SCC 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.

Repondents

-and-

THE ATTORNEY GENERAL OF CANADA; THE ATTORNEY GENERAL FOR SASKATCHEWAN; THE CANADIAN MUSLIM LAWYERS ASSOCIATION; THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO and KOOTENAY PRESBYTERY (UNITED CHURCH OF CANADA); THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP; THE ALBERTA MUSLIM PUBLIC AFFAIRS COUNCIL; THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; THE COUNCIL OF THE PASSAMAQUODDY NATION AT SCHOODIC; THE CANADIAN CHAMBER OF COMMERCE; THE SHIBOGAMA FIRST NATIONS COUNCIL; THE CENTRAL COAST INDIGENOUS RESOURCE ALLIANCE; AMNESTY INTERNATIONAL CANADA; THE TE'MEXW TREATY ASSOCIATION; THE KATIZE FIRST NATION and THE WEST MOBERLY FIRST NATIONS and PROPHET RIVER FIRST NATION

Intervenors

FACTUM OF THE INTERVENOR COUNCIL OF THE PASSAMAQUODDY NATION AT SCHOODIC

Paul Williams
Tel: 905-516-1755
Email: orihwa@gmail.com
Box 91 Ohsweken ON N0A 1M0
Solicitor for the Intervenor Council
of the Passamaquoddy Nation at Schoodic

Ottawa Agent: Westaway Law Group
Suite 230, 55 Murray Street
Ottawa ON K1N 5M3
Tel: 613-722-9091

Peter R. Grant
PETER GRANT & ASSOCIATES
#900 – 777 Hornby Street Vancouver, BC V6Z 1S4
Tel: 604-685-1229
Fax: 604-685-0244 pgrant@grantnativelaw.com
Solicitor for the Appellants, Ktunaxa Nation Council et al.

Marie-France Major
SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100 Ottawa, Ontario K2P 0R5
Tel: 613-695-8855
Fax: 613-695-8580 mfmajor@supremeadvocacy.ca
Agent for the Appellants, Ktunaxa Council et al.

Jonathan Penner
MINISTRY OF JUSTICE LEGAL SERVICES BRANCH 1001 Douglas Street Victoria, BC V8V 1X4
Tel: 250-952-0122
Fax: 250-356-9154 jonathan.penner@gov.bc.ca
Solicitor for the Respondents Minister of Forests, Lands and Natural Resource Operations

Nadia Effendi
BORDEN LADNER GERVAIS LLP
100 Queen Street, Suite 1300 Ottawa, Ontario K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842 neffendi@blg.com
Agent for the Respondents, Minister of Forests, Lands and Natural Resource Operations

Gregory J. Tucker, Q.C.
OWEN BIRD LAW CORPORATION
2900 – 595 Burrard Street Vancouver, BC V7X 1J5
Tel: 604-688-0401
Fax: 604-632-4479
gtucket@owenbird.com
Solicitor for the Respondent, Glacier Resorts Ltd.

Jeffrey Beedell
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street Ottawa, Ontario K1P 1C8
Tel: 613-786-0171
Fax: 613-788-3587 jeff.beedell@gowlingwlg.com
Agent for the Respondent, Glacier Resorts Ltd.

Nader R. Hasan
STOCKWOODS LLP
77 King Street West, Suite 4130 Toronto, Ontario M5K 1H1
Tel: 416-593-7200
Fax: 416-593-9345
naderh@stockwoods.ca
Solicitors for the Interveners, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada) and Canadian Muslim Lawyers Association

KHALID M. ELGAZZAR
440 Laurier Avenue West, Suite 200 Ottawa, Ontario K1R 7X6
Tel: 613-663-9991
Fax: 613-663-5552
ke@elgazzar.ca
Agent for the Intervener, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada) and Canadian Muslim Lawyers Association

Richard James Fyfe
ATTORNEY GENERAL FOR SASKATCHEWAN
Constitutional Law Branch, 8th Floor Regina, Saskatchewan S4P 4Bs
Tel: 306-787-7886
Fax: 306-787-9111 James.fyfe@gov.sk.ca
Solicitor for the Intervener, Attorney General for Saskatchewan

D. Lynne Watt
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street Ottawa, Ontario K1P 1C8
Tel: 613-786-8695
Fax: 613-788-3509 lynne.watt@gowlingwlg.com Agent for the Intervener,
Attorney General for Saskatchewan

Avnish Nanda
NANDA & COMPANY
3400 Manulife Place
10180 – 101 Street N.W. Edmonton, Alberta T5J 4K1
Tel: 780-801-5324
Fax: 587-318-1391 avnish@nandalaw.ca
Solicitor for the Intervener,
Alberta Muslim Public Affairs Council

Mitchell R. Taylor, Q.C.
ATTORNEY GENERAL OF CANADA
900 – 840 Howe Street Vancouver, BC V6Z 2S9
Tel: 604-666-2324
Fax: 604-666-2710 mitch.taylor@justice.gc.ca Solicitor for the Intervener, Attorney General of Canada

Christopher M. Rupar
ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500, Room 557 Ottawa, Ontario K1A 0H8
Tel: 613-670-6290
Fax: 613-954-1920 christopher.rupar@justice.gc.ca Agent for the Intervener, Attorney General of Canada

Margot Venton
ECOJUSTICE CANADA
1910-777 Bay Street
P.O. Box 106
Toronto, Ontario M4W 3X8
Tel: 416-368-7533
Fax: 416-363-2746 mventon@ecojustice.ca Solicitor for the Intervener, Amnesty International Canada

Jennifer Anne Klinck
POWER LAW
130 Albert Street, Suite 1103 Ottawa, Ontario K1P 5G4
Tel: 613-702-5560
Fax: 888-404-2227 jklinck@powerlaw.ca
Agent for the Intervener, Amnesty International Canada

Robert Janes, Q.C.
JFK LAW CORPORATION
816 – 1175 Douglas Street Victoria, BC V8W 2E1
Tel: 250-405-3460
Fax: 250-381-8567 rjanes@jfklaw.ca
Solicitor for the Intervener, Te'mexw Treaty Association

Marie-France Major
SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100 Ottawa, Ontario K2P 0R5
Tel: 613-695-8855
Fax: 613-695-8580 mfmajor@supremeadvocacy.ca Agent for the Intervener, Te'mexw Treaty Association

Lisa Fong
NG ARISS FONG
900 Howe Street, Suite 210 Vancouver, BC V6Z 2M4
Tel: 604-331-1155
Fax: 604-677-5410
lisa@ngariss.com
Solicitor for the Intervener,
Central Coast Indigenous Resource Alliance

Marie-France Major
SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100 Ottawa, Ontario K2P 0R5

Tel: 613-695-8855
Fax: 613-695-8580 mfmajor@supremeadvocacy.ca
Agent for the Intervener,
Central Coast Indigenous Resource Alliance

Senwung Luk
OLTHUIS, KLEER, TOWNSHEND LLP
250 University Avenue, 8th Floor Toronto, Ontario M5H 3E5
Tel: 416-981-9443
Fax: 416-981-9350 sluk@oktlaw.com
Solicitor for the Intervener, Shibogama First Nations Council

Marie-France Major
SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100 Ottawa, Ontario K2P 0R5
Tel: 613-695-8855
Fax: 613-695-8580 mfmajor@supremeadvocacy.ca Agent for the Intervener, Shibogama First Nations Council

Neil Finkelstein
MCCARTHY TÉTRAULT LLP
Totonto Dominion Bank Tower, Suite 5300 Toronto, Ontario M5J 1E6
Tel: 416-601-8200
Fax: 416-868-0673 nfinkelstein@mccarthy.ca Solicitor for the Intervener, Canadian Chamber of Commerce

Jeffrey Beedell
GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street Ottawa, Ontario K1P 1C8
Tel: 613-786-0171
Fax: 613-788-3587 jeff.beedell@gowlingwlg.com Agent for the Intervener, Canadian Chamber of Commerce

Jessica Orkin
GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1100 Toronto, Ontario M5G 2G8
Tel: 416-979-4381
Fax: 416-591-7333 jorkin@goldblattpartners.com
Solicitor for the Intervener,
British Columbia Civil Liberties Association

Colleen Bauman
GOLDBLATT PARTNERS LLP
500 – 30 Metcalfe Street Ottawa, Ontario K1P 5L4
Tel: 613-482-2455
Fax: 613-235-3041 cbauman@goldblattpartners.com
Agent for the Intervener,
British Columbia Civil Liberties Association

PAUL CHARLES WILLIAMS
P.O. Box 91
Grand River Territory Ohseweken, Ontario N0A 1M0
Tel: 905-765-4248
Fax: 905-765-1999
orihwa@gmail.com
Solicitor for the Intervener,
Council of the Passamaquoddy Nation at Schoodic

John Burns
DONOVAN & COMPANY
73 Water Street, 6th Floor Vancouver, BC V6B 1A1
Tel: 604-688-4272
Fax: 604-688-4282 john_burns@aboriginal-law.com Solicitor for the Intervener, Katzie First Nation

John W. Gailus
DEVLIN GAILUS WESTAWAY
736 Broughton Street, 2nd Floor Victoria, BC V8W 1E1
Tel: 250-361-9469
Fax: 250-361-9429
john@dgwlaw.ca
Solicitor for the Intervener, West Moberly First Nations and Prophet River First Nation

Cynthia A. Westaway
DEVLIN GAILUS WESTAWAY
55 Murray Street, Suite 230 Ottawa, Ontario K1N 5M3
Tel: 613-722-9091
Fax: 613-9097
Cynthia@dgwlaw.ca
Agent for the Intervener, West Moberly First Nations and Prophet River First Nation

Dylan C. McGuinty
McGuinty Law Offices
1192 Rockingham Avenue
Ottawa, ON K1H 8A7
Tel. (613) 526-3858
Fax: (613) 526-3187
dylanjr@mcguintylaw.ca

Table of Contents

Part I: Statement of Facts

1. On August 31, 2016, the Council of the Passamaquoddy Nation at Schoodic[1] ("the Council") was given leave to intervene in this matter. It takes no position on the facts.

Part II: Issues

2. This Factum addresses the following issues: respect for Indigenous laws; principles of Indigenous legal systems; Canadian law about Aboriginal peoples and their relations with their land; Canada's appeal system; protecting religious freedom as a *Charter* and Aboriginal right; treatment in the United States and New Zealand; and the application of equity as a path to reconciliation.

Part III: Argument

1. Respect for Indigenous Law

3. In considering matters of Aboriginal title and Aboriginal rights, Canadian courts must pay equal respect to, and give equal weight to, the legal systems of the Aboriginal nations involved.[2] In the twenty years since its introduction, this principle has faded. "Legal systems" and "nations" have disappeared from the courts' vocabulary, replaced by "perspectives" and "groups."
4. Respecting Indigenous legal orders (and cultures) in practice is a challenge for Canadian lawyers and judges. Both knowingly and unconsciously, Canadian lawyers and judges carry cultural baggage and assumptions.[3] These can lead to the systemic

---

[1] The Passamaquoddy Nation is an Indigenous Nation whose territory is in New Brunswick and Maine.

[2] *Delgamuukw,* 1997 3 SCR 1010, para. 147 (Appellants' Authorities No. 10); *R. v. Van der Peet,* 1996 2 SCR 507, paras. 49 and 50 (Appellants' Authorities No. 39): "True reconciliation will, equally, place weight on each." The Truth and Reconciliation Commission of Canada (in Volume 6 of its Report) clarified that "Indigenous law" means the systems of law of Indigenous Nations, while "Aboriginal law" means the laws Canada has made about Indigenous peoples. The Commission called for equal respect for Indigenous law as an aspect of reconciliation.

[3] "From the outset of our education as Canadian lawyers, indeed from the outset of our education, we are immersed in a particular context and point of view. This saturation far transcends our legal training, of course: the experience of a cultural narrative in any form, or on any subject, will be informed...by our understandings of place, kinship, and ideas about personhood. This is largely an unconscious process. Whether reading a novel or perusing a judgment, our accrued experience sets off a constant series of connective sparks, or internal signals, affirmations and disruptions, all at a level so deeply ingrained as to take place, most of the time, below the radar of awareness. And it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture's values and laws… The danger in retaining and imposing our ideas of what constitutes "law," according to our training and established habits of mind, is that we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognizable in Canadian law, rendering the Canadian legal framework determinative. At

racism exposed in the *Marshall* inquiry and the trial judgment in *Delgamuukw*, including an assumption that a technologically "primitive" society must also be culturally and legally unsophisticated.[4]

5. In *Delgamuukw*, the trial judge had refused to hear the *kungax* and *adaawk* of the Gitxsan and Wet'suwet'en Nations. Each level of court had acknowledged that these songs are a fundamental part of the Gitxsan and Wet'suwet'en legal systems.[5] But when the Supreme Court of Canada sent the matter back for a new trial, hoping for a negotiated resolution, it called them only "oral tradition evidence." They are more than that: they are law. Indigenous laws, originating in cultures without writing, are preserved, maintained and used in songs, stories, ceremonies, and oral recitals. These are forms so "foreign" that some Canadian courts fail to acknowledge them as laws, while other courts "take into account the Aboriginal perspective" only as part of an effort to "fit it into" common law concepts of rights.[6]
6. This Court asserted in *Delgamuukw* that Indigenous legal systems are to be respected. The concept of respect is fundamental to most Treaty relationships in what is now Canada. Respect surpasses the diluted "taking into account the Aboriginal perspective." It requires understanding that Indigenous legal systems are complex and legitimate, and acknowledging that Canadian law knows little about them. Respect is the prelude to reconciliation.

---

the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions: at most, we must unlearn them." The Hon. Lance S.G. Finch, *The Duty to learn: Taking Account of Indigenous Legal Orders in Practice;* British Columbia Continuing Legal Education Society, November 2012. See also TRC 6:77:

[4] 'Each tribe had its own tract of land, mountain, river or lake. They got their food by hunting and fishing and their clothing by trapping for fur. So far as we know they did not till the land. They had their chiefs and headmen to regulate their simple society and to enforce their customs. I say "to enforce their customs" because in early society custom is the basis of law." *The Queen v. Secretary of State for Foreign and Commonwealth Affairs,* [1982] 2 All E R 118 (CA) *per* Denning, MR. See also the trial decision in *Delgamuukw*, describing the lives of Indigenous peoples in British Columbia as "nasty, brutish and short."

[5] "They are oral histories of a special kind...a sacred official litany, or history, or recital of the most important *laws*, history, traditions and traditional territory of a House," and at para. 94, the *adaawk* was "relied on as a component of, and therefore as proof of the existence of a system of land tenure law internal to the Gitksan." Nevertheless, they were then treated only as "oral histories" (*Delgamuukw,* para. 107).

[6] "In translating [a practice] into a common-law right, the court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular Aboriginal practice fits it." *R. v. Marshall, R. v. Bernard,* [2005 2 SCR 220, 2005 SCC 43. para. 48. "European perspective"? What is being sought to be reconciled is not racially based: it is political, between nations

7. The trial judge in *Delgamuukw* characterized these aspects of Gitxsan and Wet'su-wet'en law as "beliefs." That enabled him to reject them – to say that, while he did not think the witnesses were lying, he was not bound to believe them himself. If a court treats a law as a matter of belief, it can then easily refuse to share the belief. It need not acknowledge its inability to respect or understand the Indigenous legal system, or the culture in which it is rooted.

2. The land is alive: Indigenous legal principles

8. In Indigenous legal systems, Creation stories are often crucial. They explain how we got here, how we relate to the land and to other living things, and what our responsibilities are.[7] The stories are law. They do what law does: they regulate behaviour. The "beliefs" of the Ktunaxa about what is allowed in Qat'muk have been as effective, in terms of what people have done there ("practices") for thousands of years, as any zoning by-law, or any provincial land use law.
9. While it is dangerous to generalize about Indigenous laws, they seem to share a key difference from the common law. It is exemplified in the Haudenosaunee Creation story, when Taharonhiawakon picks up a clod of earth in his hands and says: "I tell you the Earth is ALIVE!" Compare this to the origins of Canadian property law: centuries ago, when an Englishman bought a parcel of land, the transaction was not complete until he went to the place, picked up a lump of its earth, and declared: "This is MINE!" Seisin is not far from seizure.
10. For many Indigenous peoples, the assumption that one can "own" land is as repugnant as the idea that one can "own" other human beings (abandoned by the Crown only in 1833). The theory that open land is there for the taking, that there is a broad individual or corporate right to develop,[8] is foreign to Indigenous legal systems in which humans hold stewardship of Earth, not dominion, and in which so many things are relatives.

3. Canadian law about Aboriginal Peoples and their relations with land

11. The Court of Appeal stated that implementing Ktunaxa spiritual rights about Qat'muk would place constraints on people who did not share their beliefs. The constraints

---

[7] In contrast, the Canadian constitution does not address these matters.

[8] See Morton Horwitz, *The Transformation of American Law, 1780*-1860, Harvard University Press, 1977; Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership*, Bloomsbury Publishing

would be on a potential property right, not an existing one: Glacier's permits gave it only the possibility of buying or leasing Crown land.

12. Canadian law, and Canadian society, are now individualistic, commercial, technological and profoundly secular. They perceive land – a cultural rather than objective construct – as a commodity that can be divided, bought, sold, developed, and even "sterilized" under the authority of law. Societal and legal disconnection from and commodification of the land permits artificial separations of land and rights. Recently, Ryer, J.A. explained:

> An action that has the effect of sterilizing land near the Project right of way would, no doubt, damage a First Nation's ability to use and enjoy the flora and fauna that would otherwise have been situated on the sterilized land. However, the sterilizing action would have no impact upon the First Nation's ability to establish, at some future time, a right to Aboriginal title to, and governance rights in respect of, such land.[9]

13. In a chillingly similar spirit, the U.S. Court of Appeals in *Navajo Nation*, concluded that a desecration similar to that proposed for Qat'muk – a ski resort making artificial snow from sewage waste water - was permissible because the impact on the sacred land did not actually *prevent* its ceremonial use:

> There are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of...artificial snow. No plants would be destroyed or stunted, no springs polluted, no places of worship made inaccessible, or liturgy modified. The Plaintiffs would continue to have virtually unlimited access to the mountain...for religious and cultural purposes.[10]

14. Access to part of Qat'muk is one "accommodation" offered by British Columbia to the Ktunaxa. But the ceremonies and communications with the Grizzly Bear Spirit, and the sacredness of the place, do not depend on human access to Qat'muk, but on restricting it: "to destroy a spirit's place, to make it unsuitable to the spirit, would make the spirit homeless, so to speak."[11] The issue is the opposite of access.

15. While its language separates "land" from "resources," the Supreme Court of Canada has understood that the deep inconsistency of permitting the exploitation or even

---

[9] Ryer, J.A. in *Gitxaala Nation v. Canada,* 2016 FCA 187 at para. 350.
[10] *Navajo Nation v. U.S. Forestry Service*, 55 F. 3d 1058 (2008)(Appellants' Authorities No. 61).
[11] 2012 affidavit of Margaret Friedlander, cited in Appellants' Factum, para. 22.

sterilization of the land, including things in and on it, while there are ongoing negotiations to resolve matters of rights. In typical Canadian fashion, we may be defining *honour* and *reconciliation* by recognizing what they are not:

> To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource may be to deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation, nor is it honourable.[12]

16. This Court has acknowledged that Indigenous communities have unique and legal relationships with land, and the right to ensure that those relationships continue:

> Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time. The relevance of the continuity of the relationship of an aboriginal community with its land is that it applies not only to the past, but to the future as well.[13]
>
> The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in their land itself which is enjoyed by the community... a unique cultural component.[9]

17. The Court has recognized that spiritual ("ceremonial or cultural") significance is real and different, so much so that maintaining the relationship requires that the people continue to use that land only in ways consistent with that significance:

> …lands subject to Aboriginal title cannot be put to such uses as may be irreconcilable with the nature of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place… If a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g. by developing it in a way that the bond is destroyed...).[14]

18. The Ktunaxa say that Glacier proposes to develop the land "in a way that the bond is destroyed." If the Ktunaxa were to build a ski resort in Qat'muk, they would lose their Aboriginal title and rights to the land. If strangers were to do so, they could,

---

[12] *Haida Nation v. British Columbia,* 2004 SCC 73, {2004] 3 SCR 511 (Appellants' Authorities No. 15)
[13] *Delgamuukw* at paras. *126-127.*
[14] *Delgamuukw* at para. 128.

apparently legally, destroy the bond without impact on Ktunaxa Aboriginal rights. This paradox is erosive of the hope of reconciliation.

19. S. 6 of the *Charter* protects the economic and social right of Canadians to move, reside and work in every province: *mobility rights*. Indigenous peoples seek *immobility rights,* the right not to be removed from their land, and not to have their sacred places destroyed, but to fulfill their obligations in the place they have been given to live. They have not come here from another place, and do not look forward to moving to a better place. With respect to Qat'muk, the right of immobility extends to the spirits in their homes: they do not want to leave, either.

4. Canada's Court and Appeal System

20. "Taking into account the Indigenous perspective" is far harder for an appeal court than for a trial court. The trial judge may spend years hearing witnesses describe their culture, their laws, and their relationships with the land, often in their own languages, and often spending time on the land itself.[15] The trial takes as long as it takes. The appeal is heard in a faraway city courtroom, presented in a few days by typically white, male, middle-aged lawyers in black robes reading stacks of black and white papers distilled and refined into Canadian law – "Aboriginal law." The Supreme Court of Canada is so distant from Ktunaxa country and culture, and from Qat'muk, as to turn them into legal abstractions. It gives the matter only one day. Intervenors make their cases in ten minutes. The lack of contact and time reduce any chance the Court has to learn or understand anything about an ancient land- and spirit-based culture and its laws.

21. The Court has the authority and ability to remedy the lack of contact: s. 62 of the *Supreme Court Act* permits the Court to receive further evidence, and s. 56 permits the Chief Justice to make orders concerning proceedings. Nothing prevents the Court from traveling to Qat'muk or meeting the Ktunaxa, to truly learn about the spirit and laws of the place.[16]

---

[15] *Delgamuukw* took 318 days of testimony and 9,200 exhibits; in *Tsilhqot'in* "the trial…continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts." *Delgamukukw,* Para. 89; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, Para. 7 (Appellants' Authorities No. 51).

[16] The need for flexibility, and the Court's ability to provide it, is illustrated by the Court's unprecedented decision to issue a second judgment in the *Donald Marshall* case in 1999.

5. Arguing Religious Freedom Rather Than Aboriginal Rights

22. The Ktunaxa did not abandon their assertion of Aboriginal rights in framing most of their case in connection with their right to religious freedom pursuant to the *Charter of Rights and Freedoms*. The matter involves both kinds of rights.

23. Canadian society does not draw a bright line between what is law and what is its religion: the first line of the *Constitution Act, 1982* recognizes "the supremacy of God." Canadian coins assert that Elizabeth II is a monarch "by the grace of God." Canadian courts invite witnesses to swear on the Bible, invoking the belief that God will punish them if they lie. Canadian law and culture favour monotheism.

24. There are advantages to arguing religious freedom under s. 2 of the *Charter* rather than as an Aboriginal right protected by s. 35 of the *Constitution Act.* You need only prove a present sincere belief. You need not prove the belief is integral to your distinctive society, nor that it was integral centuries ago when you met your first European.[17] You need not prove that your belief is not shared by other human societies. Since s. 35 is not part of the *Charter*, it is not subject to the "reasonable limits" referred to in s. 2. Instead, the courts, beginning with *Sparrow* in 1990, created an easier path to Crown "infringements" upon those rights.[18] The *Sparrow* dance consists of a sequence of justification, minimized impact, consultation, and compensation that simply is not applied to *Charter* rights. The loss of a *Charter* right is not to be compensated in cash (or in an opportunity to participate in the infringement):[19] Aboriginal rights may be more comfortably taken away in part because they can be paid for. They have been transformed into a lesser level of right than *Charter* rights.

6. Reconciling

25. In 2014, the Supreme Court added a new layer of protection for Aboriginal rights. Justifiable objectives for infringing Aboriginal rights, according to *Delgamuukw* in

---

[17] Since contact with a member of any other ethnicity is legally irrelevant, is this not racist? See *Mabo v. Quensland* (1988) 166 CLR 186, HCA 69, (1992) HCA 23 in Australia, where the court rejected the morality of the Doctrine of Discovery.

[18] "Infringement" has nothing to do with fringes: it can strike to the heart of a practice or a right.

[19] In 2003 the Ktunaxa said "there is no price or set of socio-economic benefits great enough to compensate them for the loss of this priceless sacred area." *BCSC Reasons,* paras. 53-55 (Appellants' record, Tab 2). In *Delgamuukw* the Supreme Court wondered whether compensation for logging might take the form of reduced license fees for the Git'ksan and Wethsulwelthen.

1997, included "the development of agriculture, forestry, mining, and hydroelectric power, protection of endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[20] Now, according to *Tsilhqot'in*, "to constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation."[21] In the present case, how does a "broader public goal" of building a ski resort in Qatmuk further reconciliation? The question must be answered about infringements on an Aboriginal right, not about infringement of a *Charter* right. Aboriginal rights are collective, while *Charter* rights are generally individual: reconciliation is not a factor in weighing limits to *Charter* rights.

26. Reconciliation is not served by technical or rigid interpretations of the law. An example of the evolution of Canadian Aboriginal law is to be found in three major cases about Aboriginal title in which pleadings were found to be defective. In *Calder* in 1973, the application was totally set aside. In *Delgamuukw* in 1997, the case was sent back for a new trial. In *Tsilhqot'in* in 2014, the Supreme Court heard and decided the case in full, using its equitable jurisdiction to achieve justice and reconciliation.

7. The United States of America

27. In United States courts, the case of Doko'oosliid (the San Francisco Peaks) *Navajo Nation v. United States Forestry Service*[22] looks uncannily like Qat'muk (the Jumbo Valley). The private developer of a ski resort on "public land" sought to expand its ski runs with artificial snow made from undiluted treated sewage wastewater. The Peaks are sacred to twelve Indigenous nations. The trial court found the action would be tantamount to requiring Catholics to use waste water in their baptismal fonts. The Court of Appeals interpreted the United States' *Religious Freedom Restoration Act* narrowly: it concluded the Act provided no protection, because the Indigenous people would not actually be *prevented* by state action from carrying out their ceremonies: only their "subjective spiritual experience" would be affected – words echoed when

[20] *Delgamuukw*, at para. 165. Are these identical to "the public interest" referred to in *Charter* religious freedom cases? Does the "compelling and substantial" test in s. 35 cases compare to "proportionality"?
[21] *Tsilhqot'in, supra* note 13 at para. 82

[22] *Navajo Nation et al v. United States Forest Service,* 535 F. 3d 1058 (9th Cir. 2008).

the Court of Appeal in *Ktunaxa* referred to "a subjective loss of meaning."[23] Canada should avoid this example: it is based on a restrictive interpretation of a particular U.S. statute with no Canadian counterpart, a grievous misunderstanding of the nature of religion, and a legal system with no stated goal of reconciliation.[24]

8. New Zealand - Aotearoa

28. New Zealand – Aotearoa provides examples of reconciliation in law between a common law system and an Indigenous one. With a single Maori language, and a single vital Treaty of Waitangi, and a distinct Tribunal to ensure implementation of the spirit as well as the letter of that Treaty, New Zealand has addressed several situations in which Maori spiritual values about places and waters have conflicted with Crown and commercial development desires. The Waitangi Tribunal applies both legal systems. It seeks to protect the land rather than compensate for its destruction. Its respectful, bicultural approach leads to conclusions very different from the idea that Aboriginal title and rights can continue to exist in "sterilized" land:

> …the loss of Maori governance authority over the lands and resources in question is discussed in terms of the loss of relationships more than the loss of resource value. It is thus perhaps unsurprising that the recommended remedies are ones that restore the relationship rather than simply compensate for an equivalent monetary loss.[25]

29. New Zealand laws respect, recognize and incorporate Maori principles.[26] The courts use Maori words where English ones fall short of explaining the concepts: *whanaungatanga*, *mana, whenua, kaitiakitanga* are all vital concepts, legal as well as spiritual. A statutory example: the *Resource Management Act 1991* directs decision-makers to recognize and provide for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu* [sacred sites], and other *taonga* [treasured things]." (Ss. 6 and 8). Iorns Magallanes points out that "English

---

[23] *BCCA Reasons* para 67 (Appellants' Record, Tab 4)

[24] The dissent in the *Navajo Nation* points out: "Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a 'subjective spiritual experience.' Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact… The majority's misunderstanding of the nature of religious belief and exercise as merely 'subjective' is an excuse for refusing to accept the Indians' religion as worthy of protection…." (p. 1097).

[25] Catherine J. Iorns Magallanes, "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology That Protects the Environment", (2015) Vol. 21, pp. 273-327 at p. 292.

[26] See Iorns Magallanes, in entirety.

translations of Maori philosophical and spiritual concepts tend not to entail the full meaning, so using the Maori terms is likely to make them more effective as well as to not subject them to legal misinterpretation."[27] Respect for language is a symptom: it indicates that there is also respect for the thinking behind the words, and the laws that are fostered by the thinking.

9. Equity

30. The tools for restoring relationships can also be found in a stream of Canadian law: equity. Equity's roots lie in fairness rather than statutes and precedents. It lies closer in spirit to Indigenous law than any other aspect of the common law. Just as Maori law is often expressed in proverbs, so equity finds its sources in maxims: it is based on principles, not details. Just as Canadian law eventually recognized that Aboriginal title could not find its roots in a European feudal system, but was *sui generis*, so equity arose in England because the common law was often inconsistent, illogical or draconian. Equitable principles already govern the search for Aboriginal law remedies flowing from the honour of the Crown. Equity has its source in the Crown itself, rather than from statutes, as does the Treaty relationship. Its principles are equally capable of finding the necessary accommodation, and reconciliation between Indigenous legal systems and the common law. It is time to extend its thinking to other intersections, to fill the chasm between legal systems.

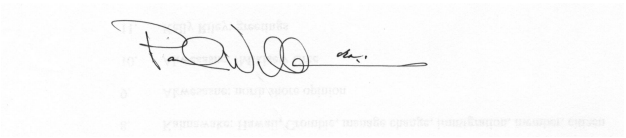
Part IV: Costs

Part V: Order Sought

31. The Council seeks permission to make oral argument up to twenty minutes in length.

32. Da neh thoh.

All of which is respectfully submitted this 24th day of October 2016.



Kayanesenh Paul Williams
Counsel for the Council of the Passamaquoddy Nation

[27] Iorns Magallanes, p. 311. In contrast, both lower courts in the Ktunaxa matter have avoided any use of the Ktunaxa language, with the exception of *Qat'muk* and three other place names.

TABLE OF AUTHORITIES

Case law

Canadian Jurisprudence

United States Jurisprudence

Secondary Sources

15. Truth and Reconciliation Commission of Canada, Vol. 6, “Reconciliation.” Queen’s Printer, Ottawa, 2016.

Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss 2, 6.

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

Resource Management Act 1991 (New Zealand), ss 6, 8.

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (United States).

Supreme Court Act, R.S.C. 1985, c. S-26, ss 56, 62.

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

MOBILITY RIGHTS

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (*a*) to move to and take up residence in any province; and
- (*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

- (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

o (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

CONSTITUTION ACT, 1982

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. (97)

Resource Management Act, 1991 (New Zealand)

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights.

Section 6(f): inserted, on 1 August 2003, by section 4 of the Resource Management Amendment Act 2003 (2003 No 23).

Section 6(g): replaced, on 1 April 2011, by section 128 of the Marine and Coastal Area (Takutai Moana) Act 2011 (2011 No 3).

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

H.R. 1308 (103rd): Religious Freedom Restoration Act of 1993

One Hundred Third Congress

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday,

the fifth day of January, one thousand nine hundred and ninety-three

An Act

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS- The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES- The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF- A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS- Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting 'the Religious Freedom Restoration Act of 1993,' before 'or title VI of the Civil Rights Act of 1964'.

(b) ADMINISTRATIVE PROCEEDINGS- Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking 'and' at the end of clause (ii);
(2) by striking the semicolon at the end of clause (iii) and inserting ', and'; and
(3) by inserting '(iv) the Religious Freedom Restoration Act of 1993;' after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act--

(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term ‘exercise of religion’ means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL- This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION- Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the ‘Establishment Clause’). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term ‘granting’, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

Supreme Court Act (R.S.C., 1985, c. S-26)

Procedure in Appeals

The Appeal

Proceedings in appeal

56 Proceedings on an appeal shall, when not otherwise provided for by this Act, the Act providing for the appeal or the general rules and orders of the Court, be in conformity with any order made, on application by a party to the appeal, by the Chief Justice or, in the absence of the Chief Justice, by the senior puisne judge present.

R.S., c. S-19, s. 63;
R.S., c. 44(1st Supp.), s. 5.

Appeal to be on a stated case

62 (1) An appeal shall be on a case to be stated by the parties or, in the event of difference, to be settled by the court appealed from or a judge thereof.

Elements of case

(2) The case shall set out the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court.

Further evidence

(3) The Court or a judge may, in the discretion of the Court or the judge, on special grounds and by special leave, receive further evidence on any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination, by affidavit or by deposition, as the Court or the judge may direct.

R.S., 1985, c. S-26, s. 62;
1990, c. 8, s. 39.