously but socially, politically, and economically as well. For Tully, "[t]he constitution is … one area of modern politics that has not been democratised over the last three hundred years" (1995, 28). This will be discussed further below.

During the colonisation process European perspectives/worldviews such as, their Christian understanding of religion, their view of history (as written and separate form religion), and narrow concepts of property ownership and views towards land (as being there to be used and for economic purposes), took precedence over any Aboriginal views of these issues and were built into the Canadian system. Aboriginal views in fact were completely ignored in this process and are only now starting to be uncovered and explored. John Lutz (2007), for example, has started the process of voicing Aboriginal understandings of their first encounters with Europeans, perspectives that were misunderstood and undervalued by Europeans at the time.

Lutz argues that it is necessary to come to an understanding of colonization through the perspectives of both Aboriginal peoples and majority views held in Canadian society, "treating both as equally credible and incredible" (Lutz 2007, 5). Aboriginal peoples' perspectives come

primarily from the oral narratives of their ancestors rather than from the written histories commonly used as a form of record keeping by European colonizers, their societies and their descendants. The existence of these less-heard Aboriginal understandings of encounters, now revealed by retellings, demonstrate that there are and have always been different ways of understanding and more than one system of knowledge holding and sharing. It also shows that Aboriginal peoples were not merely vulnerable people easily overcome by Europeans. It reveals their voice and shows that they had particular understandings of the situations as well[19]. Bringing to light Aboriginal understandings of early contact with colonisers and their early descendants recognizes those views as equally valuable and acknowledges their significance. It also creates a situation where Aboriginal peoples are participating in Canadian history making which Smith argues is important in the decolonisation process as Aboriginal peoples have been historically excluded from writing their own histories (1999, 28-30, 33). Incorporating these Aboriginal perspectives into the historical understandings of the time of contact now, while useful and a step forward, will never be the same as had they been incorporated into the construction of the Canadian state from the outset.

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[19] It is important to note that Aboriginal peoples have always had a voice and agency (not to detract from the atrocities that were committed against them). For instance, when missionaries were brought in to try to convert Aboriginal peoples to Christianity, "[s]ome indigenous people, anxious to obtain help from a white ally, saw economic benefits from association with the missionary. Few were interested in replacing their own spiritual beliefs and power with Christian ones. They sought to add the spirit powers of the whites to their own" (Lutz 2007, 44). This desire was part of the underlying reason why Pastedechouan, a young Innu boy in Emma Anderson's book *The Betrayal of Faith* was allowed by his community to live with the French and be taken to France; in order for him to learn more about the French so that he could help his Aboriginal community's social and economic situation upon his return (2007, 52). While this was not the result, it was nevertheless the Aboriginal intention. The French, however, believed that they could do the opposite, that they could socialize Aboriginal persons into their customs and religion and then use them to penetrate Aboriginal communities and assist in colonisation. Furthermore, according to Foucault, "[w]here there is power, there is resistance" (1990, 95). This is also the case Aboriginal peoples. Having faced adversity and abuse on a number of levels at the hands of non-Aboriginal society, often with little recourse, they were nevertheless not passive participants in all situations. They have shown resistance against their aggressors in various forms, including in legal challenges to gain various hunting, fishing and resource rights, using blockades or protests as they did in the Twin Sisters dispute which resulted in the British Columbia Supreme Court case *Saulteau First Nations v. Ministry of Energy and Mines* (1998), as well as in more physical confrontations surrounding land such as in the Oka crisis (1990). Not arguing for religious freedom explicitly could also be seen as a subtle form of resistance to the Canadian legal system.

Mary Louise Pratt notes the use of focusing on the situation of colonization and subsequent and continued pursuits of decolonization as a "contact zone" (1992, 1-11, 6-7). Lutz takes this terminology, nuancing it slightly to suggest focusing on colonization and the continued interaction between Aboriginal society and the descendants of colonisers in Canada as an "ongoing 'contact zone'", where "settler populations and indigenous people [are] still meeting in zones of mutual incomprehension" (2007, 4). There are still misunderstandings and disputes, even if now more subtle, between Aboriginal peoples in Canada and those in Canadian society who are unfamiliar with them and the state. They exist in the form of disputes over treaty and land claims, taxes, hunting and fishing rights, resource rights, oral knowledge, culture and most importantly for this thesis, the religious ways of Aboriginal peoples. Such points of incomprehension and misunderstanding are especially evident in courts as this is where many of the issues of colonization are brought to be resolved by a system built by colonisers.

2.3 – (DE)COLONISATION OF CHRISTIAN/EUROPEAN VIEWS IN CANADA

Decolonisation has been a slow process in Canada. Many of the effects of colonisation have remained in some form, contributing to the state of inequality and unjustness that Aboriginal peoples in Canada continue to face in what could be called contemporary colonisation. This section examines this contemporary colonisation in Canadian society and institutions (focusing on the legal system) and the effect it has on the religious ways of Aboriginal peoples in Canada.

In 1876 the Canadian government passed the Indian Act, which outlawed numerous Aboriginal religious practices. The religiously persecuting sections of the Act were repealed in 1951 (Beyer 2008, 18). Allowing Aboriginal peoples to once again practice their religious

beliefs, however, has not resulted in assurance of their religious freedom. This is because Canadian culture and society, not to mention Canada's legislative and judicial branches remain steeped in Christian undertones, reflective of the European values upon which the state was constructed. Scholars have labeled this “residual Christianity” (Rennick and Seljack 2011) (similar to David Martin’s “shadow establishment” (2000 23-33)).

Christianity has influenced or permeated Canadian institutions to a large degree, and while many have adapted to a more diverse Canada, the remnants of Christianity still remain visible. The presence of Christianity remains in more trivial ways such as in street names often being the names of Catholic saints, and many swear words having to do with Christian elements or churches (more so in French in the province of Quebec). The influence of Christianity is also present in more consequential ways such as the calendric system being based on the Christian calendar (including public holidays), which presents difficulties for religious minorities despite legal concessions that have been granted to remedy the situation. In relation to this, there are still Sunday closing restrictions in various provinces (notably, Nova Scotia). Another example is how Christianity remains supported in some of the Country’s educational systems where Christian schools still receive some funding by provincial governments, notably Ontario which has a Catholic School Board that is funded by the Province. Of most importance here is where Christianity has remained embedded in state institutions in much more profound and deeply rooted ways that affect how the religious ways of Aboriginal peoples are understood and handled in the *Delgamuukw* case. For example, Christianity has been implicitly present in the way in which the Canadian state and its provinces have approached development projects regarding the physical destruction of the environment (see discussion of land in chapter 3). It is also present in the legal understanding of land and in the prevailing view of land in Canadian society, where

land is understood to be owned, have boundaries and not be inherently religious. Finally, in the way in which the majority of non-Aboriginal society understands and recounts history where the emphasis is placed on written history rather than oral (similarly to the emphasis on the Christian Bible in Christianity), is understood to be separate form religion, and where less value is placed on stories and teaching through them. These final three ways in which Christianity has influenced institutions in Canada will be discussed further later in this thesis.

In terms of Christian society in Canada, Christians, specifically Roman Catholics and mainline Protestants, make up comparable numbers of the religious majority in Canada. According to Statistics Canada, in 2001 72% of the population was either Catholic or Protestant (45% and 29% respectively). Beaman terms this the "Christian hegemony" and states that "[i]n relation to religion, hegemony relies on a sense of what is 'normal' religion" (2003, 312-313, 314). She continues that, "[u]ltimately, interpretations of religious freedom are guided by what constitutes a normal religion, and what constitutes a normal religion is rooted in mainstream … Protestant and Roman Catholic, tenets" (2003, 318). She goes on to compare the Canadian situation with that of the United States and also comments on minority Christian religious groups, as follows,

> Canadians, for example, are as likely to elect a Roman Catholic as a Protestant prime minister. Thus the religious hegemony in Canada has a slightly different face than its U.S. counterpart. Throughout this article I will therefore characterize the religious hegemony in Canada as Protestant/Roman Catholic. Although it might be easier to simply use the term "Christian hegemony," there are a number of marginalized Christian groups that make this term problematic. In neither the United States nor Canada do groups outside of the Protestant/Roman Catholic mainstream make up significant numbers". (2003, 311)

Minority Christian groups that she is referring to here are groups such as the Jehovah's Witnesses (2008, 11, 46), fundamentalist Christians such as fundamentalist Mormonism, and the

descendants of Anabaptists such as the Amish, Hutterites and Mennonites. Such minority groups' religions, like the religious ways of Aboriginal peoples are not included in the 'normal' in terms of religion in both the United States and in Canada. Beaman argues furthermore that in Canada, "groups whose beliefs place them on the margins of, or outside the boundaries of, mainstream Christianity ... are most likely to find themselves outside the bounds of legal protection when their beliefs/activities intersect or conflict with other discursive imperatives" (2008, 46). This is the case for Aboriginal peoples where Beaman notes that freedom of religion for the religious ways of Aboriginal peoples in Canada is limited in its ability to seek protection in Canada, partially due to the fact that "the religious landscape is dominated by mainstream Christianity, resulting in a narrow interpretation of religion and religious freedom" (2002, 136)[20]. This essentially lends a Christian perspective to the understanding of religion even in legal proceedings and their outcomes. Both John Borrows (2008, 170-171) and Beaman (2008(a), 202-203) provide an example of this in their discussion of the First Nations case *Jack and Charlie* (1985) where a Christian understanding of religion equates the non-sacredness of buying wine for communion with hunting a deer for a First Nations ceremony which required the burning of deer meat. Here the Court did not take into account the possibility that hunting might be of religious significance to the First Nations people[21]. Similarly, in *Saulteau First Nations v. Ministry of Energy and Mines* (1998) a Christian understanding of the use of 'sacred sites' (specifically comparing the sacred mountains to a place of worship like a "church") and of delineations between the sacred and profane in terms of space were used to understand the religious ways of Aboriginal peoples (see discussion in Appendix 1).

[20] Jakobsen and Pellegrini (2003) have noted a similar effect that has resulted for certain forms of sexuality in the American context (specifically anything other than single partner monogamous heterosexuality) where Christianity in both society and embedded in the legal system have affected the regulation and treatment of various forms of sexuality that do not fall into the category noted above.
[21] Lovisek 2002, 100; and Guédon (2012) explain how hunting can be religious for Aboriginal groups.

Instances of Aboriginal peoples having their religious beliefs compared to Christian understandings of religion, among other factors, have led scholars such as James (Sakej) Youngblood Henderson to note that while he agrees that the protection of the religious ways of Aboriginal peoples is within the scope of the *Constitution* he is sceptical of the Canadian legal system's capacity and desire to protect Aboriginal religious ways (1999, 180). In addition to this he finds that "[e]ven if the legal system is responsive, we [Aboriginal peoples] must weigh the meaning and cost of litigation against the value of an authentic conversation about the relationship between Aboriginal rights and eurocentric notions of freedom of religion" (1999, 180)[22]. The Christian views of the majority in Canadian society can have a far-reaching impact on the religious ways of Aboriginal peoples where such Christian/Eurocentric views permeate societal institutions, particularly law. The result is that the religious ways of Aboriginal peoples are being understood and interpreted in a framework that is not their own (and at times antagonistic to their beliefs) and which does not do justice to their beliefs, confining them to something they are not in an attempt to make them fit into the current understanding of religion. In effect, it results in Aboriginal peoples falling outside of the boundaries of what is protected as freedom of religion in Canada (Beaman 2002, 136). In addition to this limiting of religious freedom for Aboriginal peoples that occurs with a Christian majority society and remnants of Christian/European views in institutions, Beaman also notes that it continues colonisation. She states, that "the legal construction of Aboriginal spirituality continues the legacy of European colonizers that treat first nations peoples as an 'abnormal' group to be either tolerated or accommodated by the benevolent 'normal' majority" (2002, 136). She notes furthermore that it is

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[22] Citing a number of examples, Mary Ellen Turpel also notes that the European/Christian heritage of the Canadian legal system negatively affects the way in which it deals with Aboriginal peoples, especially in terms of cultural recognition (1989-90).

not just a contemporary example of colonisation but also perpetuates the notion of the ‘Aboriginal problem’ where she notes that, “Aboriginals, for whom daily life and the physical world are inseparable from spirituality, are [also] constructed as ‘problematic’ because of their demands for equality and restitution” (2003, 315).

Both “residual Christianity” in Canada's institutions along with the “Christian hegemony” of Canadian society limit the religious freedom of religious minorities, including those of Aboriginal peoples, in Canada. These are structural elements of the Canadian state that make it difficult for Canada to ensure freedom of religion for Aboriginal peoples. It will be shown that similar, though perhaps more subtle, effects of Christianity mentioned above also occur in the *Delgamuukw* case where for example, European/Christian understandings are used in the quantification land as well as in the tendency to separate the sacred from the profane in understanding oral knowledge, things Aboriginal societies do not do (see chapter 4).

2.4 – CHARACTERISTICS OF THE LEGAL SYSTEM THAT AFFECT ABORIGINAL CLAIMS IN COURT

The fact that the Canadian legal system was created solely by Christian Europeans means that it has a number of characteristics that pose challenges for Aboriginal peoples who argue their claims in a Canadian courts of law and the court’s ability to deal with such claims. Some of these characteristics, such as the preamble mentioned below, are more evident on their own, as they explicitly make preferential statements, while others only become evident when Aboriginal people bring a claim before the courts or when a particular characteristic’s function is evaluated. The difficulty in resolving these unfair characteristics of the legal system is that the courts, the very institutions that are in a position to rectify much of colonialism in Canada, are themselves debilitated by being a product of it, and therefore struggle to do so.

2.4(a) – THE PREAMBLE

A blatant example of how Christianity permeates the Canadian system is noted in the preamble to part I of the *Constitution*. The preamble states: "Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law". According to Mary Ellen Turpel, the words 'supremacy of God' in the preamble if problematic for Aboriginal peoples. She states that it "is both inaccurate as an historical matter, and insensitive to cultural differences at least with respect to Aboriginal peoples" (1989-1990, 7). She believes that it portrays European/Christian as superior to other cultures, religions or peoples in the Canadian state, stating, it suggests

> "a story of monocultural dominance suggesting that Canada is, for purposes of constitutional analysis, to be seen as having been established, exclusively, on principles that recognize the supremacy of God and the rule of law, and left with irreconcilable differences. It seems clear that for the purposes of Aboriginal peoples, anything other than a fictional reading of the preamble would represent a kind of cultural hegemony". (1989-1990, 7)

Beaman shares this concern stating that, the preamble "is, perhaps of less concern to those of Abrahamic faiths than others, and thus may, in the end, contribute little to our understanding of the possibility of religious freedom. It would seem to construct a boundary of sorts that privileges god-based religions over others" (2010, 16). For Turpel, problems with the preamble become most noticeable "when placed next to the cultural understandings of Aboriginal peoples [as] it becomes a serious repression of difference" (1989-1990, 8). While some scholars have argued that the preamble is not entirely problematic and could be interpreted in ways that do not reflect cultural or religious hegemony of monotheistic traditions[23], others note that its treatment

[23] See for example Bruce Ryder (2005, 177) who argues that "The preamble represents a kind of secular humility, a recognition that there are other truths, other sources of competing world-views, or normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as counter-balances to state authority. The preamble's references to the 'supremacy of God' and the 'rule of law' express a form of

by the judges (for the most part) and by legal commentators confirms it as generally problematic (see Penny and Danay 2006). Historically the courts have also trivialized the 'supremacy of God' statement in the preamble where Sossin notes that the Supreme Court of Canada has largely ignored this part of the preamble (Sossin 2003, 232) and in one instance the British Columbia Court of Appeal appeared to trivialize it in *R. v. Sharpe* (1999), terming it a "dead letter" and stating, "this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the Charter" (paras 77-79). Scholars have stated that: it is "an embarrassment to be ignored" (Brown 2000, 561), "its value [is to be] ... seriously doubted", that it is a "contradiction", and that it provides little help towards interpreting the *Constitution* (Gibson 1986, 65; Klassen 1991, 87 and Hogg 1982, 9 respectively (see also Penney and Danay 2006, 2; and Sossin 2003, 232)). This pattern of dismissal by judges and scholars of the 'supremacy of God' phrase in the preamble was upset in 2010 in the Quebec Superior Court case *Loyola High School c. Courchesne*[24]. In this case the judge cited the preamble in allowing a private Catholic school to not have to teach Quebec's mandatory Ethics and Religious Culture program (which teaches students about many different religious traditions). The judge stated that, "Canada's democratic society is based on principles that recognize the supremacy of God and the rule of law, which enjoy constitutional protection" (2010, para 329). The judge's use of the preamble in this way is a wake-up call regarding the use of the phrase. As stated by Turpel "to the extent that it [the supremacy of God statement] projects a singular and powerful cultural image over the *Charter*, it cannot be dismissed as insignificant" (1989-1990, 8). Despite lying dormant for many years, the negative aspect of the 'supremacy of God' statement in the

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reconciliation between the secular nature of the state and the importance of protecting religious belief and practice. They underlie the fact that the state is secular and must be neutral between religions, but that it should also nurture and protect religious expression".

[24] Bruce Ryder (2005, 176) noted that the use of the preamble in this type of fashion was possible and likely.

preamble could come to be used negatively for Aboriginal peoples in regard to their religious ways and in relation to other non-monotheistic traditions. While one would like to think that colonialism is still on the decline, this change in use of the preamble shows that in some instances this is not the case. It also illustrates the necessity of rectifying these aspects of lingering colonialism in order to treat all peoples in Canada more fairly.

2.4(b) - LAW'S VIEW OF RELGION

In addition to law having a Christian understanding of religion (noted generally above but discussed in more detail below[25]), which negatively impacts the religious ways of Aboriginal peoples (and Aboriginal claims generally) in court, there are other ways in which the legal system views religion that are problematic for Aboriginal peoples. Berger, who examines religious freedom claims in Canadian courts, determined that the law, due to its own history and experience, views religion as private and individual (2008, 267, 278). There are repercussions to this for Aboriginal peoples when they make their claims in court. First, Johnson notes what when an issue raised before the courts is designated as private, it enables judges to not have to address it; such as with childcare in the *Symes* case (2002, 13-15, 37). This issue in relation to where religion is designated will be considered in the *Delgamuukw* case. Secondly, that law sees religion as individual may also be problematic for Aboriginal peoples because they might not see factors relating to their religious ways, such as protecting a community's access to particular lands, as individual but rather as a communal right. Given that such views of religion by the law would present problems for Aboriginal religious claims it seems likely that may avoid making such claims for these reasons (for further discussion see Appendix 1). Beaman also notes that in

[25] Law's Christian understanding of religion includes how it views sacred space as being delineated, it sees a separation between sacred and profane, there is a focus on religious texts, it does not understand land to be inherently religious, etc. These factors will be discussed in more detail later in this thesis.

Canada "legal claims are framed in the rhetoric of individual rights that ignores the systemic disadvantages suffered by Aboriginal peoples" (2002, 136). Ignoring these disadvantages results in the continued colonisation of Aboriginal peoples in Canada.

2.4(c) - THE LANGUAGE OF LAW

Another characteristic of the legal system that impedes fairness to Aboriginal peoples is that they are not able to use their own languages or understandings of government in court. Tully states that, being forced to use the language of the *Constitution* and of non-Aboriginal people (English or French) to make their claims exposes another way that decolonisation is incomplete (1995, 34-35). He notes that Aboriginal peoples not being able to use their own language in courts prevents giving recognition to Aboriginal peoples as "recognition involves acknowledging it in its own terms and traditions, as it wants to be and as it speaks to us" (1995, 23). Tully also finds it problematic that Aboriginal peoples are seeking concessions from a group that in many ways has unlawful power over them and uses constitutional language that is not neutral despite being depicted as such (1995, 165, 35). Aboriginal peoples are compelled not to use their language because, as Smart notes, "in order to have any impact on law one has to talk law's language, use legal methods, and accept legal procedures" (1989, 160). This makes it more difficult for Aboriginal peoples, whose language, laws, governing system and dispute resolution processes are different than those of the Canadian legal system, to effectively utilize the system to address their concerns. They also do not necessarily see legal issues in the same way and yet are forced to argue them in a way that may not make sense to them or do justice to their cultural understandings. Tully further notes that some scholars believe that the language of

constitutionalism is masculine[26], European, and imperial (1995, 45) which adds other layers of difficulty for Aboriginal peoples in court.

2.4(d) - THE CHARACTERIZING ABILITY OF THE LAW

Mary Jane Mossman (1987), who analyzes two Canadian legal cases involving "women's rights" to uncover characteristics of the legal method and their connection to feminism, provides further critique of aspects of the Canadian legal process. She discusses what she calls "the characterization of the issues" and notes that, in a case she evaluates, "the judges consistently characterized the legal issues as narrowly as possible eschewing their 'political' or 'social' significance, and explaining that the court was interested only in the law" (1987, 157). This is because one of the attributes of the law is that the "legal method defines 'relevance' and accordingly excludes some ideas while admitting others" (Mossman 1987, 164). Johnson notes that this occurred in the *Symes* case where childcare was in a sense seen as a social issue and not a legal one (2002, 133). Beaman also notes this type of characterization regarding the religious ways of Aboriginal peoples stating that "Aboriginal claims are framed as treaty rights in relation to hunting and fishing, or as rights relating to Aboriginal title, resulting in the minimization or marginalization of issues concerning religious freedom" (2002, 136). This occurred in the *Delgamuukw* case where she notes that,

> the 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. (Beaman 2002, 144)

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[26] Smart, (1989, 88) in her analysis of law draws a similar conclusion, claiming that "[l]aw is not a free- floating entity, it is grounded in patriarchy, as well as in class and ethnic divisions". Smart also examines how law is androcentric and how this masculine point of view is evident in the law surrounding rape cases, child sexual abuse and the legal construction of the female body (Mossman, (1987) also notes the androcentric character of law). Aboriginal women may therefore have an even more difficult time than Aboriginal men under the current constitution and legal system.

The tendency of judges to focus on particular aspects of a case while avoiding others is accomplished through the particular wording of legal texts. In law, 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 Johnson, masks the many voices present in cases which can be uncovered by focusing on the legal discourse (2002, 58). It is this type of analysis, which focuses on the discourse in order to reveal the many voices in a text that will be utilized in this thesis.

Characterizing cases in particular ways also allows for judges to avoid discussing or commenting on particular factors whereby avoiding them and deflecting blame for particular decisions (Mossman 1987, 158). Mossman says that the blame for an upsetting decision is then placed on the law rather than judges. She further states that, "[t]he result of the characterization process, therefore, is to reinforce the law's detachment and neutrality rather than its involvement and responsibility; and to extend these characteristics beyond law itself to judges and lawyers involved as well" (1987, 158). Belleau and Johnson also describe such tactics used by judges to shift blame elsewhere than on themselves and describe the use of particular language by judges to disguise their choice in a decision (2008, 158, 154). Mossman notes that the characterization of an issue "demonstrate[s] the opportunity for choice in legal method: choice as to which precedents are relevant and which approach to statutory interpretation is preferred; and choice as to whether the ideas of the mainstream or those of the margins are appropriate" (1987, 164). Judges can also utilize the decision to express their own views which Mossman expresses concern with stating that, the "potential for judicial attitudes to be expressed, and to be used in decision-making (either explicitly or implicitly), when there is no 'objective' evidence to support them" (1987, 164). A Judge's reluctance to address issues and attempts to disguise his/her views

about situations is also evident in the *Delgamuukw* case and will be explored further in chapter 4. The case, which started out as a land dispute issue, ended up focusing on whether Aboriginal peoples should be able to use their oral knowledge as forms of evidence in court. The original land dispute was left unresolved. This change of focus of this case can be regarded as an act of shifting the issue away from what was brought before the Court. Similarly, in chapter 4 it will be noted how Chief Justice Lamer, in the *Delgamuukw* case, chose not to discuss the religious ways of Aboriginal peoples by using a number of tactics such as referring to in in vague ways or by "writing out" the ceremonial.

2.4(e) – LANGUAGE TO DISEMPOWER OR DEVALUE IN COURT

Johnson (2002) gives examples of how important language can be in law in terms of placing something out of reach of being discussed or to disempower a particular person or group. She analyzes the Supreme Court case, *Symes v. Canada* (1993), which involved a woman who sought tax exemption for childcare expenses in order to work outside the home. Johnson focuses on the language of the case as dialogical and having many discourses from a number of different perspectives (2002, 58-59). She discusses the ramifications in the *Symes* case of labelling something as private and/or personal (2002, 14-15). In the case the law banish childcare to the private realm, which places the burden of childcare on women and lets the Court avoid ruling on it (2002, 187). This notion of designating something as public or private (or at times public and at other times private) is also relevant to the *Delgamuukw* case and the religious ways of Aboriginal peoples. Could the designation of religion as private be part of the reason why the religious ways of Aboriginal peoples are rarely discussed in legal decisions? Johnson further illustrates the consequence of the use of particular language by judges in courts, noting how language in the *Symes* case is used to discredit as when the state's lawyer used "Miss" instead of

"Dr." in addressing the expert witness who had a Phd (2002, 63). Belleau and Johnson outline a similar use of discrediting language by the Chief Justice's use of the term "lover" rather than "couple" when referring to a homosexual couple (2008, 155-156). Similarly, Fairclough states that one should pay attention to particular words and the change in their meaning throughout the text (2001, 264). The example he gives is "work" and "paid work" both referenced in the same text but having very different meanings. Chapter 4 will discuss whether similar discrediting/demeaning or change in language occurs in *Delgamuukw* when Chief Justice Lamer uses vague terms to refer to religious aspects, and in his use of the terms "legend" and "oral tradition" in relation to types of oral knowledge that involve the religious ways of the Gitksan and Wet'suwet'en peoples.

2.4(f) - SOCIETAL VIEWS INFLUENCE LEGAL DECISIONS

Mossman notes that the public can influence court proceedings noting that ideas held by society can also permeate a legal decision through a judge (1987, 160)[27]. Beaman also discusses the notion that prominent ideas in society may be used to interpret the law and that appealing to societal 'common sense' can make for nearly impenetrable arguments in court (2008, 13). These complexities of the court system hinder the protection of the religious ways of Aboriginal peoples in Canada. In terms of the *Delgamuukw* case it will be noted how dominant understandings of history, land, and religion in Canadian society have an impact on how the religious ways of Aboriginal peoples are understood and dealt with in law (see chapter 3 and 4).

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[27] Jakobsen and Pellegrini (2003) have made related comments in terms of common religious views held in society have influenced the outcomes of laws surrounding sexuality in the American context (as well as affecting the initial creation of the laws themselves).

2.4(g) - CONSTRAINTS ON ACTORS IN LAW

Mossman's "characterization" where judges have a certain amount of choice in how they decide cases resonates with Smart's view that "[t]here is no neutral terrain, and law least of all can be said to occupy that mythical space" (1989, 81). It must be noted however, that despite these features of the legal system that allow it latitude in decision-making, there are limiting factors to what judges can rule on or put in their decisions. Johnson uses Foucault's scholarship, noting that for him "[t]he issue is not to figure out 'who has power' but to examine different options for action available to different people at different locations, the costs associated with those options, and how these options are connected to other locations and options" or rather "a decentring of the search for 'who is responsible' and a focus instead on the processes that give meaning to encounters" (2002, 8, 9). In the *Symes* case Johnson examines the Court's judicial constraints (such as choosing which precedence to take into account) and legislative constraints (such as interpreting what the law intended or allow for legislation to be created to address the issue) in addition to social constraints (2002, 110-111).

Focusing on constraints is a useful way to ensure examining a case from multiple perspectives. In the *Delgamuukw* case there were likely judicial, social and political constraints on the Court. The Court was socially constrained by societal views that influenced its decision to a degree, such as in its understandings of history, land and religion in the dominant narrative (mentioned in chapters 3 and 4). It was politically constrained by what could have been the high cost for the state had it awarded Aboriginal peoples the rights to certain lands or monetary compensation (in addition to the amount of cases such a decision could generate). Johnson notes (in relation to the *Symes* case) that people who appear to have choice often have constraints on them as well (2002, 126). Chapter 4 will address whether this was the case for the First Nations

peoples in the *Delgamuukw* case. Appendix 1 also considers possible constraints on Aboriginal peoples to argue freedom of religion under s. 2(a) of the Canadian *Charter* where it may appear that Aboriginal peoples have more choice than they actually do.

For Aboriginal peoples these characteristics of the judicial system (aspects of continued colonialism) affect the way the law treat them and their religious ways. The courts, however, do not have all the power. This is especially evident in the framing of a case. As noted previously, Aboriginal peoples rarely argue for religious freedom under s. 2(a) of the *Charter* (or even clearly under section 35(1) of the *Constitution*). This then allows judges not have to address issues directly as religious freedom claims either. It allows judges to discuss these complicated issues in other less complicated ways, in essence not having to handle the religious ways of Aboriginal peoples at all. This also means, however, that Aboriginal peoples have a role to play, however limited, in the characterization of the issues in their cases.

2.4(h) - THE 'TRUTH' OF LAW

Smart notes another characteristic of law that has repercussions on Aboriginal peoples as they make claims in court. She finds that the law is built up to be a 'truth' just as science is (1989, 9-11). In examining the continuity of court decisions, Eric Reiter argues that judges construct a narrative from fact that in turn becomes fact and is used to evaluate other cases, thus perpetuating a created narrative (2010, 67-77). Reiter also notes that a result of the legal system's perpetuation of particular ways of handling 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" (2010, 67). Such a cycle is difficult to break. In addition to law as 'truth', it also has a truth making capacity where it deems what is of value and what is

not. Smart states that, "[i]f we accept that law, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences" (1989, 11). An example of this is provided by Chamberlain where he recounts how a core of earth was taken from the bottom of a lake to confirm, with 'scientific' evidence (which was acceptable to the legal system), that what First Nations peoples recounted in their oral traditions (evidence of there being an earthquake) was in fact true (2007, 27-28). Another example is given by Beaman where she shows that in the case of Bethany Hughes, blood transfusions prescribed by doctors were seen as superior to alternative medical treatments, thereby giving precedence to the former and silencing the latter (2008, 8). This truth making process is also evident in relation to defining types of good and bad history, often depicted as written vs. oral respectively[28]. This is significant for my thesis as such truth making could be yet another way for the Court to use its decision as an exercise in constructing of dichotomies of what is right and wrong, acceptable or not, true or false in law. This 'truth' making tendency of the law in relation to *Delgamuukw* will be discussed in chapter 4, specifically in relation to oral knowledge and its use as historical evidence in Court and the implications it has for the religious ways of the Aboriginal peoples.

This 'truth' making process in law does not stop, however, in jurisprudence or in the courts. Smart states that the law "extends itself beyond uttering the truth of law, to making such claims about other areas of social life" (1989, 13). The truth making (or value establishing) that occurs in law is therefore amplified by the effects that legal decisions have on society. Carabine

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[28] This truth making also happens in other instances. Michael Foucault. *The History of Sexuality, Volume 1: An Introduction*. (New York: Random House, 1978) discusses how a similar truth making process functioned throughout history with social understandings of sex and sexuality in the West.

notes, regarding an aspect of Foucauldian discourse analysis, that discourses “define and establish what is 'truth' at particular moments” and “interact[] with, and [are] mediated by, other discourses to produce new, different, and forceful ways of presenting the issue” therefore “influenc[ing] the way we understand, experience, and respond to the issue or topic” (2001, 268, 273). These repercussions on society, which can result from any text, have an even greater effect when occurring within the law. This points again to the importance and stature that society places on the law, indicating the importance and statue that society places on the law. If law defines religion in Christian ways the social ramifications can therefore be significant for non-Christian groups, such as Aboriginal peoples. Furthermore, this point of law making ‘truth’ in society, taken in consideration with comments made by Mossman and Beaman regarding how societal views can influence legal proceedings (above) creates a kind of system where law and society can reinforce views held by the other. Such a structure makes changing the way Aboriginal peoples are treated more difficult as misunderstandings held by society and by law (including judges) would now both need to be overcome.

2.4(i) - LAW AS JURIDOGENIC

Smart also notes that law is what she calls “juridogenic”, meaning that it can sometimes create new problems in its efforts to solve one issue (1989, 161). These unanticipated negative effects may be amplified for Aboriginal peoples who have more issues to be resolved by the courts namely, in the decolonisation process. The juridogenic nature of law can be seen in the *Delgamuukw* case as new issues being created after Aboriginal oral knowledge was accepted as a form of evidence in court. Three issues related to this development will be addressed here.

First, the *Delgamuukw* decision did not treat the ways of Aboriginal peoples regarding evidence as equal to what has commonly been accepted as evidence. Reiter argues that the case, while containing "a pluralist understanding of the relationship between Aboriginal and non-Aboriginal evidence about the past", also "firmly reasserts the authority of the dominant narrative and makes it clear that Aboriginal evidence must be made to fit within it" (2010, 73, 74). 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" but also states in the case that "accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure'" (2010, 74, citing Delgamuukw para 82, 87, 82). Reiter determines from these comments that in *Delgamuukw*'s allowing for oral knowledge to be included as evidence in court, "[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" (2010, 73-74).

Reiter's analysis of the *Delgamuukw* case, points to a problem with the language of 'accommodation'. He points out that Chief Justice Lamer's use of accommodation language in his discussion of the inclusion of First Nations oral knowledge as historical evidence in Court shows that it is being allowed in but is not treated equally to historically accepted forms of historical evidence (2010, 73-74). Requiring Aboriginal peoples to submit their oral traditions only within the structure of the more dominant group means they will not be understood or handled in their own right, which Tully (2005) notes does not give Aboriginal peoples proper recognition. It is for similar reasons that Turpel notes, in her discussion of the preamble, that Aboriginal peoples would disagree with "the suggestion that their spirituality could be

incorporated under the notion of the supremacy of God and the rule of law" (1989-1990, 8). Both are examples of Aboriginal peoples fitting under frameworks that are not their own. The juridogenic effect that can be noted here is the Justice's use and the potential subsequent social perpetuation of that use of 'accommodation' language (especially relevant given law's 'truth' making capabilities noted above). The language of accommodation can also be seen as contemporary colonialism. Beaman notes 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" she says (2008, 146). The power of the majority even in terms of defining what qualifies as 'normal' religion and thus deserving of protection is also addressed by Beaman (2002, 138; 2003, 313). Beaman sums up the arguments regarding this type of language, stating that

> the concepts of tolerance and accommodation work to undermine any substantive or deep sense of equality. Concepts such as these do important and damaging work in that the power relations they maintain are based in inequality. They invoke a colonial privilege that "we" will accommodate "you." The language of reasonable accommodation, as with the language of tolerance, moves us further from, rather than closer to, equality. (2011, 443)

Using such language in court perpetuates its use and understanding of the situation in this fashion outside of court as well. The problem is not only with the term 'accommodation'. The term 'tolerance' is also problematic. Wendy Brown notes this regarding 'tolerance' in her statement that,

> Like patience, tolerance is necessitated by something one would prefer did not exist. It involves managing the presence of the undesirable, the tasteless, the faulty – even the revolting, repugnant, or vile. In this activity of management, tolerance does not offer resolution or transcendence, but only a strategy for coping. (2006, 25)

Janet R. Jakobsen and Ann Pellegrini agree with this analysis of 'tolerance' but take it one step further in their discussion of its use in relation to handling sexual difference in society. They

state that “[t]olerance is supposed to be a sign of openness and a wedge against hate; but in practice it is exclusionary, hierarchical, and ultimately nondemocratic” (2003, 45). They qualify this statement later stating that, “[t]olerance disavows violence and those who commit heinus crimes, but along the way it offers no exit from the us-them logic that structures hate and tolerance in out society. It also gives us no logical exit from the mandate to tolerate those who hate” (2003, 65). Basically, both authors note that tolerance, like accommodation maintains distinction between groups and works to keep them separate and in positions that are unequal.

What then is the proper language to be used in regard to incorporating minority religions into the state? What should we strive for in terms of freedom of religion? According to Beaman what should be used is the language of equality, specifically what she calls “deep equality” (2011, 452, 443). In fact, she argues that, “tolerance and accommodation have framed the discussion of the governance or management of religious diversity in a particular way that eludes notions of equality”, citing court cases as examples (2011, 449). This makes it that much more difficult for religious minorities to achieve their goals of religious freedom. In striving for “deep equality” Beaman notes that “a basic premise of substantive equality—that equality does not mean sameness of treatment but that it can, in fact, employ creative and innovative solutions depending on needs” (2011, 452). She notes that what may look like the granting of a concession should actually be understood as having one’s equality recognized (2011, 450). Language of equality is therefore superior to language of tolerance or accommodation in terms of being able to incorporate religious minorities fairly, and generally, into a state. Similarly, in order to overcome ‘tolerance’ Jakobsen and Pellegrini note that freedom would be required (2003, 45). Equality similar to freedom both depends on instances where one group in society has a high degree of equality or freedom, or the result could still be an overall limitation.

A second juridogenic issue with allowing for oral knowledge to be used as evidence in a court of law in Canada is noted by Borrows. Borrows notes how allowing oral knowledge to be used as evidence in court will likely lead to Aboriginal traditions to be unfairly judged and examined by the courts and by members of society who are unfamiliar with or misunderstand them (2002, 86-92). He finds this to be problematic given the extent of cultural misunderstanding between these groups and Aboriginal society (2002, 86-92). Similarly, Carlson states that

> since *Delgamuukw,* expert witnesses and First Nations organizations who have tried to introduce Native oral history into the courts have found that the legal forum remains unable or unwilling to adequately deal with Aboriginal oral history on terms that are meaningful to the Native people and societies who have created and preserved them. Much of the cause for this disjuncture lies in the assumption found within the 1997 *Delgamuukw* decision that Native oral histories work in fundamentally the same way as Western history, and that these bodies of indigenous knowledge will therefore necessarily supplement and enrich an existing historiography and jurisprudence derived from what are largely archival-based understandings of past happenings. .... the fundamental dilemma seems to hinge on the issue that, as Native oral histories assume a greater presence in Canadian courts and politics, the narratives and the cultures they represent might find themselves increasingly abused in a manner not dissimilar to the way that victims of sexual crimes have often found themselves doubly violated by the courtroom cross examination experience. (2007, 47)

Borrows comments on how this abuse could take place in courts in his description of what it could be like for an Aboriginal chief to be on the stand stating namely, a humiliation, and a "discrediting [of] their reputation and standing in the[ir] community" (2001, 32, 33). Such scrutiny would be unfair to Aboriginal societies and in addition to being a hostile place to discuss their difference, it would also violate their ways of managing issues. It would also likely result in less use of the Canadian legal system.

A final juridogenic issue created for Aboriginal peoples created as a result of *Delgamuukw* allowing oral knowledge to be used as evidence in court, is that it now appears that oral knowledge may be required in order to show the religious significance of something under s.

35 (1) of the *Constitution*. This section states that, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" and can be used by Aboriginal peoples to make an assortment of claims. In the recent case of *R. v. Prairie Chicken* (2010) a First Nation couple were accused of trespassing as well as killing two moose in contravention of the Wildlife Act. When it was raised that the hunting might be religious, the Judge dismissed the claim on the basis that the accused party was not able to produce evidence in the form of oral history to support the claim (para 24-26, 20). This is an important finding, given that non-Aboriginal people in Canada need only prove sincerity of belief – as established in the Supreme Court case *Syndicat Northcrest v. Amselem,* (2004) – to prove that something is religiously significant to them and therefore deserving of protection as a religious freedom under s. 2(a) of the *Canadian Charter of Rights and Freedoms.* In addition to this, Borrows notes that, regarding Aboriginal claims to religion under s. 35(1) (which is also the section used in the *R v. Prairie Chicken* claim[29]), the integral-to-distinctive culture test which is necessary under s. 35(1) is "exceedingly inappropriate" for Aboriginal religions as "[i]t can lead to potentially dangerous stereotypes and caricatures of Aboriginal peoples as 'past- tense' cultures, with no right to expect protection for religious beliefs developed since Europeans arrived" (2008, 180). While the acceptance of the use of oral knowledge as evidence in a court of law is for the most part a significant advancement for the Canadian legal system, it also presents new difficulties, such as those noted by Reiter, or in the critical examination of oral knowledge by those unfamiliar with it, as well as what now appears to be a necessity to use oral knowledge in order to establish a religious right for Aboriginal peoples under s. 35(1) of the *Constitution*.

[29] The Aboriginal peoples in *R. v. Prairie Chicken* (2010) may have had more success had they argued their claim under s. 2(a) of the Canadian Charter of Rights and Freedoms.

Chapter 5 addresses ways that the negative effects of some of these characteristics of the law have the potential to be curbed. It notes this through a discussion of possible ways that law and the majority of non-Aboriginal peoples in Canada could come to better understand and handle the religious ways of Aboriginal peoples than the way in which they were comprehended and framed in the *Delgamuukw* case.

2.5 – CHAPTER CONCLUSION

This chapter focused on literature explaining how the colonisation of Aboriginal peoples in Canada has not come to an end. It shows that Aboriginal beliefs and perspectives were left out of the creation of the Canadian state and only European and Christian ones were taken into account. This has resulted in the lingering of particular values in the Canadian legal system and this contemporary colonisation makes it difficult for the courts to adequately manage Aboriginal peoples' claims, especially involving religion. The literature reviewed in this chapter reveals the socio-legal context in which aboriginal claims are made and comments on how this context presents challenges for aboriginal peoples particularly in exhibiting a bifurcation of worldviews between those of Aboriginal peoples and that of the dominant Canadian majority. Specifically to in terms of how Aboriginal peoples must make claims in legal systems, with laws and language that are not their own; how the law understands factors such as religion to be Christian, individual and private; or in how law frames and adjudicates what is acceptable as evidence, etc. These factors shape and control the entry of aboriginal peoples into the legal domain. Focusing on how certain aspects of law are problematic for Aboriginal peoples allows for a better understanding of how the law views and handles Aboriginal claims such as that in the *Delgamuukw* case. The next chapter in this thesis identifies the markers of the religious ways of Aboriginal peoples in the *Delgamuukw* case and how they are understood in the aforementioned

Canadian socio-legal context. Specifically, what the religious elements might mean for the Gitksan and Wet'suwet'en peoples and how the legal system might have trouble handling them.

CHAPTER III – DEMYSTIFYING THE UNFAMILIAR

> *Some of that [land claims] evidence was not in a form which is familiar to common law courts, including oral histories and legends.*
>
> - *Delgamuukw* para 5

> *[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. Both of these were entered as evidence on behalf of the appellants. The 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.*
>
> - *Delgamuukw* Introduction and at para 14

3.1 - INTRODUCTION

Delgamuukw is one of a long trajectory of cases involving Aboriginal peoples and the Supreme Court of Canada. As previously mentioned, it is considered to be a landmark case in that it allowed the oral knowledge of Aboriginal peoples to be included as historical evidence in Canadian courts (in this case for the purposes of a land claim). This chapter explores some of the obvious and more subtle references to the religious ways of Aboriginal peoples that I located in the *Delgamuukw* case and its facta through discourse analysis. Through reading, rereading and coding the documents, my findings revealed the following themes relating to the religious ways of Aboriginal peoples, oral knowledge, views towards land, crests, totem poles and feasting[30]. These elements made up the bulk of the evidence submitted to the Court in the *Delgmauukw* case by the Gitksan and Wet'suwet'en to prove their occupation and use of the land that they were claiming title to. Before discussing how these elements were treated and translated by the

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[30] The religious ways of the Gitksan and Wet'suwet'en peoples are mentioned on a number of occasions in the *Delgamuukw* case, in its factum, and in its intervener documents. While there are some sparse use of terms such as ritual, ceremonial, religious, and spiritual that are obviously related to the religious ways of First Nations peoples, what is of most interest for my purpose is greater reference to their less obvious and more specific and concrete references to religious ways including oral knowledge, Aboriginal relationships with land, crests, totem poles and feasting.

Supreme Court of Canada in the following chapter, it is important to know how these elements are relevant to the religious ways of the Gitksan and Wet'suwet'en peoples in the case. Illustrating the religious importance of these elements to the First Nations peoples of the *Delgamuukw* case provides a better understanding of how these religious elements were treated by law and also helps to improve comprehension of Gitksan and Wet'suwet'en perspectives in Court (as well as other Aboriginal groups). The significance of each element as religious to the Gitksan and Wet'suwet'en peoples will be noted followed by a discussion of the difficulties each presents to Canadian law. It also sets the stage for the next chapter which analyses how these elements are presented to the Court and understood legally in the *Delgamuukw* case. A better understanding of the religious ways allows for a more in depth and thoughtful analysis, including a better recognition of how the Court translates the religious elements of oral knowledge; how Chief Justice Lamer obscures the Aboriginal religious views towards land in determining its use, and has difficulties handling forms of history that are not written and that have religious content.

The first section of this chapter examines how the religious ways of the Gitksan and Wet'suwet'en were referred to in the *Delgamuukw* case. It notes that this reference was vague and the reasons for why the Court may have done this. The second section focuses on oral knowledge. It notes that the Canadian legal system has trouble handling oral knowledge because of law's different understandings, compared to Aboriginal peoples, of history and what is true versus what is false. The third section focuses on land and the religious relationship that First Nations peoples have with it, stating that land goes to the core of Aboriginal identity. The chapter points out law's difficulties in handling this relationship mostly as a result of its inability to conceptualize land as broadly as Aboriginal peoples do. The subsequent part of this chapter illustrates how crests, feasting and totem poles are religious for the Gitksan and Wet'suwet'en

peoples as well as for First Nations peoples more generally. It acknowledges that these elements, although religiously significant, have to date played a more minor role in law. This chapter concludes by noting how secrecy surrounding the religious oral knowledge of Aboriginal peoples further complicates how it is understood and whether it is protected in legal contexts. It is through understanding what each religious element (oral knowledge, land, crests, totem poles and feasting) means for Aboriginal peoples and the problems that they present to the Canadian legal system that allow for a better understanding of how Aboriginal religious ways were treated in the *Delgamuukw* case.

3.2 – REFERRING TO RELIGIOUS FACTORS IN *DELGAMUUKW*

In the *Delgamuukw* case there are some obvious references to religious factors in using language such as "religious", "spiritual", "ritual", "ceremonial", as well as words that state First Nations peoples' connection with the land. There are also many statements in the decision that could encompass the religious ways of the Gitksan and Wet'suwet'en peoples such as "practice, custom and tradition" and the use of these terms individually. It should be noted that such general and loose references to the religious ways of Aboriginal peoples may be indicative of how Aboriginal religious beliefs actually are (and how the Gitksan and Wet'suwet'en peoples themselves refer to religious aspects in their facta), 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" (2005, 3-4)[31]. In relation to the Gitksan, Valerie Ruth Napoleon notes similarly that history and religion, for example, are not separate for them (2009, 165, footnote 334). This means not singling out the religious ways of Aboriginal peoples

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[31] Singling out 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, 2005; Henderson 1999, 175; Battiste and Henderson 2000, 159.

from other aspects of their lives. Chief Justice Lamer may have chosen not to single out religious aspects in order to do justice to this worldview. However, this is unlikely considering the degree to which the Canadian legal system and Canadian "Christian hegemony" have misunderstood the religious ways of Aboriginal peoples in Canada, as well as how relevant the religious ways of Aboriginal peoples are in this case[32]. What is more likely that the Court is intentionally referring to Aboriginal religious ways in this more covert manner. This is especially noticeable given that the Court rather than using other more encompassing language to refer to the religious ways of Aboriginal peoples, has elsewhere discussed these ways as "religious" or "religion" such as in *Jack and Charlie v. The Queen* (1985), *Thomas v. Norris* (1992), *Saulteau First Nations v. Ministry of Energy and Mines* (1998) (this will be discussed further in the next chapter).

3.3 – ABORIGINAL ORAL KNOWLEDGE

Aboriginal oral knowledge became the main issue in the Supreme Court case of *Delgamuukw*. The case started as a land claims dispute but the legal question once at the Supreme Court level became whether oral knowledge could be used as historical evidence in a court of law. The Court determined that it could be used as a form of historical evidence, although in the previous chapter it was noted that there are a number of results from this that demonstrate the juridogenic nature of law as identified by Smart (1989). Such as, that oral knowledge is not treated equally to other forms of evidence as it is expected to conform to the current system (noted by Reiter (2010)), that now Aboriginal traditions will likely be unfairly judged (stated by Borrows (2002)), and that oral knowledge may now be required as evidence in some instances (evidenced through the case *R v. Prairie Chicken* (2010)). In terms of how Aboriginal oral knowledge is related to the religious ways of Aboriginal peoples, Smith notes

[32] Despite being treated as nearly irrelevant.

that Aboriginal religious ways are intimately tied to their oral knowledge. She states that, despite efforts by colonisers to rid Aboriginal peoples of their beliefs, "many of those beliefs still persist; they are embedded in indigenous languages and stories and etched in memories" (1999, 43). Similarly, Leroy Little Bear states, from a First Nations perspective (particularly relevant to the land claims case), that

> [o]ur stories arise out of the land. Or ceremonies occur because of the interrelational network that occurred all over our land. Our way of mapping our territory is through our stories. There is a story about every place. There are songs about each place. There are ceremonies that occur about those places. The dongs, the stories, the ceremonies are our map. (1998, 19)

Chief Justice Lamer, in the *Delgamuukw* decision also acknowledged the importance of oral knowledge for the religious ways of Aboriginal peoples where he noted that oral knowledge is "sacred" to the First Nations communities in the case (*Delgamuukw* para 13, 93). This finding is pertinent to my research, as the way First Nations oral knowledge is understood can speak to how the law conceptualizes Aboriginal religious ways and religion more generally in Canada.

The forms of oral knowledge that are at the center of the *Delgamuukw* case are the Gitksan *adaawk* and Wet'suwet'en *kungax*. They are described in the decision as follows:

> the 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. (*Delgamuukw* para 13)

These forms of First Nations oral knowledge appear to have been labeled as "sacred" to the Gitksan and Wet'suwet'en respectively by the Court as they are greatly respected within the First Nations communities and because they are believed to contain spiritual knowledge of the religious ways of these peoples. Both the adaawk and the kungax forms of First Nations oral knowledge will be discussed next.

3.3(a) - ADAAWK

As noted in the *Delgamuukw* decision, the Gitksan adaawk is "a collection of sacred oral tradition about their ancestors, histories and territories" (para 13). For the Gitksan peoples it is also an important form of historical evidence used in the case to demonstrate their historical occupation and use of their claimed traditional territories, as well as land's significance for their community. One aspect of an adaawk is that it is an oral recording of historical events. It has been stated that, "[e]ach adaawk and ayuuk [crest] marks a major event in a lineage's history. A House group today will possess a distinct set of these histories and crests, although those recording older events may be shared by a number of related Houses that once formed a single group" (Overstall 2005, 39). According to a number of scholars the following historical information is wrapped up in an addawk:

> A group's territorial acquisitions are described in one or more of its *adaawk*, or formal oral histories. Heard together, a lineage's adaawk describe its ancient migrations, its encounters with the power in the land, its defence of its territories, and major events in its history, such as natural disasters, epidemics, war, meeting new peoples, the establishment of trade alliances, and major shifts in political power. (Overstall 2005, 26; referring to Sterritt, Marsden, Galois, Grant and himself 1998, 12)

Any major event that occurred was likely recorded in an adaawk. In addition to recording the historical happenings of the Gitksan community, adaawks also have religious aspects that are embedded deep within them. This is because religious factors are not seen as separate from other factors such as history in their communities. Napoleon notes this in comparing the Gitksan with Europeans, stating that, "[t]he history of the Gitksan people is not separated from the history of the Gitksan world as Benedict Anderson argues has been the case in Europe" where "[a]ccording to Benedict Anderson, cosmology and the origin of the world were once indistinguishable and formed one of the ancient certainties of life in Europe. Capitalism, rapid communications, and

social and scientific changes “drove a harsh wedge between cosmology and history” and enabled “people to think about themselves, and to relate themselves to others, in profoundly new ways’” (Napoleon 2009, 165 and footnote 334). This separation of history from religion did not happen in the Gitksan context. The Gitksan adaawk has been described as “oral histories, and halayt, or spiritual powers” (Overstall 2005, 38). Andrea Laforet and Annie Work note how linked together history and religion are for these First Nations peoples stating that,

> [i]t is not possible, for example, to remove the actions of supernatural beings form the Gitksan *adaawak* without removing much of their significance. Encounters between human and animal/supernatural beings are the source of crest objects owned by Gitksan lineages, the carved figures on totem poles, the names that were lineage property, and the funeral and other songs that were part of the lineage history. (1998, 218)

The adaawk has deep religious elements. They have been and continue to be a means for the Gitksan peoples to remember and recount the most significant events in their societies. For First Nations peoples, for whom religion pervades all aspects of life, this type of blending of history and religion as a means of record keeping is not a problem.

3.3(b) - KUNGAX

In the *Delgamuukw* case the other appellant, the Wet’suwet’en peoples, used their form of oral knowledge, the kungax, as a form of historical evidence to prove their occupation and use of their traditional territories to aid in their land claim. It also indicates the religious relationship that the Wet’suwet’en have with their land. As noted by the Supreme Court, the kungax is “a spiritual song or dance or performance which ties them [the Wet’suwet’en] to their land” (para 13). The kungax has multiple meanings, “[t]he word kungax is the possessive form of the word *kun*. Kun means ‘song’; it also means ‘spirit’ or ‘spirit power.’ Kungax means ‘own spirit power,’ or ‘own song,’ or ‘personal crest’” (Mills 1994, 122). The Wet’suwet’en kungax therefore can be understood to be a song that contains elements that have to do with the religious

ways of the Wet'suwet'en peoples (see also the section below on crests). The religious ways of the Wet'suwet'en are intimately tied to the kungax. The Kungax is not so much a recounting of history, as it is "statements about the moral and spiritual order of the world" (Mills 1994, 129). Therefore, the "Kungax, in the sense of recitations of oral histories, are used less often by the Wit'suwit'en to validate a title than are the enactment of the crest and the capturing of a song that expresses the spirit trail of the title" (Mills 1994, 122). As evidence in the *Delgamuukw* case, the kungax would have been able to show the importance and deep religious connection that the Wet'suwet'en peoples have with their lands.

3.3(c) – HANDLING ORAL KNOWLEDGE IN COURT

Oral knowledge in the *Delgamuukw* case is referred to in two ways, as oral traditions and as oral history. In the Canadian legal context this distinction has also been made. For instance, the 'variance' between oral histories and oral traditions was outlined explicitly in *R. v. Vautour,* 2010 where it was stated by Mi'kmaq Chief Augustine that the term:

> '[o]ral traditions' encompasses the ceremonies, the stories, the songs, the dances and activities, prophesies 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 and what they have seen... (para 38)

The religious ways of Aboriginal peoples involve the activities described by the Chief Augustine as "oral traditions". The term "legend" would also fit into this category, a term was used by Chief Justice Lamer in the *Delgamuukw* case (the implications of which will be discussed in the next chapter). The commanding conceptualization of history in Canadian society would deem such forms of oral knowledge as untrue and therefore not valuable historically. This is not how many Aboriginal peoples understand oral knowledge however and neither was it the position explicitly stated by Chief Augustine in his quote, namely that oral histories are historically true

and oral traditions are not. Similar distinctions to those made by the Chief Augustine seem to exist among other Aboriginal groups in Canada. The Sto:lo First Nations distinguish between two types of oral knowledge,

> *sqwelqwel,* often translated as 'true stories' or 'real news' which seem to tell of recent happenings; and *sxwoxwiyam,* which often appear to describe the distant past when *Xexa:ls* (the transformers) and the *tel swayel* (sky people) transformed the chaotic world of creation into the stable and permanent form it takes today. (Carlson 2010, 63-64)

Although Aboriginal peoples may make these types of distinctions (and the one noted by the Mik'maq Chief) they do not to distinguish between what is true and what is false historically in terms of types of oral knowledge. According to them "both [are] considered true accounts of past happenings" (Carlson 2010, 64). As well, in some Aboriginal communities the two types of oral knowledge might not be so distinct from one another. In the Gitksan and Wet'suwet'en factum they only refer to oral knowledge as "oral history" and I have not been able to find any information on whether they make any further distinctions of this knowledge. It appears therefore that for them religious and historical elements are both encompassed in "oral history". The presiding views of history in non-Aboriginal society however, often fixate on these subtle differences in forms of oral knowledge which exist for some Aboriginal peoples and this has resulted in courts and others deeming some of the knowledge to be more 'true' than other forms. Those who understand history in this way often fail to recognize that Aboriginal peoples do not see the distinctions as 'true' or 'false' ones. With no discussion of the following statement, Smith also comments briefly on oral knowledge, stating that "[m]any of these systems have since been reclassified as oral *traditions* rather than histories" (1999, 33, emphasis in original). Although she does not expand on who is reclassifying oral knowledge in this way, or why, it is likely that she is referring to certain members of non-Aboriginal society, including lawyers, judges and many of those who share their understandings of history with the dominant narrative. The next

chapter will discuss what the implications are of referring to oral knowledge as “tradition” or “legend” is in the *Delgamuukw* case.

Oral knowledge is not only deemed true or false, or reclassified, it is also commonly deemed inferior to written history or scientific explanation. It is for this reason that at some points in the *Delgamuukw* case the appellants used other methods to help 'prove' their stories for non-Aboriginal audiences who are unfamiliar with their traditions. This occurred when an elder recounted a story that discussed how a grizzly spirit was upset by their community and ended up making half the mountain crash down on one of their villages. The judges only came to understand the story when geologists were able to corroborate it with a core sample that confirmed the occurrence of an earthquake around the same time (Chamberlain 2007, 27-28). Even when this information was provided

> [t]he court was inclined to see the scientific story as confirming the ‘legendary’ one. However, the elders of the Gitksan were at pains to persuade the judge that each story was validated by the other; that neither had a monopoly on understanding what happened; that the storyline of geology was framed by a narrative just as much the product of invention as the story told by their people; and that each storyteller's imagination – whether telling of tectonic plates or of grizzly outrage – was engaged with discovering a reality that included much more than the merely human. (Chamberlain 2007, 28)

Chamberlain notes that Aboriginal recountings of the past should not be discarded because they involve non-human phenomena. Similarly, Wendy Wickwire states that “[r]ather than being viewed as fictional embellishments of imaginative reworkings, as they might be in a Western context, instances where myth and history merge ... can be taken as serious reflections on the past” (2007, 130). This statement indicates that oral knowledge with religious content should be given more consideration as history and as a form of legitimate evidence in court. The way in which law and the presiding view in non-Aboriginal society defines history in Canada has effects on how Aboriginal oral knowledge is understood which could result in religious elements being

discarded by law. This view of history by law also demonstrates the ‘truth’ making ability of law as noted by Smart (1989).

Another challenge that Aboriginal oral knowledge poses to Canadian law and those who are not familiar with it is that oral knowledge is thought to violate the rules of hearsay (*Delgamuukw* para 86) and/or are perhaps thought to be able to be easily changed. The extensive measures in place to ensure that Aboriginal knowledge is not significantly altered over time, as noted by Keith Thor Carlson (2007, 50,) should subdue such concerns. Marlene Brant Castellano notes some of these measures, stating that “the degree to which you can trust what is being said is tied up with the integrity and perceptiveness of the speaker” as well as “valida[tion] through collective analysis and consensus building” (2000, 25-26). It is even noted in the *Delgamuukw* case that at “feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax” (para 93). Such factors work to keep knowledge consistent over time. Such an analysis is corroborated by Keith Thor Carlson's research on the oral narratives of the Coast Salish. In addition to Castellano's comments, Carlson adds that another mode for ensuring accuracy in oral narratives is that inaccuracy by a teller can result in a loss of their standing in the community (2007, 48-60). Carlson further notes that there are very particular and communally accepted ways of remembering forgotten knowledge in Aboriginal communities (2007, 48-60, 67). Certain communities also have different ways of holding knowledge where in some communities, such as the Gitksan, only certain people are allowed to recount particular narratives whereas in others, such as Wet’suwet’en society, more importance is placed on the teller and, “he or she [must] know[] the tale well” (Mills 1994, 129).

This again shows again the degree of importance that is placed on keeping Aboriginal oral narratives unchanged and the importance placed upon keeping this knowledge in general[33].

As noted in the previous chapter, the legal system in Canada establishes truths on matters or frames things in particular ways, which influence how Canadian society understands them (noted by Smart (1989) and Mossman (1987 respectively). The result of oral knowledge being presented to the Canadian courts as a form of historical evidence is that such evidence is severely at odds with the way law has defined history and evidence over time. How the legal system has defined history and evidence have been reinforced not only by the presiding view of these elements in society but also by Canada's European legal heritage. Through acknowledging oral knowledge as evidence, the *Delgamuukw* case is exemplary of the fact that the way law and the majority of non-Aboriginal society understand history and evidence is not the only way. While the law has tried to adapt itself to this realisation in allowing oral knowledge to be used as evidence, it has yet to evolve into a system that can truly handle such Aboriginal views.

3.4 – LAND AS THE RELIGIOUS WAY OF ABORIGINAL PEOPLES

Aboriginal peoples in general are described as having a special and religious connection with their land in *Delgamuukw*. The decision states that Aboriginal title is "*sui generis*", which in Latin means "of its own kind/genus". In assigning this term, which is said to incorporate Aboriginal perspectives (including religious ones), the Court affirms the religious connection that Aboriginal people have with land and "it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies" (para 111, 112) (including religious use). *Delgamuukw* also acknowledges that the Gitksan and Wet'suwet'en specifically have a religious

[33] For more on how to better understand Aboriginal oral knowledge see Borrows, 2001.

connection with their land, and notes it as being tied to their oral knowledge. Chief Justice Lamer uses the Gitksan and Wet'suwet'en words for oral knowledge and explicitly notes the connection stating that "the Gitksan Houses have an 'adaawk' which is a collection of **sacred oral tradition about their** ancestors, histories and **territories**. [While] [t]he Wet'suwet'en each have a 'kungax' which is **a spiritual song or dance or performance which ties them to their land**" (para 13, emphasis added). The connection that these First Nations groups have with their land was also acknowledged by the Court in its description of the purpose of the feast hall where they state that the feast hall, "is where the Gitksan and Wet'suwet'en peoples **tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands**" (*Delgamuukw* para14, emphasis added).

Aboriginal peoples understand land in a religious way. A depiction of the interconnectedness of the religious ways of Aboriginal peoples to other elements in their society is that oral knowledge connects Aboriginal peoples to their lands. David McNab notes that, "Aboriginal oral tradition sees humankind, as one with, and inseparable from, nature. Without 'pen or ink,' First nations remember and understand their internal and external landscapes, using their oral traditions and their stories" (1998, 38). This relationship is not merely a way to remember their past and their land transactions, it is also a religious one. Aboriginal peoples find land in general or particular geographies/sites to be of religious importance (Ross 2005, 3). In fact, Ross has gone as far as to say that "First Nations spirituality and religion are rooted in the land. Sacred sites are their taproots" (2005, 3). For the Gitksan and Wet'suwet'en peoples land is a source of "power" where "life forces" reside and where "the ancestor spirits of all life forms [are] lodged in the land" (Daly 2005, 46, 213). In essence, they see and treat the land as living (see more on this below in the crests, totem poles and feasting sections). These First Nations

groups feel indebted to the land and have a reciprocal relationship with it where they show their respect and thanks for all the land has given them through feasting (Daly 2005, 213).

Land or 'Sacred sites' are more than just religiously significant for Aboriginal peoples. Ross states that "other cultural elements (such as history, ethics, law, and politics) are intricately interwoven with their spirituality and religion, First Nations sacred sites often serve other cultural functions" as well (2005, 3-4; see also Beaman 2002). When an Aboriginal land claim is lost and land is developed or taken away the result is therefore not only a limitation of Aboriginal religious freedom but also a restriction or negative effect on other aspects of Aboriginal societies. Examples of such broader societal effects of changes to land include the necessity of having to manage hunting ground changes or the loss of clan land which ties Aboriginal peoples to their ancestors.

3.4(a) - LAND AND IDENTITY

James Zion notes that, "land is an essential part of Indianness. Without a land base there can be no meaningful exercise of group rights, including religion" (1992, 205). A number of those involved in the *Delgamuukw* case appeared to agree with this concept. Chief Justice Lamer recognized First Nations religious relationship with the land as being part of their distinctive culture, stating, that "[f]or the Wet'suwet'en, the kungax was offered as proof of the central significance of the claimed lands to their distinctive culture" (*Delgamuukw* para 94). Justice La Forest in his concurring opinion also notes the importance of land for Aboriginal identity stating that when establishing Aboriginal peoples' "traditional way of life"[34], one must focus on how "the society used the land <u>to live</u>, namely to establish villages, to work, to get to work, to hunt, to

[34] This suggests a stagnant view of Aboriginal traditions, which has been discussed above and will be discussed again later in this thesis.

travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc" (*Delgamuukw* para 194, emphasis in original). The fact that Justice La forest notes religious factors as a part of the use of land "to live", suggests that it is essential to the ways of Aboriginal peoples. The Wet'suwet'en, in their factum, note that the land is important in defining who they are on multiple levels including a religious one, stating that,

> The facts set out above establish that the proprietary rights of the Wet'suwet'en in relation to their territories are in themselves of central significance to Wet'suwet'en culture and are an integral and inextricable part of their social, political and economic culture, their spiritual beliefs, and their identity as a people. (para 96; see also para 137)

The First Nations Summit, an intervener in the case, links land and the religious ways of Aboriginal peoples, land and identity and also identity and spirituality by mentioning them in conjunction with one another as follows in their factum:

> Prior to contact, what we now term "aboriginal title" was part of the fundamental law of the various First Nations. It reflected their own history, identity and spirituality, and was the foundation, in their own laws and customs, for their collective authority to occupy, possess and use their territorial lands, waters and resources. It included both rights of reliance and responsibilities of stewardship. (para 29)

Land is important to Aboriginal peoples for a number of reasons but specifically because it is a part of their religious ways, thus going to the core of their identity[35]. According to Richard Moon, religion and identity can be tied in Canada because, "the formal defence of religious freedom ... emphasizes the value of individual autonomy or choice, the protection of religious freedom sometimes seems to rest also, or instead, on the idea that religion is a matter of cultural identity" (2008, 217). Moon further states that,

> [a]ccording to this view, religious belief is not simply a choice the individual makes. It is a deeply rooted part of her identity or character that should be treated with equal respect. It represents a significant connection with others – with a community of believers – and structures the individual's view of herself and the world. When the state treats the individual's religious practices or beliefs as less important or less true than the practices

[35] See for example *Delgamuukw* para 85 which cites Report of the Royal Commission on Aboriginal Peoples 1996, 33.

of others, or when her religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of her views and values but also as a denial of her equal worth or desert, as unequal treatment that affects her dignity. (2008, 217)

That religion is tied to identity has been suggested by scholars[36] and used as an argument by Aboriginal peoples in court. In *Jack and Charlie v. The Queen* (1985) two First Nations peoples were charged under the British Columbia Wildlife Act with hunting for deer meat out of season. The two were doing so for a religious ceremony and therefore tied religion to their identity as First Nations peoples claiming that "[i]n interfering with aboriginal religion, the Wildlife Act goes to the root of Indianness, and purports to regulate the appellants qua Indians" and that "it accordingly should be held inapplicable to them"[37]. Such arguments indicate that land for Aboriginal peoples, for religious reasons as well as others, goes to the core of their Aboriginal identity. It follows that when land is taken away from Aboriginal peoples or developed/destroyed it not only limits Aboriginal religious freedom but can also be understood as an attack on Aboriginal identity. While the Court in *Delgamuukw* gives formal recognition to the fact that land is important to Aboriginal peoples religiously, and while the importance of land for their identity is potentially made, the Court does not make decisions on land, in this case that reflect these understandings.

3.4(b) – ABORIGINAL VIEWS TOWARDS LAND AND LEGAL APPROACHES

According to Ross (2005), Aboriginal peoples' current ability to seek protection for their 'sacred sites' through land claims as well as interim injunctions have had mixed results. He outlines a number of methods that Aboriginal peoples have employed in these efforts and notes

[36] See Beaman, 2002, 144. She states, "the 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" Here Beaman is implying that 'Indianness' and Aboriginal identity are one in the same.
[37] *Jack and Charlie v. The Queen*, (1985) 2 S.C.R. 332, para 10 point 2.

that some have been more successful than others. Part of the problem appears to be the Aboriginal peoples' own seeming ambivalence and reluctance to argue their claims using religious freedom rhetoric. Claims made under a religious freedom argument have sometimes failed because, in relation to their 'sacred sites', Aboriginal peoples "must prove that it is highly sacred and that, as highly sacred, its integrity is crucial to their cultural identity and well-being" and must also "take care that they do nothing by their actions (leading up to and during litigation) that would suggest that the site is less than highly sacred to them" (Ross 2005, 68). Aboriginal peoples have not always been able to meet these criteria in the eyes of the law, of certain judges, or of the "Christian hegemony" in society. This presents a problem or injustice where, in seeking the protection of their 'sacred sites', actions that some judges, lawyers or non-Aboriginal society may see as being contrary to the way religious sites or land should be treated (likely influenced by Christian understandings of religion), may not be contrary to the way Aboriginal peoples treat their lands religiously. In such an instance Aboriginal peoples may be unfairly judged due to a lack of legal and general understanding regarding their religious view of land. Given differences of beliefs between many Christians and many Aboriginal peoples, what may be seen as a desacralization for one is likely not the same for the other. In fact, after coming to an understanding of the reciprocal relationship that Aboriginal peoples have with the land, it seems possible within their beliefs to use territory in a number of different respects while not violating Aboriginal religious views towards land. It is therefore difficult for Aboriginal peoples to demonstrate the uniqueness and importance of a site to a group that does not evaluate Aboriginal religious ways on their own terms but instead from a Christian perspective.

There are a number of other differences in how many Aboriginal peoples and the "Christian hegemony" understand land that may also negatively impact the protection or control

of Aboriginal 'sacred sites'. For instance, whereas Christians see particular sites with delineated boundaries to be sacred such as a church or a graveyard (as distinguished from other areas that are not sacred/profane), Aboriginal peoples might have an understanding of land where "all land is sacred" (Bobiwash 1998, 206; see also Petch 1998, 192 and Borrows 2008, 163). Protecting just one portion of land would therefore be contrary to their understanding of its religious nature and would not make sense. This is one of the reasons for which they do not necessarily delineate burial grounds. Even if Aboriginal groups see particular places such as a mountain or a river to be of religious importance there may still not be clear delineations of the 'sacred' (note the case *Saulteau First Nations v. Ministry of Energy and Mines* (1998) where the boundaries of the 'sacredness' for a mountain were difficult to establish), partially because they have a religious connection with the entirely of land. In the Canadian legal system this is a problem where property is how land is now divided and there are boundaries and borders to note 'ownership'[38]. Similarly, drawing boundaries on land is likely one of the prerequisites for Aboriginal title claims as the must be "identified precisely" (see *Delgamuukw*) which may present an issue for Aboriginal peoples.

The law may also have problems protecting the religious views that the Gitksan and Wet'suwet'en peoples have towards the land because they understand land to have spirit and in this sense as living (at least treating it as such) (see Daly 2005, 46 and 213). Borrows discusses the possibility for an Aboriginal group with similar views towards land, the Anishinabek nation in particular, to seek protection for their belief of the earth as living and thus deserving protection from factors such as development. He examines the possibility of arguing such a case

[38] Not only has the creation of property ownership caused problems for the religious ways of Aboriginal peoples, Smith has also noted that taking land from Aboriginal peoples and renaming places has cut people off from their histories, cultures and religions (1999, 51).

under s. 2(a) of the Canadian Charter of Rights and Freedoms and determines that it would be exceedingly difficult for the reasons that "Anishinabek beliefs may not be regarded as 'religion', interference with Anishinabek rights might be thought trivial, and infringement on those rights may be found reasonable in Canada's 'free and democratic society'" (2008, 176). Borrows also discusses the potential of s. 35(1) of the *Constitution* to offer protection for the Anishinabek beliefs towards the earth. He finds, however, that s. 35(1)

> might fail to protect Anishinabek spirituality if beliefs concerning the Earth are not regarded as integral to the distinctive Aboriginal culture prior to European contact, if they are thought to have been extinguished by common law, or if they are 'justifiably' infringed on according to the Supreme Court's test regarding the Crown's valid legislative objectives and honour. (Borrows 2008, 185)

For these reasons Borrows remains pessimistic regarding the likelihood of legal protection for beliefs of the earth as living or having spirit. Smith agrees stating that Western systems have had difficulties handling and acknowledging Aboriginal religious beliefs but especially so with the notion of the living earth (1999, 74, 89, 99). Borrows notes another reason to be pessimistic about Aboriginal religious view towards land being protected in Canada, is that Canada has often overridden Aboriginal claims to land or protection of it in favour of 'development' projects or resource exploration and extraction, which it claims is intended to benefit the majority of Canadians but does so while violating the rights of a minority (2008, 176; see also *Delgamuukw* para 165). Such a view of land to be used solely for its resources where man rules over all has at times been condoned by Christianity where for example, the King James Version of the bible notes, "[a]nd God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth" and "God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it" (Genesis 1:26 and 1:28). Dale

Moody and others noted however that this interpretation is incorrect and man should not have 'dominion" over the animals and the earth but rather be a "caretaker" or "shepherd" of everything on and including the earth (1981, 191; see also Young 2007, 112). Nevertheless, this notion of ruling over the earth and all its animals, while perhaps not being explicit in the thoughts of many people, remains to a large degree present in their actions, namely in the current destruction of the environment that many engage in (see Suzuki, Mason & McConnell 2007, 11).

An additional difficulty for Aboriginal peoples in trying to establish protection or control of a 'sacred site' is that such claims likely require an explanation of Aboriginal beliefs and understandings to the court. In light of the rules on knowledge transmission it may not be possible to share such religious information in legal contexts (Battiste and Henderson 2000, 140, 141; see section 3.6 below which discusses secrecy around some Aboriginal oral knowledge). Aboriginal peoples often have a degree of secrecy surrounding their oral knowledge and perhaps especially so with their religious knowledge including knowledge about 'sacred sites' (see Ross 2005, 144-145), something that Christianity and most other religious traditions largely do not. The Canadian legal system is set up in a way that it is unlikely that Aboriginal peoples will receive protection for their 'sacred sites' without judges knowing what it is that they are protecting. Ross states why:

> Where a site's ethic places strict restrictions on information sharing, the context and scope of the associated Aboriginal right will reflect that fact. Thus, some of the Aboriginal rights connected with the use or integrity of sacred sites will include the right to secrecy or, more accurately, the right not to violate the duty to keep some or all information about the sites secret. The duty to keep some of all information about a site secret can require that the specific Aboriginal right associated with the site is itself kept secret. Some Aboriginal rights connected with the use or integrity of sacred sites will therefore include the right to keep those rights secret. Now, s. 35(1) obliges the Crown to recognize and affirm Aboriginal rights. The Crown's duty is premised on the possibility of it acquiring some awareness of the existence, nature, and scope of Aboriginal rights. But some Aboriginal rights connected to the use or integrity of sacred sites may preclude

> telling the Crown about the nature and scope or even (at the extreme) the existence of the right. It can turn out that a First Nation possesses a specific Aboriginal right (in relation to a particular sacred site) that is entitled to constitutional protection but that, by virtue of a subsidiary constitutional right not to violate the duty of secrecy, cannot ever enjoy such protection. (2005, 144-145)

While I am not advocating that Aboriginal peoples should violate their rights to secrecy of religious oral knowledge in order to seek protection for their 'sacred sites', it should be noted that the secrecy surrounding oral knowledge (which makes up part of their traditions) could result in Aboriginal peoples religious ways being threatened and their religious freedom limited in Canada due to how the Canadian legal system functions. Ross argues that if something is religious to someone that alone should be sufficient to warrant protection and he believes that the current legal system is capable of protecting beliefs they do not know the details of (at least to a certain degree) (2005, 157-158). This however, remains to be seen.

Finally, Aboriginal claims for control or protection of 'sacred sites' might also be challenging because Aboriginal peoples do not see their religious ways as separate form other aspects of their lives. As religion permeates all aspects of their lives, Aboriginal peoples may feel that it is unnatural to separate out religious elements as something to focus on or seek protection for. This varies from the dominant narrative in Canadian society where separation or compartmentalization is made between many things such as history, religion, politics, economics, etc. In addition to this, the commanding view in non-Aboriginal society is also to think more in terms of binaries such as true/false, sacred/profane, etc. The legal system tends to share these same views, which contributes to their difficulties in approaching Aboriginal claims especially those involving Aboriginal religious ways when they do end up in court. Furthermore, considering the limited success in receiving protection for 'sacred sites' (and other religious beliefs), Aboriginal peoples may not willing to do make such claims in court (see Appendix 1 for

a discussion of reasons why Aboriginal peoples are not making religious freedoms claims under s.2(a)).

In summary, the current legal system finds it difficult to understand and handle Aboriginal views towards land for several reasons. The challenge is largely that Aboriginal views are so different from the presiding view of land in non-Aboriginal society. For Aboriginal peoples land is, in a sense, living, it is the source of all and should be treated with respect, be dealt with in a reciprocal fashion and given thanks. Whereas in non-Aboriginal society the dominant view of land, largely as a result of European legal traditions that Canada has inherited, is that it is a commodity to be delineated, owned, bought, sold and used. The law therefore has a particular understanding of religion and land that is different from Aboriginal understandings of them, which it uses to evaluate Aboriginal religious views towards land. Other factors that were noted as causing difficulty for the protection of Aboriginal peoples' religious views towards land was first, that many Aboriginal peoples have secrecy in their traditions that the legal system does not manage well and the result is a lack of protection for their 'sacred sites'. Aboriginal peoples also see religion as interpenetrating multiple aspects of life, which may lead them not to separate it out for protection. Finally, there may also be a lack of desire to make claims regarding land as such claims have, in the past, garnered limited success.

3.5 - CRESTS, FEASTING AND TOTEM POLES

The final elements of the religious ways of Aboriginal peoples that came forth as I read, reread and coded the *Delgamuukw* case were, crests, totem poles, and feasting. While only feasting is directly tied to the religious ways of the First Nations people in the case, crests and totem poles also have religious significance for the Gitksan and Wet'suwet'en peoples. Given the

degree to which these elements are all connected to one another, which is demonstrative of the religious ways of aboriginal peoples, all are therefore best understood in reference to each other and will be addressed accordingly.

3.5(a) - CRESTS

In the *Delgamuukw* case crests are described as being a part of oral histories regarding Gitksan and Wet'suwet'en relationships with their land (see *Delgamuukw* para 13, 93). Crests came to my attention through coding the case for this reason but others, such as Richard Daly gives a better view of the significance of crests religiously for the Gitksan and Wet'suwet'en peoples. He notes that for the *Delgamuukw* appellants,

> crests themselves are considered gifts of power from the life forces in the land to the human beings living on that land. Enlivened by a life force, these gifts originally came from what the European cultures call 'the world of nature.' They were revealed, or given, to the ancestors of today's House members, and their power is revitalized again and again by their involvement in reciprocal gifting between kin groups. People say they give back in feasts in order to requite the gift of land, history, and legitimacy they inherited at birth. (2005, 46)

He comments further that, "[t]he spiritual force of the crests … signals the donor family's unique identity and legitimate proprietorship of land and history" (2005, 45). Similarly, Gitksan factum also notes that crests come from the land, likely referring to the location of the aforementioned spiritual force (Gitksan Factum para 130). According to the Gitksan factum crests have an important role to play in how the group records history. It states that,

> [t]he Gitksan crests and totem poles are memory devices which are like a map. Their existence on the blankets, House fronts and totem poles call up the history, the rights and the authority of the chief and his or her House. They evidence, metaphorically and physically, the root of title of the House. (Gitksan Factum para 23; see also para 12, 16, 26, 126, 170)

Crests can also give power to other objects (Daly 2005, 46) and can thus be used as a form of protection where

> [m]isfortunes and illnesses suffered by trespassers and their close relations are ascribed, first, to the protective power of the owners' crests and legitimacy, and second, to the trespasser's dishonourable actions – to his or her anti-social, anti-reciprocal, anti-respectful behaviour. The powers of the owners to call down misfortune on trespassers by tapping into the life force of the land and projecting it outward against incursions by the unauthorized are frequently manifested in the form of carvings (arboroglyphs) or drawings (arborographs) on trees in boundary areas. (Daly 2005, 260)

Not only do the crests of First Nations groups therefore tie them to their land through power gifted to them but crests also serve as a power source for Aboriginal peoples in a number of respects. This power can easily be viewed as part of the religious ways of the Gitksan and Wet'suwet'en peoples.

3.5(b) - FEASTS

In the *Delgamuukw* decision, Chief Justice Lamer describes the feast and the hall in which it takes place as being very important for the Gitksan and Wet'suwet'en peoples, as a means of tying them religiously to their land. He states that:

> The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitksan and Wet'suwet'en peoples 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. (para 14)

The Court's overt statement of the importance of the feast and the feast hall, both spiritually and socially, for these communities is a significant acknowledgement considering that feasting and potlatches were banned by the Canadian government until 1951. These activities were banned, at least partially, because they were seen to be heathenistic and antithetical to the process of converting Aboriginal peoples to Christianity (Fisher 1977, 206-207). That such a ban was believed to be necessary in order to assimilate and Christianize Aboriginal peoples indicates that the state, even then, was aware of the religious importance of these practices to Aboriginal

peoples and certainly long before their importance was more formally recognized by the state. Antonia Curtze Mills provides more specific examples of the feast's importance (specifically in relation to the Wet'suwet'en). She states:

> The feast is at the core of Wit'suwit'en society. Despite the concerted past efforts of missionaries and government agents to displace the feast from the life of the people, the feast system remains central to Wit'suwit'en government, law, social structure, and world view. It is in the feast that people are given their titles (and authority over the territory associated with them), their robes, and their crests. This succession is witnessed by the Wit'suwit'en and the neighbouring peoples, the Babine, the Nutseni, and the Gitksan. At the same time that the feasts make the jurisdiction of the high chiefs clear to all concerned, they demonstrate that such jurisdiction is based on a deep appreciation of the spiritual qualities of the land, the animals, and the holder of the titles. (Mills 1994, 43)

Feasts in First Nations communities are important for a number of reasons states Daly (2005), such as: to mourn the passing of a member of the community (96, 159); for the prestige of a house (96); as venues where a chief's psychic powers were used (113); as a marker of coming of age phases for people in these societies (57); and to tie people to their land (303) (or to particular lands through certain foods (128)). They also had an administrative component where they were used to make announcements and claims which were validated by those present (59). Daly states that generally, "[f]easts validate the reincarnation of personalities, names, crests, histories, laws, and traditions of the hosting group, as well as the readjustment of relationships with linked kin groups" (2005, 58).

As noted earlier, the Gitksan and Wet'suwet'en "[p]eople say they give back in feasts in order to requite the gift of land, history, and legitimacy they inherited at birth (Daly 2005, 46). This is perhaps one of the most significant reasons for feasting, to repay debts and show appreciation (see Mills quote above); even ones to non-humans. Daly states,

> [a]nnually, the Gitksan and Wit'suwit'en receive the gift of foodstuffs, materials, and resources from nature. Each proprietary group, or House, legitimately receives the gifts of nature from its lands and fishing sites. These groups reciprocate respectfully, and show

> their gratitude, they say, through their participation in the endless spiral of feast-giving. They feel perpetually indebted to the ancestor spirits of all life forms lodged in the land. All they can do by way of recompense is eventually give their lives back to nature and, meanwhile, fulfill their feasting duties to local society. Peoples of the Northwest Coast tradition recall a time when these powers of the land once had human forms, or could transform back and forth at will, as attested by the transformative nature of Northwest Coast art (Anderson 1996). These were the being that gifted the human world with light and knowledge, giving humans special useful skills and powers, and revealing themselves to the first and founding ancestors of the House groups. These givings are immortalized in the *addaawk̲* and *kungakhs*. They are the source of the peoples' legitimate ownership of inalienable property as well as of their eternal indebtedness. One might consider the periodic opening of the family treasure box to the community, and the revelation of its esoteric powers and ancient history, as a gifting because the knowledge is, during the event, shared out to guests and outsiders, yet without being alienable in the commodity sense. To come up to standard, the guest or outsider must eventually reciprocate in kind since not to do so reveals him or her to be mere driftwood, without roots, pedigree, or citizenship – a vagabond always fed by others. (Daly 2005, 213)

Debt repayment to the powers of the land is therefore an important reason for feasting. This power in the land is stated to be ancestral power and feasting acknowledges its importance to the religious ways of the Gitksan and Wet'suwet'en peoples; by connecting them to their ancestors and other powers. For many Aboriginal communities, "[c]ontact with the spirit powers is acted out in the feasts through the use of crests and songs" (Mills 1994, 38). Perhaps in recognition of this, a pole-raising ceremony, called a "*Yukw*", where "a chief and his/her counsellors will honour their recent predecessors with a new carved pole" appeared to be the most important kind of feast (Daly 2005, 69). It is through such feasts that the First Nations appellants of the *Delgamuukw* case are connected to their past, through to the present and into the future as,

> [f]easts mark the changing generations, the shifts in privilege and responsibility. As hosts look forward into the future, they feel that generations of ancestors who held their chiefly names centuries ago are looking with them and at them. The hosts feel the steering hands and voices of the generations of House leaders, those who are venerated in the pole raising, and this ethos contributes to the forward thrust of feasting into the coming generations. These intimations from the past accompany each family into the future. (Daly 2005, 95)

Feasts tie the past and present to the future for these communities, and also ties them to their lands. Feasts are also essential for these First Nations because, "[i]n the eyes of the Gitksan and Wit'suwit'en, if the House fails to mount its feasts, the life force that surges through the regalia, the masks, the copper shields, and totem poles of the chief grows weak and feeble" (Daly 2005, 170). It seems that the power that can be accessed through crests (mentioned above) is reinvigorated through feasts (Daly 2005, 46), making them an essential part of the religious ways of these First Nations peoples.

3.5(c) - TOTEM POLES

In the *Delgamuukw* decision totem poles are also mentioned as being a part of oral history that tie the Gitksan and Wet'suwet'en peoples to their land. From the religious perspective of the First Nations in the case, totem poles commemorate the dead through a pole, which is a symbolic microcosm of birth, life and death. According to Daly,

> [a] crest pole is a commemoration of the recently deceased generation and usually survives for two or three generations if it is well cared for. With the passage of time, the pole will lean and eventually topple. It will fall back to the earth and rot away, following the cycle of life, death, and rebirth. A new generation of House leaders will then, when they have judged the time to be ripe, take the decision to raise another pole and, with it, the names of their predecessors. (2005, 68)

Daly states that, "[a]s the pole goes up, so do the names of all the high chiefs and counsellor chiefs who have died since the last *xwts'aan* [(memorial pole)] was raised" (2005, 81). When a pole is transported to where it will be erected as it passes by people treat it as if it were full of souls or spirits of those who have died, which provides people the opportunity to giving thanks and appreciation and encourages the spirits to move on (Daly 2005, 73-74, 80).

Totem poles can also be similar to crests (and if it is a crest pole then it is the same as a crest) because totem poles connect the Gitksan and Wet'suwet'en peoples to their ancestors and to their lands. It is noted by Daly, for example, that

> [t]he raising of a House crest pole is at once a memorial to a generation of House leaders and a periodic renewal of the dynamic relationship between the people and their land. Putting the elaborately carved pole into the ground renews the bond between the group and the land by focusing the will and desire, the labour and wealth, of a whole generation of House chiefs when they *adaawax̲* (verb intrans.), when they see their *adaawk̲*' (noun) 'written' on their crest pole. This is what the chiefs mean when they say that the power of the generations, the *dax̲gat/daxget*, is suffused into the pole whenever it is raised. In the mind of the host chief, this power of the generations flows from the land, which is covered with the dust of the ancestors, and on into the living descendants. The living, by their meritorious actions, convey *daxget/dax̲gat* into the pole. The pole, once connected to the earth, allows this power to flow back into the territories, stronger for the reciprocal transactions it has experienced. The collective will and energy of the House is seen as the force that renews and concentrates this power, revitalizes the land's humanity, and enhances its productivity for yet another generation. (Daly 2005, 67)

Perhaps the religious and social importance of pole raisings is why pole-raising feasts are the most important feasts (Daly 2005, 69).

In addition to commemoration of the dead and the restoration of power from the land (which ties Aboriginal peoples to the land), erecting a totem pole also has other implications. It can be seen as a demonstration of the strength of a House (Daly 2005, 73-74). It is relevant to the land claim issue in *Delgamuukw* in that erecting a pole allows the erectors to reinforce publically where their territory is (Daly 2005, 73-74). In addition to this "[e]ach crest pole legitimates rights to specific fishing sites and hunting grounds" (Daly 2005, 250). Practically, totem poles, like crests, are present at feasts, all of which can be used to remember events, relationships and rights (Daly 2005, 46, 247; also mentioned in the Gitksan Factum para 23, 26). It is for these reasons that the appellants in the *Delgamuukw* case used them as evidence in an effort to claim their traditional territory (for an example see Gitksan Factum para 17).

3.5(d) – LEGALLY UNDERSTANDING CRESTS, FEASTING, AND TOTEM POLES

Crests, feasting and totem poles have rarely come up in court cases other than in the *Delgamuukw* case (and its lower court predecessors) and therefore there has been very little legal discussion of them by judges and legal scholars. It can easily be anticipated however, that the law would also have difficulty handling these elements. Crests, feasts (including various performances there) and totem poles may not be considered forms of oral knowledge because they are not necessarily in a story form that can be recounted the same as an event. It is also not in a textual format, which is how the commanding narrative in society likes its history (and its religion for that matter). Secondly, while there might be some interest (or ability) by the courts to protect physical objects such as crests and totem poles[39], protecting feasting would be more challenging. As well, when a religious object denotes a relationship with something, although the object can likely be protected the religious relationship or belief cannot. For example, law might be able to protect totem poles but not the fact that they connect the Gitksan and Wet'suwet'en peoples to their ancestors and to power from/in the land (which would require the protection of land as well). The messiness surrounding the protection of the religious ways of Aboriginal peoples is also depicted in the Australian "Carpets case" (known formally as Milpurrurru v Indofurn Pty Ltd (1995)). In this case an Australian carpet company that sold carpets with Aboriginal artwork on them was forced to pay damages and royalties to the relevant Aboriginal groups as they did not ask permission to use the artwork, and the images used were determined to be of a culturally sensitive nature (depicting religious components: some of the groups' creation stories). The case became weightier because the decision would affect not only an individual but also a whole Aboriginal society because the images were communal property and

[39] For instances of success in the repatriation of physical objects to Aboriginal communities in the United States see Greg Johnson, 2007.

the entire group had a claim to make on them and did not want them to be made public. In terms of copyright law, while the images were not new (only innovation is protected), they were deemed sufficiently "new" in how the artist portrayed them, which allowed them to be protected. One wonders whether this issue will arise again when the copyright time limit ends and whether the outcome will be the same then if the groups still do not want their images made public. This illustrates the complexities that can arise in protecting such physical forms of knowledge as well as the implications to Aboriginal societies if they are not protected. It also illustrates how law's view of religion as individual, as noted by Berger (2008) and Beaman (2002), can be problematic in terms of protecting Aboriginal religious ways.

3.6 - SECRECY'S BROAD IMPACT IN COURT AND OUTSIDE OF IT

Secrecy surrounding knowledge in Aboriginal communities makes it difficult for their religious ways to be understood and adequately protected in courts. Because oral knowledge is important for Aboriginal communities[40], it is not surprising that there is an element of protectionism and secrecy surrounding it. As a result, Marie Battiste and James [Sa'ke'j] Youngblood Henderson note that some knowledge "cannot be revealed completely to outsiders, or even to the rest of the community" (2000, 141, 140; see also Smith 1999, 85; in terms of 'sacred sites' see Ross 2005, 144-145). In fact, for some Aboriginal communities, some knowledge is only known by certain families notes Lutz (2007, 37). This also applies to feasting knowledge, which Daly notes is so closely guarded that while many may know generalities regarding the practices, few know the specifics (2005, 98). A similar situation exists regarding the protection of knowledge around First Nations 'sacred sites' (Ross 2005, 144-145). This presents problems in court, as noted in regards to the discussion of 'sacred sites' mentioned

[40] Historically, socially, politically, religiously, environmentally, etc.

above. Secrecy therefore makes it difficult to seek protection for religious (as well as other) elements unless the courts recognize and learn to properly manage this cultural aspect of Aboriginal societies.

What I refer to as secrecy here, where Aboriginal peoples are not able to discuss their religious ways in a legal context, may also at times not be for secrecy reasons but rather intentional actions of choosing not to. For instance, Aboriginal peoples might know that exposing their beliefs will yield nothing for them and only subject their beliefs to unjust or injurious examination. As noted in chapter 2, it is important to acknowledge the agency of Aboriginal peoples. They are have and currently do subvert the Canadian legal system and state in a number of respects, including blockades and protests (such as with the Oka crisis (1990) and the "Twin Sisters" dispute (1998), actively participating in the opposition to the building of oil pipelines through their territories (2011-2012), to name a few. Such subversion also occurs in more understated ways such as in not recognizing the authority of the Canadian state by refusing to be labeled as "Canadian". Relevant to the religious ways of Aboriginal peoples and their ability to be protected by law, Aboriginal peoples may chose to subvert the Canadian legal system and state by not using the Canadian legal system and/or by only presenting limited aspects of their cultures to judges or those unfamiliar with their traditions in court, and/or by arguing their claims in particular ways.

3.7 – CHAPTER CONCLUSION

The religious ways of Aboriginal peoples consist of much more than just oral knowledge, particular views of land, crests, feasts and totem poles. These themes were addressed in this chapter because after I coded the *Delgamuukw* case (see Appendix 2 for details on this process)

and used my method of discourse analysis (see chapter 1), these elements were revealed as those involving the religious ways of the Gitksan and Wet'suwet'en peoples. In this chapter I contemplated these themes that emerged around religion in a broader context to better understand what they mean and how the socio-legal context shapes the way the law understands them. In chapter 4, these religious elements therefore provide a way to examine how law understands the religious ways of Aboriginal peoples and translated them in the *Delgamuukw* decision. A more in-depth look at these elements shows their complexities, broadness, and meaning for Gitksan and Wet'suwet'en peoples that helps to better understand why the legal system has such difficulty understanding and handling them and Aboriginal claims more generally. Accordingly this chapter first discussed how the *Delgamuukw* decision referred vaguely to the religious ways of Aboriginal peoples. The chapter then discussed how oral knowledge is relevant to the religious ways of Aboriginal peoples and how the law and the dominant views held in non-Aboriginal society have difficulty fully understanding and handling it. Aboriginal views towards land were then addressed where it was noted how land is a part of Aboriginal identity and how their understanding of land is different than that of the majority of Canadians and law. This results in these beliefs having difficulty being protected in Canada. Crests, feasting and totem poles were then addressed and the potential difficulties that the legal system would with them were speculated on. Finally, the secrecy of oral knowledge related to all of the religious elements mentioned was noted and comments were made regarding the problem it presents for Aboriginal peoples gaining protection of their religious ways. The next chapter will focus specifically on analysis. It will determine how these First Nations religious ways were understood and translated in the *Delgamuukw* decision, and what this can say about how the law views the religious ways of Aboriginal peoples and religion more generally in Canada.

<u>CHAPTER IV – ANALYSIS OF HOW THE RELIGIOUS WAYS OF THE GITKSAN AND WET'SUWET'EN ARE UNDERSTOOD IN *DELGAMUUKW*</u>

4.1 - INTRODUCTION

Despite numerous references to the religious ways of the Gitksan and Wet'suwet'en peoples in the *Delgamuukw* case, legal adjudicators do not pay much attention to them. The religious elements, including the religious significance of oral knowledge, land, and feasting, while being ever present, stay tucked away just below the surface of the discourse of the appellants and the respondents in their factum, and the Justices in the *Delgamuukw* decision. The religious ways of Aboriginal peoples are essentially the elephant in the courtroom, so to speak; it is there, but everyone ignores it. The way in which those involved in the case strategically mention religious ways reveals a number of noteworthy features that will be discussed in this chapter. The Court may have purposefully used non-descript terms to refer to Aboriginal religious ways; written terms out at times; noted religious factors and then not discussed them; understood crests and totem poles to be lesser forms of oral knowledge; used a Christian understanding of religion to understand oral knowledge; dismissed religious oral knowledge as evidence and determined it to be 'untrue'; and finally, made unwarranted determinations regarding the religiousness of land and its use. These ways in which the decision handles religious elements in the case reveals how law understands the religious ways of Aboriginal peoples in Canada. It also reveals the struggle that exists in making rules and establishing boundaries on something like Aboriginal religious ways that has few limits, if any. This chapter considers how the ways of Aboriginal peoples (particularly their religious ways) remain bracketed by the Court in the *Delgamuukw* decision through the use of particular language. It also notes what this bracketing indicates about the Canadian legal system.

I must note that my findings, while perhaps presented as obvious and unacceptable ways in which Aboriginal religious ways were understood in the *Delgamuukw* case, are actually quite an achievement by the Court in terms of handling Aboriginal worldviews. While this feat must be acknowledged, there are nevertheless shortcomings to how Aboriginal ways were treated in the case. During the course of writing this thesis it was suggested to me that such deficiencies will exist until Aboriginal peoples have sovereignty, something that is not likely to be achieved, nor is it something wanted by all Aboriginal peoples in Canada. While this thesis could have argued that great strides were made with the *Delgamuukw* case in terms of how the law and particularly Chief Justice Lamer managed the beliefs of Aboriginal peoples, I found it more interesting to uncover where the limitations lay in the case and where the religious ways of Aboriginal peoples were not dealt with adequately. While religion was not the focus of the case, nor was it really discussed, it is present and much can be said about it. However, in drawing attention to the religious factors of the case I do employ conditional language in a number of instances in my analysis because the data puts limits on the definitive statements that I can make. Where the data presented such issues, my review of secondary literature was helpful in drawing particular links to make my conclusions regarding the case.

4.2 – THE WAYS LANGUAGE IS USED TO DOWNPLAY RELIGIOUS ELEMENTS

This section first examines how language was used in vague ways to refer to the religious ways of the Gitksan and Wet'suwet'en peoples and the implications of this. Next, it focuses on where language is lacking, including a discussion of how feasts as a part of the religious ways of Aboriginal peoples were treated by the legal adjudicators. Finally, it notes how crests and totem poles are made to appear less important aspects of oral knowledge (than oral stories in text) and considers why this occurs.

4.2(a) – REFERRING TO RELIGIOUS FACTORS IN LESS THAN DESCRIPT WAYS

As Fairclough (2001) and Beaman (2008) suggest, the silences of a text can reveals as much as specific words sometimes, Belleau and Johnson (2008) note the same regarding tone. Focusing therefore on silences and tone in the text of the *Delgamuukw* case, it is revealed that the decision includes a number of indirect comments and references to the religious ways of the Gitksan and Wet'suwet'en peoples. It is noteworthy that the language used to refer to these elements typically puts religion under larger umbrella terms such as: "ceremony"/"ceremonial," "tradition," or phrases such as, "practice, custom or/or tradition". 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. (*Delgamuukw* para 70, emphasis added)

Mentioning rituals, ceremonial robes and the feast system in the legal description of First Nations "traditions" are references to the religious ways of the Gitksan and Wet'suwet'en peoples. The term "traditions" therefore encompasses First Nations religious ways. The Court is couching the religious ways of First Nations peoples in the broader term "traditions" which has implications for law's ability to discount certain forms of Aboriginal knowledge (as discussed below). This language also minimizes religious aspects when they could be referred to more explicitly. Minimizing or devaluing particular factors in cases is a characteristic of the law, as noted by Johnson (2002). The Court may be minimizing religious aspects for a number of reasons which will be discussed under the next heading.

Chief Justice Lamer also uses the indirect term "ceremonial" to refer to the religious ways of the Gitksan and Wet'suwet'en peoples. The term "ceremonial" or "ceremony" need not necessarily refer to a religious ceremony, however in the *Delgamuukw* case, examination of the language surrounding the term clarifies that it in fact does likely refer to a religious ceremony. This is understood in the Court's reference to the ceremonial in terms of feasts (para 14), the significance of land for the First Nations appellants (para 128), and in referring to food (para 10, 163) (which would likely often involve religious ceremonies such as feasting). Therefore, the Court's use of the term "ceremonial" in this case refers to the religious ways of First Nations peoples in a way that is not entirely direct. The *Delgamuukw* decision's later discussion of the ceremonial purposes of land use for First Nations reveal issues with the Court's treatment of the religious ways of Aboriginal peoples (see below).

Aboriginal "practices, customs and traditions" together are referred to at least 37 times, (even more when used individually) by the Court in the *Delgamuukw* case. They are referred to only 6 times, however, by the Gitksan and 10 times by the Wet'suwet'en in their factums. Often the types of "practices, customs and/or traditions" that are mentioned refer to the connection that Aboriginal peoples have with their lands (which is a religious connection) and are noted as being integral to their distinctive culture. These terms can therefore be understood to encompass the religious ways of the First Nations appellants, which also make up a part of their distinctive cultures. The *Delgamuukw* case, for the most part, refers to the religious ways of Aboriginal peoples in these types of broad all-encompassing terms with only an occasional direct reference to religion by using the terms "religious", "spiritual", "ritual", or "ceremonial". The term "religious" is used only once in the Supreme Court decision of 130 pages, "spiritual" 7 times, "sacred" 5 times, and the term "ritual" once. This use of religious language is infrequent

considering the religious content in the case, which has already been discussed. It is also infrequent given that the Gitksan and Wet'suwet'en use such terms somewhat more frequently in their factums. Although the Gitksan themselves only refer to the "religious" once in their factum, they mention the "spiritual"/"spirit"/"spirituality" 15 times in the 70 page document (more than twice than the Supreme Court in just over half the pages) and mention the "sacred" 3 times. The Wet'suwet'en, in their factum, do not refer to the "religious" but do use the terms "spiritual" 3 times and the "sacred" twice in their 57 page document. Although it is difficult to draw conclusions from these numbers, the Court's use of more encompassing terms in the *Delgamuukw* decision ("practices, customs and traditions" and their use individually) as well as their sparse use of direct terms regarding the religious ways of Aboriginal peoples ("religious", "spiritual", "sacred", "ritual") suggests the intention of the Court to downplay the religious aspects of the case or their intention to avoid discussing such aspects altogether. In other instances the Court seems to acknowledge the religious factors of the case but does not build upon them, choosing instead to discuss them only in vague ways (see discussion of feasting below).

As I have already mentioned, it is possible that the decision refers to First Nations religious ways vaguely in order to do justice to how the Gitksan and Wet'suwet'en peoples understand religion (as something that is not really separated out from other aspects of Aboriginal life). As already noted this is unlikely, however, given the degree to which religious aspects are relevant to the case, how much reflection does into legal decisions, as well as how misunderstood the religious ways of Aboriginal peoples are in Canada. Furthermore, if the law was trying to do justice to an Aboriginal worldview then it should have addressed religious, economic, political, social, etc. factors of the case equally as they are all interconnected, which it

did not do. An analysis of this case from a religious studies perspective therefore reveals convincing evidence that the legal adjudicators are actively trying not to refer to the religious ways of the Gitksan and Wet'suwet'en peoples in the decision. Chief Justice Lamer is in fact characterizing aspects of the case in ways that result in him not having to address religious elements. I previously noted Mossman's (1987) discussion of the characterization capacity of the legal system in chapter 2. There are a number of reasons for why the Court might be avoiding discussion of religion.

4.2(a)i – WHAT A VAGUE REFERENCE TO RELIGION INDICATES ABOUT LAW

The vague reference by the legal adjudicators in the *Delgamuukw* case suggests a number of things. First, it shows potential strategy on behalf of the Court. If the law does not a have a good understanding of the religious ways of Aboriginal peoples, in an effort to acknowledge that they have considered the issue fully, for convenience (such issues are complicated), and so not to tread into a discussion it is uncomfortable facing (because Aboriginal religious ways are broad and interconnected to other aspects of life), it could be using all-encompassing terms to refer to the religious ways of the Gitksan and Wet'suwet'en peoples. As Belleau and Johnson (2008) point out, legal adjudicators have the ability of to use the language of their choice in decisions and as Mossman (1987) and Beaman (2002) discussed, they can frame or characterize the issues of cases as they wish. Such vague references to the religious ways of Aboriginal peoples illustrates this.

Secondly, focusing on legal constraints, a method used by Johnson (2002), if the Justices chose to address religion as an issue or an important factor in the case then it would have to analyze it thoroughly which could result in an undesirable outcome (socially, politically, etc) for

the state or the Court. This could also lead to a spurt of similar claims in the future that are complicated, time consuming and difficult for the law to handle, in addition to generating related legal complaints by those members of Canadian society affected by such decisions.

The third implication of the Court not clearly referring to religion is that it indicates unwillingness, in this case, to include Aboriginal religious ways in the legal definition of religion. The *Delgamuukw* decision rarely uses the term "religious". It is noteworthy, however, that elsewhere the Court has used the term "religion" or "religious" to refer to the religious ways of Aboriginal peoples (see *Jack and Charlie v. The Queen* (1985), *Thomas v. Norris* (1992), *Saulteau First Nations v. Ministry of Energy and Mines* (1998)). Although these cases argued for freedom of religion, while *Delgamuukw* did not, the judges in these cases used explicit terms such as "religion"/"religious" in their discussion of religious factors. While also discussing the religious ways of Aboriginal peoples *Delgamuukw* does not use explicit terms like "religion"/"religious", instead using the terms "spiritual", "sacred" or "ceremonial". The term "spirituality" as compared to "religion"/"religious" therefore somehow eludes discussion of the protection of religious freedom in Court. Note, that I was weary of using the term "spirituality" to refer to the religious ways of Aboriginal peoples in chapter 1 of this thesis for this very reason.

While the First Nations peoples in the case may have done this intentionally to avoid discussing their religious ways, in examining the case for what could have been done or stated differently (the "possibility" suggested by Fairclough (2001) and Beaman (2008)), it is revealed that the Justices in *Delgamuukw* could have commented on religion to a greater extent or more explicitly than they did. Discussion by Mossman (1987) and Beaman (2002) revealed the ability of judges not to address particular aspects of cases, something they appear to be doing here. A

further issue of not including Aboriginal religious ways in the legal definition of religion is that given law's 'truth' making capacity, noted by Smart (1989), and laws ability to socially construct views in society, discussed by Carabine (2001), Beaman (2002), and Johnson and Belleau (2008), the law, in leaving Aboriginal religious ways out of the discussion, can influence society's understanding of religion to not include such Aboriginal ways.

4.2(b) – FEASTING NOTED BUT NOT DISCUSSED

Examining the *Delgamuukw* decision for silences, as suggested by Carabine (2001) and Belleau and Johnson (2008), exposed some noteworthy results. In the case there is such a silence on the topic of feasting. For the appellants in the *Delgamuukw* case feasting is very important in a number of respects, including religiously. This is depicted in the Gitksan Factum:

> The feast is the central institution of the Gitksan and is at the core of their social and land- holding system. The feast is at one and the same time political, legal, economic and ceremonial. The feast is the forum for the public witnessing of the succession of chiefs' names, changes in legal status (such as, adoption, marriage and divorce), validation of changes in the ownership of territories and of decisions regarding territories (such as access rights) and the ratification of dispute resolutions. Holding a feast allows a House to settle its affairs, repay its debts and publicly present its history, land boundaries and succession to title for ratification by other Houses. (para 15)

It is also depicted in the Wet'suwet'en factum as being "Central to Wet'suwet'en governance and society", referencing historical experts, Wet'suwet'en elders and Chiefs and finally quoting Justice Lambert from the lower court who states the following:

> Until late in the 19th century, and for many years before that, the feast was the institution through which the people governed themselves. It was at the feast that rules of conduct were settled and disputes were resolved. The feast dealt with confirmation of inheritance and with succession to rank and property. There was time for celebration, for nourishment, for worship, and for dramatic and sacred performance. were confirmed, and customs were observed and honoured. **Most importantly, the relationship between each House and its territories was confirmed and the boundaries of each were recognized**. (para 39, emphasis in factum)

Through both appellants' factum it can be understood that feasts are not only important to Aboriginal communities but they also have religious significance regarding land, which is relevant to their land claim.

In addition to the feast being mentioned in the Gitksan and Wet'suwet'en facta it is also addressed in both respondents' facta. The respondent factum of the Attorney General of Canada finds the feast to be problematic to its case and therefore ties to undermine its value as evidence for land claims purposes by citing a lower court judge, "experts" and anthropologists to argue that the feasts serve a primarily "social" or "cultural" function rather than "'in the management and allocation of lands...'" or for "land governance purposes " (para 133-134). The Attorney General of Canada seems to come to the conclusion that the feast therefore has little significance to land claims. This respondent's factum also seems to completely ignore the fact that the feast may have religious significance to the Aboriginal groups in using the terms "cultural" and "social" to describe it rather than "ceremonial" or noting its significance for "worship" as noted in the Gitksan and Wet'suwet'en facta (para 15; para 39 respectively). The Attorney General of Canada's respondent factum uses particular language and broad terms to keep attention away from the religious aspects of feasting and its relevance for the case (a tactic of discourse that this thesis has previously noted has been used by judges). It is likely the case that the Attorney General of Canada is downplaying the religious element of feasting because it sees this as a strong factor and potential threat to their argument. The fact that they did this perhaps had the opposite effect however, where in trying to downplay religious aspects, the Attorney General of Canada actually drew attention to it and its importance for Aboriginal peoples and their land claim. The Attorney General of Canada also likely did not want to address the religious aspect of feasting. This is because it could signal the religious importance of land for Aboriginal peoples

to the Court which could result in the Court investigating it, which would complicate their arguments or require further ones to be made. Furthermore, the Attorney General of Canada may have simply misunderstood the religious aspect of feasting, dismissing its relevance. It may have done this because it equated feasting with a prayer of thanks to God before dinner that often occurs around Christian tables, rather than understanding it as mean to revitalize one's connection with the powers in the earth and to show respect, gratitude and continue the reciprocal relationship with the power that has given Aboriginal peoples all (Daly 2005, 46, 213).

Nevertheless, in the *Delgamuukw* decision Chief Justice Lamer comes down recognizing that the feast has religious significance that ties the Gitksan and Wet'suwet'en peoples to their land. He states:

> The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitksan and Wet'suwet'en peoples 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. The trial judge also noted the Criminal Code prohibition on aboriginal feast ceremonies, which existed until 1951. (*Delgamuukw* para 14)

In the legal decision feasting is mentioned at the beginning and then disappears as an influential factor in the rest of the case. Although the First Nations groups do not claim that their spiritual connection needs to be considered in relation to feasting, describing it as merely one factor among many that ties them to the land, the Court states that "[t]he most significant evidence of spiritual connection between the Houses and their territory is a feast hall" (*Delgamuukw* para 14). However, after singling out and making such a definitive and grandiose statement regarding the feast hall, specifically acknowledging the spiritual/religious significance of the land for Gitksan and Wet'suwet'en peoples through it, Chief Justice Lamer does not go on to address it

further. Revealed through discourse analysis, I identified this instance as another silence in the case or instance where things could have been handled differently, described as "possibilities" by Fairclough (2001) and Beaman (2008).

4.2(b)i - WHAT THE TREATMENT OF FEASTING REVEALS ABOUT THE COURT

In failing to discuss the feast hall/feasting could again be demonstrative of the Justices' unwillingness to approach the religious ways of Aboriginal peoples. This unwillingness could be for a number of reasons similar to those mentioned above under 4.2(a)i for reasons why religion is referred to vaguely by the Court. The Court's unwillingness to discuss religion might be because such issues are only mentioned in passing to create the illusion of addressing all facets of the case, feasting may be too complicated to understand and handle, it puts the legal adjudicators into unknown territory, and there may be constrains on the Court such as that it could make the decision go in another direction which could be costly for the state and create a field day for the legal system by generating cases.

In not further discussing the feat hall/ feasting, it is also possible that the Court is acknowledging its discomfort with this evidence for Aboriginal land claims. They might be uncomfortable with feasts because they have a religious component, similar to Court's difficulty with oral knowledge with religious content. The connection that the feast hall/ feasting shows to the land is religious; described as a "spiritual connection" in the *Delgamuukw* decision (para 14). Not discussing feasting may show the Court's hesitancy in accepting evidence with religious content, which demonstrates the difficulty law has in understanding and handling the interconnectedness of Aboriginal peoples' religious ways. It might also show discomfort from

moving away from a Christian understanding of religion where God is the source of all, to an understanding of religion that allows for the source of all to also be placed in the land.

4.2(c) – TREATING TOTEM POLES AND CRESTS AS LESSER FORMS OF ORAL KNOWLEDGE

The *Delgamuukw* decision appears to treat totem poles and crests as lesser forms of oral knowledge. According to the Gitksan in their factum, totem poles, crests and history are all interconnected aspects of Aboriginal oral knowledge that all tie them to their land. This is depicted in the following quote where crests are explained to be a visual representation of oral knowledge put on totem poles:

> The connection of the Gitksan to their territory is also reflected in the oral histories and crests. The social organization of the Houses is related through common ancient histories. Houses possess specific crests which are linked to territories and to chieftainships. Houses **are** identified by their crests which are a visual image and record of the oral history of the House commemorating the House's origins, migrations and the major historical events from the House's history. Crest images in the oral histories are evoked by songs. Crests are materially represented on totem poles, parts of dwellings and regalia. Glen Williams testified that the crest identifies the chief and his authority over his land:
>
> > ...the ayuks [crest] clearly identifies who you are, which House group you belong to. It clearly defines how much land you have, how much power do you have, and it defines that you have ownership -- you own a particular piece of land, and that you have authority over that piece of land. ... Ours [crest] -- our House is the grizzly bear with the two baby bear cubs on the ears. That identifies who I am... (Gitksan Factum para 22)

The Gitksan see all three of these factors, namely oral knowledge, totem poles and crests as a means to prove their title (Gitksan Factum para 164). This is likely one of the reasons why they point out, in their factum, that the trial judge made a mistake in not allowing totem poles and crests, specifically, to be used as historical evidence in their case (Gitksan Factum para 170).

Chief Justice Lamer also acknowledges the interconnectedness of these three aspects, stating that,

> The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge, at p. 164, as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". The content of these special oral histories includes its physical representation totem poles, crests and blankets. (*Delgamuukw* para 93) [41]

The decision, however, only acknowledges this interconnectedness and acceptance of crests and totem poles as a form of oral knowledge in paragraph 93 of the decision. It does not mention crests or totem poles in its initial introduction and description of oral knowledge. This seems to imply that to the Court, crests and totem poles are less important and a lesser form of Aboriginal oral knowledge. After paragraph 93, the remainder of the decision does not again mention totem poles and crests as being a part of oral knowledge and or as having religious significance for the Gitksan and Wet'suwet'en peoples.

4.2(c)i – WHAT THIS TREATMENT OF TOTEM POLES AND CRESTS SUGGESTS REGARDING LAW

The Court, by collapsing crests, totem poles and feasting into 'oral knowledge' in some cases and singling out one or two of these in other instances may show the intentional characterization of oral knowledge at different times. In this way the Court makes determinations about what is valuable and not in terms of history. This, however, is not how Aboriginal peoples understand their oral knowledge or religious ways. Furthermore, the failure to really engage with totem poles and crests beyond the brief comment in paragraph 93 could indicate an omission by the Court. Such an omission could imply that the Court sees crests and totem poles less as describing history and perhaps more as religious and therefore have excluded them intentionally from the discussion. Collapsing terms into one, creating a hierarchy of oral knowledge forms, and omitting certain forms reflect the court's difficultly in managing Aboriginal physical forms of history, which have been discussed in chapter 3. This difficulty could arise from the fact that

[41] The connection of totem poles and crests as being a part of oral tradition is noted in the Gitksan Factum.

the most commonly held views in Canada's non-Aboriginal society and "Christian hegemony" are more likely to understand history presented in a story format and in text, just as Christians rely on the biblical text. Inherited from the European legal system, the majority of Canadian also understand property in textual terms as well where paper determines ownership, sale and right to resources on land. Furthermore, the prevailing tendency in non-Aboriginal society is to separate history from art and history from religion because they distinguish between what is sacred and what is profane. Aboriginal peoples, on the other hand, have not and do not make such distinctions and therefore can see physical objects as history while also potentially understanding it as art. The way the *Delgamuukw* decision treats totem poles and crests in the case could therefore indicate a Christian understanding of religion and illustrate how a Christian view of religion is used to interpret and understand Aboriginal religious ways and their claims. This results in Aboriginal religious views being misunderstood where, not only is the orality of their religious ways a problem for the system but so are their beliefs regarding land as a Christianity cannot comprehend such beliefs (such as land not being 'owned' or it having power/spirit, etc).

4.2(d) – "WRITING OUT" THE CEREMONIAL ASPECT OF LAND

Similar to acknowledging and then not further discussing feasting, Chief Justice Lamer "wrote out" the Gitksan and Wet'suwet'en use of the claimed land for religious purposes in the *Delgamuukw* decision. This is an example of the already demonstrated strategic capabilities of legal adjudicators to choose not to discuss something by using certain language to deemphasise it, in this case, the religious aspect of land use by stopping its inclusion in discussion entirely. How the religious use of land was downplayed in this instance will be discussed further in the section of this chapter that focuses on land.

4.3 – ORAL KNOWLEDGE

This section first examines how Aboriginal oral knowledge was referred to by the legal system as “sacred” and what this means for the way the law understands religion. Secondly, this section describes how Aboriginal oral knowledge with religious content can and will likely be disqualified as historical evidence in Canadian Courts. It notes the results of this for the religious ways of Aboriginal peoples and comments on what it suggests about the Canadian legal system.

4.3(a) – REFERRING TO ORAL KNOWLEDGE AS ‘SACRED’ AND WHAT IT SAYS ABOUT LAW

The Court refers to Aboriginal oral knowledge as “sacred” in the *Delgamuukw* case. Legal adjudicators state, “the Gitksan Houses have an ‘adaawk’ which is a collection of sacred oral tradition about their ancestors, histories and territories” and where they cite a lower court Judge who describes Gitksan and Wet’suwet’en oral knowledge stating, they are a “‘sacred ‘official’ litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House’” (*Delgamuukw* para 13, 93). What is noteworthy here is that neither the Gitksan, nor the Wet’suwet’en factum uses the term “sacred” themselves, only citing lower court judges who do. Instead they themselves both only use the terms “spiritual” and “ceremonial” in directly discussing religious elements in their facta. Interestingly, neither of the respondents use the term “sacred” at all in their factum. The Supreme Court seems to be taking this term from lower court judges’ previous decisions.

The result of describing Aboriginal oral knowledge as “sacred” is that it invokes a Christian understanding of religion on behalf of the law. As previously noted, Christianity makes a distinction between the sacred and the profane, a distinction that Aboriginal peoples for do not make. In referring to oral knowledge as “sacred” in the *Delgamuukw* case, the Canadian legal

system is therefore potentially acknowledging a Christian understanding of religion where some things are sacred and others are profane.

As Aboriginal peoples do not make these types of sacred/profane distinctions, the result is that the law is not doing justice to their beliefs and is using a Christian understanding of religion to evaluate religion present in their claims. Tully (1995) noted this to be a problem in terms of legally recognizing Aboriginal peoples and their difference in Canada. This evaluation is also an example of the remnants of colonialism in the Canadian legal system. Furthermore, given that the respondents in the *Delgamuukw* case did not use the term "sacred" in their facta either, shows that it may have had a broader understanding of religion than the legal system does. This may indicate a broader understanding of religion on behalf of the Canadian state and society, which may suggest that the law is behind in terms of broadening their understanding of the religious ways of Aboriginal peoples. Such a broadening needs to occur in order for the religious ways of Aboriginal peoples to be treated in their own right in Canadian law.

4.3(b) - DISCOUNTING THE RELIGIOUS PARTS OF ORAL KNOWLEDGE

The *Delgamuukw* decision allows law to disqualify the religious aspects of oral knowledge by linking legend, with oral tradition, and with the religious ways of Aboriginal peoples and also by making distinctions between what is 'true' and what is 'false' in terms of history (again employing binaries in their understanding of Aboriginal ways). The way in which the law did this, its implications, and what it says about the Court follows.

The use of oral knowledge as evidence presents problems for the Canadian legal system. In the *Delgamuukw* case, Chief Justice Lamer states that this is because it must make "the

determination of the historical truth" (para 86). The Court identifies a related problem with oral knowledge, stating that,

> [a]nother feature of which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay. (*Delgamuukw* para 86)

Despite these concerns, the *Delgamuukw* decision ultimately decided to allow oral knowledge to be used as evidence in Canadian courts. The law however, retained its authority to determine what is acceptable in terms of oral knowledge evidence by noting that legal adjudicators will include oral knowledge as evidence "on a case-by-case basis" (*Delgamuukw* para 87) rather than stating that all oral knowledge can be included. Furthermore, in it's use of tone and language surrounding oral tradition, legend and the religious ways of Aboriginal peoples, it appears that the Court will only allow oral knowledge to be used as evidence if it is 'true' and therefore does not contain religious elements, which are seen as untrue.

The possibility for discarding of oral knowledge with religious content in *Delgamuukw* happens when Chief Justice Lamer appears to give a lower court judge a slap on the wrist for using the term "myth" in reference to Aboriginal oral knowledge and thereby discounting such information. Chief Justice Lamer appear to be in support of allowing all forms of Aboriginal knowledge as evidence. In the *Delgamuukw* decision however, he states that,

> [a]lthough he [the lower court judge] had earlier recognized, when making his ruling on admissibility, that it was impossible to make an easy distinction between the mythological and "real" aspects of these oral histories, he discounted the adaawk and kungax [oral knowledge G and W] because they were not "literally true", confounded "what is fact and what is belief", "included some material which might be classified as mythology", and projected a "romantic view" of the history of the appellants. (*Delgamuukw* para 97)

Chief Justice Lamer essentially falls into making a similar distinction to that made by the lower court judge but does so by using the language of "legend" rather than "myth"[42]. Chief Justice Lamer does so in referring to evidence presented to the lower court judges, stating "[s]ome of that evidence was not in a form which is familiar to common law courts, including oral histories and legends" (*Delgamuukw* para 5). Mentioned briefly already, the term "legends" equates with oral traditions and religion, and by using this term the Court appears to discount the religious ways of Aboriginal peoples as evidence and allow for it to be discounted in the future by equating it with that which is not true. Scholarship on "legends" for example, indicates that they are stories where "untruth is told for truth" (Dégh 2001, 46). As already shown, the Court in *Delgamuukw* does this by also viewing the terms "oral traditions" as similar to how "legend" and "myth" have been discussed, with them both being distinguished from "oral history" (note the previous quote, for example). Justice Dickson also makes this differentiation regarding oral knowledge, between "legend" and "history" in *Kruger v. The Queen* (1978, page 109), who Chief Justice Lamer cites in *Delgamuukw*. It appears that in law, "oral tradition", "legend" and "myth" all encompass that which is not true or that which has a religious content. While the law refers easily to Aboriginal religious ways as "myth" or "legend", would they do so as easily in regard to stories such as Jesus'?

While the *Delgamuukw* decision makes the distinction between oral history and other forms of orality (namely oral tradition), it is only the respondents that make such distinctions in their factum. The Attorney General of Canada uses the term "oral tradition" explicitly while the Province of British Columbia does not use it explicitly but cites others who do. Both the

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[42] "Myth" language was reprimanded by Chief Justice Lamer in *Delgamuukw*. In terms of the language of "legend", this may indeed be suitable when referring to oral knowledge but its use (and its implications, i.e that legend is deemed untrue) would require corroboration by the relevant Aboriginal groups to ensure its accuracy from their perspective.

appellants as well as some of the interveners use the terminology “oral history”. Other interveners who use neither term, may not see the need to distinguish between oral history and oral tradition, potentially showing their acceptance of it as history. In the case the legal adjudicators side with the minority understanding of oral knowledge, which results in parts of it being disqualifiable because they are deemed untrue forms of historical evidence. That this discarding will occur is even more likely given that the Court, as already mentioned, did not establish a rule in terms of how to understand and handle Aboriginal oral knowledge but stated instead that decisions whether to incorporate in in court “must be undertaken on a case-by-case basis” (*Delgamuukw* para 87).

4.3(b)i – WHAT THIS DISTINCTION SAYS ABOUT THE LEGAL SYSTEM

In distinguishing between what could be considered true or false, or historical or not (and allowing room for such distinctions to be made in the future), the legal adjudicators in *Delgamuukw* are allowing for religious oral knowledge to be discarded as evidence in court. This has five major implications.

First, the distinction could affect the Court’s role in the social construction of religion in Canada, an ability of the Court that was previously discussed by Belleau and Johnson (2008) and Beaman (200). In the *Delgamuukw* case, it was only the Respondents (The Attorney General of Canada and the Province of British Columbia) and subsequently Chief Justice Lamer that used “legend” or “oral tradition” language in terms of oral knowledge, thus making a distinction between what they think is historical and what they think is not. This may be viewed as an attempt by the Respondents to push the Court towards the use of such language. The legal use of this language could perpetuate that understanding of oral knowledge in society, as it has been

noted by Smart (1989), Carabine (2001), Beaman (2002), and Belleau and Johnson (2008) that Court's have the ability to socially construct understandings of things in society. The result of this is that the Court, by making a distinction between what is 'true' and 'false', has itself perpetuated or created these arbitrary lines through its 'truth' making capabilities. The outcome is that valuable historical evidence could be discarded for having elements that the legal adjudicators deem 'untrue'. In focusing only on what is "true" and "historical", the law misses the richness of this oral knowledge, which encompasses more than religious and historical aspects[43].

The second implication of distinguishing between oral histories and oral traditions/legends/the religious ways of Aboriginal peoples is the practical effect that it may have. Drawing a distinction between "oral tradition" and "oral history" has the effect of devaluing or even discounting much of Aboriginal peoples' oral knowledge, specifically that with a religious aspect. The devaluing or discounting ability of the law was noted by Johnson (2002) and Belleau and Johnson (2008) in chapter 2. Chief Justice Lamer in *Delgamuukw*, despite warning that making distinctions between what is "true" or "real" in terms of history used as evidence could lead to the undervaluing of Aboriginal oral knowledge (para 97, 98), nevertheless makes similar, albeit more subtle distinctions himself. Such religious oral knowledge that is diminished by the Court in *Delgamuukw* could be very valuable evidence in a court of law. Such evidences' legal inadmissibility could therefore limit Aboriginal perspectives in courts and in addition to this it could also reduce the willingness of Aboriginal peoples to use the Canadian legal system, thus perpetuating a tense relationship between Aboriginal peoples and the Canadian state.

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[43] For a description of how rich oral traditions are see Borrows, 2001, 11.

Thirdly, the law, by linking oral tradition and religion with legend, and alluding to these elements as untrue, may be referring to very meaningful aspects of the religious ways of Aboriginal peoples in a disparaging way. Not to mention that the courts, as established in *Syndicat Northcrest v. Amselem* (2004)[44], are not supposed to make comments on what is true and false in terms of a religion and its tenets. It should be noted however, that, as previously discussed in reference to a comment by Edley (2001), certain language is used at certain times throughout history, therefore it is possible that the Court, in referring to religious elements as "legend", could be explained as that term being simply was in use at the time of the decision. However, this is unlikely given that the case is recent and it involved extensive focus by the Court on not devaluing such forms of knowledge. Further research would be required to determine whether the term legend was properly used in its proper historical context. Returning to disparaging or devaluing language, which has already been discussed in relation to how judges use it to devalue something or someone in court (noted by Johnson (2002) and Belleau and Johnson (2008)). This problem with labelling something as legend is more striking when considering its possible use in relation to other religious traditions. Would courts as easily allude to particular parts of other religious traditions' stories (written or not) as 'legends'? As previously questioned, what about the story of Jesus? As well, labelling something as legend and therefore untrue would not account for Catholic society's willingness to consider as historically true the sometimes fantastical stories of events that result in the canonization of new saints in the

[44] Paragraph 50 of the decision states, "In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion".

Catholic tradition. Should these stories have less historical significance because they contain religious overtones or aspects?

The fourth implication of distinguishing between what is “true” or “historical” from what is “false” or “myth”, “legend” and part of “oral tradition”, is that while perhaps this is pertinent to evidentiary standards in a Canadian court of law, it does not do justice to Aboriginal beliefs. As noted previously, Tully (1995) comments on how this is a problem in terms of the legal recognition of Aboriginal peoples in Canada. The need to distinguish between what is true and what is false in terms of history seems to be a preoccupation of the commanding view in non-Aboriginal society as compared to the majority of Aboriginal society (Flanagan 2000, 160-161; Carlson 2007, 50). Similarly, in terms of history, for the majority of non-Aboriginal Canadians written history has become the dominant discourse, supported over time by the development of a number of scientific-like procedures to record and determine “historical” events[45]. When the Court makes these distinctions, which it does, it can be considered a type of ‘truth’ making or social construction of particular views on ‘true history’ by law, which I have noted affect society’s understanding of these things[46]. Aboriginal peoples on the other hand, may not be making such distinctions. An example of this is evident in *Delgamuukw* where the Appellants' factum only referred to “oral history” in reference to oral knowledge and does not distinguish between “oral history” and “oral tradition”. Similarly, Chief Justice Lamer's citation of the 1996 Report of the Royal Commission on Aboriginal Peoples also depicts an understanding of oral

[45] This is similar to Michel Foucault's (1978) discussion of the discourses surrounding sexuality where scientific language was used to determine the 'truth' about sex thus allowing only certain discourses on the subject to come to the fore.
[46] The truth making capacity of law was noted by Smart (1989) and law’s ability to influence views in society were noted by Smart (1989) in addition to Carabine (2001) and Belleau and Johnson (2008).

knowledge that blurs the lines of true and false (perhaps indicative of the Commission makeup including Aboriginal peoples). The Royal Commission states that,

> the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
> In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. . . .
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people. (*Delgamuukw* para 85)

Despite the Court's citing of it, the Royal Commission seems to have a broader understanding of Aboriginal oral knowledge than that of either the Court's or the Respondents'. The Court, as part of its evidence based decision-making, is concerned about making true false distinctions about history. While it sees this as necessary and makes these true false distinctions subtly in the *Delgamuukw* case, it need not be so fixated on making these distinctions, because as Carlson (2007) and Castellano (2000) have noted, in many Aboriginal groups there are significant measures in place to ensure that Aboriginal knowledge is not significantly altered over time. Just because Aboriginal history is not written does not mean that it is made up on the spot.

A final implication of distinguishing between oral history and oral tradition is that the belittling surrounding some of Aboriginal peoples' oral knowledge inside law and outside it replicates the colonial desire to convert Aboriginal peoples to European ways of thinking and believing. The law itself is also colonial in the cense that it forces Aboriginal peoples to use

language and laws that are not their own to argue their cases, which works to once again decrease Aboriginal peoples voice and power in relation to the dominant Canadian system. It is conceivable that the Court, by making distinctions between types of oral knowledge, may be attempting to fit Aboriginal oral knowledge into the dominant narrative's way of understanding history rather than looking for more innovative ways to reconcile the two. This is similar to Reiter's (2010) view of the case where he finds that the language used in the *Delgamuukw* decision that discussed incorporating Aboriginal oral knowledge actually only sought to fit it in or accommodate it in the current structure. Borrows (2002) , also mentioned a colonial-type problem which I have already discussed, where allowing for Aboriginal oral knowledge to be used as evidence in court renders Aboriginal ways susceptible to criticism and judgement by those in non-Aboriginal society who do not comprehend them. Both scholars' views reflect the unjust exercise of power by those who wield it, which were discussed by van Dijk (1999). Therefore, legal attempts to allow oral knowledge into the current legal system falls short of adequately understanding and handling it and allows for oral knowledge that has religious content to be disqualified as evidence in courts in the future. By extension, this shows the courts inability to manage the religious ways of Aboriginal peoples. It also shows what Tully (1995) and Rennick and Seljack (2011) have noted which is that the decolonisation process has not been completed in Canada, especially in the legal system.

The Court's language regarding Aboriginal oral knowledge as "sacred" serves to demonstrate that Aboriginal religious ways are being understood from a Christian understanding of religion in the Canadian legal system. Furthermore, the law's decisions on how to incorporate Aboriginal oral knowledge as evidence in court will likely result in discarding oral knowledge with a religious content. The implications of this are that it could help to socially construct a

certain view of oral knowledge and history in Canadian society. Such ability for the law to influence understanding in society was noted by various scholars such as Smart (1989), Carabine (2001), Beaman (2002), Belleau and Johnson (2008) in chapters 1 and 2. In addition to this, it could have practical implications for Aboriginal use of the legal system. The Court's reference to oral knowledge as "sacred" also does not do justice to Aboriginal beliefs. Finally, it is demonstrative of the continued colonization of Aboriginal peoples in Canada, which has been commented on by Tully (1995). These implications of describing oral knowledge as "sacred" and in referring to some parts of oral knowledge as legend should be considered by courts in future decisions as it denotes things about law that the legal system may wish it not to.

4.4 –LAND AND TITLE

In the *Delgamuukw* case land is acknowledged as being religious to the First Nations peoples. The Court acknowledges this on a number of occasions such as in its comments on oral knowledge. This section examines how the law quantifies land, restricts land use, and states why it can infringe on Aboriginal title. The following sections will discuss each of these decisions regarding land, as well as what they imply about law.

4.4(a) – "WRITING OUT" THE CEREMONIAL ASPECT OF LAND/ QUANTIFICATION OF LAND AND WHAT IT SAYS ABOUT LAW

Despite acknowledging that land is religiously important for Aboriginal peoples, the *Delgamuukw* decision defines land's religious significance and use for the Gitksan and Wet'suwet'en peoples rather than letting them define it for themselves. This was illustrated by the following quote regarding historical occupation and use of the land:

> 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. (*Delgamuukw* para 10)

Through examining *Delgamuukw* for silences in the case, as suggested by Fairclough (2001) and Beaman (2008), as well as for watching how language use changes throughout a text, also noted by Fairclough (2001), it is possible to see how in the previous paragraph the legal adjudicators literally "write out" the ceremonial aspect of First Nations land use in a matter of three sentences. In determining the occupancy and use of land in order to establish title, the Court first acknowledged that the groups used a larger area of land than that in close proximity to the villages "for hunting and gathering for both food and ceremonial purposes". Here it recognizes the dual importance of hunting and gathering for food as well as for religious purposes. In the next sentence, Chief Justice Lamer refers to the particular "area" used for hunting and gathering, although he does not specify what the hunting and gathering was for. In the Court's concluding remark of this paragraph it refers only to "subsistence requirements" and fails to mention the ceremonial aspects that hunting and gathering referred to in the first sentence. In a matter of three sentences, the Court acknowledges and dismisses (by "writing out") the religious significance claimed by the Gitksan and Wet'suwet'en's respective factums stating that they used significant resources from the land for ceremonial purposes and even, in some instances, travelled great distances to do so[47].

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[47] Gitksan Factum para 47. (my emphasis added). This is depicted in the following quotes, "The Gitksan used and occupied the land **throughout** their traditional territory. **They made, and continue to make, extensive use of the fish, mammals, berries, plants, timber and mineral resources for domestic consumption and for the fulfillment of ceremonial and social obligations and trade**" and Gitksan Factum, para 192. (my emphasis added). and when they state that, "These hunts on distant mountain territories were not for beaver, but for groundhog, goat

There are a number of reasons and implications to law's "writing out" of the ceremonial significance of land for Aboriginal peoples. First, the Court may have written it out in this way because to not do so would show that the religious ways of Aboriginal peoples utilized much of the land. Such evidence could further complicate the land claims by brining in the religious ways of Aboriginal peoples. The Court may also have been unwilling to discuss Aboriginal religious factors regarding land use because the law has not considered it extensively and does not adequately understand the religious ways of Aboriginal peoples in this regard, which would have put much to the discretion of Justices who were likely uncomfortable handling it. Avoiding such discussion of the Aboriginal religious uses/understandings of land may therefore have been for convenience. The tactics that judges use to avoid discussing a factor have been commented on and have been known include the way they characterize the issues of cases which has been discussed by Mossman (1987), as well as the language and arguments they use to discuss particular factors of the case which were noted by Belleau and Johnson (2008).

Focusing again on constraints when thinking about the actions of various actors involved in legal disputes to determine reasoning suggest that it is possible that there were a number of constrains on the Court, which resulted in it "writing out" the religious uses of land. For instance, the difficulties that the success of a land claim could yield for the Canadian state, in addition to the potential headache of cases that could be generated as a result of a successful land claim (such as by those unhappy or affected by the decision or by Aboriginal groups wishing to accomplish the same results). Finally, it is possible that given the relatively unchartered territory

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and caribou, and not for the European fur trade, but to make clothing and blankets for their own use, for ceremonial purposes and for trade". Wet'suwet'en Factum, para 25. , for when referring specifically to a number of oral knowledge presented at the trial the Wet'suwet'en state in their factum that "[t]here was considerable evidence before the trial Judge of Wet'suwet'en of the land for harvesting, processing and storage of berries, timber and other resources **for sustenance, trading and ceremonial purposes**, both before and after sovereignty".

of law considering Aboriginal religious uses of land, the Justices did not feel equipped or comfortable to handle the issue and therefore did not.

The law's need to determine exactly how far Aboriginal peoples went from their main settlements and for what reasons appears to be a way of quantifying how much land these groups actually need for various purposes. The quantification of land itself can be seen as a type of 'truth' making or deciding of what is 'normal' by the legal system, (characteristics of law previously discussed by Smart (1989) and Beaman (2002)), regarding how much land is needed in order to be religious for example. Beaman has addressed this 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" (2002, 144). A further problem with commodifying the religious ways of Aboriginal peoples in this manner is that it fastens the religious significance to a particular quantitative amount which may not only be disparaging to Aboriginal beliefs but also likely has less meaning for them as such quantification may not be how they determine value and therefore does not do justice to their beliefs[48]. Which Tully (1995) notes does not allow for the legal recognition of Aboriginal peoples in Canada. A final issue with the legal quantification of land when Aboriginal peoples view it as religious or have 'sacred sites', is that it indicates that the legal system understands land from a European/Christian perspective where religious space and property has limits that can be delineated. Furthermore, from a Christian understanding land is not inherently religious, a place is made sacred through various actions (such as the consecration of a church) or by way of a religious event occurring there (such as Jesus' birth at a particular spot in Bethlehem). The sacredness of land and space is also seen as distinct from non-sacred or profane land and space. Conversely, for Aboriginal

[48] For a brief description of how some Aboriginal peoples view land 'ownership' for example see: Bobiwash 1998, 207; and Little Bear 1998, 18-9.

peoples land is religious in and of itself and nothing can change that. The religious ways of Aboriginal peoples are not delineated. This European/Christian understanding of land that Canadian law has, is not how Aboriginal peoples understand it, which serves as an indication of the lack of Aboriginal perspectives that exist in the Canadian legal system in regards to land which were discussed as problematic in chapter 2 in terms of it now being able to handle Aboriginal religious ways and in chapter 3 it was discussed specifically in terms of land.

4.4(b) – REGULATING LAND AND WHAT THIS INDICATES ABOUT LAW

Land is regulated as a commodity in Canada, which presents problems for Aboriginal peoples who do not treat land this way. A result of this regulation of land is that when law enforces land regulations it implicitly regulates on the religious ways of Aboriginal peoples thus restricting their religious freedom. This section focuses on the regulation of title and its effects, as discussed in the case.

In *Delgamuukw* decision it is stated 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" (*Delgamuukw* para 128). Examples of how this is relevant to Aboriginal religions is noted where the legal adjudicators state 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)" (*Delgamuukw* para 128). Justice La Forest, in his concurring opinions, also states that, "if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, it necessarily follows that the land is of central significance to them"

(*Delgamuukw* para 199), suggesting that if Aboriginal peoples do not occupy the land traditionally then for all intents and purposes the land can be seen as no longer significant to them.

There are a number of implications to restricting land. The first result of which is that it limits Aboriginal religious freedom. According to the previous statements by the Court, Aboriginal peoples are forbidden from using title land in a way that is inconsistent with the beliefs that were used to establish title or how it was traditionally used. 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. Together the statements above regarding Aboriginal title can be argued to restrict Aboriginal religious views regarding the land or particular geographies within an Aboriginal title area, which limits Aboriginal religious freedom.

These restrictions on land and its use by Aboriginal peoples also expose the law's stagnant view of Aboriginal religious beliefs and culture. The Court does this by defining Aboriginal land use in relation to their religious beliefs or traditions at a particular time in history and does not allow for or accommodate changes in beliefs that may change land use. This stagnant view is compounded by the fact that establishing title through a religious right to the land under s. 35(1) of the *Constitution* is subject to a similar stagnant understanding of the religious ways of Aboriginal peoples, which demands continuity of the religious practice since pre-contact time. Borrows, addressed this stagnant understanding of Aboriginal culture under s. 35(1) of the Constitution more extensively (2008). Regulation of First Nations' lands through regulating title in this manner places unwarranted restrictions on how Aboriginal religions are legally viewed and how they evolve over time. It can be argued that Aboriginal views towards

land, like any other religious views, should be allowed to evolve and change over time (and do). Such an understanding was part of the reason for understanding religion as broadly as possible in this thesis and for using work on religion as lived which can account for religion as evolving according to Orsi (1997) and McGuire (2008). The situation is especially unjust for Aboriginal peoples when viewed in relation to non-Aboriginal peoples in Canada who need only prove sincerity of belief to obtain protection for their religions under s. 2(a) of the *Charter* in Canada.

The aforementioned regulations on Aboriginal land use also reveal the lingering of colonialism in the Canadian system, noted previously by Tully (1995) and Rennick and Seljack (2011). Two examples of such contemporary colonialism follow. First, colonialism changed religious views for many Aboriginal peoples and now a stagnant view of Aboriginal beliefs by the law prevents them from receiving protection for all of their beliefs, both their traditional Aboriginal spirituality as well as the religious ways brought by European colonisers. Secondly, it can also be understood to be colonial when the presiding non-Aboriginal understandings in society of religion and land make restrictions on land to which Aboriginal peoples are religiously connected. This perpetuates the ‘ruling’ of these understandings (the dominant views of the descendants of colonisers) over Aboriginal peoples and leaves Aboriginal religious rights regarding land in the hands of those who do not share their views and have other, often opposing interests for land.

4.4(c) – TITLE INFRINGEMENT

The state and law’s ability to infringe on Aboriginal title also limits Aboriginal religious freedom. Regarding such title infringement, the Court states that the Crown must always consult with Aboriginal peoples before infringing on their title rights and that,

> this 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. (*Delgamuukw* para 168)

These statements do not offer much hope for Aboriginal peoples who might seek protection for their religious traditions as the Court uses the wording that “full consent” “may”, as opposed to “must” be required. This is a significantly lower standard and gives little assurance that full consent will be sought and demonstrates how the Court can use particular language to devalue or disempower groups as noted by Johnson (2002). Furthermore, as noted in the *Delgamuukw* decision, although consultations are intended to ensure “that aboriginal interests be placed first” the reality is that fiduciary duty broadly demands consultation only and “does not demand that aboriginal rights always be given priority” (*Delgamuukw* para 162). These statements seem to contradict one another with the outcome being that the dominant majority’s “rights” would likely be given priority. The likelihood of this outcome is emphasized by a comment made by Justice La Forest in his concurring comments to the case. He states, “[c]ertainly, one aspect of accommodation in this context [of accommodating Aboriginal title] entails notifying and consulting aboriginal peoples with respect to the development of the affected territory” (*Delgamuukw* para 203). Here one should be weary of the term “notifying” where Justice La Forest suggests that Aboriginal peoples may not even need to be consulted in having their land, or land that is important to them used in ways they do not wish[49]. Furthermore, the fact that the dominant majority’s ‘rights’ will likely be given precedence seems especially the case given that in the *Delgamuukw* decision it is stated that,

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[49] Belleau and Johnson (2008) note the importance of concurring and dissenting opinions as still being part of a decision and they note the ability for these opinion to be used in the future in legal decisions. These opinions are therefore important and worth noting (see chapter 1 for further discussion on this).

> the 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. (para 165)

While it is not stated that such 'development' will always be able to infringe on Aboriginal title the implication in it being stated in this way is that it likely will.

4.4(c)i - INFRINGEMENT'S IMPLICATIONS AND WHAT IT REVEALS ABOUT LAW

There are a number of implications for the religious ways of Aboriginal peoples when title is allowed to be infringed upon and this outcome is likely and occurs. First, the ability to override Aboriginal title rights and therefore allowing for Aboriginal religious freedom to be undermined, reveals the double standard that Aboriginal peoples face in this area because of law's Christian understanding of religion. The result is less protection of Aboriginal 'sacred sites' and religious ways than that received by other religions in Canada. This less protection likely results from the fact that Aboriginal conception of religion is different and they focus on land and geography rather than buildings or statues as Christians primarily do (Beaman 2002, 144-145)[50].

Secondly, the ability to infringe on Aboriginal title denotes the continued colonisation of Aboriginal peoples in Canada (a continuation noted previously by Tully (1995)). Regarding how Aboriginal title is discussed in *Delgamuukw*, Gordon Christie accurately summarizes by stating that,

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[50] Here Beaman discusses the implications of the Canadian Christian majority on Aboriginal religions. Also, for issues in dealing with different views of the religious see: Gordon-McCutchan 1991, 790.

> the 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). (Christie 2000, 115)

Similarly, Borrows states explicitly in terms of title infringement and Aboriginal religious ways, that the type of 'development' activities that the *Delgamuukw* case notes at para 165 threaten and harm Aboriginal religious beliefs and are therefore a continuation of the colonialist project towards Aboriginal peoples (2008, 183). Aboriginal title has little value if it can be so easily infringed upon by the Canadian state and legal system and is therefore unable to fully protect Aboriginal religious beliefs. Until Aboriginal peoples have complete control over their land and it is unable to be encroached upon, their religious traditions regarding the land will remain threatened, as will their Aboriginal identity. Aboriginal identity will be threatened because as linked by Zion (1992) and Moon (2008), Aboriginal religious views towards land are tied to their Aboriginal identities.

Finally, the Court's stated abilities to infringe on Aboriginal title also depict what little understanding it has regarding the meaning of land for Aboriginal peoples and how such infringement could affect Aboriginal peoples and their religious ways. *Delgamuukw* decision suggests a remedy for infringement of Aboriginal title, stating, "fair compensation will ordinarily be required when aboriginal title is infringed" (para 169). The Court however does not elaborate on what such compensation would entail, only stating, "it is best that we leave those difficult questions to another day" (para 169). There is no discussion in the case of compensation or of harm (such as mental distress) or "irreparable harm" in relation to religion (Beaman 2008, 89) caused by the destruction of or prohibiting access to Aboriginal 'sacred sites'. This demonstrates

little understanding of the seriousness of title infringements and destruction/loss of ‘sacred sites’ 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. This is again demonstrative of the Court’s ability to not discuss issues at its whim as discussed by Belleau and Johnson (2008) and Mossman (1987).

The commodification of land, its regulation, as well as, the infringement abilities of law regarding Aboriginal title make it not only difficult for Aboriginal peoples to obtain a legal religious right regarding land but also in maintaining these rights once established in the form of title. Such actions regarding land are therefore detrimental to the religious freedom of Aboriginal peoples in Canada.

4.5 – CHAPTER CONCLUSION

This chapter focused on the religious ways of Aboriginal peoples in the *Delgamuukw* case and how they were presented to and translated by law. My analysis of the case revealed that first, the Court referred to the religious ways of Aboriginal peoples in particularly vague ways in an effort to downplay it, in order not to have to discuss it. My review of the case also uncovered that in terms of oral knowledge, the Court distinguished between what sacred and profane in terms of oral knowledge which depicted a Christian understanding of religion on behalf of the law. Legal adjudicators also used binaries of true and false in terms of history, which resulted in oral knowledge involving religion being deemed false and likely discarded as useful evidence in the future. My research also revealed that in terms of land, the *Delgamuukw* decision quantified land, which did not do justice to how Aboriginal peoples understand it. The Court regulated Aboriginal land use, stating that it had to be used in a way that reflected the religious

understanding of it at the time of establishment (if that was how it was established), this showed a stagnant view of religion by the law. The *Delgamuukw* case also noted why Aboriginal title could be infringed upon which diminished the value of title and did not ensure the protection of Aboriginal religious ways. These observations of how the court understood and handled the religious ways of Aboriginal peoples in *Delgamuukw* illustrate the difficulties that exist when people whose religious beliefs vary from those of Aboriginal peoples (or when they do not understand them well) attempt to draw boundaries on Aboriginal issues involving religion. This chapter illustrated how the boundaries mentioned above that the Court drew, allowed for the religious ways of Aboriginal peoples to be excluded as evidence in court, it enabled religious views to have little bearing on the use of the claimed land, and despite the acknowledgement of religious factors, the result had little effect on the Court's view of land from the perspective of Aboriginal peoples. If the Court had followed through with understanding land to have religious significance for Aboriginal peoples the decision might have been different. The techniques that the court used to do this however may not have been so much intentional than merely demonstrative of its difficulty in understanding and handling the religious ways of Aboriginal peoples.

CHAPTER V – WORKING TOWARDS FAMILIARITY

5.1 - INTRODUCTION

My analysis of the *Delgamuukw* case and related literature reveals that the Canadian socio-legal system understands the religious ways of Aboriginal peoples in particular ways, which result in making it challenging for the law to understand and handle these religious ways. Given the dominant narratives about history, land and religion, where Aboriginal understandings ways are excluded, it should be of no surprise that Canadian laws surrounding these factors fall short of doing justice to Aboriginal worldviews. But are there other ways in which the law, and the majority of non-Aboriginal peoples in Canada, could have come to better understand and handle the religious ways of Aboriginal peoples than they did in the *Delgamuukw* case? This chapter argues that there are five reasons for why alternative interpretations of Aboriginal religious ways in the Canadian socio-legal system are possible: 1. Canada's unique history which has led to an understanding of religion that is better equipped to handle religious minorities. 2. The skill present in many Aboriginal communities in terms of teaching a communicating. 3. The introduction of new possibilities surrounding oral knowledge and understanding it. 4. The existence of dialogue between Aboriginal society and those in Canada who have trouble comprehending them. 5. The reevaluation and (re)writing of history in Canada.

5.2 – CANADA'S UNIQUE HISTORICAL SITUATION

In comparison to other countries, Canada is in a unique position to increase understanding of minority groups and protect their religious freedoms, including the religious ways of Aboriginal peoples. Beaman notes that,

> the historically strong presence of Roman Catholicism in Canada, coupled with (and mixed with) the spiritualities of First Nations groups, created space for a broader conceptualization of religion that renders the possibility of an expanded notion of religion and thus a thicker and more textured religious freedom perhaps greater than it is in the protestant-dominated society of the United States. (2010, 9)

As previously acknowledged, in Canada the Christian majority is not dominated by one particular Christian group (Catholics and Protestants have comparable representation), this, along with the presence of the religious ways of Aboriginal peoples in Canada has rendered the state potentially more capable of protecting many religious freedoms. This potential can perhaps be exhibited through particular legal cases that have improved law's ability to handle the religious ways of Aboriginal peoples and other minority religious groups in Canada that have occurred since the *Delgamuukw* decision.

The Supreme Court case *Syndicat Northcrest v. Amselem* (2004) as previous discussed, resulted it the expansion of the definition of religion in Canada to include that which one sincerely believes, which appears to understand religion as lived where particular beliefs and practices now no longer have to be tied to a religious institution. This allows for the possibly of the inclusion of Aboriginal ways in the legal system in a new manner. For Aboriginal peoples this is positive as their religious ways are not institutionalized in the same way that Christianity is for example. The second case of importance here, also discussed previously, is *Multani v. Comission Scolaire Marguerite-Bourgeoys* (2006), which determined that a young Sikh boy could wear his *kirpan* to school. Both of these cases used a decision of religion that tied ones beliefs and practices to what one sincerely believes. This is consistent with a view of religion as lived, which was previously established to be a better way of handling and protecting the religious ways of Aboriginal peoples under the Canadian legal system. It should be noted however that this view of religion as being what one sincerely believes is employed when a

claim is argued under a s. 2(a) of the *Charter* (or potentially under s. 35(1) of the *Constitution*), as Aboriginal peoples do not often do this (see possible reasons for why in Appendix 1), the ability for their religious ways to be protected in Canada is tenuous. It is likely that the legal system does not currently view religion as that which one sincerely believes in its adjudication relation to religion under other areas of law than s. 2(a) of the *Charter*; if the *Delgamuukw* case arose in the legal system now, I do not believe the decision would be much different than it was in 1997. Nevertheless, the *Amselem* and *Multani* decisions expanded legal definitions of religion, which could be beneficial to Aboriginal peoples depending on how they argue their claims. A final potential benefit to the unique historical situation in Canada, which has rendered it more able to understand and handle the religious ways of Aboriginal peoples, comes as a result of the historical and continued presence of Aboriginal peoples in the state. While Beaman (2010) noted how Aboriginal presence helped to make the Canadian understanding of religion more able to handle minority religions, I note another outcome. Aboriginal peoples have historically and currently, both physically and vocally, insisted that their views be heard by the Canadian state and by those who have difficulty understanding them. They have done so through previously noted physical confrontations such as blockades and protests and have also engaged the state on a number of other levels including legally. The Gitksan and Wet'suwet'en peoples for example, forced the Canadian state and legal institution to cope with their claims to land. While the case did not result in a decision on this matter it showed, again, what Aboriginal peoples are capable of and it led to their ability to use their oral knowledge as evidence in courts in Canada. In addition to examples such as this, the *Delgamuukw* case shows how modern constitutionalism is able to adapt and can change to more adequately engage with Aboriginal peoples and their claims. The fact that this occurred raises hopes of the Canadian system one day being able to

better handle the religious ways of Aboriginal peoples as well. Canada's unique history sets it up, in a number of ways, to be able to potentially manage the religious ways of Aboriginal peoples better now than it did in the *Delgamuukw* case, and potentially in an even more advantageous way of Aboriginal peoples at some point in the future.

5.3 –COMMUNICATION AND TEACHING SKILLS PRESENT IN ABORIGINAL COMMUNITIES

The second reason for why the religious ways of Aboriginal peoples could be understood differently the way they were in the *Delgamuukw* case is because of teaching and communicative abilities present in many of their communities. Furthermore, in the *Delgamuukw* case, the insistence of the groups on the validity of aboriginal narratives and oral knowledge has created the necessity of accounting for these in a way that law has not previously. How one tells their story or claims to a court can have significant ramifications on the outcome of a case. The idea of using narratives to teach or the understanding of narrative skills is certainly present in aboriginal communities. Johnson notes that Aboriginal peoples can "speak in a range of ways according to their perception of their audience and their sense of which aspects of their experiences and heritage will best reach a specific audience for a particular purpose" (2007, 155). Aboriginal peoples use these different ranges when they recount oral knowledge to members of their society; the same story can be used to teach a number of different things to a number of different people (Guédon 2012, 9th). Aboriginal peoples could employ these skills in order to help law and those who are unfamiliar with them in non-Aboriginal society to better understand their positions and worldviews, as has been done in the United States.

In the American context, Greg Johnson, after studying the process of repatriation claims under the *Native American Graves Protection and Repatriation Act* (NAGPRA) (1990), stated that he was

> struck by how successful native advocates were at persuading politicians and the public of the seriousness and moral gravity of their position. A principal index of this perception [he notes] is the ways and frequency which legislators have described repatriation as a religious issue. (Johnson 2007, 10)

He argues further that such success is possibly because “these politicians were converted, albeit in limited ways, to Native Americans' religious and moral perspectives” (Johnson 2007, 11, see also 59). Greg Johnson has noted that when Aboriginal peoples recount their views to those use are less familiar with them in the repatriation context,

> [w]ell-told stories elicit a kind of assent that is subtle and mild, asking listeners simply to imagine another kind of world. And the act of listening – which provides a forum and an audience – accords significant authority to the speaker, especially when the forum is a congressional hearing and the audience legislators. (2007, 58)

It seems that in some cases when Aboriginal peoples are presenting their views listeners are able to 'imagine another kind of world' and give the view a just weight. This type of story telling or framing of claims is a tool that Aboriginal peoples in Canada have that could be utilized to their advantage, as it has in the American context.

In addition to the skill in storytelling that exists in Aboriginal communities, they also have a number of oratory skills that could be useful to them in legal and other contexts involving those who are unfamiliar with their views. Johnson’s comments on how Aboriginal peoples have faired under the *Native American Graves Protection and Repatriation Act* (NAGPRA) acknowledges these skills. He states that Aboriginal peoples use this religious language because they

> understand ... that religious speech has a greater range of rhetorical possibilities than Western discourses of science and legalism. Whereas the latter are resolutely literal, religious language is defined by its playfulness; its metaphoric capacities; and, in short, its sheer capacity for narrative innovation. (2007, 24)

For these reasons such language is often employed in the repatriation claims made by Aboriginal peoples. Success in their claims has been attributed to the use of such language. The repatriation context in the United States illustrates how Aboriginal peoples, by telling their views in particular ways, can have their views better understood by those who are unfamiliar with them.

It should be noted that Aboriginal peoples in the United States that have used this Repatriation Act have been forced to discuss their religious beliefs in court in ways that Aboriginal peoples in Canada have been much less willing to do. This is partially due to the secrecy surrounding their religious and other knowledge. However, such techniques may be fruitful without exposing many of their religious understandings, this remains to be seen. Furthermore, in the American context in setting up the Repatriation Act the American legal system showed that it was serious in helping Aboriginal peoples regain their religious and cultural artefacts and objects (this is understood in the creation of the act as well as the fact that it contains clauses such as that the burden of proof will not be placed on Aboriginal peoples (see Johnson 2007, 68-71)). If the Canadian system treated Aboriginal religious ways with similar seriousness, Aboriginal peoples might also be more willing to pursue religious claims in court. Nevertheless, in Canada there are a number of contexts in which Aboriginal peoples could use these teaching and oratory techniques, such as in treaty negotiations, in consultations with those interested in using land that has religious value to them, in public hearings and in legal contexts. Such tools could be used particularly in relation to aiding those who are unfamiliar with Aboriginal religious ways to better understand them. The success of using these techniques in the

American repatriation context points to the ability that Aboriginal society may have in successfully getting those who have different beliefs than them to understand Aboriginal views. The result of which would hopefully be a better understanding and handling of Aboriginal peoples' views on their own terms and in ways that resonate more with their traditions. If Aboriginal peoples use these ways they already communicate within their societies in legal and other contexts it might result in more successful claims.

5.4 – THE INTRODUCTION OF POSSIBILITIES SURROUNDING ORAL KNOWLEDGE

Another reason for it being possible for the religious ways of Aboriginal peoples be understood and treated in alternative ways to how they were handled in the *Delgamuukw* case is because of the very introduction of oral knowledge as evidence into the legal system. In the *Delgamuukw* case it was acknowledged by Chief Justice Lamer that the Court was not familiar with Aboriginal oral knowledge (para 5). The fact that the law still went on to accept oral knowledge as valid evidence suggests the possibility that the way law understands and frames things can change[51]. Although Mossman argues "the significant role of legal method in preserving the status quo" (1987, 164), the introduction of oral knowledge as evidence to some extent, suggests the contrary, that legal frameworks may not always be so immutable.

It should similarly be expected that the understanding of oral knowledge can also change or improve. The best way for this to occur in the socio-legal system is through instruction, which could broaden the space that *Delgamuukw* has opened in regard to oral knowledge. Andie Diane Palmer has noted the necessity of educating legal adjudicators if we expect oral knowledge to be understood and handled better in court (2000, 1047). Learning about oral knowledge would also involve learning how to listen where according to J. Edward Chamberlain,

[51] The *Amselsem* and *Multani* cases that I previously discussed also suggest that this type of change is possible.

> [i]t is an assumption that understanding sophisticated oral traditions comes naturally to the sympathetic ear. It doesn't. Just as we learn how to read, so we learn how to listen; and this learning does not come naturally. It requires what the literary critic Northrop Frye used to call an educated imagination. (2007, 24)

Chamberlain states further that those unfamiliar with oral knowledge should cultivate their listening skills to be able to hear what Aboriginal peoples have to say (2007, 24). Borrows notes that the use of interpreters and translators would be helpful, even in contexts where the language used by Aboriginal peoples is one of the national languages; interpreters should be employed for cultural interpretation (2001, 31). If improving how the religious ways of Aboriginal peoples are understood and handled legally comes down to judges learning and improving how to listen, the possibility that it could be handled better in court in the future is likely. The introduction of Aboriginal oral knowledge as evidence in court shows that ability of the legal system to change, and the possibility that it comes to better understand oral knowledge through education strengthens this ability. If this occurs, it increases the likelihood that those in Canadian society who are unfamiliar with oral knowledge will also come to better understand it. This is because as Smart (1989), Carabine (2001), Beaman (2002), and Belleau and Johnson (2008) mention, the law has an impact on society's understandings of things.

5.5 – INCREASED DIALOGUE

The religious ways of Aboriginal peoples can also be understood and handled in alternative ways than how they were in the *Delgamuukw* case because of the increased dialogue that has occurred between Aboriginal and non-Aboriginal peoples in Canada since the mid 1970s (Lutz 2008, 291) and especially since the beginning of the 1990s which has in part been due to the inspiration that Aboriginal peoples received from the Oka crisis (Swain 2010, 180). Dialogue can take the form of informal discussions, formal exchanges such as consultations or

commissions, legal cases, etc. *Delgamuukw* is an example of this dialogue and its products where Aboriginal peoples insisted on the validity of their perspectives and the legal system had to cope. Such dialogue and pressing for those who are unfamiliar with Aboriginal traditions to better understand them opens space for Aboriginal religious ways to be handled more adequately in legal contexts. Tully sees the potential of this opening, where he imagines the improvement of the situation for Aboriginal peoples in Canada taking place through Aboriginal and peoples who misapprehend them coming to mutual understandings of one another through a process of dialogue and mediation. He argues that

> [t]he reason it is possible to understand one another in intercultural conversations is because this is what we do all the time in culturally diverse societies to some extent. The everyday mastery of the criss-crossing, overlapping and contested uses of terms is not different in kind (but of course in degree) from the understanding demanded by constitutional dialogue. (1995, 133)

For Tully, this understanding will occur through mediation, which must be done while keeping "conventions of mutual recognition, continuity and consent" in the forefront. Much of this mediation is a back and forth dialogue process where eventually an understanding is reached between the parties. Tully breaks down how this process works in the following quote:

> The dialogue in such constitutional negotiations usually consists in the back and forth exchange of speech acts of the form, 'let me see if I understand what you said', 'let me rephrase what you said and see if you agree', 'is what you said analogous to this example in my culture'. Or 'I am sorry, let me try another intermediate example that is closer', or 'can you acknowledge this analogy?' 'Now I think I can see what you are saying – let me put it this way for I now see that it complements my view.' The participants are gradually able to see the association from the points of view of each other and cobble together an acceptable intercultural language capable of accommodating the truth in each of their limited and complementary views and of setting aside the incompatible ones. (1995, 133-134)

Tully notes that the First Nations appellants in the *Delgamuukw* case utilized this method of mediation or intercultural dialogue in their arguments made to judges in lower courts. He states that,

> [t]he Gitskan and Wet'suwet'en nations of the northwest coast of Great Turtle Island brought forward their claim for recognition of their nations and territories. Gisday Wa and Delgam Uukw carefully outlined Aboriginal concepts of evidence, history, government and argument, contrasting these with European understandings and finding intermediate examples to help the judge understand. They then explained their claim to territory and self rule, based on their forms of governance and use long before the Europeans arrived, in their own terms and compared it with analogous European concepts, calling on respected anthropologists to support their claims. (1995, 132)

Initially these Gitksan and Wet'suwet'en efforts at dialogue were not accepted by the court but on appeal to the Supreme Court it seemed that some of this aspect of dialogue was finally heard and the Court ruled that Aboriginal oral knowledge (or at least parts of them) would be permitted as forms of evidence in court (while not ruling on the land claims issues itself). Through dialogue, the opening of such space can (and has in the instance of *Delgamuukw*) result in alternative ways of understanding Aboriginal traditions in law, which will hopefully continue.

5.6 – HISTORIES ARE BEING REVIEWED AND (RE)WRITTEN

A final factor that indicates that the way in which law understands and handles Aboriginal religious ways in the *Delgamuukw* case can be done differently is that history is now being (re)examined and Aboriginal perspectives recounted. It has been noted that over the last two or so decades "the diversity and volume of published opinion on aboriginal people and by aboriginal people in Canada has considerably increased" (Swain 2010, 170). Some of this scholarship has also involved the recounting of Aboriginal perspectives of history, which have been missing from the history books of the majority (an example of this scholarship in the edited collection by John Lutz (2007)). This scholarship inevitably has scholars returning to dominant recounting of history as well. Scholars such as Dwight Newman (2007) has stated the importance of reviewing Aboriginal perspectives of history, arguing for Aboriginal and non-Aboriginal scholars to engage with one another's work to improve relations between the two groups and stop

a one sided view of Aboriginal peoples. As I have already mentioned, Smith as also noted the importance of Aboriginal peoples writing their own history to continue the decolonisation process (1999, 28-30, 33). This revaluation and recounting of history in general is also useful in terms of improving relations and understanding between Aboriginal society and those who are unfamiliar with them or misunderstand their traditions in Canada by reimagining group narratives of identity. Improving such relations and understandings could improve how Aboriginal peoples and their religious ways are understood in Canada and in Canadian courts.

In terms of reviewing history, there are potential positive outcomes from it for Aboriginal peoples in Canada. These include the reimagining of history and group narratives. According to Imad Mansour, there are identity narratives that a society tells itself about events that have occurred and especially events that affect relationships that they have with other groups. He states that,

> Any group tells itself a storyline that defines its identity. These narratives include stories about the group's history, ideas about their future goals and aspirations, their place in the world; they also include symbols that they identify with (geographic location, emblem, or dress code). They also help to define its enemies and friends. The narrative is malleable and its contents change over time – some are discredited or seen as outdated while new ones issue forth when the group decides to adopt them; yet a narrative is generally stable and changes slowly. This identity narrative contains historical experiences which the group generally agrees they have passed through, regardless of their accuracy, experiences which weave themselves into current events. Narratives are transmitted through oral exchange, the arts, literary works, music, and newspapers; they are also transmitted through state-run and influential institutions such as schools and history books. The governing regime, which controls state institutions and presides over a society, has an important input into the pool of national ideas making up the identity narrative. Moreover, a regime is supposed to develop goals and policies in pursuit of the society's aspirations and to ensure these conform to its values; it is, after all, the executive body looking after that group/society. (2011, Sept 2)

What is most relevant here is the historical aspect of these identity narratives. Mansour states,

> Historical experiences are an important constitutive part of the narrative; those are events that a group believes it passed through – which might not necessarily be accurate but which the group *agrees* they are. In the identity narrative are also weaved current experiences and symbols which the group sees as constituting part of its contemporary existence. Hence the identity narrative, as a story line, changes over time with the addition of new experiences and the omitting of old ones. A narrative is not fixed, and is open to discursive contestation. … Identity narratives reflect a group's sense of collective purpose, and the validity of its behaviour. (2011, Mar 16)

In order to improve the relationship between two groups, who have historically been in conflict with or had hostile feeling towards one another, one must look critically at their historical narratives and look for misunderstandings and build on understandings between them (Mansour 2009). Talal Asad argues similarly that historical narratives are tied to identity and for this reason, when a majority (be it a country or a group) tries to incorporate a minority into their state or group, the more larger more dominant group has to deconstruct their historical narratives relating to their identity to have these groups coexist together (2003, 166-167, 177). The same could be said regarding deconstructing Canadian historical narratives relating to identity to allow for Aboriginal peoples to exist more justly in the state. Furthermore, Asad argues that "the historical narratives produced by so-called 'minorities' need to be respected" (2003, 177). While this appears to be a double standard (which Asad recognizes) it is not without reason based on his understanding of democracy. In terms of democratic societies Asad states that, the principle of democracy means that majority rules where there is "the assumption not only that the whole is authoritative over any of its parts, but that what there is *more of* has *ipso facto* greater weight than that which differs from it merely by being less" (2003, 173). The result then he says, is that minorities will likely receive less representation in the state (2003, 173). It is for this reason that Asad takes a liberal view to the state that "time and place should be made for weaker groups within spaces and times commanded by a dominate one" and therefore finds that minorities' historical narratives should be respected rather than also deconstructed (2003, 178, 177).

Working with re-evaluating historical narratives of at least the Canadian state (if not both groups) by critically examining them allows for common ground to be reached between disputing groups. Such examination of history and historical narrative improves the relationship between Aboriginal people and those who have historically misunderstood them in Canada and could result in increased understanding between these groups and of Aboriginal religious ways. The process of revaluation and reimagining is already occurring as Aboriginal peoples re-examine history and as they recount their own. This shows the potential of alternative ways of understanding Aboriginal religious ways, which could result in improvement in how they are handled and comprehended in the Canadian legal system.

5.7 - CHAPTER CONCLUSION

This chapter focused how the socio-legal landscape in Canada shows the possibilities of alternative interpretations of the religious ways of Aboriginal peoples than how it was understood and handled in the *Delgamuukw* case. First, it focused on Canada's unique history that has led to an understanding of religion that is better equipped to understand and manage religious minorities. The chapter then focused on how the teaching and communicative skills present in many Aboriginal communities could be used to generate understanding of their ways in a number of socio-legal contexts which would improve the way they fair in court. The fourth part of this chapter noted the space that has been opened in law surrounding oral knowledge that allows for it to be understood in a way not previously possible in Canada and how education could push this space to be even larger. Next, the chapter discussed how increased dialogue between Aboriginal communities and those who misunderstand or are unfamiliar with them increases the capacity of these groups to understand one another and improves the likelihood of

Aboriginal claims being treated more justly in court. Finally, this chapter addressed how the reevaluation and recounting of history in Canada could improve relations and understandings between Aboriginal peoples' narratives and those of the majority in Canada. This chapter notes how the socio-legal context in Canada allows for an improved understanding of Aboriginal peoples and their religious ways. The expectation is that if understanding can be improved then this would lead to an amelioration of how Aboriginal religious ways are understood and framed in law. Nevertheless there remains ambivalence in terms of whether the law will go in a direction that would allow for alternative understandings of the religious ways of Aboriginal peoples that would allow for their traditions to be better understood and handled in their own right.

CHAPTER VI – CONCLUSION

6.1 – INTRODUCTION

According to van Dijk's version of critical discourse analysis, which focuses on power and inequalities in society, "success is measured by its effectiveness and relevance, that is, by its contribution to change" (1993, 253), change that results in actual elimination of inequality. However I believe, that improved understanding and a change in the ways that a situation is viewed, the precursors to actual change, can also be of value. This chapter will summarize the findings of my thesis. It will note the tools I used to evaluate the *Delgamuukw* case and its related facta. The chapter will comment on the socio-legal context in which the case exists. Thirdly, it will discuss the religious traces that came forth through coding the case and note how law struggles to deal with them. Next the chapter will focus on how the religious ways of Aboriginal peoples were treated and interpreted by the Court in the *Delgamuukw* case and mention the implications of how it was framed. Finally an abridged evaluation of whether there are alternative ways of thinking about the religious ways of Aboriginal peoples in the current socio-legal context will be given. This chapter will summarize these aspects of my thesis through a re-examination of the questions I posed at the beginning of my thesis.

6.2 – SUMMARY

I first asked, what are some of the tools that can be used to examine and evaluate how the religious ways of Aboriginal peoples are discussed in law in Canada? Chapter 1 of my thesis answered this question by noting first, how it is important to use precise language in doing an evaluation of legal documents, chapter 1 therefore outlined my reasoning for using particular language. To answer this question I also examined how best to think about the religious ways of Aboriginal peoples. I determined that focusing on religion as lived, where it is not tied to an

institution, can encompass a broad array of beliefs, accounts for the interconnectedness of Aboriginal worldviews, and the fact that religion is constantly in flux was the best way to comprehend the religious ways of Aboriginal peoples in order to determine how they were handled in the *Delgamuukw* case. Chapter 1 then approached method, where I noted that a discourse analysis approach would yield the best results in terms of focus of my research. Here I used various sources to build my own discourse analysis method, which focused on three main factors: 1. What to analyse, where attention was paid to all parts of the case, including concurring opinions, as well as to examining that which is present and that which is absent form the case. 2. How to do discourse analysis drawing from a number of sources. 3. What to look for in doing discourse analysis. Here I focused on language that reflected a particular emotion or view, language that indicated social construction on behalf of the Court, language that reflected social happenings, language that could have been embedded in a particular historical context, and finally the language of power. My position as a researcher was also noted in this chapter, which became an important tool in understanding how the religious ways of Aboriginal peoples were viewed in the *Delgamuukw* case, as it forced me to think more critically about my topic. Here I discussed the insider/outsider perspective, parallels in studying the other as noted by Edward Said, and finally, how I should approach those actors in the case. There were the tools I used to evaluate and examine the *Delgamuukw* case.

I then posed the questions, what is the socio-legal context in Canada in which Aboriginal peoples and their claims need to be understood? In particular, how have the European and Christian views held by colonisers and their descendants affected the construction of the Canadian state, the decolonisation process and particularly the legal system in regards to Aboriginal peoples? I attempted to answer this question in the second chapter of my thesis. It

was there that I addressed the role that history, particularly that colonisation played, and still plays, in how Aboriginal peoples and the Canadian state interact. I commented on how only European/Christian understandings and worldviews were taken into account in constructing the Canadian *Constitution*. Here I tried to show how Aboriginal peoples understood early encounters with colonisers as this has been commonly overlooked in the discussion of history. Chapter 2 then focuses on how decolonisation in Canada has not been complete and the presence of Christianity and other European understandings remain in the Canadian state, its institutions and society, which affect how the religious ways of Aboriginal peoples are treated and handled in Canada. The greatest difficulties for the freedom of the religious ways of Aboriginal peoples in Canada is the effect of "residual Christianity" and the prevalence of other European views, in addition to the effect of the majority of Canadians being Christian (the "Christian hegemony"). These factors were and their effect on the socio-legal context in which *Delgamuukw* is situated were discussed in chapter two, noting the difficulties for Aboriginal claims and how they are understood. The final way in which I tried to answer the question of how we might better understand the struggles of Aboriginal peoples and their claims in the Canadian socio-legal context in which *Delgamuukw* occurred was to focus on the characteristics of the legal system that present difficulties for Aboriginal peoples in making their claims. These factors included the preamble to the *Constitution*, which notes 'the supremacy of God' therefore embedding a Christian and culturally European understanding in the Canadian constitutional system. This chapter also noted the difficulties for Aboriginal peoples when the law understands religion to be private and individual. It also noted how Aboriginal peoples are forced to use languages and laws that are not their own to argue their claims, which was deemed problematic for Aboriginal peoples and exposes contemporary colonialism. Next the characterizing ability of the law was

discussed where it was noted that legal adjudicators can frame cases as they like and also emphasize and minimize aspects of cases. It was also noted that they can use particular language to disempower or devalue in court as well. These abilities of judges were understood to be negative for Aboriginal peoples as their claims are potentially more complicated, have significant repercussions and are misunderstood by the law, thus making the chance of characterizing and deflecting attention likely. The next characteristic of the law that was addressed as being able to cause problems for Aboriginal claims was that social views can influence legal decisions which is problematic for Aboriginal peoples as their ways are greatly misunderstood in Canadian society. Next the constraints on the legal system were addressed, where it was noted that judges may make choices that do not favour Aboriginal peoples in order to avoid the headache of future claims. It then commented on the effect of the law having a truth making capacity where this could be problematic for Aboriginal peoples in its ability to disqualify certain forms of knowledge (such as oral knowledge with religious context, for example). The final factor of law that it addressed was law's juridogenic nature where it causes more problems that it solves, examples of this were given for how this occurred with the decisions made in the *Delgamuukw* case. Through examining the effects of colonialism in terms of embedding Christian and European views into the Canadian socio-legal system, and by focusing on the characteristics of the legal system that negatively affect Aboriginal claims, I was able to better understand the context and difficulties presented to Aboriginal peoples in making their claims in cases such as *Delgamuukw*.

My third area for exploration started with the questions: What are the markers of the religious ways of Aboriginal peoples in the *Delgamuukw* case and how are they understood in the Canadian socio-legal context? What might the religious elements in the case mean for the

Gitksan and Wet'suwet'en peoples and how might the legal system have trouble handling them? Chapter 3 of this thesis examined the third question posed in this thesis. In order to answer this question the chapter focused on the religious elements of the Gitksan and Wet'suwet'en that I identified through my coding of the *Delgamuukw* case, how each was understood to be religious to these First Nations peoples, and how they present problems for Canadian law. The religious factors addressed were, references to religion, oral knowledge, land, crests, feasting and totem poles. This chapter examined how religion was referred to vaguely in the *Delgamuukw* case where it was revealed that the Court was avoiding it. It then described oral knowledge and how it is tied to religion for Aboriginal peoples. It noted that the Canadian legal system had trouble handling oral knowledge because of law's different understandings of history and what is true versus what is false compared to Aboriginal peoples. The chapter then discussed land and how it is religious for Aboriginal peoples and goes to the core of their identity as Aboriginal peoples. It stated that the law cannot adequately handle Aboriginal understandings of land because of its inability to conceptualize land as broadly as Aboriginal peoples do. The chapter also addressed how crests, feasting and totem poles are religious for the Gitksan and Wet'suwet'en peoples as well as First Nations peoples more generally. It acknowledged that law had not yet addressed these elements but that it is likely that the law will struggle with them because of them being physical forms of history. Finally, the role that secrecy plays in Aboriginal communities regarding sacred oral knowledge was commented on. Through examining what the religious elements of the case mean for the Gitksan and Wet'suwet'en peoples, as well as the trouble that the legal system might have in understanding and handling them, I was able to set the set the stage for better comprehending how they were framed in the *Delgamuukw* case.

I then investigated the questions: How does the law understand and frame the religious ways of the Gitksan and Wet'suwet'en peoples in the *Delgamuukw* case? What does the decision's language suggests about how law (and potentially the majority of non-Aboriginal Canadians) conceptualize religion and the religious ways of Aboriginal peoples in Canada? The fourth chapter in my thesis addressed these questions by first addressing how a particular religious aspect was addressed in the case followed by a discussion of what its treatment might indicate about law. It did this for each element: reference to religion, comments on feasting, totem poles and crests, oral knowledge, and Aboriginal views towards land. This chapter noted that the Court referred to the religious ways of Aboriginal peoples in vague ways, and that this indicated that the Court may have done so on purpose, it may have done so for self serving reasons and that it might indicate an unwillingness of the law to include the religious ways of Aboriginal peoples in their understanding of religion. My analysis revealed that feasting was not discussed in the case, and that this could indicate that the Court did not want to discuss it for a number of reasons such as, because it would create more work for the court, it is uncomfortable with the topic, it is hesitant to understand feasting as a form of historical evidence and/or, the Court cannot conceptualize of the source of all being in the land. In terms of totem poles and crests, it was determined that the Court seemed to understand these factors as lesser forms of oral knowledge, often collapsing them into the term "oral knowledge". This could indicate the Court's view of totem poles and crests as more religious and less historical and could show a Christian understanding of religion. In terms of oral knowledge, it was noted that the court's reference to it as "sacred" could indicate a Christian understanding of religion by the Court, which does not do justice to Aboriginal beliefs. In addition to this, parts of oral knowledge with a religious content were discarded by the Court by its linking of "oral tradition" and "legend", with

religion. Such discarding showed the social construction of religion by the Court, it revealed practical implications, the discarding indicated a disparaging reference to the religious ways of Aboriginal peoples on behalf of the law, it did not do justice to Aboriginal beliefs, and showed that the decolonisation process is unfinished in the Canadian legal system. Finally, in regard to land, this chapter noted that land was quantified, which showed an unwillingness to discuss religious land use and depicts a Christian understanding of religion on behalf of the law. Land was also regulated in the *Delgamuukw* case, which showed limitations on Aboriginal religious freedom in addition to a stagnant view of religion on behalf of the Court as well as the remnants of colonialism. Finally, I commented on the Court's stated ability to infringe on Aboriginal title. This undermined Aboriginal religious freedom, demonstrated contemporary colonialism, and showed the Court's misunderstanding of the religious importance of land for Aboriginal peoples. From my analysis of the *Delgamuukw* case, it was noted that the Court struggled in handling the religious ways of Aboriginal peoples and as a result Aboriginal religious freedom in Canada was observed to have many limits.

Finally, I explored whether there are other ways in which the law, and the majority of non-Aboriginal peoples in Canada, could come to better understand and handle the religious ways of Aboriginal peoples than they did in the *Delgamuukw* case. Chapter 5 of my thesis addressed this final research question and determined that there are alternatives to the way in which Aboriginal peoples' religious ways were understood and handled in the *Delgamuukw* case. The chapter noted five reasons for this: 1. Canada's unique history which has led to an understanding of religion that is better equipped to manage religious minorities. 2. The skill present in many Aboriginal communities to teach and communicate. 3. The possibility that was opened up surrounding oral knowledge and understanding it. 4. The existence of dialogue

between Aboriginal peoples and those who have trouble comprehending them. 5. The reevaluation and (re)writing of history that Aboriginal peoples have been doing. It is for these five reasons that the religious ways of Aboriginal peoples may not inevitably be treated as they were in the *Delgamuukw* case. Nevertheless there is ambivalence in behalf of law regarding whether it will take such alternative approach to allow for a better understandings of the religious ways of Aboriginal peoples on their own terms.

6.3 - CONCLUSION

When I imagined Delgamuukw (Earl Muldoe), one of the Gitksan hereditary chiefs, looking out over his nation's land at the beginning of this thesis, I wonder now how he felt about the outcome of the legal decision regarding his land. While no decision was made regarding the disputed territory, Aboriginal oral knowledge could now be used as evidence in court. But did Earl Muldoe feel that anything had really changed? This thesis illustrated how the *Delgamuukw* decision in many ways shows a business as usual approach by law in terms of how it understands and handles Aboriginal peoples and their religious ways. My findings revealed that the Court downplayed the religious ways of Aboriginal peoples (by "writing out", by using vague language to refer to it or by not mentioning it at all). Analysis indicated that the *Delgamuukw* decision fell short of really treating oral knowledge as equal to other forms of historical evidence by excluding oral knowledge with religious content. The Court also did not do justice to Aboriginal beliefs by labeling oral knowledge as "sacred", therefore using a Christian understanding of religion to interpret it. My research also discussed how legal adjudicators made pronouncements on the religious uses of land for the Gitksan and Wet'suwet'en and finally, how land was quantified, regulated and title was diminished by the ability for the court to infringe on it. These findings limited the ability for Aboriginal peoples to practice their religious ways in Canada. It

also showed how law characterized issues and used particular language to avoid discussing religion, or to downplay it, or discard it entirely (such as with religious forms of oral knowledge). This thesis also demonstrated law's view of religion as Christian where it evaluated Aboriginal religious ways from this perspective, which did not do justice to their beliefs and resulted in them being misunderstood and not handled adequately by law. It also indicated a number of deficiencies in the legal system and challenges it faced in terms of understanding and handling Aboriginal peoples and their claims. At the same time however, the *Delgamuukw* decision also shows how in some ways, space was created in the legal system (including the introduction of oral knowledge as evidence), for an alternative understanding of the religious ways of Aboriginal peoples since the *Delgamuukw* decision was handed down. Whether the law will move in the direction of this space, however unlikely it may be, towards alternative understandings of the religious ways of Aboriginal peoples that allow for them to be better understood and handled by the legal system, has yet to be determined.

It is easy to imagine once more, how for now, it appears yet again to Delgamuukw (Earl Muldoe), that too many decisions regarding Aboriginal peoples and their land, rest in the clutches of a system rife with factors to overcome before it is able to do or see anything differently.

APPENDIX 1 – WHY ABORIGINAL PEOPLES ARE NOT FREQUENTLY USING S.(2)A OF THE *CHARTER*

Aboriginal peoples in Canada have had the tendency of keeping issues involving their religious beliefs out of the court system. Since the institution of the Canadian Charter of Rights and Freedoms not only is there very few cases arguing for an Aboriginal religious right but many such issues surface only as secondary factors in hunting and fishing rights cases or in title or treaty disputes (Beaman 2002, 136). There are likely two factors at play here. First, Aboriginal peoples are in many cases choosing not to argue for their religious freedom explicitly under s. 2(a) of the *Charter* for which there are a number of plausible explanations. Secondly, courts are choosing not to see Aboriginal cases involving the religious ways of Aboriginal peoples as cases involving religious freedom factors and they are able to do so because of the way the courts system functions (see chapter 2 for discussion on this). In terms of why Aboriginal peoples in Canada are rarely arguing for religious rights under s. 2(a), there are five main reasons, many of which can be seen through the limited number of Aboriginal court cases that involve the religious ways of Aboriginal peoples.

First, Aboriginal peoples have had little success in arguing for religious freedom in the past and therefore may feel they will not be successful in such endeavours (Beaman 2011, Feb 3). This concern could be borne out of cases where types of arguments for religious freedom have not been successful, such as in the pre-Charter case *Jack and Charlie v. The Queen* (1985) where two members of the Tsartlip First Nations were accused of hunting a deer out of season which was against British Columbia Wildlife Act regulations. While a religious freedom argument was pursued by the two Tsartlip people, legal adjudicators used a Christian understanding of religion in evaluating the case equating the non-sacredness of buying wine for

communion with hunting a deer for a First Nations ceremony (which required the burning of deer meat) and thus completely ignoring the fact that hunting in and of itself could be encompassed in the religious ways of Aboriginal peoples[52]. Another case that was argued under s. 2(a) of the *Charter* was *Saulteau First Nations v. Ministry of Energy and Mines* (1998) (aka: *Cameron v. Ministry of Energy And Mines* (1998) and more informally as the "Twin Sisters" case). This case involved two First Nations groups, the Saulteau First Nations and the Kelly Lake Cree Nations who claimed that two particular mountains that were located side by side, referred to commonly as the Twin sisters, had religious significance to them and therefore deserved protection from having a company build a road into and mine in the small space between them. While a religious freedom argument was made the judges decided that the First Nations involved did not have their religious rights significantly infringed upon, as it would not change each group's actions involving the mountains (it would only change the mountain itself). The court felt that changing the mountain would not change anything for Aboriginal peoples' understandings of it. In fact, the court only delineated a particular part of the mountains (the peaks) as a 'sacred site' that could not be disturbed. The claim therefore was only semi successful in protecting that which had religious significance for the First Nations groups as it literally only protected a portion of the mountains.

A second reason for rarely arguing for a religious right under s. 2(a) could be that many Aboriginal peoples do not view their religious ways in the same manner as the law does. The law seems to isolate one aspect of Aboriginal claims or disputes to concentrate on and consequently fail to account for the degree of interconnectedness that the religious ways of Aboriginal peoples have in many aspects of Aboriginal lives. For many Aboriginal peoples there is no separation

[52] For how hunting is considered religious for Aboriginal peoples see statements made by Paper 2012, 28; Lovisek 2002, 104.

between their religious beliefs and other parts of their lives/cultures (Ross 2005, 3-4; Beaman 2002, 137; Stonechild 1994, “Foreword”). They therefore may not see why religion should be argued separately from other rights. It seems that an example of this type of argument was used in the again unsuccessful case, *Thomas v. Norris* (1992). In this case, a Lyackson Frist Nations man was held against his will as apart of a Coast Salish initiation ceremony conducted by the Cowichan First Nations. Both nations while distinct and different from one another are understood to be Coast Salish. The ceremony, while able to be conceptualized as a religious ceremony (and was stated as such in the case) therefore deserving protection under s. 2(a) of the *Charter*, was instead argued more generally to be an Aboriginal right under s. 35(1) of the *Constitution*. The case concluded by determining the acts against the Lyackson man who was grabbed to be criminal rather than as a part of Aboriginal religious ways.

An extension of Aboriginal peoples not seeing religion in the same fashion as the dominant understanding in non-Aboriginal society is that there also be the belief, on behalf of at least some Aboriginal peoples, that the Canadian legal system is rooted in values and understandings that have difficulty grappling with Aboriginal perspectives to deliver an adequate outcome (Turpel 1989-1990). *Jack and Charlie v. The Queen* (1985) is an example of this where a Christian understanding of religion was used to interpret the religious ways of First Nations peoples. In the Twin Sisters case this difference in understanding was also exemplified by the court in that it used a Christian understanding of how one treats sacred space (such as churches) to determine that the Twin Sisters did not deserve protection from being mined. The court ignored the cosmological significance of the site for particular First Nations groups.

Furthermore, the result of deliberations between the First Nations groups with the state and company seeking mining rights was that degrees of sacredness to the mountain were established which resulted in only a part of the Twin Sisters being protected from mining activities and leaving the rest to be mined to a certain degree. The establishment of degrees of sacredness essentially allowed a Christian understanding of sacred and profane to be cast over the issue where only the most sacred parts of the mountain ended up being protected (causing at least one group to stop negotiations). While effort was made to understand First Nations perspectives, the fact that Aboriginal peoples make little distinction, if any, between sacred and profane, and given that Aboriginal peoples understand religion to penetrate all aspects of society, the decision did not reflect these understandings. This case is an example of how "residual Christianity", and the Canadian "Christian hegemony" both have an effect on how non-Christians beliefs are handled in a court of law (see discussion on this in Chapter 2).

Thirdly, many Aboriginal groups may not want to, or not be able to, expose their beliefs to peoples outside their communities. Aboriginal peoples may not want to explain their beliefs to peoples outside their communities for a number of reasons such as not being able to be understood (as mentioned above) and also mentioned by Lutz that First Nations peoples' actions were greatly misunderstood by Europeans upon contact (2007, 30-45). Brining these beliefs up in legal contexts could similarly lead to them being judged or scrutinized (Beaman 2011, June 21). As Smith states generally regarding indigenous peoples,

> The values, attitudes, concepts and language embedded in beliefs about spirituality represent, in many cases, the clearest contrast and mark of difference between indigenous peoples and the West. It is one of the few parts of ourselves which the West cannot decipher, cannot understand and cannot control ... yet. (1999, 74)

In this quote, Smith notes that the religious ways of Indigenous peoples are the only thing left that non-Indigenous peoples have not destroyed. When your beliefs are all that is left (and given how tied they are to one's individual and collective identity), it is understandable why they might not want to share their beliefs in a court of law in Canada or elsewhere. Aboriginal peoples might not only not want to expose their beliefs to peoples outside their communities for the reasons mentioned above but they may not want to expose them simply because in some indigenous communities some knowledge can only be shared to one's community, or even only to particular individuals within it (Battiste and Henderson 2000, 140-141; in relation to 'sacred sites' see Ross 2005, 144-145). In many Aboriginal communities knowledge is revealed only when one is ready to understand it or able to handle it (Guédon 2012, Jan 9). For the reasons mentioned above, it would make sense therefore that religious knowledge above all else would have the highest degree of protection and concealment in Aboriginal communities.

The fourth reason why many Aboriginal peoples might not want to participate in the Canadian state's legal proceedings is that they may see it as an invalid exercise if they do not see themselves as falling under the governance of the Canadian state[53]. The *Thomas v. Norris* (1992) case is an example of how Canadian law was seen to supersede previously existing First Nations rights (Borrows 2008, 182). This case shows explicitly how Aboriginal understandings and ways have been rendered powerless and inferior to the Canadian, which raises its laws to be superior in rule.

A last reason why Aboriginal peoples may be infrequently arguing for religious freedom under s. 2(a) of the *Charter* is, according to Jack Woodward, because of the way the relevant laws play out. He states that because the religious ways of Aboriginal peoples can be protected

[53] For a description that some Aboriginal people(s) have of 'nation-to-nation' with Canada see: Turner 2006, 4.

under both s. 2(a) of the *Charter* and under s. 35(1) of the *Constitution* "[t]he practical effect of this … is that the material conditions necessary for the exercise of native religion may be guaranteed as 'aboriginal or treaty rights', over and above the personal freedom to carry on the practices" (Woodward 1989, 14-6 to 14-7). It seems pertinent to mention here that arguments under s. 35(1) of the *Constitution* might be thought to have a greater chance of being granted but this does not necessarily mean that they will be granted them over s. 2(a) of the *Charter*. It seems there are too few cases involving either argument to make a distinction of which might be more successful. Nevertheless, the fact that s. 35(1) of the *Constitution* is thought to be more successful could, in practice, be leading to the opposite result.

With such few legal cases approaching the religious ways of Aboriginal peoples, and little legislation on the matter, it may seem that there is not enough data on the basis of which to analyse how the religious ways of Aboriginal peoples are viewed and treated legally in Canada. However, given that many Aboriginal peoples view their religions as pervading all aspects of their lives (Ross 2005, 3-4; Beaman 2002, 137; Stonechild 1994, "Foreword"), it seems that Aboriginal cases that do not deal with religion directly (or seemingly at all) may be sources of study in this regard. This thesis does just that in an examination of the *Delgamuukw* case.

APPENDIX 2 - CODING PROCESS

After establishing a preliminary method of discourses analysis I started by reading through the main *Delgamuukw* case a number of times getting a feel for what was being stated and potentially not stated and I determined some of the themes I would use in the coding process. Some of these themes resulted in additional discourse analysis approaches being added to my method. I then coded the *Delgamuukw* case and its related documents (the facta of the appellants, the respondents and the interveners). I went through each document highlighting particular words, phrases and paragraphs that fit together under my themes. These themes and words were words that related explicitly or indirectly to the religious ways of Aboriginal peoples such as, "spirituality/spiritual"; "sacred"; "ceremony/ceremonial"; "worshipping"; "legend"; "ritual"; "myth"; connecting words (words tying people through time such as "ancestors" or connecting them to the land); "land/territory"; "history/histories"; "traditions"; "oral"; "integral"; "sustenance/gather/hunt"; the term "indianness'; "adaawk" and "kungax"; "feasting"; "crests"; "totem poles"; and then other words that might be useful or have a religious element such as "customs," "practices,"; I also looked at words less related to religion such as, economic words (words dealing with money or resources); latin words; and "accommodation" terms; etc. I did not have all of these themes or categories to begin with, some of them were added later as they emerged through coding. When they emerged I then had to skim back though what I had previously coded to pull out relevant parts of previous documents that were pertinent to the new theme or category. As I went through the coding process I systematically put each paragraph that mentioned a particular theme, category or key word together in chronological order for each document so that I could see how each theme, category or key word was discussed over time throughout the pieces and whether there was consistency in the way they were discussed or

whether the way they were spoken about changed. I also created detailed table of contents for each document so that I was able to determine who was speaking/writing at which at each instance in the documents and what they were talking about in each section. Below is an example of some of my coding for "sacred" from the *Delgamuukw* case, it is followed by a table of contents from the case as well.

Sacred

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the 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. Both of these were entered as evidence on behalf of the appellants. The 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.

//The Chief Justice//
II. Facts.
B. The Gitksan and Wet' suwet'en Peoples
(4) Present Social Organization
13 At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. The trial judge held that these are marked, in some cases, by physical and tangible indicators of their association with the territories. He cited as examples totem poles with the Houses' crests carved, or distinctive regalia. In addition, the 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. Both of these were entered as evidence on behalf of the appellants (see my discussion of the trial judge's view of this evidence, infra).

14 The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitksan and Wet'suwet'en peoples 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. The trial judge also noted the Criminal Code prohibition on aboriginal feast ceremonies, which existed until 1951.

The Chief Justice:

- I. Introduction: 1-4
- II. Facts: 5-14
  - A. The Claim at Trial: 7
  - B. The Gitksan and Wet'suwet'wn Peoples: 8-14
    - (1) Demography: 8-9
    - (2) History: 10
    - (3) North American Exploration: 11
    - (4) Present Social Organization 12-14
- III. Judgements Below: 15-71
  - A. Supreme Court of British Columbia: 15-30
    - (1) General Principles 15-16
    - (2) Aboriginal Ownership 17-19
    - (3) Aboriginal Sovereignty 20
    - (4) Aboriginal Rights 21-22
    - (5) Extinguishment and Fiduciary Duties 23-25
    - (6) Damages 26
    - (7) Lands Subject to Aboriginal Rights at Sovereignty 27-28
    - (8) Other Matters 29
    - (9) Final Order 30
  - B. British Columbia Court of Appeal
    - (1) Judgement of Macfarlane J.A. (Taggart J.A. Concurring) 31-40
      - (a) Ownership Rights 32
      - (b) Aboriginal sustenance Rights 33
      - (c) Jurisdiction 34
      - (d) Extinguishment 35-37
      - (e) Relief Allowed 38-40
    - (2) Wallace J.A. (concurring) 41-47
      - (a) Scope of Appellate Review 41
      - (b) General Principles 42
      - (c) Aboriginal Ownership 43
      - (d) Aboriginal Rights ... and Use of Traditional Lands 44
      - (e) Aboriginal Jurisdiction or self-Government
      - (f) Extinguishment 46

After the coding was complete I looked for trends in and between documents and also looked for instances where there were such things as silences, particular tones used or cases where certain language could be seen as problematic. It is from this analysis process that I determined how the religious ways of Aboriginal peoples were handled in the *Delgamuukw* case, which was outlined in chapter 4.

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