SCC Court File No. 36664

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N :

KTUNAXA NATION COUNCIL and KATHRYN TENEESE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CITIZEN OF THE KTUNAXA

Appellants

- and -

MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS and GLACIER RESORTS LTD.

Respondents

- and -

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FACTUM OF THE INTERVENER, THE CANADIAN CHAMBER OF COMMERCE

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PART I—OVERVIEW

1. Introduction

1. The disposition of this appeal has far-reaching impacts on the development of large tracts of land throughout Canada that are subject to Aboriginal spiritual rights claims. The Canadian Chamber of Commerce (the "**Chamber**") intervenes to make two submissions.

2. *First*, while s. 2(a) of the *Charter* protects certain Aboriginal spiritual beliefs and practices, it does not protect subjective spiritual fulfilment from those beliefs and practices where it would restrain the otherwise lawful and competing behaviour of others that do not share the same religious beliefs.

3. *Second*, in cases where both s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982* are engaged, the Crown should consider s. 2(a) of the *Charter* and the duty to consult harmoniously under the duty to consult framework rather than conduct a separate *Charter* analysis.

4. The Chamber requests leave to present 10 minutes of oral argument at the hearing of this appeal. None of the parties hereto have made submissions on the interaction between s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982* in the context of asserted Aboriginal spiritual rights. This issue underpins the entire appeal, and is fundamental to the manner in which Aboriginal spiritual beliefs and practices are recognized and accommodated. The Chamber is putting forward a novel approach to resolving the legal and factual issues raised by the parties, and it is submitted that the Court will benefit from its oral submissions.

5. The Chamber represents over 200,000 businesses across Canada in all sectors of the economy and in every region of the country. This appeal directly implicates the Chamber's mission of ensuring a strong economy for all Canadians. This Court's decision could impact many development initiatives and related investments. The Chamber brings a national and cross-industry perspective to this appeal and its significant potential implications.

2. Statement of Facts

6. On March 20, 2012, the Minister of Forests, Lands and Natural Resource Operations (the "**Minister**") approved a Master Development Agreement ("**MDA**") granting permission to the Respondent Glacier Resorts Ltd. ("**Glacier**") to build a ski resort on Crown land in the Jumbo Valley of British Columbia.

7. This Ministerial approval was issued after over two decades of negotiations and regulatory reviews and several prior approvals. The Appellant Ktunaxa First Nation was closely involved in the 20 year review process that ultimately led to the MDA approval.[1]

8. The Appellants applied unsuccessfully for judicial review of the Minister's decision to approve the MDA, alleging that the MDA violated their right to freedom of religion under s. 2(a) of the *Charter* and that the Crown breached its duty to consult. The Appellants appealed to the British Columbia Court of Appeal, and the appeal was dismissed on August 6, 2015.

PART II—POSITION RESPECTING THE QUESTIONS IN THE APPEAL

9. The Chamber makes two submissions. *First*, section 2(a) of the *Charter* does not protect subjective spiritual fulfilment derived from religious or spiritual beliefs, as opposed to the right to hold and celebrate these beliefs, where it would restrain the rights of others and impose a positive obligation on the state which is inconsistent with the state's duty of neutrality. *Second*, where s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982* are both engaged in the context of asserted or established Aboriginal spiritual rights, s. 2(a) of the *Charter* and the duty to consult should be considered harmoniously together.

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[1] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 [BCCA Reasons], Appellants' Record [AR], Tab 4, ¶1 and 8-23.

PART III—ARGUMENT

1. Section 2(a) of the *Charter* does not impose a positive obligation on the state to support the religious beliefs of one group such that the rights of others are constrained

10. As this Court has held, freedom of religion is not absolute. Rather, it is "inherently limited by the rights and freedoms of others."[2] The context must therefore be considered.[3] As this Court explained in *Amselem*:

> Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, ***our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action***, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, ***and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected.*** The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[4]

11. As stated by Iacobucci and Bastarache JJ. in *Trinity Western University v. British Columbia College of Teachers*, "the freedom to hold beliefs is broader than the freedom to act on them".[5] While the Ktunaxa are free to hold particular beliefs, they are not entitled to act on them in a way that imposes their beliefs on others and restrains otherwise lawful conduct.

12. The Appellants seek here to restrain the rights of others who do not share the same beliefs,[6] and would force the Crown to impose Ktunaxa beliefs on others who have different beliefs, including non-belief.

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[2] *P.(D.) v. S(C.)*, [1993] 4 S.C.R. 141 at 182, Canadian Chamber of Commerce Book of Authorities ("Chamber BOA"), Tab 11.
[3] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 55, ¶60, Chamber BOA, Tab 14.
[4] *Ibid.*, ¶62 [emphasis added].
[5] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, ¶36, Book of Authorities of the Minister of Forests, Lands and Natural Resource Operations ("Minister BOA"), Tab 22.
[6] Appellants' Factum, see e.g. ¶7, 12-13, 108-109.

13. The Appellant's interpretation of s. 2(a) would impose a positive obligation on the Crown to maintain this land – in this case, Qat'muk, which is estimated to be approximately 14,714 hectares[7] – in a particular manner (in this case, to maintain the land as undeveloped), in order to facilitate Ktunaxa spiritual beliefs.

14. As stated by Gascon J. in *Mouvement laïque québécois v. Saguenay (City)*, the state must remain neutral. It cannot act in a way that favours certain religious groups and is hostile to others.[8] Using s. 2(a) of the *Charter* to impose land-use constraints on Crown held land based on the beliefs of one particular group would have this effect.

15. In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, the appellants argued that a municipality's failure to amend its by-laws in order to allow a place of worship to be built in a particular area of the municipality violated their s. 2(a) rights. Bastarache J., writing for the majority, held that there was no positive obligation on the municipality to do so, and that to find otherwise would be incompatible with the municipality's duty of neutrality as it would "be manipulating its regulatory standards in favour of a particular religion".[9]

16. Much like in *Lafontaine*, the Ktunaxa ask the Crown to provide assistance by requiring the Crown to regulate the use of land in a specific manner (non-use) for spiritual purposes.[10] Such an interpretation goes beyond the scope of s. 2(a) of the *Charter* and would have far-reaching effects. Significant portions of Crown land across Canada are subject to asserted Aboriginal spiritual rights. To require the Crown to restrict the use of all Crown held land over which Aboriginal spiritual rights are asserted on the basis of freedom of religion would impose a positive obligation on the Crown to curtail the use of broad swathes of land to facilitate Aboriginal spiritual beliefs.

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[7] BCCA Reasons, AR, Tab 4, ¶ 50 and 83.
[8] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, ¶75, Chamber BOA, Tab 9.
[9] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, ¶71 [emphasis added], Chamber BOA, Tab 3.
[10] Appellants' Factum, see e.g. ¶7, 12-13, 108-109.

2. Section 2(a) of the Charter and s. 35 of the *Constitution Act, 1982* should be considered harmoniously together if both are engaged by an asserted or established Aboriginal spiritual right

17. While the facts in this case do not fall within the ambit of s. 2(a) of the *Charter*, there are situations where adverse impacts to asserted or established s. 35 Aboriginal spiritual rights could engage s. 2(a) of the *Charter* in addition to triggering the duty to consult. Where this arises, the decision-maker should consider the *Charter* and the duty to consult harmoniously together rather than conducting a separate *Charter* analysis. This simply requires expanding the existing duty to consult framework to incorporate a modified *Doré* analysis.[11]

18. Administrative decision-makers should always consider *Charter* rights and values,[12] including for decisions relating to the duty to consult. However, this does not mean such consideration must take place in silos, separate and apart from other relevant constitutional rights. To the contrary, there are compelling reasons why potentially adverse impacts to Aboriginal spiritual practices and beliefs that both trigger the duty to consult and engage s. 2(a) of the *Charter* should be considered harmoniously together.

19. *First*, Aboriginal spiritual practices and beliefs raise unique constitutional and policy issues in comparison to other non-Aboriginal religious or spiritual practices and beliefs that may engage s. 2(a) of the *Charter*. These issues and the broader reconciliation process and imperative involved should not be segregated from any balancing of *Charter* values and statutory objectives required by *Doré*. Instead, such balancing is best achieved by integrating it with the duty to consult and the broader framework of s. 35(1) of the *Constitution Act, 1982,* the "grand purpose" of which is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[13] As stated by Lamer C.J. in *Van der Peet*,

> ***....what s. 35(1) does is provide the constitutional framework through which the fact that aboriginal lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.*** The substantive rights which fall within the provision

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[11] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, Appellants' Book of Authorities ("Appellant BOA"), Tab 11.
[12] *Ibid.*, ¶35.
[13] *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 S.C.R. 103, ¶10, Chamber BOA, Tab 1.

> must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[14] (emphasis added)

20. *Second*, as stated by the Appellants in their factum, Aboriginal "spiritual beliefs and practices are often inextricably bound up with and dependent upon specific areas of land."[15] This can raise unique s. 35 considerations when the land at issue is held by the Crown or a third-party and is subject to Aboriginal rights and title claims.

21. For example, in this case, the land is held by the Crown and there are overlapping Aboriginal rights and title claims between the Ktunaxa and the Shuswap Indian Band, which is physically closest to and supportive of the project. If the approval of the MDA engaged s. 2(a) of the *Charter,* the potential impact of a *Charter* determination is not limited to the Ktunaxa and the Crown.

22. Any limits on land use could also impact the asserted rights of another First Nation and the rights and interests of Glacier, future third-party proponents, and other recreational users of the land. Indeed, a determination that a portion of Crown land is a sacred site and must be protected for an Aboriginal group to carry out their spiritual practices is akin to granting Aboriginal title to that group, without any regard to whether such title can be established. This case highlights the problem with this potential issue given that the Minister determined that the strength of claim for Aboriginal title was weak due to a lack of exclusive use of the area.[16]

23. These conflicting asserted rights and interests and broader land-use questions are better weighed and balanced by integrating any required s. 2(a) *Charter* analysis under *Doré* with the duty to consult. The duty to consult is rooted in the honour of the Crown, is more flexible, and regularly requires the Crown to balance competing rights and interests related to land use and avoid potential adverse impacts to asserted or established Aboriginal and treaty rights. In fact, it was designed for the very purpose of protecting Aboriginal interests. As stated by this Court in *Rio Tinto Alcan*:

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[14] *R. v. Van der Peet,* [1996] 2 S.C.R. 507, ¶31, Chamber BOA, Tab 12.
[15] Appellants' Factum, ¶1.
[16] Minister's Rationale for Decision, ¶ 212, AR, Tab 2.

> ***The duty to consult described in Haida Nation derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right.***
>
> .....
>
> Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6. ***The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests.***[17]

24. It would be inimical to these purposes if the Crown could be found to have fulfilled its duty to consult and accommodate, and yet at the same time unjustifiably infringed *Charter* rights in the context of the same Aboriginal right. The two inquiries necessarily run together.

25. There are also significant practical advantages of integrating any analysis of s. 2(a) *Charter* rights with the duty to consult. As of 2011, the duty to consult was triggered on average over 100,000 times per year for some provinces, and over 5,000 times per year for the federal government.[18] The Chamber, in consultation with its members, has identified the lack of clarity around the duty to consult as one of the Top 10 Barriers to Competitiveness in Canada for the past two years.[19] The requirement to undertake a separate *Charter* analysis and two different balancing exercises when Aboriginal spiritual rights are asserted would inject additional uncertainty and duplication. This is unnecessary where the Crown clearly turns its mind to the potential impacts on the asserted Aboriginal spiritual rights of the project in question and ensures that appropriate accommodation measures are in place.

26. The duty to consult framework is sufficiently flexible and robust to integrate any required consideration of *Charter* rights and values as part of the larger reconciliation process. As this Court held in *Haida Nation*:

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[17] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, ¶33-34 [emphasis added], Chamber BOA, Tab 13.

[18] Indian and Northern Affairs Canada, Statement by the Observer Delegation of Canada delivered by Jean-Francois Tremblay, Senior Assistant Deputy Minister, Indian and Northern Affairs Canada, at the tenth session of the United Nations Permanent Forum on Indigenous Issues: Follow-Up to the Recommendations of the Permanent Forum on Free, Prior and Informed Consent, May 17, 2011, Chamber BOA, Tab 15.

[19] Affidavit of Warren Everson, ¶9, Motion Record of the Chamber of Commerce on Leave to Intervene, Tab 2.

> ***The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.*** Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people....
>
> ...
>
> ***Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.*** The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake... [P]ending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.[20]

27. In situations where *Charter* rights and values are engaged, there is inherent flexibility to require deeper consultation or more significant accommodation to ensure that the relevant *Charter* rights are appropriately considered and balanced. This may require the Crown to make changes to its proposed action, to avoid irreparable harm, or to minimize the effects of any impacts.[21]

28. The consideration of applicable *Charter* rights and values within the duty to consult framework is conceptually consistent with a *Doré* analysis, which requires administrative decision-makers to balance any engaged *Charter* protections to ensure that they are limited no more than necessary given the applicable statutory objectives they are obliged to pursue.[22] At the same time, it allows for the *Doré* analysis to incorporate and balance other relevant factors beyond statutory objectives, including competing rights and interests of other Aboriginal groups and non-Aboriginal Canadians and the broader reconciliation agenda.

29. The consideration of these issues together also allows the Crown (and if necessary the Court) to take into account other factors that may be relevant to assessing

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[20] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, ¶32 and 45 [emphasis added], Minister's BOA, Tab 9.
[21] *Ibid.*, ¶46-47.
[22] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, ¶4, Chamber BOA, Tab 6.

the severity of the alleged impacts on asserted or established Aboriginal spiritual rights and the adequacy of consultation and accommodation related thereto, including:

(a) All opportunities for consultation including through proponents, regulatory processes and by the Crown;[23]

(b) Strength of claim, current use of the land impacted by the decision by the Aboriginal group for spiritual purposes, and the prior uses of such land by other third parties;[24]

(c) Positions taken with respect to prior related decisions and the reciprocal obligations of Aboriginal groups to promptly raise concerns and interests once they have had an opportunity to consider the information;[25]

(d) Whether the harm alleged to Aboriginal spiritual practices is reasonably foreseeable or speculative;[26] and

(e) Efforts by the Crown and the proponent to respond to concerns raised through accommodation measures that avoid or minimize the specific harm alleged.

PART IV—COSTS

30. Pursuant to the August 31, 2016 order of Wagner J., the Chamber undertakes to pay the Appellant and Respondents any additional disbursements occasioned to them by its intervention, but requests that no costs otherwise be awarded for or against it.

PART V—REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

31. The Chamber requests that it be permitted to present ***10 minutes of oral argument*** at the hearing of the appeal.

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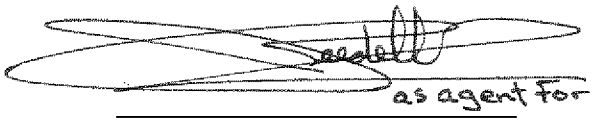
[23] *Martin v. Province of New Brunswick*, 2016 NBQB 138, ¶155-156, Chamber BOA, Tab 7; *Nunatsiavut v. Canada (Department of Fisheries and Oceans)*, 2015 FC 492, ¶191-192, Chamber BOA, Tab 10.
[24] *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, ¶103-104, Chamber BOA, Tab 4.
[25] *Martin v. Province of New Brunswick*, 2016 NBQB 138, ¶155-156, Chamber BOA, Tab 7; *Canada v. Long Plain First Nation*, 2015 FCA 177, ¶158-159, Chamber BOA, Tab 2; and *Mikisew Cree First Nation v. Canada*, 2005 SCC 69, [2005] 3 S.C.R. 388, ¶65, Chamber BOA, Tab 8.
[26] *Hupacasath v. Canada*, 2015 FCA 4, ¶102 & 117, Chamber BOA, Tab 5. While these comments were made in the context of whether the duty to consult is triggered, the same principles regarding speculative impacts are applicable to the assessment of potential adverse impacts if the duty to consult is triggered.

32. The Chamber brings a unique and broad perspective to this appeal. Neither the Appellants nor the Respondents bring a national and cross-industry perspective and none have them have addressed the interplay between s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982*. Similarly, none of the other interveners have proposed a framework by which s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982* may be considered together.

33. The Chamber is uniquely well-positioned to make this submission, as its members frequently engage in developments across the country that trigger the duty to consult. The determination of the issues before the Court on this appeal may have a far-reaching impact on the Chamber's members and the Canadian economy as a whole. It is important that the Court hear oral arguments from the Chamber upon these issues, particularly its novel approach to considering s. 2(a) of the *Charter* and s. 35 of the *Constitution Act, 1982* harmoniously together, so that it will have the opportunity to fully examine these issues and the unique perspective the Chamber brings before rendering its judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2016.



Neil Finkelstein
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Jessica L. Laham
Counsel for the Intervener,
The Canadian Chamber of Commerce

PART VI—TABLE OF AUTHORITIES

Tab	Authority	Paragraph(s) Referenced in Memorandum of Argument
17.	*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31	11
OTHER SOURCES		
18.	Indian and Northern Affairs Canada, Statement by the Observer Delegation of Canada delivered by Jean-Francois Tremblay, Senior Assistant Deputy Minister, Indian and Northern Affairs Canada, at the tenth session of the United Nations Permanent Forum on Indigenous Issues: Follow-Up to the Recommendations of the Permanent Forum on Free, Prior and Informed Consent, May 17, 2011	25

PART VII—LEGISLATION RELIED UPON

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11, s. 2(a)

2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes:
(a) freedom of conscience and religion;	(a) liberté de conscience et de religion;

Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11, s. 35(1)

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**35** (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.