

**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 CITIZEN OF THE KTUNAXA NATION**

APPELLANTS

AND:

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

RESPONDENTS

AND:

**THE ATTORNEY GENERAL OF CANADA; THE ATTORNEY GENERAL FOR  
SASKATCHEWAN; THE CANADIAN MUSLIM LAWYERS ASSOCIATION,  
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CENTRAL COAST INDIGENOUS RESOURCE ALLIANCE; AMNESTY  
INTERNATIONAL CANADA; THE TE'MEXW TREATY ASSOCIATION; THE  
KATZIE FIRST NATION and THE WEST MOBERLY FIRST NATIONS and  
PROPHET RIVER FIRST NATION**

INTERVENERS

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## **PART I – STATEMENT OF FACTS**

1. The Central Coast Indigenous Resource Alliance<sup>1</sup> (the “Alliance”) received leave to intervene on Aug. 31, 2016. The Alliance takes no position on the facts.

## **PART II – STATEMENT OF ISSUES**

2. The Alliance makes submissions about two matters: first, Aboriginal spiritual beliefs that depend on the integrity of sacred lands – and particularly origin stories tied to specific places, and expressing the spiritual relationships of peoples to the world – and secondly, whether actions by the Crown, *qua* owner, that impact such sacred lands may infringe freedom of religion under section 2(a) of the *Charter*.

## **PART III – STATEMENT OF ARGUMENT**

### **A. Aboriginal spirituality and sacred lands**

3. Ktunaxa’s spiritual beliefs, which rely and depend on the integrity of particular sacred lands, are not unique in that respect. The Nations of the Alliance also hold spiritual beliefs that are tied to sacred lands (and sacred animals). The existence of such beliefs (of which the Alliance and its Nations provide merely a sampling) ought to inform any interpretation of section 2(a). Similarly, all such beliefs may be impacted by any interpretation of section 2(a) that either encompasses all aspects of Aboriginal “land-based” (or marine-based) spirituality, or instead protects only aspects of such religious beliefs that do not conflict with the Crown’s “radical” or “ultimate” title to land in B.C. from the time of sovereignty,<sup>2</sup> or other forms of Crown ownership (e.g., the Crown’s ownership of all “wildlife” in B.C.).<sup>3</sup>

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<sup>1</sup> The Alliance is a non-profit organization that represents a collective of four First Nations: Heiltsuk, Kitasoo/Xai’xais, Nuxalk and Wuikinuxwv First Nations (the “Nations”). The Alliance’s mandate of ensuring the Nations’ ecosystems return to a healthy balance includes protecting and restoring sacred and other lands and animals. The Alliance and the Nations promote stewardship predicated on their traditional laws, which include respect for sacred spaces and animals.

<sup>2</sup> In British Columbia, Crown sovereignty was settled in 1846 by the Oregon Boundary Treaty, as noted in, for example, *Re A.-G. Can. and A.-G. B.C.* (sub nom. *Reference re Ownership of the Bed of the Strait of Georgia*), [1984] 1 S.C.R. 388 [Alliance Book of Authorities (“CCIRA BA”) Tab 1].

<sup>3</sup> *Wildlife Act*, R.S.B.C. 1996, c. 488, section 2(1) [CCIRA BA Tab 5], this being the ultimate basis on which the Crown may authorize, for example, trophy-hunting of bears.



4. Aboriginal spiritual beliefs are not uniform. But many coastal First Nations in British Columbia, for example, share common themes and values underlying their beliefs about spirituality, and about their lives and their connection to other life forms on the land, and on the waters:
- a. Beliefs taught through traditional stories, especially origin stories, that may take different and multiple forms, including oral story-telling, visual art, song and dance. Such stories may vary in details between families and groups, but carry the same themes, teachings and values; origin stories speak about the nature of life and reality.<sup>4</sup>
  - b. Creation having a common origin in a creator that entails respect for all life, and the maintaining of relationships as part of the creator's original design of wholeness.
  - c. Stories of transformations, which speak to changes of outward physical form or 'clothing', but similarity of essence. Biodiversity is physical, not spiritual or essential.
  - d. Oneness of physical and spiritual worlds, which are connected, interrelated and interactive, with communication and travel between them by humans and by spirit beings.
  - e. Community and interdependence of families, peoples, and living things, as a natural state, to be maintained through balanced and harmonious relationships.
  - f. Understandings, agreements and respectful protocols between societies of people, societies of animals and societies of spirits, passed down through generations, renewed and expressed through ritual, ceremonies and songs. These protocols may include treating the bones of animals and fish with respect, so that they will return to give themselves up to humans, and non-public (secret) methods of

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<sup>4</sup> Origin stories may also involve rules as to who and how the stories are told, such as being told only on the sacred land, or being told only by families who own and have responsibility to keep, protect and pass down those stories.

spiritual communication that guide communication and interventions between the physical and spiritual worlds.<sup>5</sup>

5. Origin stories thus define the spirituality and the practices of First Nations in multi-faceted ways, including how they came into being; the purpose of their being; their relationship with others beings, material and spiritual; and their relationship with the environment, real and mystical. They are the basis for commitments to take only what is needed; that all lives – human, plant or animal – have equal value, and not to kill without proper protocol. The stories that teach these beliefs and values occur within the traditional territories of their respective First Nations – on particular lands, rivers, lakes, channels, islands, beaches, and seas. These stories are about home.<sup>6</sup> The desecration or destruction of sacred lands would erode the spiritual identities of people guided by these stories.
6. For example, Heiltsuk First Nation (“Heiltsuk”) is a band of Aboriginal peoples on the Central Coast of British Columbia. Heiltsuk traditional territories encompass 16,658 square kilometres. The territories include extensive nearshore and offshore waters. These territories include specific lands sacred to Heiltsuk peoples, including sacred lands that form part of the origin stories of Heiltsuk. These origin stories, and the places they involve, are sacred; they involve rules and restrictions relating to the stories and the places.<sup>7</sup> Sacred lands are an inextricable part of their origin stories, and not merely locations where certain events took place.
7. Sacred lands also exist where supernatural forces reside, such as ancestral spirits and animal spirits. Members are prohibited from interfering with the balance of these supernatural forces, and are obligated to restore the balance when they are upset. Like

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<sup>5</sup> For example, in 2016, in conjunction with Raincoast Conservation Foundation, the Alliance obtained a recommendation by a British Columbia court that the remains of a grizzly bear, illegally shot and taken by a poacher, be returned to the Kwatna area of the Great Bear Rainforest, to allow his spirit to rest in accordance with traditional laws.

<sup>6</sup> Origin stories may involve an aspect of secrecy in their practice, including the secrecy of the precise location of sacred land to some or all persons.

<sup>7</sup> The allowable use of sacred land in an origin story may vary. For example, the Heiltsuk may allow pilgrimages to sacred land, and permit activities such as harvesting that will not interfere with the land, but do not permit desecration or destruction.

places related to origin stories, these sacred lands may involve rules and restrictions. The desecration or destruction of such sacred lands would also erode Heiltsuk's spiritual identity.

8. Similarly, Kitasoo/Xai'xais First Nation ("Kitasoo/Xai'xais") is a band of Aboriginal peoples also on the Central Coast. Their traditional territories include specific places and animals sacred to Kitasoo/Xai'xais.
9. One version of a story with a specific site is the Blackfish (or orca) story, which (in brief) tells of four seal hunters, travelling by canoe, who drop anchor for the night. Their anchor strikes the roof of an underwater bighouse, whose spirit chief (Git-nu-gwun-aks) sends a fish to investigate. The fish keeps one hunter awake, who then tears off its fins. The chief, angered, creates a whirlpool that pulls the canoe and the hunters underwater, to his bighouse. When the hunters give up their seal fat, the chief called for a feast for spirits. When they are let go, four days later, they find they have been gone for four-years. This story occurs off the north end of Aristazabal Island, in what is now called Borrowman's Bay. The four wind spirits come from specific places in the territory. The bighouse that the hunters build is dis'ju, a site sacred on Princess Royal Island.
10. Similarly, a version of the Big Salmon story tells of a salmon spirit who entices a man to hunt him, then takes him underwater, and tests him for a year. After a year, the salmon spirit brings him back and gifts him with regalia, and a chief's song that takes four days to sing. The story continues where other chiefs, who become jealous of him, cause his death to take his power, but are killed (except for one) by the salmon spirit. This story occurs specifically in Kynoch.
11. In addition to sacred lands, Kitasoo/Xai'xais are spiritually connected to certain animals, including bears. Their origin stories and traditional stories include human/bear transformations in sacred lands in their traditional territory. These places and animals are sacred; the destruction of these places and animals would impact Kitasoo/Xai'xais by eroding their spiritual identity.

12. Kitasoo/Xai'xais believe the Spirit Bear, or moskgm'ol, hold supernatural powers. Ancestral spirits can reside within the Spirit Bear. The Spirit Bear's story involves the Raven making one in every ten black bears white, to remind the people of when ice covered the land and how the people should be thankful for the bountiful land of today. The Raven decreed that they could live in peace forever. The land referenced in this story is Princess Royal Island, which is considered sacred land. Kitasoo/Xai'xais have protected the Spirit Bear and its habitat on Princess Royal Island since time immemorial.<sup>8</sup>
13. Sacred lands are not always "public", and the secrecy that forms a part of Ktunaxa's spiritual practices is not unique. For some coastal First Nations, spiritual information, such as certain practices and locations of some sacred sites, may be kept secret from outsiders.<sup>9</sup>
14. Sacred lands (e.g., of Heiltsuk and Kitasoo/Xai'xais) are generally located on lands or waters over which Canada or British Columbia claims ownership, subject only to Aboriginal title and rights. Consequently, subject only to constraints under sections 2(a) and further or alternatively, aboriginal rights under section 35, the Crown grant may grant property rights, or exercise its own property rights over such sacred lands.

**B. Interpretations of section 2(a) and infringements relating to sacred lands**

15. This court stated in *Loyola* that measures which disrupt the vitality of religious communities represent a profound interference with religious freedom.<sup>10</sup> The Court of Appeal below perceived an internal limit to the freedom of religion guaranteed by section 2(a) based on the inability of that freedom to impact "the behaviour of others on their

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<sup>8</sup> In 2006, Kitasoo/Xai'xais worked with the Valhalla Wilderness Society and the provincial government to create the Spirit Bear Conservancy on Princess Royal Island, which prohibits the hunting of the Spirit Bear and black bears. In principle, however, the power of the government to authorize hunts of spiritually-significant wildlife raises issues relating to the scope of section 2(a) arising in the different context of this case.

<sup>9</sup> For example, a court that heard evidence of sites sacred to the Hupacasath First Nation noted that the sites are "secret, specific to families, and must be secluded from, and untouched by, other human beings" in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at paras. 15 and 61 [CCIRA BA Tab 3].

<sup>10</sup> *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613, 2015 SCC 12 at para. 67 [Appellant's Book of Authorities ("ABA") Tab 21].

own property”, as that freedom (categorically) could not require “others” to “act or refrain from acting and behave in a manner consistent with a belief that they do not share.”<sup>11</sup> Yet in *Multani*, this court rejected an “internal limit” on freedom of religion – in that case, based on “imperatives of public order, safety, and health, as well as by the rights and freedoms of others” – on the basis that, while freedom of religion can be limited by harm to or interference with the rights of others, competing rights should be reconciled by means of a section 1 analysis.<sup>12</sup> Respectfully, section 2(a) constrains action by public actors, and ought not to categorically exempt acts by the Crown that are attributable to its property rights, including any stemming from its radical or ultimate title in lands.<sup>13</sup> By extension, any “private” rights that Glacier Resorts Ltd. might acquire in the future presuppose the validity of Crown conduct granting property interests to Glacier.

16. The Alliance submits a need for a robust conception of religion that addresses the reality of Aboriginal spiritual beliefs encompassing sacred lands, rather than a limited conception of “religion” that leave the integrity of such sacred lands – and Aboriginal beliefs sustained by their integrity – open to erosion by unfettered Crown grants, or other Crown exercises of “title” rights, relating to such lands.
17. The Aboriginal spiritual beliefs of First Nations – not limited to members of the Alliance like Heiltsuk and Kitasoo/Xai’xais – have already faced substantial erosion through the Crown’s historical attempts to assimilate members of First Nations communities, such as by the Crown banning “potlaches” under the *Indian Act* from 1884 to 1951, and by removing generations of children from their homes and forcing them into the residential school system. For generations, the Crown attempted to assimilate members of First Nations into Euro-Canadian (and more particularly Christian) culture, at the expense of

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<sup>11</sup> Judgment of the Court of Appeal, at paras. 71 and 74 [Appellant’s Record].

<sup>12</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 at paras. 25-26 [ABA Tab 24].

<sup>13</sup> For example, in the context of freedom of expression, this court (albeit to differing degrees) rejected the proposition that the Crown *qua* owner could categorically prevent the use of airport property for expression: *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, e.g., at paras. 14-16 (per Lamer C.J. and Sopinka J.) and paras. 224-226 (per McLachlin J.) [CCIRA BA Tab 2].

their Aboriginal cultures, and more particularly, with damage to the vitality of the spiritual beliefs of their respective First Nations.

18. The knowledge-keepers of Heiltsuk, for example, speak of their way of life, including their sacred connections with all life forms on the land and in the waters, as having been fractured by the disruption to their laws, practices, and the transmission of their spiritual beliefs and values. Even when the law prohibiting “potlatches” changed in 1951, the change was not well-known, and the missionary presence was so long-standing and entrenched that Heiltsuk continued to behave as if the restrictions were in place until the 1980s. Knowledge-keepers could only transmit information in bits and pieces, and preserve practices and knowledge as best they could. For Heiltsuk, the exceptions to the restrictions arose only during times of death, when missionaries left Heiltsuk to practice their spiritual and mortuary customs. This led Heiltsuk to carry out what they would have otherwise practiced in a “potlatch” setting to such ceremonies. Knowledge-keepers have since had to rebuild their knowledge through peer-review with surviving elders to confirm the accuracy of what knowledge has survived.
19. Spiritual practices were also compromised by the residential school system. Heiltsuk, for example, lost five generations of children who were removed north to Kitimat, east to Edmonton, or south to Alert Bay and Port Alberni. Heiltsuk were punished for using their native language. This system led to confusion and conflicting values, loss of family structure, loss of language, and loss of traditional spiritual beliefs. The Truth and Reconciliation Commission of Canada has recognized, in the opening words of its report, that Canada engaged in “cultural genocide” by persecuting spiritual leaders, forbidding spiritual practices, confiscating and destroying objects of spiritual value, and sending children to residential schools “not to educate them, but primarily to break their link to their culture and identity”.<sup>14</sup>

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<sup>14</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at pages 1 and 2 (the “TRC Report”) [CCIRA BA Tab 4].

20. First Nations have, as a result, already lost spiritual knowledge that should have been passed down by elders to new generations, but was instead prohibited or systematically interfered with through government action.
21. Respectfully, the need to repair the cumulative effects of past governmental conduct – to address the legacies of colonialism – may also legitimately inform a broader interpretation of section 2(a). The values that underlie the *Charter*, which include accommodation of a wide variety of beliefs, and respect for cultural and group identity, are consistent with the reasoning of the *Truth and Reconciliation Commission* that, “supporting the right of Indigenous peoples to self-determination in spiritual matters must be a high priority in the reconciliation process,” and that further, “Indigenous peoples, who were denied the right to practise and teach their own spiritual and religious beliefs and traditions, must now be able to do so freely and on their own terms.”<sup>15</sup>
22. In contrast, a narrower interpretation of section 2(a) that excludes the integrity of genuinely sacred lands effectively guarantees freedom of religion to adherents to non-land-based religions (including monotheistic religions that do not have their sacred lands in Canada), while at the same time leaving key aspects of Aboriginal spiritualities that may be tied to lands and waters subject to non-trivial, substantial interferences, on the basis that all such lands and waters (now) form property of the Crown – even where such property has not yet passed into the hands of Crown subjects.
23. Absent *established* or *recognized* Aboriginal title over any particular sacred lands, or Aboriginal rights addressing the integrity of sacred lands, a decision excluding land-based spirituality from the scope of the freedom of conscience and religion protected by section 2(a) allows government an unfettered right to develop or dispose of Crown-owned sacred lands, regardless of any disproportionate impact of such conduct on the vitality of the spiritual beliefs in affected aboriginal communities.
24. Finally, the Alliance submits that proportionality analyses of infringements under section 1 may also be informed by the fragility of Aboriginal beliefs resulting from historical state efforts to suppress and eradicate those beliefs, and the potential for greater impacts

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<sup>15</sup> Ibid., at page 226 [CCIRA BA Tab 4].

from infringements, due to the already-compromised vitality of spiritual beliefs within Aboriginal communities. A higher threshold for justifying an infringement may properly flow from the context of ongoing, cumulative effects of past governmental conduct.

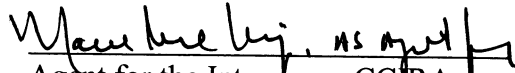
**PART IV – COSTS**

25. The Alliance does not seek costs, and asks that no costs be awarded against it.

**PART V – ORDER SOUGHT**

26. The Alliance requests the right to make oral arguments of no more than 10 minutes at the hearing of this appeal.

Dated: October 26, 2016

  
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**PART VI – TABLE OF AUTHORITIES**

<b>Tab</b>	<b>Authority (* indicates authority cited by the appellant or respondents)</b>	<b>Para.</b>
1.	<i>A.-G. Can. and A.-G. B.C. (Re)</i> (sub nom. <i>Reference re Ownership of the Bed of the Strait of Georgia</i> ), [1984] 1 S.C.R. 388	3
2.	<i>Committee for the Commonwealth of Canada v. Canada</i> , [1991] 1 S.C.R. 139	15
3.	<i>Hupacasath First Nation v. British Columbia (Minister of Forests)</i> , 2008 BCSC 1505 at paras. 15 and 61	13
	<i>Loyola High School v. Quebec (Attorney General)</i> , [2015] 1 S.C.R. 613, 2015 SCC 12 at para. 67 [* ABA Tab 21]	15
	<i>Multani v. Commission scolaire Marguerite-Bourgeois</i> , [2006] 1 S.C.R. 256, 2006 SCC 6 at paras. 25-26 [* ABA Tab 24]	15
4.	Truth and Reconciliation Commission of Canada, <i>Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada</i> (2015) at pages 1, 2 and 226	19, 21

**PART VII – STATUTORY PROVISIONS**

<b>Tab</b>	<b>Statute</b>	<b>Para.</b>
5.	<i>Wildlife Act, R.S.B.C. 1996, c. 488, section 2(1)</i>	3