SCC File No. 36664

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

BETWEEN:

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

APPELLANTS

AND:

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

RESPONDENTS

AND:

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INTERVENERS

FACTUM OF THE INTERVENERS, WEST MOBERLY FIRST NATIONS and PROPHET RIVER FIRST NATION

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TABLE OF CONTENTS

PAGE

PART I – STATEMENT OF FACTS

1. The West Moberly First Nations and Prophet River First Nation (the "Treaty 8 Nations") adopt the facts set out in the Appellant's factum.

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

2. While the Treaty 8 Nations generally support the positions advanced by the Appellants, they focus their submissions on two areas: 1) the legal requirements imposed on decision-making bodies when constitutional rights are alleged to be infringed by a statutory decision; and 2) that spiritual and cultural practices are manifestations of Indigenous Laws which are themselves Aboriginal rights, dependent upon specific places.

PART III – STATEMENT OF ARGUMENT

3. Aboriginal rights find their source not in a magic moment of European contact, but in the *traditional laws and customs* of the aboriginal people in question. These Indigenous laws in relation to land are relevant to establishing the occupation of Aboriginal title lands.

R. v. Van der Peet, [1996] 2 S.C.R. 507 ["*Van der Peet*"] at para. 247 [ABOA, tab 29].
Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para 148 [ABOA, tab 10].

4. "[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) , because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in *distinctive cultures*, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

Van der Peet at para. 30 [ABOA, tab 29].

5. This court has repeatedly stated that reconciliation is the underlying goal when addressing Aboriginal and Treaty rights.

R. v.Gladstone, [1996] 2 S.C.R. 723 at para. 73[Treaty 8 Book of Authorities (T8 BOA), tab 4].
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69, at para. 1 [T8 BOA, tab 1].

6. It is the application of these principles that should govern the disposition of this appeal.

Duty to Decide Infringement

7. Whether one is dealing with *Charter* rights or section 35 rights there is a *positive duty* on statutory decision-makers to ensure that their decisions are constitutionally compliant.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at pp. 1077-1078 [ABOA, tab 48].
Doré v. Barreau du Québec, [2012] 1 S.C.R. 395 ["*Doré* "] at paras. 35 & 56 [ABOA, tab 11].
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53 ["*Beckman*"] at paras. 47-48 [ABOA, tab 4].

8. The principle of constitutional supremacy applies to all statutory decisions that potentially impact upon section 35 or *Charter* rights.

9. In the context of section 35 rights such duties to Aboriginal peoples lie "upstream" of the statutory mandate of the decision-maker.

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247 ["*West Moberly*"] at para. 106 [T8 BOA, tab 6].
Musqueam Indian Band v. British Columbia, 2005 BCCA 128 at paras 18-19 [T8 BOA, tab 2].

10. Ensuring that statutory decision-makers inquire whether their decisions are constitutionally compliant is consistent with the underlying purposes of consultation, which requires Aboriginal rights to be *identified, protected* and *preserved.* The Crown's approach to consultation must be focussed on avoiding unjustifiable infringements of *Charter*, Aboriginal and Treaty rights.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 at paras. 34-35 [ABOA, tab 45].
Haida Nation v. British Columbia, [2004] 3 S.C.R. 511 ["*Haida*"] at para. 25 [ABOA, tab 15].
Beckman at para. 53 [ABOA, tab 4].
R. v. Oakes, [1986] 1 S.C.R. 103 [ABOA, tab 35].

11. Unlike administrative tribunals who are constrained by their enabling statute, statutory decision-makers, including Ministers, have a "duty to decide" constitutional issues that are raised in the context of proceedings before them. In this case, the statutory decision-maker did not decide the *Charter* issue.

12. However, the law does not allow decision-makers simply to declare that considerations of infringements of constitutional rights are "out of scope" or that the claim is weak and therefore need not be addressed in their reasons for decision.

13. The failure of a statutory decision-maker to consider matters of *Charter* and Aboriginal rights infringement risks the unlawfulness of untrammelled discretion that this court warned against in *Adams*:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights.
>
> *R. v. Adams*, [1996] 3 S.C.R. 101 ["*Adams*"] at para. 54[T8 BOA, tab 3].

14. Parties seeking to challenge the lawfulness of statutory decisions must proceed by judicial review. As the judicial review is based on the record that was before the decision-maker, as a general rule a party must not raise an issue for the first time on judicial review. Once raised, and absent a statutory bar, the decision-maker is obliged to decide constitutional issues, which allows the reviewing court with a full record and reasons, rather than searching for possible explanations or *post-hoc* justification.

> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-26 (Minister of Forests Book of Authorities [MF BOA], tab 1).

15. In British Columbia, the *Supreme Court Rules* provide that their object "is to secure the just, speedy and inexpensive determination of every proceeding on its merits." The integration of section 35 and *Charter* analysis into administrative decision-making fulfills

the object of the Rules and provides parties with timely access to justice, rather than having to launch multiple court proceedings.

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 1-3.

Spiritual & Cultural Sites are Manifestations of Aboriginal Rights

16. Aboriginal and Treaty rights are more than *rights simpliciter*; they require specific preferred places that often hold cultural and spiritual significance to the First Nation. The destruction of cultural and spiritual cites substantially interferes with the meaningful exercise of rights, which is integral to First Nations' ability to participate in their Aboriginal practices, customs or traditions.

17. In *Côté*, this court recognized that it is not the mere act of fishing that defines an Aboriginal right, but that there is a cultural importance of the right to fish and the incidental rights to teach such a practice, custom and tradition to the younger generation. This holistic approach to Aboriginal rights is demanded by the jurisprudence.

R. v. Côté, [1996] 3 S.C.R. 139 at para. 56 [ABOA, tab 31].

18. These 'sacred' section 35 rights and section 2(a) *Charter* rights are inextricably linked. Aboriginal rights and religion or spiritualism operate in a symbiotic relationship that forms the distinctive, pre-European contact culture of the First Nations.

19. The approach of the lower courts was that they were not prepared to recognize that Aboriginal spiritual practices could occur in one place in relation to a sacred place elsewhere or that such practices were subject to the protection of section 2(a) of the *Charter*. This approach is troubling because this perspective is inconsistent with the *Charter* jurisprudence of this court, but it also fails to consider the Aboriginal perspective.

Syndicat Northcrest v. Anselem, [2004] 2 S.C.R. 551, 2004 SCC 47 at paras. 43 & 53 [ABOA, tab 50].
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 ["*Tsilhqot'in*"] at para. 35 [ABOA, tab 51].

20. The well-known religions of the Western world identify sacred places where people go to worship – eg. church, synagogue, mosque. The preservation of those places is well understood because those locations are where people congregate to engage in their respective spiritual practices. In many Aboriginal cultures, the opposite is often true.

21. In First Nations' culture, certain sacred places are specific locations which are known but are to be avoided and are not to be visited. The spiritual practices occur away from those locations. Congregating at those sacred locations would be contrary to their spiritual practices.

22. Oftentimes, there are complex Indigenous laws relating to spiritual sites and their locations. Members are prohibited from identifying the exact locations of these spiritual sites to preserve sacred sites from being despoiled by third parties or development.

Impact of Destruction of Cultural & Spiritual Sites

23. The destruction of cultural and spiritual sites has a devastating effect on Aboriginal peoples that cannot be understated. "Spiritual Places are destroyed and with them opportunities to pass along cultural knowledge become fewer."

> Marc V. Fonda "Are they like us yet? Some thoughts on why religious freedom remains elusive for Aboriginals in North America" (2011) 2:4 The International Indigenous Policy Journal at p. 2 [ABOA, tab 70].

24. The Truth and Reconciliation Commission report characterized the history of Crown-First Nations relations as one of cultural genocide:

> Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed.

> *Summary of the Final Report of The Truth and Reconciliation Commission of Canada (2015),* Honouring the Truth, Reconciling for the Future ["Summary Report"] at p. 1 [T8 BOA, tab 9].

25. In spite of this troubled history, Indigenous laws and customs persist in Aboriginal communities. The rules which make up Indigenous Laws govern the observance of sacred ritual and economic activity: they maintain social order and dictate the minutiae of everyday life. "Land, language, culture, and identity are inseparable from spirituality; all are necessary elements of a whole way of being, of living on the land as Indigenous peoples."

The Final Report of the Truth and Reconciliation Commission of Canada (2015), Vol. 6, "Canada's Residential Schools: Reconciliation" at pages, 102 – 103 [T8 BOA, tab 10].

26. Courts have recognized that the exercise of religious rights and customs have a territorial aspect to them. Such rights will attract a duty of consultation when the Crown contemplates an action that will adversely affect or infringe upon these Aboriginal and Treaty rights.

Sioui v. Québec (Attorney General), [1990] 1 S.C.R. 1025 ["*Sioui*"] [T8 BOA, tab 5].
Halfway River First Nation v. British Columbia, 1999 BCCA 470 at para. 187 [GR BA, tab 9].

27. In most circumstances, the exercise of these spiritual and cultural rights will also give rise to *Charter* considerations. Freedom of religion may be tied to a particular piece of land. As this court stated in *Sioui*: "[f]or a freedom to have real value and meaning, it must be possible to exercise it somewhere."

Sioui at 1067 [T8 BOA, tab 5].

28. The approach of the lower courts was that the First Nation could simply "go elsewhere" to practice their religion. This is often the approach that courts take in consultation cases as well. Such an approach fails to appreciate the significance of sacred places in the exercise of Aboriginal rights and Indigenous spirituality according to the Indigenous laws of the Aboriginal community in question. As more of these places are "taken up" by development, the persistence of Indigenous social order and norms continues to be eroded. The Truth and Reconciliation Commission has well-documented the devastation that such erosion on Indigenous communities. This erosion should not be justifiable under s.35(1) or s.1 of the *Charter*.

29. In the *Lafontaine* case, Justice Lebel (in dissent) held that if the state makes it impossible to exercise or substantially interferes with one's freedom there may be a *positive duty* on government to put an end to the interference with the *Charter* right. The example that Justice Lebel used was a situation where a municipality exercised its zoning bylaw power in such a manner that the appellants could not establish their place of worship.

> *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48 ["*Lafontaine*"] at paras. 77-78 [ABOA, tab 8].

30. There is no dispute that the destruction of a church, synagogue or a mosque would be an unjustified infringement of the freedom of religion. The desecration of a sacred mountain should attract similar considerations. Whether the members of that Nation attend to the mountain to perform "religious rites" is irrelevant to the analysis whether there has been an infringement of s. 2(a) of the *Charter*. Muslims pray toward Mecca, yet most are never are able to visit it. The analysis must have reference to the Indigenous perspective, through the Indigenous laws, and not a non-Indigenous definition of a sacred place.

A Proposed Approach to Reconciling Section 35 & Charter Rights

31. The proper approach when dealing with *Charter* rights and Aboriginal rights is one of respect for the Indigenous laws and customs that inform these rights.

32. Section 35 rights, like *Charter* rights are not static; they can evolve over time. Professor Slattery puts the matter this way, in reference to the *Haida* and *Taku River* decisions:

> ...the Court attributes a *generative* role to section 35. In effect, it holds that the Crown, with the assistance of the courts, has the *duty* to bring into being a new legal order that accommodates Aboriginal rights, through negotiation and agreement with the indigenous peoples affected. This approach views section 35 as serving a dynamic and not simply static function – a function that does not come to an end even when treaties are successfully negotiated.
>
> Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433.at p. 440 [T8 BOA, tab 7].

33. The Honour of Crown therefore imposes a positive duty to ensure that these constitutional rights are *protected* and *preserved*. Far too often third party commercial interests are preferred to protecting the constitutional rights of First Nations.

34. Chief Justice Lamer's judgment foreshadows this approach in *Adams*:

> As with limitations of the rights enshrined in the *Charter*, limits on the aboriginal rights protected by s. 35(1) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable...Those purposes are the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of prior occupation by aboriginal peoples with the assertion of Crown sovereignty.
>
> *Adams* at para. 57 [T8 BOA, tab 3].

35. The approach of statutory decision-makers must be one that is cognizant and respectful of the *Charter* rights and Aboriginal rights of First Nations. The goal is the reconciliation of First Nations' rights with those of the broader community. Importantly, any limitations on those rights must be consistent with the purposes with which those rights are entrenched in the *Constitution*.

36. The Crown has the onus of justifying infringements of these rights and in some cases it imposes a significant burden. The recognition of Aboriginal spirituality as Indigenous law, subject to section 35 and *Charter* protection does not "open the floodgates". Statutory decision-makers and the courts are well-equipped to distinguish between dubious claims and those which have merit. They key is not, as the decision-maker in this case did, simply ignore or mischaracterize the nature of the First Nations' claims.

37. What is critical is a serious dialogue and negotiation around the reconciliation of Aboriginal claims and *Charter* rights.

> Simply put, the challenge is this: how is one to justly and fairly assess how to respond to beliefs and practices that come from a way of understanding and being in the world that is profoundly foreign to one's own and, perhaps, to most with which one has come into contact? This question poses the essential struggle of religious freedom in a constitutional democracy.
>
> Benjamin L. Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 S.C.L.R. (2d) at p. 41 [ABOA, tab 67].

38. The same challenges with freedom of religion are at play in considering Aboriginal and treaty rights. In certain circumstances, it may be that the state's interest in economic

development must give way to the Aboriginal constitutional rights. In appropriate circumstances, the Crown may have a *positive duty* to ensure that Aboriginal peoples have the sacred space to allow them to exercise their constitutional rights. Protecting and preserving the meaningful exercise of these rights is animating purpose of consultation and reconciliation.

39. By the decision-maker not addressing the First Nations claims the reviewing court is left to construct reasons for the decision-maker's rejection of the s. 2(a) claim. First Nations may also be forced to pursue claims of infringement in parallel actions as decision-makers claim that they have no jurisdiction to entertain such claims. This approach was soundly rejected in *Beckman*, where Justice Binnie stated:

> The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new "constitutional remedy". Administrative law is flexible enough to give full weight to the *constitutional interests* of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant. [emphasis added]

Beckman at para. 47 [ABOA, tab 4].

40. While the *Charter* right and section 35 right are different rights with different tests for infringement, although post-*Tsilhqot'in* the justification standards are similar, the fundamental question in either circumstance is whether the statutory decision reflects a proportionate balancing between the severity of the impacts on the rights and the statutory objectives, informed by the constitutional values at stake.

Lafontaine at para. 78 [ABOA, tab 8].
West Moberly at para. 148[T8 BOA, tab 6].

41. The principle of proportionality is a common thread for the review of statutory decisions that engage constitutional questions, whether under the *Charter* or section 35 of the *Constitution*. Balance and proportionality are the key considerations when the state proposes to exercise its power to infringe constitutional rights.

Doré at paras. 5-6 [ABOA, tab 11].
Tsilqhot'in at para. 82 [ABOA, tab 51].

42. Applying the proportionality analysis as a principled and structured basis for judicial review leads to predictable and just outcomes.

Joseph Arvay, Sean Hern & Alison Latimer, "Proportionality and the Public Law" (2015) 28 Can J. Admin. L. & Prac. 23. at p. 7 [T8 BOA, tab 8].

43. Unfortunately, in this case, the decision-maker failed to determine whether his approval would infringe the Appellants *Charter* rights, let alone whether such infringement could be justified. Under the circumstances, the remedy is to have the matter sent back to the decision-maker to consider the Aboriginal spiritual practice in accordance with the Aboriginal perspective and the *Charter* values at stake.

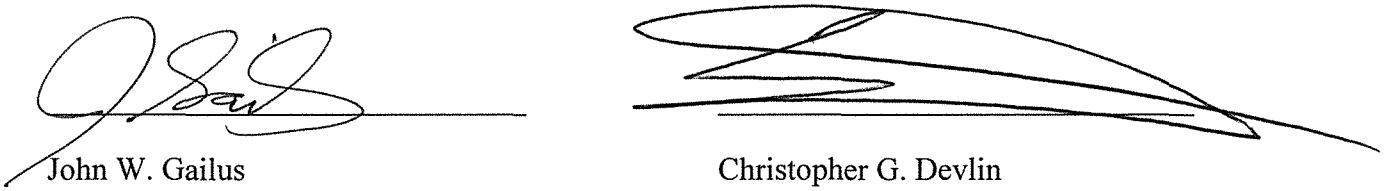
PART IV –COSTS

44. The Treaty 8 Nations submit that all parties bear their own costs related to the Treaty 8 Nations intervention in the appeal.

PART V – REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

45. The Treaty 8 Nations request permission to make oral argument for 10 minutes at the hearing of the Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24 day of October, 2016.



John W. Gailus

Christopher G. Devlin

Solicitors for the Interveners, West Moberly First Nations and Prophet River First Nation

PART VI – LIST OF AUTHORITIES

CASE	PARAGRAPHS
Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654.	14
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53.	7, 9, 35
Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650, 2004 SCC 48.	26
Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.	3
Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395.	7, 37
Haida Nation v. British Columbia, [2004] 3 S.C.R. 511.	9
Halfway River First Nation v. British Columbia, 1999 BCCA 470.	23
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.	5
Musqueam Indian Band v. British Columbia, 2005 BCCA 128.	8
R. v. Adams, [1996] 3 S.C.R. 101.	11, 31
R. v. Côté, [1996] 3 S.C.R. 139.	14
R. v. Gladstone, [1996] 2 S.C.R. 723.	5
R. v. Oakes, [1986] 1 S.C.R.103.	9

R. v. Van der Peet, [1996] 2 S.C.R. 507.	3, 4
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650.	9
Sioui v. Québec (Attorney General), [1990] 1 S.C.R. 1025.	23, 24
Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.	7
Syndicat Northcrest v. Anselem, [2004] 2 S.C.R. 551, 2004 SCC 47.	16
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.	16, 36, 37
West Moberly First Nations v. British Columbia, 2011 BCCA 247.	8, 36

PART VII – LEGISLATION

Canadian Charter of Rights and Freedoms, Part 1 of *the Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (*UK), 1982, c 11.
Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (U.K.). 1982, ch. 11, s. 35(1).
Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 1-3.

PART VIII– SECONDARY MATERIALS

SECONDARY MATERIALS	PARAGRAPHS
Benjamin L. Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony"* (2010) 51 S.C.L.R. (2d).	37

Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433.	29
Joseph Arvay, Sean Hern & Alison Latimer, "Proportionality and the Public Law" (2015) 28 Can J. Admin. L. & Prac. 23.	38
Marc V. Fonda, "Are they like us yet? Some thoughts on why religious freedom remains elusive for Aboriginals in North America" (2011) 2:4 The International Indigenous Policy Journal.	20
Summary of The Truth and Reconciliation Commission of Canada (2015), Honouring the Truth, Reconciling for the Future.	21
The Final Report of the Truth and Reconciliation Commission of Canada (2015), Vol. 6, "Canada's Residential Schools: Reconciliation".	22

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, ss. 1, 2(a), 27

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
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;
27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.	27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Constitution Act, 1982, being Schedule B to the _Canada Act 1982_ (U.K.), 1982, ch. 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.

B.C. Reg. 168/2009
O.C. 302/2009

Deposited July 7, 2009
effective July 1, 2010

Court Rules Act

Supreme Court Civil Rules

Rule 1-3 — Object of Rules

Object

(1)The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

(2)Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.