

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

BETWEEN:

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

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-and-

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**FACTUM OF THE INTERVENER,  
SHIBOGAMA FIRST NATIONS COUNCIL**  
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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## TABLE OF CONTENTS

## PAGE

<b>PART I – OVERVIEW AND STATEMENT OF FACTS</b> .....	1
A. Overview .....	1
B. Facts .....	1
<b>PART II – QUESTIONS AT ISSUE</b> .....	1
<b>PART III – STATEMENT OF ARGUMENT</b> .....	2
A. The basic issue at stake in this case is the scope of the state’s obligations when it makes a land use decision that affects religious belief and practice .....	2
B. Equality values must guide the interpretation of religious freedom under the <i>Charter</i> .....	4
C. A Framework for Equal Protection under s. 2(a) .....	5
1. <i>The infringement analysis must focus on the claimants’ experience and tradition, understood on their own terms</i> .....	6
2. <i>Competing rights and interests should be considered under the proportionality analysis, not as an internal limit on s. 2(a)</i> .....	7
D. Canada’s international human rights commitments guarantee equal access to basic human rights for Indigenous peoples .....	8
E. This approach is consistent with the Treaty relationship .....	10
<b>PART IV – COSTS</b> .....	10
<b>PART V – ORDER REQUESTED</b> .....	10
<b>PART VI – TABLE OF AUTHORITIES</b> .....	11
<b>PART VII – STATUTORY PROVISIONS</b> .....	14



## PART I - OVERVIEW AND STATEMENT OF FACTS

### A Overview

1. The question at the heart of this appeal is the scope of the state's obligations when it decides whether to approve a development on Crown land. These obligations are informed by the constitutional protection for the freedom of religion under s. 2(a) of the *Charter of Rights and Freedoms*.<sup>1</sup> This appeal is not about the impact of religious practice on private property rights, as the land at issue in this case is Crown land. It is not about the Ktunaxa attempting to force their religious practices upon others. It is only about the role that the Ktunaxa's religious practices should play in the decision-making of the Crown in the issuance of a development permit.

2. Accounting for the competing interests in this case does not require imposing an internal limit on s. 2(a). By imposing such internal limits, the courts below made a radical and troubling departure from this Court's religious freedom jurisprudence that effectively excludes Indigenous religious practices and beliefs tied to sacred places from the protection of the *Charter*.

3. Religious freedom is in part an equality right – a right not to have one's religious beliefs discounted or denigrated simply because they diverge from the mainstream. Shibogama First Nations Council ("SFNC") submits *Charter* values of equality and pluralism, alongside Canada's international human rights commitments, must guide the scope and application of s. 2(a). This requires: 1) focusing on the claimant's belief, understood on its own terms, when assessing whether s. 2(a) is engaged; and 2) addressing competing rights and interests as part of the proportionality analysis, rather than by imposing an internal limit on the scope of s. 2(a).

### B Facts

4. SFNC adopts the facts as set out in the Appellant's factum.

## PART II – QUESTIONS AT ISSUE

5. SFNC takes the position s. 2(a) of the *Charter of Rights and Freedoms* should be interpreted to include within its scope the protection of beliefs and practices tied to Indigenous sacred places.

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982*, c 11 ("*Charter*").

### PART III – STATEMENT OF ARGUMENT

#### **A The basic issue at stake in this case is the scope of the state’s obligations when it makes a land use decision that affects religious belief and practice**

6. The *Charter* sets out the Canadian state’s most fundamental commitments to the rights and freedoms of its people. It enumerates a set of guarantees that the government may limit “only if it can justify those limitations as proportionate”.<sup>2</sup> When making administrative decisions, governments have an obligation to ensure that, any time a decision limits *Charter* rights, the decision reflects a proportionate balancing between the *Charter* protections at stake and the relevant statutory mandate.<sup>3</sup>

7. The key issue in this case is whether the Minister’s decision engages religious freedom under the *Charter* – that is, the right, shared by every person in Canada, to “entertain such religious beliefs as a person chooses” and “to manifest [those] religious beliefs” without state interference.<sup>4</sup> The Courts below concluded that it did not. SFNC submits that it must.

8. The Court of Appeal characterized the Ktunaxa’s religious belief as seeking to “control (or at least modify) the behaviour of others on their own property”<sup>5</sup> and to impose “constraints on people who do not share that same religious belief”<sup>6</sup>. This, in the Court of Appeal’s view, was not protected by s. 2(a).<sup>7</sup>

9. The Ktunaxa are not asking anyone to share their religious belief, or participate in their rituals. Nor are the Ktunaxa asking the state to interfere with a private property right.<sup>8</sup> The ski resort is being proposed for what is Crown land under Canadian law. The competing interests are not property rights, but economic interests<sup>9</sup> – the private economic interests of the proponent in securing regulatory approval for a potentially lucrative ski development project they hope to pursue, and the broader public interest in promoting economic activity in the region. The proponent can have no legal right to the land until the resolution of this appeal.

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<sup>2</sup> *Loyola High School v. Attorney General (Quebec)*, 2015 SCC 12, [2015] 1 SCR 613 at para 38, Intervener SFNCs Book of Authorities, herein after “I.B.A.” Tab 9 [“*Loyola*”].

<sup>3</sup> *Loyola*, *supra*, at para 39, I.B.A. Tab 9; *Doré v. Barreau du Québec*, [2012] 1 SCR 395 at para 57, I.B.A. Tab 3 [“*Doré*”].

<sup>4</sup> *R v Big M Drug Mart*, [1985] 1 SCR 295 at 336, I.B.A. Tab 13 [“*Big M.*”].

<sup>5</sup> *Ktunaxa Nation v. British Columbia*, 2015 BCCA 352 [“*Ktunaxa*, BCCA”] at para 71, emphasis added.

<sup>6</sup> *Ktunaxa*, BCCA at para 73.

<sup>7</sup> *Ktunaxa*, BCCA at para 74.

<sup>8</sup> Factum of the Appellant Ktunaxa Nation at paras 83-84.

<sup>9</sup> As acknowledged by the Factum of the Respondent Minister at para 60-62.

10. The Ktunaxa are simply asking the state to consider their religious practices when making a decision that would fundamentally disrupt their belief system, and seriously interfere with their ability to manifest those beliefs through practice. This is an ordinary *Charter* case about how the state is to balance religious freedom against competing economic interests, and the accommodations required to make space for different religions in the public life of Canada.

11. In *Rosenberg v Outremont*, decided under s. 3 of the *Quebec Charter*, the Quebec Superior Court found in favour of a very similar claim. In that case, the Hasidic Jewish community erected wires and strings throughout the city to mark an *eruv*, or domestic sphere. The purpose of the *eruv* was to make it easier for the community to obey religious rules about removing things from one building to another on the Sabbath and on religious holidays.<sup>10</sup> One of the interveners argued that the *eruv* forced the Hasidic community's neighbours to participate in a religious enclave against their will.<sup>11</sup> The Court rejected this argument, and held that the City of Outremont could not remove the wires. It observed that Outremont was "not being asked to associate itself with the Orthodox Jewish faith,"<sup>12</sup> but rather to accommodate the Hasidic community's practice of its own faith. Like the Hasidic community in *Rosenberg*, the Ktunaxa are asking the state to refrain from interfering with the basic conditions that enable them to practice their faith. Protecting religious beliefs that depend on sacred places similarly requires that the government refrain from taking steps – directly, or indirectly – to desecrate those places.

12. The Court of Appeal's approach creates an internal limit on s. 2(a) that effectively denies the very possibility of *Charter*-protection for beliefs tied to sacred places. This new internal limit applies disproportionately to Indigenous peoples, who are much more likely to have a religious tradition that is intimately connected to the sacred places in their traditional territories,<sup>13</sup> and – because of the impacts of colonization – much less likely than non-Indigenous religious communities to be able to control their sacred places through the laws of private property. What Canadian law sees as Crown land, and Glacier resorts sees as a potential development site, is – when the colonial lens is lifted – the Indigenous Peoples' homeland.

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<sup>10</sup> *Rosenberg v Outremont*, [2001] OJ No 2858 at para 7, I.B.A. Tab 17 ["*Rosenberg*"].

<sup>11</sup> *Ibid* at para 18, I.B.A. Tab 17.

<sup>12</sup> *Ibid* at para 25, I.B.A. Tab 17.

<sup>13</sup> *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 460-1, per Brennan J. (dissenting) I.B.A. Tab 10.

## **B Equality values must guide the interpretation of s. 2(a)**

13. As Abella J. explained in *Loyola High School*, “the purpose of a constitutional right is the realization of constitutional values.”<sup>14</sup> These values “underpin each right and [...] give it meaning.”<sup>15</sup> At the infringement stage, the values of the *Charter* help determine the scope of each right<sup>16</sup> and the extent of any infringement.<sup>17</sup> In the *Doré* proportionality analysis, *Charter* values serve as a guide to “when limitations on [a] right are proportionate in light of the applicable statutory objective”.<sup>18</sup>

14. Equality is one of the core *Charter* values that underpins religious freedom.<sup>19</sup> Religious freedom under the *Charter* protects the right to “entertain such religious beliefs as a person chooses” and “to manifest [those] religious beliefs” without state interference.<sup>20</sup> The efficacy of this promise depends on the capacity of s. 2(a) to offer equal protection to a wide variety of beliefs and practices –especially beliefs held by a minority. In *Big M Drug Mart*, Dickson C.J. held that, “A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms”.<sup>21</sup> He warned that, “the protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.”<sup>22</sup>

15. The close relationship between equality and religious freedom flows in part from the deeply rooted role of religious belief in individual and group identity. Religious belief and practice orients a person in the world, forms his or her identity, and shapes his or her perception of the social and natural orders.<sup>23</sup> Because it is so fundamental, as Gascon J. observed in *Mouvement laïque québécois v Saguenay (City)*, “when the state treats [a person’s] religious

<sup>14</sup> *Loyola, supra*, at para 36, I.B.A. Tab 9.

<sup>15</sup> *Ibid* at para 36, I.B.A. Tab 9.

<sup>16</sup> *Saskatchewan Federation of Labour v Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4 para 53, I.B.A. Tab 19 [“*Saskatchewan Federation*”]; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 at paras 39, 80-82, I.B.A. Tab 4.

<sup>17</sup> *Loyola, supra*, at para 36, I.B.A. Tab 9.

<sup>18</sup> *Ibid* at para 36, I.B.A. Tab 9.

<sup>19</sup> R. Moon, “Freedom of Conscience and Religion”, (2013) 61 Sup Ct L Rev (2d) 339-428 at para 2, I.B.A. Tab 33.

<sup>20</sup> *Big M, supra* note 4 at 336, I.B.A. Tab 13.

<sup>21</sup> *Ibid* at 336, [emphasis added], I.B.A. Tab 13.

<sup>22</sup> *Ibid* at 337, I.B.A. Tab 13.

<sup>23</sup> Richard Moon “Accommodation without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony* (2010), 51 Sup Ct L Rev (2d) 95-130 at para 43, I.B.A. Tab 32. See also: *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 SCR 3, at para 73, I.B.A. Tab 11 [“*Mouvement laïque québécois*”].

practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community [...], it is not simply rejecting the individual's views and values, it is denying her or his equal worth".<sup>24</sup>

16. Equality under the *Charter* means substantive and not merely formal equality. As under s. 15 of the *Charter*, a substantive equality approach to s. 2(a) requires taking account of the social, historical and economic context in which a claim arises.<sup>25</sup> For many years, Indigenous Peoples in Canada have endured state actions targeted at erasing their Indigenous spiritual beliefs and identity through the criminalization of ceremonies and the imposition of residential schools.<sup>26</sup> Continuing to treat Indigenous Peoples' beliefs as less important by denying them protection under the *Charter* exacerbates rather than dismantles this legacy.

17. In interpreting the scope of s. 2(a), this Court should accordingly be guided by the objective of ensuring its protections extend meaningfully to different forms of belief, including those held by Indigenous Peoples. Such an approach is foundational to reconciliation.

18. This is reinforced by s. 27 of the *Charter*, which directs that the rights enumerated in the *Charter* must be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."<sup>27</sup> By ensuring the state is even-handed as between different religious traditions, religious freedom "allows communities with different values and practices to peacefully coexist" and through this, supports pluralism.<sup>28</sup> Section 27 requires that the scope of s. 2(a) "be interpreted [...] with a view to promoting and enhancing diversity".<sup>29</sup>

### **C A Framework for Equal Protection under s. 2(a)**

19. Given the importance of equality values in religious freedom, SFNC submits that s. 2(a) must be interpreted to protect the integrity of Indigenous values systems by including within its scope Indigenous beliefs and spiritual practices tied to sacred places.

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<sup>24</sup> Richard Moon, "Freedom of Religion Under the *Charter of Rights: The Limits of State Neutrality*" (2012), 45 UBC L Rev 497 at 507, cited in *Mouvement laïque québécois, supra*, at para 73 I.B.A. Tab 11, emphasis in original; see also, *Loyola, supra*, at para 44, I.B.A. Tab 9.

<sup>25</sup> *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548 at para 17, I.B.A. Tab 8; *Big M, supra*, at 347, I.B.A. Tab 13.

<sup>26</sup> See, for instance, *Indian Act*, SC 1884, c 27, s 3, I.B.A. Tab 40; *Indian Act* SC 1895, c35, s 6, I.B.A. Tab 41.

<sup>27</sup> *Big M, supra*, at 337-338, I.B.A. Tab 13; *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 758-759, I.B.A. Tab 14 ["*Edward Books*"]; *Mouvement laïque québécois, supra*, at para 74, I.B.A. Tab 11.

<sup>28</sup> *Loyola, supra*, at para 45, I.B.A. Tab 9.

<sup>29</sup> *Mouvement laïque québécois, supra*, at para 74 I.B.A. Tab 11.

**1. *The infringement analysis must focus on the claimants' experience and tradition, understood on their own terms***

20. Under the test set out *Syndicat Northcrest v Amselem*, to establish an infringement of s. 2(a), the claimant must show: 1) that he or she has a sincerely held belief that has a “nexus” with religion; and 2) that the state conduct at issue interferes with that practice or belief in a manner that is more than trivial or insubstantial.<sup>30</sup> The test for demonstrating the sincerity of a religious belief is not rigorous: it is “only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious.”<sup>31</sup>

21. It is essential, however, to correctly characterize the claimant’s asserted belief or practice in light of his or her own tradition. To misstate the nature of her belief or practice would make it difficult to properly assess whether that belief or practice falls within the scope of s. 2(a), as well as whether it has been infringed.

22. In *Jack and Charlie v The Queen*, for example, a pre-*Charter* case that addressed whether the British Columbia *Wildlife Act* interfered with the religious freedom of the Coast Salish, the issue was whether killing a deer in preparation for a religious ceremony was protected by the “fundamental” principles of religious freedom”.<sup>32</sup> In concluding that it was not, the Court compared the practices of killing the deer to purchasing sacramental wine as part of a Holy Communion ceremony, reasoning that both the purchase of wine and the killing of a deer are not ceremonial.<sup>33</sup> As Prof. Borrows explains, by relying on a faulty analogy to Christian traditions, the Court failed to engage with “the holistic practices of Salish spiritual life” and thus mischaracterized the nature of their practice.<sup>34</sup>

23. In this case, the courts below made a similar mistake by failing to fully understand from within the adherent’s perspective the deep connection between the sacred place, Qat’muk, and the Ktunaxa’s belief in the Grizzly Bear Spirit.<sup>35</sup> Instead, they focused primarily on the perceived impact of protecting the sacred place on the developer seeking regulatory approval.

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<sup>30</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, 2004 SCC 47 at paras 56, 59, I.B.A. Tab 22 [“*Amselem*”].

<sup>31</sup> *Ibid* at para 52, I.B.A. Tab 22.

<sup>32</sup> *Jack and Charlie v The Queen*, [1985] 2 SCR 332 at 338, I.B.A. Tab 6.

<sup>33</sup> *Ibid* at 345, I.B.A. Tab 6.

<sup>34</sup> John Borrows, “Living Law on Living Earth,” in *Canada’s Indigenous Constitution*, (Toronto: University of Toronto Press, 2010) at 252, I.B.A. Tab 28 [“Borrows”].

<sup>35</sup> *Ktunaxa Nation v British Columbia*, 2014 BCSC 568 at paras 296-299; *Ktunaxa*, BCCA at paras 63-74.

24. Because the belief or practice should be characterized from the perspective of the claimant, the claimant's own context is an indispensable part of this analysis. Given the historical context of residential schools, it is not surprising that religious beliefs and practices may not be widely practiced, or easily discussed and shared. This should not lead the Court to doubt the sincerity of the believer, or discount the import of the belief. Nor should the fact that people may not physically attend a sacred place for ceremonies necessarily be held to indicate that its desecration would have only a trivial impact on believers: in some Indigenous religions sacred spaces are honoured through a prohibition on humans from visiting and disturbing the place.<sup>36</sup> Protecting and respecting the Creator's gifts can be a crucial spiritual responsibility. Interfering with a site that must remain intact for the spiritual purposes of a religious group is as at least as much of a constraint as physically removing a religious object, like an *eruv*.

25. Under *S.L. v Commission Scolaire des Chênes*, the test for whether the state has interfered with a claimant's practice or belief is objective: the claimant is required to adduce evidence to show "facts that can be established objectively" about how their belief or practice "might reasonably or actually be threatened" by the state action.<sup>37</sup> This evidentiary rule requires the claimant to demonstrate the impact of the state action – that a Sunday closing law drives up the cost of business for a person who observes Saturday as a religious day of rest,<sup>38</sup> or, as in this case, of the ways in which a sacred place would be materially impacted by the Minister's approval of a proposed resort.

**2. *Competing rights and interests should be considered under the proportionality analysis, not as an internal limit on s. 2(a)***

26. Religious freedom is not absolute: s. 2(a) requires the state to "accommodate individuals' freedom to hold and express religious beliefs and engage in religious practices *unless* doing so would interfere with the rights of others or with compelling social interests."<sup>39</sup> However, this Court has repeatedly confirmed that these competing rights and interests should be addressed

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<sup>36</sup> Darlene Johnston, "Respecting and Protecting the Sacred", paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006), at 6, I.B.A. Tab 30; *Hiawatha First Nation v. Ontario (Minister of the Environment)*, [2007] OJ No 506, 221 OAC 113, at para 45 (Ont. Div. Ct.), I.B.A. Tab 5; Borrows at 246-47; Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (UBC Press, 2005) at 53, I.B.A. Tab 18.

<sup>37</sup> *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235, at paras 23-24, I.B.A. Tab 21; *Edwards Books, supra*, at 759.

<sup>38</sup> *Edward Books, supra* note 27 at 763-767, I.B.A. Tab 14.

<sup>39</sup> Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship", in *Law and Religious Pluralism in Canada*, Richard Moon Ed. (Vancouver: UBC Press, 2008) 87-109 at 87. I.B.A. Tab 36.

under s. 1, and not by imposing an internal limit on s. 2(a). This has been so even in cases where the religious belief in question demonstrably injures non-believers.<sup>40</sup>

27. There is no reason to depart from this approach. Using competing interests to justify circumscribing a sincerely held belief or practice as part of the infringement analysis is inconsistent with the test in *Amselem*, and risks obscuring the basis on which protection for a particular belief or practice is recognized or denied. It also limits the courts' ability to respond when the impact of a proposed state action on a sacred place and associated beliefs is catastrophic, and the competing interests are relatively insignificant. The proportionality frameworks set out in *Doré* and *Oakes*, on the other hand, offer effective, transparent and sensitive tools for identifying the competing concerns at stake, and weighing them against the effect of the state action on the claimants.<sup>41</sup>

#### **D Canada's international human rights commitments guarantee equal access to basic human rights for Indigenous peoples**

28. This approach is reinforced by Canada's international human rights obligations. This Court has long recognized that the norms of international human rights law should guide the interpretation of the rights enshrined in the *Charter*. The *Charter* can be "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents" to which Canada is a party.<sup>42</sup> In addition, as Dickson C.J. explained in his influential dissent in *Reference Re Public Service Employee Relations Act (Alta.)*,

The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in

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<sup>40</sup> *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 74, I.B.A. Tab 18; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, at para 154, I.B.A. Tab 20. See also: *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, at para 26, I.B.A. Tab 12. See also: *B (R) v Children's Aid Society*, [1995] 1 SCR 315 at 383-384, I.B.A. Tab 1, where the belief would have caused harm to a child born into the religious tradition.

<sup>41</sup> *Doré*, *supra*, I.B.A. Tab 3; *R. v Oakes*, [1986] 1 SCR 103, I.B.A. Tab 15. See, generally, *Loyola*, *supra*, at paras 39-40, I.B.A. Tab 9.

<sup>42</sup> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at 349-350 per Dickson CJ in dissent, I.B.A. Tab 16 ["*Alberta Reference*"]; see also *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157, at paras 22-23, I.B.A. Tab 2; *Saskatchewan Federation*, *supra*, at paras 64-65, I.B.A. Tab 19.



my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.<sup>43</sup>

29. The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") is an authoritative source of international human rights law.<sup>44</sup> UNDRIP has been relied upon by a number of domestic courts and international human rights bodies to interpret the scope of international human rights instruments and domestic constitutional rights.<sup>45</sup> Canada supports UNDRIP without qualification.<sup>46</sup>

30. Art. 12 of UNDRIP applies directly to this case:

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

31. Art. 1 of UNDRIP also confirms that Indigenous peoples should have the full benefit of other human rights and fundamental freedoms:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.<sup>47</sup>

32. A number of binding international instruments guarantee the right to manifest religion or belief, including Art. 18 of the International Covenant on Civil and Political Rights, which protects the right to freedom of thought, conscience and religion, and to manifest religion or belief in teaching, practice, worship and observance.<sup>48</sup> Art. 1 of UNDRIP accordingly reaffirms

<sup>43</sup> *Alberta Reference*, *supra*, at 348, I.B.A. Tab 16, per Dickson CJ in dissent. This dissent was adopted by the majority of the Court in *Saskatchewan Federation*, *supra*, I.B.A. Tab 19.

<sup>44</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), I.B.A. Tab 27 [UNDRIP].

<sup>45</sup> Inter-American Court of Human Rights, *Case of Saramaka People v Suriname*, Judgment of Nov 28, 2007 (Preliminary Objections, Merits, Reparations and Costs) at para 131, I.B.A. Tab 25; *John Hanita Paki and other v The Attorney-General* [2014] NZSC 118 (29 August 2014) at para 158, I.B.A. Tab 7; *Takamore v Clarke* [2011] NZCA 587 (23 November 2011) at para 250, I.B.A. Tab 23; Committee on the Elimination of Racial Discrimination [CERD] *Concluding observations on the eighteenth to the twentieth periodic reports of New Zealand* CERD/C/NZL/CO/18-20 (2013) at 18, I.B.A. Tab 24.

<sup>46</sup> Government of Canada (2016) Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10. Government of Canada, May 10th, [news.gc.ca/web/article-en.do?nid=1064009](http://news.gc.ca/web/article-en.do?nid=1064009). Accessed October 25, 2016, I.B.A. Tab 29. See: "Honouring Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada," (2015) at 187-191, 191, I.B.A. Tab 37.

<sup>47</sup> UNDRIP, *supra*, I.B.A. Tab 27.

<sup>48</sup> International Covenant on Civil and Political Rights, at Art 18, I.B.A. Tab 26.

the binding principle of international law that Indigenous people, like all others, are entitled to full enjoyment of religious freedom, including the right to manifest their religious beliefs.

**E This approach is consistent with the Treaty relationship**

33. Finally, an interpretation of s. 2(a) of the *Charter* that is capable of protecting Indigenous religious beliefs tied to sacred places is consistent with the Treaty relationship. From the Indigenous perspective, it has long been understood that the spirit and intent of the Treaty relationship is a commitment to an ongoing relationship of mutual respect and understanding.<sup>49</sup> Mutual respect means that Crown decision-making must recognize the spiritual beliefs and practices of Indigenous people on at least equal terms with non-Indigenous belief systems. Reconciliation requires acknowledging the deep spiritual relationships that connect many Indigenous Peoples to their lands, and making space in Canadian law for those relationships to be recognized and equally protected.

34. The Treaty relationship also recognizes the right of Treaty partners to exist as independent peoples,<sup>50</sup> and acts as a guarantee of the continuity of Indigenous ways of life.<sup>51</sup> In this sense, it is the foundational form of pluralism in Canada. Like s. 27 of the *Charter*, it points toward an obligation to equally respect the religious practices and beliefs of Indigenous Peoples.


**PART IV– COSTS**

35. SFNC seeks no costs of this motion and requests that none be awarded against it.

**PART V - ORDER REQUESTED**

36. SFNC respectfully seeks to present oral submissions not to exceed ten minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25<sup>th</sup> DAY OF OCTOBER, 2016.



Senwung Luk and Krista Nerland  
Counsel for the Intervener, Shibogama First Nations Council

<sup>49</sup> Janna Promislow, “Special Issue: Law on the Edge: Treaties in History and Law,” (2014) 47 UBC L Rev 1085-1183 at para 2, I.B.A. Tab 34.

<sup>50</sup> Mark D Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall,” (Fall 2001), 24 Dalhousie LJ No. 75 at 81-83, esp. 82, I.B.A. Tab 38.

<sup>51</sup> Leroy Little Bear, “Aboriginal Paradigms: implications for Relationships to Land and Treaty Making,” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions; Strategies, Directions*, (Saskatoon: Purich Publishing, 2004), 26-38 at 37, I.B.A. Tab 31.

## PART VI – TABLE OF AUTHORITIES

<b>TAB</b>		<b>Paragraph Reference</b>
	<b>Cases</b>	
<b>1</b>	<i>B. (R.) v Children’s Aid Society</i> , [1995] 1 SCR 315	28
<b>2</b>	<i>Divito v Canada (Public Safety and Emergency Preparedness)</i> , [2013] 3 SCR 157, 2013 SCC 47	30
<b>3</b>	<i>Doré v Barreau du Québec</i> , [2012] 1 SCR 395, 2012 SCC 12	6, 29
<b>4</b>	<i>Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia</i> , [2007] 2 SCR 391, 2007 SCC 27	14
<b>5</b>	<i>Hiawatha First Nation v. Ontario (Minister of the Environment)</i> , [2007] O.J. No. 506, 221 O.A.C. 113, at para. 45 (Ont. Div. Ct.)	26
<b>6</b>	<i>Jack and Charlie v The Queen</i> , [1985] 2 SCR 332.	24
<b>7</b>	<i>John Hanita Paki and other v The Attorney-General</i> , [2014] NZSC 118 (29 August 2014)	31
<b>8</b>	<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30, [2015] 2 SCR 548	17
<b>9</b>	<i>Loyola High School v Quebec (Attorney General)</i> , [2015] 1 SCR 613, 2015 SCC 12	6, 14, 16 19, 29
<b>10</b>	<i>Lyng v. Northwest Indian Cemetery Protective Association</i> , 485 U.S. 439 (1988)	13
<b>11</b>	<i>Mouvement laïque québécois v Saguenay (City)</i> , [2015] 2 SCR 3, 2015 SCC 16	16, 19
<b>12</b>	<i>Multani v Commission scolaire Marguerite-Bourgeoys</i> , [2006] 1 SCR 256, 2006 SCC 6	28
<b>13</b>	<i>R. v Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295	7, 15, 17, 19
<b>14</b>	<i>R. v Edwards Books and Art Ltd.</i> , [1986] 2 SCR 713	19, 27
<b>15</b>	<i>R. v Oakes</i> , [1986] 1 SCR 103	29
<b>16</b>	<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , [1987] 1 SCR 313, 38 DLR (4th) 161	30
<b>17</b>	<i>Rosenberg v Outremont</i> , [2001] OJ No. 2858	11, 12

<b>TAB</b>		<b>Paragraph Reference</b>
<b>18</b>	<i>Ross v. New Brunswick School District No. 15</i> , [1996] 1 SCR 825	28
<b>19</b>	<i>Saskatchewan Federation of Labour v Saskatchewan</i> , [2015] 1 SCR 245, 2015 SCC 4	14, 30
<b>20</b>	<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , [2013] 1 SCR 467, 2013 SCC 11	28
<b>21</b>	<i>S.L. v Commission Scolaire des Chênes</i> , [2012] 1 SCR 235, 2012 SCC 7	27
<b>22</b>	<i>Syndicat Northcrest v Amselem</i> , [2004] 2 SCR 551, 2004 SCC 47	21, 22
<b>23</b>	<i>Takamore v Clarke</i> [2011] NZCA 587 (23 November 2011)	31
<b>International Human Rights Instruments and decisions of human rights bodies</b>		
<b>24</b>	Committee on the Elimination of Racial Discrimination [CERD] <i>Concluding observations on the eighteenth to the twentieth periodic reports of New Zealand</i> CERD/C/NZL/CO/18-20 (2013)	31
<b>25</b>	Inter-American Court of Human Rights, <i>Case of Saramaka People v Suriname</i> , Judgment of Nov 28, 2007 (Preliminary Objections, Merits, Reparations and Costs)	31
<b>26</b>	<i>International Covenant on Civil and Political Rights</i> , 999 UNTS 171 and 1057 UNTS 407.	34
<b>27</b>	<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , GA. Res. 61/295, UN GAOR, 61st Sess., Annex, UN Doc. A/RES/61/295(2007)	31, 32, 33
<b>Secondary Sources</b>		
<b>28</b>	John Borrows, “Living Law on Living Earth,” in <i>Canada’s Indigenous Constitution</i> , (Toronto: University of Toronto Press, 2010).	24, 26
<b>29</b>	Government of Canada (2016) Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10. Government of Canada, May 10th, <a href="http://news.gc.ca/web/article-en.do?nid=1064009">news.gc.ca/web/article-en.do?nid=1064009</a> . Accessed October 25, 2016.	31
<b>30</b>	Darlene Johnston, “Respecting and Protecting the Sacred”, paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006).	26

<b>TAB</b>		<b>Paragraph Reference</b>
<b>31</b>	Leroy Little Bear, “Aboriginal Paradigms: implications for Relationships to Land and Treaty Making,” in Kerry Wilkins, ed., <i>Advancing Aboriginal Claims: Visions; Strategies, Directions</i> , (Saskatoon: Purich Publishing, 2004), 26-38	36
<b>32</b>	Richard Moon “Accommodation without Compromise: Comment on <i>Alberta v. Hutterian Brethren of Wilson Colony</i> (2010), 51 Sup Ct L Rev (2d) 95-130.	16
<b>33</b>	Richard Moon, “Freedom of Conscience and Religion”, (2013) 61 Sup Ct L Rev (2d) 339-428	15
<b>34</b>	Janna Promislow, “Special Issue: Law on the Edge: Treaties in History and Law,” (2014) 47 UBC L Rev 1085-1183	35
<b>35</b>	Michael Lee Ross, <i>First Nations Sacred Sites in Canada’s Courts</i> (Vancouver: UBC Press, 2005)	26
<b>36</b>	Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship,” in Richard Moon, ed, <i>Law and Religious Pluralism in Canada</i> (Vancouver: UBC Press, 2008) 87-109	28
<b>37</b>	Truth and Reconciliation Commission of Canada, “Honouring Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” (2015).	31
<b>38</b>	Mark D Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall,” (Fall 2001), 24 Dalhousie LJ No. 75	36

**PART VII – STATUTES****TAB**

- 39**     *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 1., s 2(a), s. 27*
- 40**     *Indian Act, SC 1884, c 27, s 3*
- 41**     *Indian Act SC 1895, c35, s6*
- 42**     *Charte des droits et libertés de la personne, RLRQ c C-12, s. 3*