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.

Respondents

- and -

THE ATTORNEY GENERAL OF CANADA; THE ATTORNEY GENERAL FOR SASKATCHEWAN; THE CANADIAN MUSLIM LAWYERS ASSOCIATION, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO and KOOTNEAY PRESBYTERY (UNITED CHURCH OF CANADA); THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP; THE ALBERTA MUSLIM PUBLIC AFFAIRS CONCIL; THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; THE COUNCIL OF THE PASSAMAQUODDY NATION AT SCHOODIC; THE CANADIAN CHAMBER OF COMMERCE; THE SHIBOGAMA FIRT NATIONS COUNCIL; THE 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

FACTUM OF THE INTERVENERS, THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP

VINCENT DAGENAIS GIBSON LLP/s.r.l.
260 Dalhousie Street, Suite 400
Ottawa, Ontario K1N 7E4

ALBERTOS POLIZOGOPOULOS /
DEREK ROSS
Tel : 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca
Solicitors for the Interveners, the Evangelical Fellowship of Canada and Christian Legal Fellowship

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 Ohsweken, 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, Canadian Chamber of Commerce	
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

TABLE OF CONTENTS

PAGE

PART I: STATEMENT OF FACTS

1. The Evangelical Fellowship of Canada[1] ("EFC") and Christian Legal Fellowship[2] ("CLF") were granted leave to intervene in this appeal by the Order of the Honourable Wagner J. on August 31, 2016. The EFC and CLF take no position on the facts.

PART II: ISSUES

2. The EFC and CLF will make submissions on the following issues:
   a) Does s. 2(a) of the *Canadian Charter of Rights and Freedoms*[3] (the "*Charter*") only protect religious beliefs and practices which are private and have no potential impact on others?
   b) Is State interference with the means, instruments or vehicles through which religious individuals or religious communities practice and manifest their faith equivalent to direct interference with their religious practice itself?

PART III: ARGUMENT

A. Does s. 2(a) only protect religious beliefs and practices which are private and have no potential impact on others?

3. The court below concluded that the Ktunaxa Nation's religious claim was outside the scope of section 2(a) *Charter* protection on the basis that it negatively impacted third party interests and imposed "constraints on people who do not share [the Ktunaxa Nation's] religious belief."[4]
4. While third party interests may or may not ultimately be permitted to reasonably limit s. 2(a) *Charter* rights and freedoms, that is not the beginning and the end of the analysis. As set out by this Court, consideration of other competing rights is most appropriately placed in the balancing or proportionality component of the analysis.[5] This balancing comes *after*

---

1 The Evangelical Fellowship of Canada ("EFC") is a national association of churches, church-related organizations and educational institutions. The EFC is an interdenominational association of Protestant denominations and represents a constituency of 40 denominations, approximately 125 other organizations and colleges in addition to individual churches. There are approximately 4 million Protestant Evangelicals in Canada of which approximately 2.1 million are members or adherents of EFC affiliated organizations.

2 Christian Legal Fellowship ("CLF") is a national non-profit association of lawyers, law students, professors, friends and other legal professionals who support its work. Among other things, the CLF explores the complex interrelationships between the practice and theory of law and the Christian faith. While having no direct denominational affiliation, the CLF has over 600 active members from over 30 Christian denominations working in association.

3 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* ["*Charter*"].

4 *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 at para 73, ["BCCA Reasons"] **Appellants' Record, Tab 4**.

5 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, at para 26, ["*Multani*"] **Book**

inquiring into sincerity of belief that has a nexus with religion, and, if so, whether there is an interference with those beliefs that is more than trivial or insubstantial.[6]

5. The reasoning of the court below effectively circumvented this framework and could result in a precedent that suggests impacts on third party interests—even interests that are not actually *Charter* rights—will *automatically* override an entrenched constitutional right. This approach ought to be corrected so as to avoid:
    a) perpetuating a diminished understanding of religious practice and religious observance as only private exercises that ought to have minimal public dimensions; and,
    b) departing from established methodology in religious freedom jurisprudence that seeks nuanced solutions to competing rights claims.[7]

Religious freedom is not exercised only privately; there is a public good inherent in the freedom

6. Contrary to commentary contained in the BCCA decision,[8] religious belief is not private; its emphasis may often be individual, but that does not mean it is exclusively or even primarily private. Religious freedom has an inescapable public dimension that courts, including this Court, have recognized and must continue to recognize and protect.[9]
7. Freedom of religion protects more than just private human self-expression. It is also necessary to protect religious communities for their own intrinsic value, including their public contributions to the collective good of society.[10]
8. Chief Justice Dickson's seminal definition of religious freedom assumes a significant public element by including the right to (1) "declare religious beliefs openly", the right to (2) "manifest religious belief by […] teaching and dissemination", to (3) do so without fear of hindrance or reprisal, and to (4) create safeguards from the threat of the "tyranny of the

---

of Authorities of the Appellants ("**Appellants' Authorities**"), **Tab 24**.

6 *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, at paras 56-59, ["*Amselem*"] **Appellants' Authorities, Tab 50.**

7 Dwight Newman, "Implications of the *Ktunaxa Nation* / Jumbo Valley Case for Religious Freedom Jurisprudence" [2016] 75 SCLR (2d), at p. 7 ["*Newman*"] **Book of Authorities of the Respondent, the Minister of Forests, Lands and Natural Resource Operations** ("**Minister's Authorities**") **TAB 24**.

8 BCCA Reasons, *supra*, at paras. 69-70, **Appellants' Record, Tab 4**.

9 See for example, *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 SCR 772, ["*TWU*"] **Minister's Authorities, Tab 22**; and, *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613, ["*Loyola*"], **Appellants' Authorities, Tab 21**.

10 *TWU, supra*, at para 33:

> "The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." **Minister's Authorities, Tab 22**.

majority".[11] If there is no public element to religious freedom, there would be no need to fear hindrance, reprisal, or the tyranny of the majority. Further, teaching and disseminating presume the existence of others to whom religious beliefs can be taught and disseminated.

9. That religious belief has a public dimension and that it is an important and welcome aspect of Canadian society has been affirmed by this Court. For example, in *Mouvement laique Quebecois v. Saguenay,*[12] this Court affirmed the State's responsibility to preserve a "neutral public space that is free of discrimination and in which true freedom to believe or not believe is enjoyed by everyone equally, given that everyone is valued equally."[13]

10. Religious belief and religious practice have therefore rightly always been recognized as more than individual and private undertakings.[14] To the extent that it is expressed in a public and/or communal way, religious belief is no less worthy of protection and should not fall outside the scope of s. 2(a) of the *Charter*.

Scope of 2(a) does not automatically exclude claims that impact third parties

11. Similarly, s. 2(a) of the *Charter* does not automatically exclude claims simply because they impact third parties. Indeed, the existence of (seemingly competing) third party and/or public interests is inherent in virtually all freedom of religion jurisprudence. Examples include: safety in public schools;[15] rights of property owners;[16] existence of potential discrimination in public school classrooms;[17] government licensing requirements;[18] accused persons' ability to make full answer and defence;[19] claims to religious heritage;[20] and, the State's interest in protecting the best interest of the child.[21]Accordingly, as observed by Professor Dwight Newman, it follows that:

> [a]ny right that gives rise to legal requirements of accommodation inherently

---

11 *R v. Big M Drug Mart*, [1985] 1 SCR 295, at para. 96 ["*Big M*"], **Appellants' Authorities, Tab 29**

12 *Mouvement laique Quebecois v. Saguenay*, [2015] 2 SCR 3, ["*Saguenay*"], **Appellants' Authorities, Tab 23**.

13 *Saguenay, supra*, at para 74, ["*Saguenay*"], **Appellants' Authorities, Tab 23**.

14 *R. v. Edwards Books and Art Limited*, [1986] 2 SCR 713 at paras. 145, 207:
> "…freedom of religion has both individual and collective aspects"; " …when the *Charter* protects groups rights such as freedom of religion, it protects the rights of all members of the group";

See *Loyola, supra,* at paras. 43, 59-60, **Appellants' Authorities, Tab 21**; *Saguenay, supra*, at paras. 72-75.

15 *Multani, supra,* **Appellants' Authorities, Tab 24**.

16 *Amselem, supra,* **Appellants' Authorities, Tab 50**.

17 *TWU, supra,* **Minister's Authorities, Tab 22**.

18 *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 ["*Hutterian Brethren*"], **Appellants' Authorities, Tab 2**.

19 *R. v. N.S.*, [2012] 3 SCR 726 [*N.S.*], **EFC/CLFAuthorities, Tab 3**.

20 *Saguenay, supra,* **Appellants' Authorities, Tab 23**.

21 *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 SCR 181, **Appellants' Authorities, Tab 68**.

> affects third party interests, and it would thus be a profound error to say that religious freedom extends only to the point where it has no impact on others. The question is, rather, what impacts on others are permissible and legitimate and which are not.[22]

Applying the appropriate methodology

12. Where legitimate competing considerations exist in the context of a religious freedom claim, they are to be considered not at the s. 2(a) threshold stage, but in the balancing or proportionality component of the analysis.[23] Circumventing this framework forfeits the opportunity to properly (1) examine sincerity of belief; (2) assess the context-specific nature of the competing claim; (3) delineate any competing *Charter* rights; (4) determine whether the *Charter* right or freedom is infringed no more than reasonably necessary; and, (5) reconcile competing rights where delineation fails to resolve the issue.

The need to first assess sincerity of belief & interference

13. As this Court set out in *Alberta v. Hutterian Brethren of Wilson Colony*[24], a claimant must establish sincere belief[25] in a belief or practice that has a nexus with religion and that the challenged measure interferes with the claimant's religious beliefs in a manner that is more than trivial or insubstantial.[26]
14. To prove the infringement, a claimant must present objectively established facts on a balance of probabilities using any legal form of proof. However, proving an infringement and proving the absence of other interests are not one and the same. *Charter* claimants need prove only the former. Infringements that are more than trivial or insubstantial exist even in the presence of other interests.
15. In this case, the Ktunaxa Nation asserts that building a prohibited form of human accommodation in Qat'muk is a course of action that is fundamentally inconsistent with a

---

22 *Newman, supra,* at p. 6, **Minister's Authorities, TAB 24**.

23 *Multani, supra,* at para. 26, **Appellants' Authorities, Tab 24**.

24 *Hutterian Brethren, supra.*

25 There is some suggestion by the Minister that recency is a reason to reject protection of belief as insincere (see Respondent Minister factum at paras. 47, 71-72, 75, 88). However, such a finding would leave "no room for developments within religions or the formation of new religious systems" and exclude "the possibility of new religious experiences." Recency as a factor in assessing sincerity should be approached cautiously, as it may be new religious converts who need "as much, if not more, religious freedom protection than someone who has long been associated with a faith" (*Newman, supra,* at pp. 7, 8, **Minister's Authorities, Tab 24**).

26 *Hutterian Brethren, supra,* at para 32, **Appellants' Authorities**, **Tab 2**.

preeminent exercise of their faith.[27] So long as objective facts meeting the standard of a balance of probabilities support the assertion, there exists a *Charter* violation. At this stage, the absence of other interests, or the absence of impact on other interests need not be proven.

The need to assess the context and nature of "competing" considerations

16. Once a *Charter* infringement is established, the context and nature of any competing claims must be thoroughly canvassed to ascertain whether they are of sufficient importance to justify limiting that *Charter* protected freedom.[28] As Justice Abella observed in *Hutterian Brethren*: "Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the benefits of the infringement outweigh the harm it imposes."[29] The decision maker must ask: Is the competing interest another *Charter* claim? A (non-*Charter*) legal right? A statutory objective?
17. Where the competing claim is another *Charter* right, the rights can often be resolved through proper delineation so as to avoid true conflict.[30] Where there is true conflict, the competing harms, deleterious effects, and any salutary effects of the *Charter* violation are to be carefully weighed.[31] In this case, there are no competing *Charter* rights at issue. Even if there were, the mere existence of such a competing *Charter* right would not extinguish the initial *Charter* rights claim; neither should the mere existence of any other third party or public interest.
18. Where the competing claim is a statutory objective, the essential question to be asked is whether any decision made in pursuit of that objective limits the right to freedom of religion proportionately, that is, no more than is reasonably necessary.[32] In balancing statutory objectives with *Charter* rights and values engaged by their decision, administrative decision makers must give effect "as fully as possible to the *Charter* protections at stake given the particular statutory mandate."[33] This includes statutory objectives framed in terms of protecting, furthering or enhancing the "public interest"[34]as in the instant case.

---

27 Appellants' Factum, at paras. 7, 10, 19, 20, 22, 23, 24, 38.

28 The EFC and CLF agree with the Appellants' submissions on the obligation of State actors to consider and appreciate s.2(a) implications, even if other *Charter* rights are pleaded (Appellants' factum at paras 43-109)

29 *Hutterian Brethren, supra,* at para. 110, **Appellants' Authorities**, **Tab 2**.

30 *TWU, supra,* at para 29, **Minister's Authorities, Tab 22**.

31 *N.S., supra,* at paras 34-45, **EFC/CLFAuthorities, Tab 3**.

32 *Loyola, supra* at para 114, **Appellants' Authorities, Tab 21**.

33 *Loyola, supra* at para 39, **Appellants' Authorities, Tab 21**, citing *Doré v. Barreau du Québec,* [2012] 1 SCR 395, at para 56 ["*Doré*"], **Appellants' Authorities Tab 11**.

34 The CLF and EFC agree with the Appellant's discussion of the vagueness issues surrounding the term "public interest" at paras. 95-104 of Appellants' Factum.

19. The Respondent Minister is tasked with disposing of Crown land as the Minister considers advisable, *in the public interest*.[35] This power to exercise discretion in the public interest, however, is still subject to (not paramount to) the *Charter* and must not be used as a *carte blanche* mechanism to limit, restrict and infringe protected religious belief, unless it can be shown to be demonstrably justified in a free and democratic society.[36]
20. The concept of public interest—whatever the contextual definition—therefore must recognize *Charter* rights, freedoms and values as an inherent component of that interest. The *Charter*'s guarantees are not properly understood to be, in and of themselves, antithetical to the public interest – rather, it is in *keeping* with the public interest to protect *Charter* rights and freedoms, particularly religious freedom, and particularly minority religious beliefs.[37] Marginalizing individual and communal religious practices or beliefs as less important or less true than the practices–or interests–of others, "is not simply rejecting the individual's views and values, it is denying her or his equal worth."[38]
21. Public interest claims must be examined to determine what is actually meant by the public interest on the particular set of facts, whether the nature of that interest should be permitted to infringe a *Charter* right/freedom, and whether the infringement is minimally impairing. In the context of freedom of religion, the broader societal harms of infringing that right must also be considered.[39]
22. The only way to reasonably balance the statutory objectives with the *Charter* is by considering and analyzing each individual *Charter* right or freedom engaged:[40] in this case, those are the Appellants' s. 35 and s. 2(a) *Charter* rights and freedoms.
23. In the present case, can it be said that the Minister evaluated how the 2(a) rights and freedoms of the Appellants would be best protected in view of the statutory objective? It would appear not, since the Minister apparently did not even consider the Appellants' 2(a)

---

35 See s.11(1) of the *Land Act*, RSBC 1996 c. 245: "Subject to compliance with this Act and the regulations, the minister may dispose of surveyed or unsurveyed Crown land by any of the following means, as the minister considers advisable in the public interest…"

36 *Charter, supra,* at s. 1.

37 *Saguenay, supra,* at paras. 74-76, **Appellants' Authorities, Tab 23**.

38 *Saguenay, supra,* at para. 73, **Appellants' Authorities, Tab 23**.

39 *N.S., supra,* at paras 36-37, **EFC/CLF Authorities, Tab 3**.

40 As this Court observed in *Loyola, supra,* the purpose of a constitutional right is the realization of its constitutional values, and therefore the administrative decision maker must consider the "values that underpin <u>*each*</u> right and give it meaning" in order to determine if any limitations on that right are proportionate in light of the applicable statutory objectives: para. 36 [emphasis added].

rights and freedoms as distinct from any s. 35 rights claim, even though the 2(a) religious freedom claim was specifically raised by the Appellants in *addition* to their s. 35 claim. [41]

24. As the supreme law of Canada, the *Charter* is not to be discretionarily applied or adhered to. No *Charter* right is absolute, but no *Charter* right should be circumscribed for lack of analysis or for importing balancing considerations as threshold matters.

B. Is State interference with the means, instruments or vehicles through which religious individuals or religious communities practice and manifest their faith equivalent to direct interference with their religious practice itself?

25. This Court, in *R. v. Big M Drug Mart Ltd.,*[42] concluded that both purpose and effect are relevant in determining constitutionality.[43] As such, administrative decision makers and courts must consider not only the purpose of a decision, but the effect of that decision.

26. In *Hutterian Brethren,* this Court recognized that while some violations of freedom of religion are the result of "direct compulsion", they can also result from the "incidental effects" of a decision, which can be "so great that they effectively deprive the adherent of a meaningful choice", rendering the impact of the limit "very serious".[44]

27. On this basis, the *effect* of a decision maker's decision on the ability of a religious individual or community to practice and manifest their faith must be considered in determining whether the decision has reasonably balanced the *Charter* with the statutory objectives.

28. In other words, even if a decision does not affect an individual directly, but instead, affects an institution, practice, or physical space they rely on to worship, then the decision must be viewed as violating the freedom of religion of the individual.

29. In *Syndicat Northcrest v. Amselem,*[45] this Court affirmed that for the religious individual to benefit from his or her freedom of religion, the institutions and practices that permit the development and expression of religious belief must be protected.[46]

30. In *Hutterian Brethren,* Justice Abella (in dissent), recognized that for all Hutterites in Wilson Colony to be able to practice their faith, certain Hutterites needed to be in a position to possess drivers' licenses.[47] In that case, Alberta's requirement that all drivers' licenses have a

---

41 *Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations)*, 2014 BCSC 568, at paras. 269-273, **Appellants' Record, Tab 2**.

42 *Big M, supra*, **Appellants' Authorities**, **Tab 29**.

43 *Big M, supra*, at para. 80, **Appellants' Authorities**, **Tab 29**.

44 *Hutterian Brethren, supra,* at para. 94, **Appellants' Authorities, Tab 2**.

45 *Amselem, supra,* **Appellants' Authorities**, **Tab 50**.

46 *Amselem, supra,* at para. 137, **Appellants' Authorities**, **Tab 50**.

photo of the licensee only *directly* affected approximately 250 Hutterites, but the effect of the requirement made it impossible *for all* colony Hutterites to practice their faith (which required them to live in community) since it would force those possessing driver's licenses to give them up, putting the self-sufficiency of their religious community at risk.[48]

> The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence.[49]

31. That individuals and communities rely on certain means, instruments or vehicles to exercise and benefit from their *Charter* rights and freedoms is not unique to s. 2(a). For example, this Court has recognized that in some instances, s. 2(b) freedom of expression can only be meaningfully realized with access to information[50] and that s. 16(1) language rights can only be meaningfully realized if the means, which is a community of individuals speaking the same language, is provided.[51] Justice Bastarache has stated:

> In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach. […] These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees;[52]

32. Justice Abella's reasoning in *Hutterian Brethren* and Justice Bastarache's reasoning in *R. V. Beaulac*[53] apply here as well. The Ktunaxa Nation claims that the land in question is integral to their religious practice. Any State decision involving the land in question must therefore

---

47 *Hutterian Brethren, supra,* at para. 114, **Appellants' Authorities, Tab 2**.
48 *Hutterian Brethren, supra,* at paras. 119, 164, 167, **Appellants' Authorities, Tab 2**.
49 *Hutterian Brethren, supra,* at para. 170, **Appellants' Authorities, Tab 2**.
50 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 ["*Criminal Lawyers*"], at paras. 33, 34, 36, 37, **EFC/CLF Authorities, Tab 1.**
51 *R. v. Beaulac*, [1999] 1 S.C.R. 768 [*Beaulac*"], at paras. 16 and 20, **EFC/CLF Authorities, Tab 2.**
52 *Beaulac, supra,* at paras. 16 and 20, **EFC/CLF Authorities, Tab 2**.
53 *Beaulac, supra.*

be analyzed with regard to how that decision affects the freedom and ability of the Ktunaxa Nation to practice their faith.

33. In *Congregation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*[54], Justice Lebel, in dissent (though not on this point), confirmed that the *Charter* 2(a) right to freedom of religion must include the right to possess or maintain certain vehicles which are necessary to certain individuals' or communities' practice of religion and/or worship.[55]

> Freedom of religion includes the right to have a place of worship. Generally speaking, the establishment of a place of worship is necessary to the practice of a religion. Such facilities allow individuals to declare their religious beliefs, to manifest them and, quite simply, to practise their religion by worship, as well as to teach or disseminate it. In short, the construction of a place of worship is an integral part of the freedom of religion protected by s. 2 (*a*) of the *Charter*.
>
> In the case at bar, the appellants have shown that their Kingdom Hall, a place of prayer and contemplation that serves as a venue for weddings and funerals, is necessary to the manifestation of their religious faith. They should therefore be free to establish such a facility within the boundaries of the municipality. If no land were available in Zone P-3, they would be prevented from doing so, in which case they would be unable to practise their religion, and their freedom guaranteed by s. 2 (*a*) of the *Charter* would be infringed accordingly.[56]

34. In *Lafontaine,* Justice Lebel was dealing with a congregation of Jehovah's Witnesses and their need for a place or worship in order for their 2(a) rights and freedoms to have any meaning or substance, but as with *Hutterian Brethren,* the reasoning ought not be limited to places of worship but must apply to all vehicles that are demonstrably necessary for religious practice and worship.

35. In the same way that a place of worship is an integral part of religious practice and observance, other vehicles may also be integral. In *Hutterian Brethren,* that vehicle was the commune on which all Hutterites lived and which could only continue to exist if some Hutterites possessed drivers' licenses. Here, for the Ktunaxa Nation, that vehicle is the land in question as it is claimed to be integral to their relationship with the Grizzly Bear Spirit.[57]

---

54 *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*, [2004] 2 SCR 650 ["*Lafontaine*"], **Appellants' Authorities, Tab 8**.

55 *Lafontaine, supra,* at paras. 73, 74, **Appellants' Authorities, Tab 8**.

56 *Lafontaine, supra,* at paras. 73, 74, **Appellants' Authorities, Tab 8**.

57 Factum of the Appellants, at paras. 9, 10.

36. Assuming this claim is accepted, the fact that the lands are necessary for the Ktunaxa Nation to exercise their faith does not automatically mean that the Minister's decision ought to be set aside, it simply means that the effect that the development of the lands would have on the Ktunaxa Nation's 2(a) *Charter* rights to religious freedom must be considered.

37. Although the Minister's decision is not directed at the Ktunaxa Nation's religious exercise, the effect of the decision, according to the Appellants, severely impacts their ability to practice their religion. As this Court said in *Big M*, both purpose and effect are relevant to determining constitutionality.[58] In this regard, it is improper to not consider the effect of the Minister's decision on the Ktunaxa Nation's ability to practice their religion.

    In order for religious freedom to have any meaning, religious individuals and communities must have the ability to rely on and use the vehicles which are necessary to practice their religion. As a result, State action which affects the vehicles which are integral to religious practice, such as colonies, drivers' licenses, places of worship and sacred land, can and ought to be found to violate s. 2(a) of the *Charter*. Once that determination is made, the next step would be to determine whether the right or freedom is limited no more than reasonably necessary and therefore "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

PART IV: COSTS

38. The EFC and CLF do not seek costs, and asks that no costs be awarded against them.

PART V: ORDER SOUGHT

39. The EFC and CLF request the right to make oral arguments of no more than 10 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 18h day of October, 2016.

_____

ALBERTOS POLIZOGOPOULOS
DEREK ROSS
DEINA WARREN
Counsel for The Evangelical Fellowship of Canada and Christian Legal Fellowship

---

58 *Big M, supra,* at para. 80, **Appellants' Authorities, Tab 29**.

PART VI: TABLE OF AUTHORITIES

Jurisprudence

CASE	PARAGRAPHS
Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567	32, 94, 110, 114, 119, 164, 167, 170
A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181	N/A
Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine, [2004] 2 SCR 650	73, 74
Doré v. Barreau du Québec, [2012] 1 SCR 395	55, 56
Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations), 2014 BCSC 568,	269, 270, 271, 272, 273
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2015 BCCA 352	69, 70, 73
Loyola High School v. Quebec (Attorney General), [2015] 1 S.C.R. 613	4, 39, 43, 59, 60
Mouvement laique Quebecois v. Saguenay (City), [2015] 2 SCR 3	72, 73, 74, 75, 76
Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256	26
Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815	33, 34, 36, 37

R. v. Beaulac, [1999] 1 S.C.R. 768	16, 20
R v. Big M Drug Mart, [1985] 1 SCR 295	80, 96
R. v. Edwards Books and Art Limited, [1986] 2 SCR 713	145, 207
R. v. N.S., [2012] 3 SCR 726	34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45
Syndicat Northcrest v. Amselem, [2004] 2 SCR 551	56, 57, 58, 59, 137
Trinity Western University .v College of Teachers (British Columbia), [2001] 1 SCR 772	29, 33

Other References

SOURCE	**PAGE**
Dwight Newman, "Implications of the *Ktunaxa Nation* / Jumbo Valley Case for Religious Freedom, Jurisprudence" [2016] 75 SCLR (2d)	6, 7, 8

Legislative Provisions

Canadian Charter of Rights and Freedoms, Part I of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*	
Fundamental freedoms **2.** Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion;	**Libertés fondamentales** **2.** Chacun a les libertés fondamentales suivantes : *a*) liberté de conscience et de religion;

Land Act
[RSBC 1996] CHAPTER 245

11 (1) Subject to compliance with this Act and the regulations, the minister may dispose of surveyed or unsurveyed Crown land by any of the following means, as the minister considers advisable in the public interest, to a person entitled under this Act:

(a) application;

(b) public auction;

(c) public notice of tender;

(d) public drawing of lots;

(e) public request for proposals;

(f) listing with a brokerage licensed under the *Real Estate Services Act*;

(g) land exchanges.

KTUNAXA NATION COUNCIL et al. **and** **MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS et al.**

Appellants Respondents

Court File Number: 36662

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

FACTUM OF THE INTERVENERS, THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP

VINCENT DANGENAIS GIBSON LLP/s.r.l.
260 Dalhousie Street, Suite 400
Ottawa, Ontario K1N 7E4

Albertos Polizogopoulos / Derek Ross
Tel : 613-241-2701
Fax : 613-241-2599
albertos@vdg.ca
Solicitors for the Interveners,
the Evangelical Fellowship of Canada
and Christian Legal Fellowship