

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

BETWEEN:

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

APPELLANTS

AND

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Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal (the “Appeal”) raises the critical issue of the nature and scope of the s. 2(a) *Canadian Charter of Rights and Freedoms* (the “Charter”) right to freedom of religion and conscience,¹ and in particular, how this should be understood in the context of a First Nation claimant with spiritual connections to a sacred site.
2. Katzie hopes that its submission will help the Court: (1) understand the nature and scope of the s. 2(a) right in the context of First Nation claimants with spiritual connections to sacred sites, including the need to concretely protect the “belief” inherent in the s. 2(a) right; and (2) meaningfully balance the values that underlie both the s. 2(a) right and the statutory objective in question at the balancing stage.

B. Facts: Katzie First Nation, its sacred site, and the issues Katzie will address

3. Katzie is a First Nation from British Columbia, with over 500 members.² Development currently threatens Katzie’s creation site, Sheridan Hill. In response, Katzie has asserted its s. 2(a) right to preserve this site and ensure that Katzie spirituality can be meaningfully passed on to future generations.³ The outcome of this case will therefore have a significant impact on Katzie. In particular, the outcome of issues (b) and (c), as set out at paragraph 42 of the Appellant’s factum will have a significant impact on Katzie’s spirituality and culture as it relates to Sheridan Hill.

PART II. ISSUES TO BE ADDRESSED

4. Katzie’s submissions address the following issues, as set out at paragraph 42 of the Appellant’s factum: whether the Appellant’s s. 2(a) right was infringed by the Minister’s decision (Issue (b)); and whether the Minister’s decision reflects a proportionate balancing of the right and the statutory objective (Issue (c)).⁴ Katzie’s conclusions are the same as those of the Appellant (yes to Issue (b) and no to Issue (c)), although for different reasons.

PART III. STATEMENT OF ARGUMENT

A. Section 2(a) must protect the “belief” as well as the “act”

5. Katzie submits that the Appellant’s s. 2(a) right was infringed by the Minister’s decision (Issue

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

² Affidavit of Susan Miller (sworn August 4, 2016) at para 4, Katzie First Nation Motion Record for Leave to Intervene, Tab 2.

³ Ibid at paras 5–11.

⁴ Factum of the Appellant Ktunaxa Nation Council (dated July 5, 2016) at para 42 [Ktunaxa Factum].

(b)). More specifically, and as set out below, the refusal to protect Ktunaxa's sacred site deprived the Nation of its ability to "believe" in its spirituality, and hence deprived it of the full scope of the s. 2(a) protections afforded to other Canadians.

1. Section 2(a) and "belief": effecting true equality and reconciliation

6. As set out in the jurisprudence, the scope of the protection afforded by s. 2(a) is the right to "act" in accordance with religious beliefs" [emphasis added].⁵ Generally speaking, the protection of a religious "act" necessarily results in the protection of the ancillary religious "belief", without the need for any additional tangible protection of that "belief". This is because, for most claimants, "belief" is internal and does not depend on any such additional protection.

7. For example, Orthodox Sikhs "believe" that their religion commands them to wear a kirpan.⁶ Thus, in protecting a claimant's right to wear a kirpan (*i.e.* the "act"),⁷ this Court has also protected the Sikh claimant's "belief" that he or she is required to do so. As a further example, this Court has also refused to compel religious officials to perform same-sex marriages (*i.e.* the "act"). As a consequence of refusing to do so, it has also protected the officials' internally held "belief" that their religion prohibits them from performing this act.⁸ Thus, at least as far as the jurisprudence is concerned, the protection of the religious "act" under s. 2(a) effectively functions to protect both "act" and "belief" for most claimants.

8. In the case of First Nation claimants whose spirituality depends on the existence of a sacred site, however, we are faced with a different kind of "belief": one that is not entirely internal but that is inextricably connected to the sanctity of the site itself. In other words, the spiritual "belief" and the land are one and the same. On this note, the jurisprudence has also documented the interconnectedness of First Nation spiritual beliefs and the land:

... the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is ... often difficult to understand from a non-Aboriginal viewpoint.⁹

⁵ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32, [2009] 2 SCR 567 [*Hutterian Brethren*], Appellant's Book of Authorities [ABA], Tab 2.

⁶ *Multani v Commission scolaire Marguerite Bourgeoys*, 2006 SCC 6 at para 36, [2006] 1 SCR 256 [*Multani*], ABA, Tab 24.

⁷ *Ibid* at para 41.

⁸ *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 56–59, [2004] 3 SCR 698, Book of Authorities [BOA], Tab 8.

⁹ *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 272 DLR (4th) 727 at para 80, 2006 CanLII 26171 (ONSC), BOA, Tab 6; see also *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 46, [2001] 3 SCR 746, BOA, Tab 5.

9. In light of this interconnection between First Nation spiritual belief and the land, it becomes apparent how pointless the Court of Appeal's protection of the Ktunaxa's ceremonial "act" was in this case, absent the protection of the land on which Ktunaxa's spiritual "belief" related to Grizzly Bear Spirit relies. By failing to protect the sacred site upon which the "belief" relies, it thus failed to accomplish the function of s. 2(a).

10. Put another way, failing to protect the sacred site upon which their belief relies denied the Ktunaxa the ability to genuinely "believe" in accordance with the scope of s. 2(a),¹⁰ and further made the Court of Appeal an "arbiter of religious dogma" (a role which this Court has historically refused to accept).¹¹ To avoid being such an arbiter, it is thus submitted that, pursuant to s. 2(a), this Court must protect not only Ktunaxa's ceremonial "act" in respect of Grizzly Bear Spirit, but also Ktunaxa's ability to "believe" in Grizzly Bear Spirit via the protection of Qatmuk.

11. Of course, the practical consequence of this is that s. 2(a) will look different for First Nation claimants with spiritual connections to the land (such as the Ktunaxa) than it does for other claimants. That is, for such First Nation claimants, s. 2(a) will protect two things (*i.e.* the religious "act" and the sanctity of the sacred site that is required for "belief") rather than one (*i.e.* the "act" alone), as is generally the case for most claimants whose "belief" is internal and the protection thereof necessarily follows from the protection of the "act". Yet despite this differential protection, Katzie submits that understanding s. 2(a) in this manner is the only way to afford First Nations the same *Charter* protections enjoyed by other Canadians and hence effect true equality in this respect. As some academics have noted, such "group differentiated rights" may well be necessary where a given individual or group requires different rights to "protect their identity by limiting their vulnerability to the decisions of the larger society",¹² and thus achieve equality with the majority.¹³

12. Furthermore, the provision of a unique s. 2(a) right for First Nation claimants with spiritual connections to the land is also a necessary step on the path toward reconciliation. As this Court noted with respect to resolving land claims: "The governing ethos is not one of competing interests but of reconciliation".¹⁴ Katzie submits that this ethos of reconciliation should be no less important when

¹⁰ *Reference re Same Sex Marriage*, *supra* note 8 at para 57.

¹¹ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50, [2004] 2 SCR 551, ABA, Tab 50.

¹² Will Kymlicka and Raphael Cohen-Almagor, "Democracy and Multiculturalism" in Raphael Cohen-Almagor, ed, *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin* (London: Ashgate Publishing Ltd, 2000) at pg. 89 and 99, BOA, Tab 18.

¹³ *Ibid* at pg. 89 and 99.

¹⁴ *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 256, at para. 17, ABA, Tab 51

defining the scope of a First Nation's s. 2(a) right, even if this means that in effect, the protection is distinct from that afforded to other Canadian claimants.

2. Protecting sacred sites will not overextend the proper scope of section 2(a)

13. Katzie submits that protecting the sacred sites of First Nations will not lead to an influx of religious claimants seeking to protect land via s. 2(a) of the *Charter*. While ancient spiritual connections to land may abound in other countries and with other religions, in Canada, it is only the first inhabitants of this country – the First Nations – that can legitimately claim the centrality of land to their spirituality and belief system. First Nations have been here since time immemorial, and so too have their spiritual connections to the land. No other religion in Canada can objectively prove such connections. Hence, it is likely that no other religious claimants will successfully argue that s. 2(a) requires the protection of a particular piece of land, as foundation for a spiritual “belief”.

B. The decision maker must meaningfully weigh both sets of *Charter* values

14. Katzie submits that the Minister's decision does not reflect a proportional balancing of the *Charter* right and the statutory objective at issue (Issue (c)). As set out below, when a meaningful balancing of the relevant *Charter* values is carried out per the *Loyola High School v Quebec (Attorney General)* (“*Loyola*”)¹⁵ analysis, it becomes evident that the *Charter* values underlying Ktunaxa's s. 2(a) right outweigh the *Charter* values underlying the material statutory objectives.

1. The *Loyola* analysis requires a consideration of the *Charter* values underlying both the *Charter* right and statutory objectives at play

15. As set out in *Loyola*, once a *Charter* right has been claimed, established, and infringed in the administrative context, the next step is for the decision maker to determine whether that right can be upheld in light of the statutory objectives at issue, via a proportional balancing of that right and the objectives. The ultimate decision – whether it favours the upholding of the right or the infringement of the right in the face of the statutory objective – must be one that “accord[s] with the fundamental values protected by the *Charter*”.¹⁶

16. The Appellant's submissions imply that in this balancing exercise, it will not be possible for a broadly drafted statutory objective such as the “public interest” to override *Charter* rights.¹⁷ In Katzie's view, however, this presents a possible floodgates concern, since many Canadian statutes (including for

¹⁵ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 37, 39, [2015] 1 SCR 613, ABA, Tab 21 [*Loyola*].

¹⁶ *Ibid* at para 37.

¹⁷ Ktunaxa Factum at paras 94–104.

example those that facilitate regulatory decisions, such as the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*) compel decisions in the “public interest”.¹⁸ As such every time a *Charter* right was claimed in the context of a decision made under such a statute, the statutory objective could never prevail.

17. Given this untenable result, Katzie submits that even in the case of a broadly drafted statutory objective, the proportionality exercise in *Loyola* demands a meaningful balancing of the *Charter* right at stake against the statutory objective.¹⁹ This, in turn, requires considering the respective values underlying both the right and the broadly drafted statutory objective in question.

18. The need to consider values that underlie the statutory objective (in addition to those underlying the right) is supported by the jurisprudence dictating that the “core national values” underlying legislation cannot be overlooked, even in the face of a *Charter* right.²⁰ Rather, the respective values that underlie both must be balanced. Specifically, as the Court set out in *Loyola* [emphasis added]:²¹

This does not mean that religious differences [*i.e.* *Charter* rights and the values that underlie these] trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, 2007 SCC 54 (CanLII), [2007] 3 S.C.R. 607:

Not all differences [*i.e.* claimed *Charter* rights] are compatible with Canada’s fundamental values [*i.e.* those underlying the statutory objective] and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2]

Or, as the Bouchard-Taylor report observed:

A democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. These are the constituent values of our political system and they provide its foundation.

19. Moreover, if pursuant to *Loyola*, the ultimate decision must accord with *Charter* values,²² and if in some instances statutory objectives will outweigh the *Charter* right in the balancing exercise,²³ it must

¹⁸ *National Energy Board Act*, RSC, 1985, c N-7, s. 52; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s. 38.

¹⁹ *Loyola*, *supra* note 15 at para 35.

²⁰ *Ibid* at para 46; see also Dwight Newman, “Implications of the *Ktunaxa Nation/Jumbo Valley Case for Religious Freedom Jurisprudence*”, at 7, in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, forthcoming October 2016), Book of Authorities of the Respondent the Minister of Forests, Lands and Natural Resource Operations [Minister’s BOA], Tab 24.

²¹ *Loyola*, *supra* note 15 at para 46.

²² *Ibid* at para 37.

be the case that *Charter* values (or “core national values”) underlie those statutory objectives. Thus, even where the statutory objective in question is broadly drafted, decision makers must do their best to examine and balance the underlying values.

20. In short, Katzie submits that what *Loyola* requires in this case is a meaningful balancing of the respective *Charter* values underling Ktunaxa’s s. 2(a) right with respect to its sacred site, against those underling the relevant statutory objectives.

2. Identifying and balancing the relevant values

21. As set out in more detail below, Katzie submits distinct important values underlie both Ktunaxa’s s. 2(a) *Charter* right and the relevant statutory objectives. Per *Loyola*, these values must be identified and weighed against one another.

22. Although the identification of such values is a task for the decision maker on a case by case basis, it will inevitably require the decision maker to consider not only the values identified in the jurisprudence, but also in the national socio-political climate at the time of the decision. Given this, Katzie submits that a reasonable manner of identifying these values is to review both the jurisprudence, and current federal political mandates and parliamentary debates, as these are all real-time reflections of Canada’s democratic voice.

a. Values that may underlie the relevant statutory objectives

23. The relevant statutory objectives at play in the present case are set out in the *Ministry of Lands, Parks, and Housing Act*,²⁴ and the *Land Act*²⁵ in conjunction with the All-Seasons Resort Policy (as set out in the Respondent’s factum²⁶). Specifically, the objective of the *Ministry of Lands, Parks, and Housing Act* is to “to ensure the maintenance and improvement of a quality system of parks and the encouragement of the best use of Crown land for agricultural, residential, industrial, commercial and recreational opportunities within the province of British Columbia”,²⁷ and to “administer the Crown land” and “encourage outdoor recreation, establish parks and conserve the natural scenic and historic features of

²³ See, for example, *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, ABA, Tab 11; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518, Minister’s BOA, Tab 23; *Bonitto v Halifax Regional School Board*, 2015 NSCA 80, [2015] NSJ No 357 (QL), BOA, Tab 1; *Canadian Broadcasting Corporation v Warden of Bowden Institution*, 2015 FC 173, [2015] FCJ No 155 (QL), BOA, Tab 3.

²⁴ *Ministry of Lands, Parks, and Housing Act*, RSBC 1996, c 307.

²⁵ *Land Act*, RSBC 1996, c 245.

²⁶ Factum of the Respondent the Minister of Forests, Lands and Natural Resource Operations, paras 92, 93 [Minister’s Factum].

²⁷ “Bill No 16, Land Amendment Act, 1979”, 2nd reading, British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 32nd Parl, 1st Sess (12 July 1979) at 705 (Hon James Chabot, then Minister of Lands, Parks and Housing), BOA, Tab 9; see also Chabot at 709–10.

British Columbia".²⁸ The objectives of the *Land Act* are to facilitate the disposal and use of Crown land in the public interest, to designate Crown land for recreational uses and prohibit foreign purchases of Crown land,²⁹ and to dispose of Crown land where "the minister considers advisable in the public interest".³⁰

24. As such, Katzie submits the core national values underlying these statutory objectives as they relate to this decision are: (i) economic development/job creation; (ii) enjoyment of nature; and (iii) property rights.

Economic development and job creation

25. This Court has recognized economic development as a core national value underlying a statutory objective. As Chief Justice Lamer stated in *Delgamuukw v British Columbia* [emphasis added]: "In my opinion, ... general economic development of the interior of British Columbia, ... [is] the [kind] of [objective] that ... can justify the infringement of aboriginal title."³¹

26. Additionally, underscoring the current importance of economic development and job creation in Canada, all thirty mandate letters from Prime Minister Trudeau to his Executive Cabinet Ministers (the "**Mandate Letters**") contain instructions to make economic development and job creation a national priority [emphasis added]: "We made a commitment to invest in growing our economy ... to public investment as the best way to spur economic growth, job creation, and broad-based prosperity"³²

Enjoyment of nature

27. The Mandate Letter to the Minister of Environment and Climate Change confers a requirement to ensure that more Canadians "have an opportunity to experience Canada's outdoors", and "learn more about our environment."³³ In a similar expression of the democratic voice, the importance of outdoor recreation has often been relied on by Members of Parliament in debates, and when discussing the value

²⁸ *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at para 302, [2014] BCJ No 584, citing the *Ministry of Lands, Parks, and Housing Act*, s. 5(a) and *Land Act*, s. 11(1), BOA, Tab 4 [*Ktunaxa BCSC*].

²⁹ "Bill No 27, Land Act", 2nd reading, British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 29th Parl, 1st Sess (16 March 1970) at 655–56 (Hon Ray Williston, then Minister of Lands, Forests and Water Resources), BOA, Tab 10.

³⁰ *Ktunaxa BCSC*, *supra* note 28 at para 302, citing the *Land Act*, s. 11(1); Minister's Factum at para 92.

³¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165, 153 DLR (4th) 193, ABA, Tab 10.

³² See, for example, Mandate Letter from Rt Hon Justin Trudeau, Prime Minister, to Catherine McKenna, Minister of Environment and Climate Change [nd], online at: <<http://pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>>, BOA, Tab 14.

³³ *Ibid.*

of parks and outdoor recreation to Canadians.³⁴

28. Furthermore, the jurisprudence has recognized the enjoyment of nature as a core national value, capable of being balanced against *Charter* values.³⁵ An Ontario Superior Court judge recently observed that “the public from all over the world take their children to the Parks to get away from the insults and abuse of everyday life”.³⁶

Property rights

29. Despite the fact that property rights were not ultimately granted *Charter* protection, both the legislature and judiciary have contemplated but dismissed the inclusion of such a right under the *Charter*.³⁷ Katzie submits that this contemplation itself signals the core national importance of property rights. As parliamentary scholar David Johansen observes, “[p]roperty rights have played a central role in the evolution of Canadian society and indeed are an essential part of British parliamentary democracy”, and can be “traced back to the year 1215, when the *Magna Carta* was signed.”³⁸

b. Values that may underlie Ktunaxa’s section 2(a) right

30. Katzie submits that the values underlying Ktunaxa’s s. 2(a) *Charter* right include: (i) the intertwined values of true equality, human dignity, and a legitimately functioning democracy; and (ii) reconciliation. Each of these is discussed below.

True equality, human dignity, and democracy

31. Katzie submits that a nation can be neither secular (free) nor truly democratic if the *Charter* values of true equality and universal human dignity are not given significant weight at the balancing stage.

32. This Court has recognized that in order for the Canadian democratic process to meaningfully include *all* Canadians (and thus function as a truly responsible government), the *Charter* value of freedom of religion must be given significant weight in order to allow for equal human dignity and the ensuing equal ability to participate in the democratic process. Speaking about the fundamental importance of

³⁴ *House of Commons Debates*, 42nd Parl, 1st Sess, No 87 (4 October 2016) at 5493 (Ramesh Sangha), BOA, Tab 13; *House of Commons Debates*, 41st Parl, 2nd Sess, No 212 (12 May 2015) at 13786 (Blake Richards), BOA, Tab 12.

³⁵ See, for example, *R v Pawlowski*, 2014 ABCA 135, [2014] AJ No 394 (QL), BOA, Tab 7; *Bracken v Niagara Parks Police*, 2016 ONSC 5615 at para 16, [2016] OJ No 5115 (QL), BOA, Tab 2.

³⁶ *Ibid.*

³⁷ See, for example, *R v Chomski*, [1986] 1 WCB (2d) 40; *Shaw v Stein*, 2004 SKQB 194, SJ No 229; *Becker v Alberta*, [1983] 148 DLR (3d) 539, aff’d [1983] AWLD 700.

³⁸ Canada, Law and Government Division, “Property Rights and the Constitution” by David Johansen (Ottawa: BP-268E, October 1991) at 7, BOA, Tab 11.

equal human dignity as between citizens in order to enable the legitimate operation of a free and democratic society, Dickson J. drew a parallel between the American First Amendment, and s. 2 of the *Charter*, noting:³⁹

[a]n emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. [Equal rights of the individual] are the *sine qua non* of the [free democratic] political tradition underlying the Charter.

Reconciliation

33. Katzie further submits that reconciliation with First Nations is another fundamental value that underlies a First Nation's s. 2(a) right in respect of a sacred site. Indeed, in all thirty Mandate Letters, the Prime Minister stressed the paramountcy of this value, noting [emphasis added]: "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."⁴⁰ It is submitted that this need for reconciliation – which extends to the recognition of "rights" – is therefore is a fundamental value underlying a First Nation's s. 2(a) right. Thus, it too must be given significant weight at the balancing stage.

c. The final balance: the values underlying the section 2(a) right must prevail

34. As set out above, *Loyola* requires a balancing of the values underling both the *Charter* right and Statutory Objectives. Thus, the complete failure of the decision makers in this case to even identify the values to be weighed, much less balance them in a meaningful way, is untenable. That said, and as set out above, so too is the view that s. 2(a) will always prevail over broadly drafted "public interest" objectives. Thus, a case-by-case identification and meaningful evaluation of all underlying values is needed.

35. Katzie has attempted to identify the relevant values above. When these values are weighed against one another, it is Katzie's submission those values underlying Ktunaxa's s. 2(a) right must prevail. Katzie submits that although property rights, the enjoyment of nature, and economic development and job creation are undoubtedly core values in a capitalist society which has historically emphasized resource use and enjoyment, these values do not legitimate Canadian free and democratic society itself. As such, they must be considered secondary to those which do: true equality, human dignity, and reconciliation.

³⁹ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, at para 122, [1985] SCJ No 17 (QL), ABA, Tab 29.

⁴⁰ See, for example, Mandate Letter from Rt Hon Justin Trudeau, Prime Minister, to Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada [nd], online at: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>, BOA, Tab 15.

36. Specifically, Katzie's submissions have contended that true participation in the democratic process, and thus a truly representative democracy, relies on the recognition of true equality and human dignity brought about by ongoing reconciliation with First Nations, both in the legislature and the courts.

37. It would be difficult to definitively prove a causal link between increased First Nation voter turnout in the 2015 federal election⁴¹ and recent judicial and government commitment to reconciliation, though the apparent correlation is hard to ignore. As recent efforts towards reconciliation with First Nations increase, so too does First Nation participation in the democratic process.⁴²

38. Similarly, the historic under-representation of First Nations in the Canadian democratic process⁴³ has resulted in an under-representation of the First Nation perspective in legislation, including those pieces of legislation at issue in this appeal and their respective statutory objectives.

39. Katzie contends that as the judiciary, government, and society continue down the path towards reconciliation with First Nations, increased First Nation human dignity will lead to increased First Nation participation in Canada's democratic process, increased First Nation's influence over legislation, and ultimately, a decrease in the number of conflicts between core Canadian values as seen in this appeal.

40. Katzie submits that the ultimate decision in this appeal will either increase or decrease the recognition of First Nation human dignity and First Nation inclusion in Canada's free and democratic society, and thus set the pathway for tomorrow. Katzie submits that the values underlying Ktunaxa's s. 2(a) *Charter* right outweigh those underlying the statutory objectives in this appeal.

PART IV. SUBMISSIONS ON COSTS

41. Katzie does not seek costs in this Appeal and asks that no costs be awarded against it.

PART V. ORDERS SOUGHT

42. Katzie asks this honourable Court to grant it the opportunity to make oral submissions at the hearing of this Appeal, not exceeding 10 minutes.

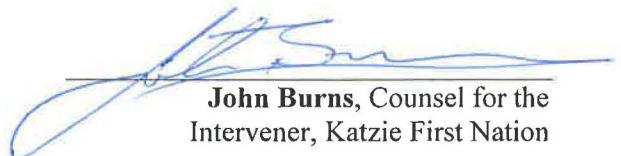
⁴¹ Sharanjit Uppal and Sebastien LaRochelle-Cote, *Indishgts on Canadian Society: Understandin the increase in voting rates between the 2011 and 2015 federal elections* (12 Oct 2016) Statistics Canada, online: <http://www.statcan.gc.ca/pub/75-006-x/2016001/article/14669-eng.htm>, BOA Tab 17.

⁴² *Ibid.*

⁴³ Kiera L Ladner and Michael McCrossan, *The Electoral Participation of Aboriginal People*, (Chief Electoral Officer of Canada, 2007) at 21, online: Elections Canada http://elections.ca/res/rec/part/paper/aboriginal/aboriginal_e.pdf, BOA, Tab 16.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2016.

SIGNED BY



John Burns, Counsel for the
Intervener, Katzie First Nation



Amy Jo Scherman, Counsel for the
Intervener, Katzie First Nation

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PART VII. STATUTORY PROVISIONS**CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

...

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Loi constitutionnelle de 1982(R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.

LIBERTES FONDAMENTALES

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

...

CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012, SC 2012, c 19, s 52.

Environmental Assessment by a Review Panel

Évaluation environnementale renvoyée pour examen par une commission

General Rules

Règles générales

Referral to review panel

Renvoi pour examen par une commission

38 (1) Subject to subsection (6), within 60 days after the notice of the commencement of the environmental assessment of a designated project is posted on the Internet site, the Minister may, if he or she is of the opinion that it is in the public interest, refer the environmental assessment to a review panel.

38 (1) Sous réserve du paragraphe (6), dans les soixante jours suivant l'affichage sur le site Internet de l'avis du début de l'évaluation environnementale d'un projet désigné, le ministre peut, s'il estime qu'il est dans l'intérêt public que celui-ci fasse l'objet d'un examen par une commission, renvoyer l'évaluation environnementale du projet pour examen par une commission.

Public interest

Intérêt public

(2) The Minister's determination regarding whether the referral of the environmental assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors:

(2) Il tient notamment compte des éléments ci-après lorsqu'il détermine si, selon lui, il est dans l'intérêt public qu'un projet désigné fasse l'objet d'un examen par une commission :

(a) whether the designated project may cause significant adverse environmental effects;

a) la possibilité que le projet entraîne des effets environnementaux négatifs importants;

(b) public concerns related to the significant adverse environmental effects that the designated project may cause; and

b) les préoccupations du public concernant les effets environnementaux négatifs importants que le projet peut entraîner;

(c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it.

c) la possibilité de coopérer avec toute instance qui exerce des attributions relatives à l'évaluation des effets environnementaux de tout ou partie du projet.

LAND ACT, RSBC 1996, c 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.

MINISTRY OF LANDS, PARKS, AND HOUSING ACT, RSBC 1996, c 307.

5 The purposes and functions of the ministry are as follows:

- (a) to administer the Crown land resource of British Columbia;
- (b) to encourage outdoor recreation, establish parks and conserve the natural scenic and historic features of British Columbia;
- (c) to undertake programs relating to the provision of housing in British Columbia;
- (d) to administer and enforce safety standards prescribed under section 11 respecting recreational activities and services on Crown land.

NATIONAL ENERGY BOARD ACT, RSC, 1985, c N-7.

Certificates

Report

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

Factors to consider

(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

...
(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

Certificats

Rapport de l'Office

52 (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit

et présente au ministre un rapport, qu'il doit rendre public, où figurent:

a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;

b) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.

Facteurs à considérer

(2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :

...
e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.