Court File No. 36664

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

B E W T E E N :

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 -

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

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – FACTS

1. The British Columbia Civil Liberties Association ("BCCLA") accepts and adopts the facts as stated by the appellants.

PART II - ISSUES

2. The BCCLA takes no position on the outcome of this appeal but rather confines its submissions to (i) the nature and scope of the right to freedom of religion guaranteed by section 2(a) of the *Charter*; and (ii) the proportionality analysis required to be undertaken when that right is infringed.

PART III - ARGUMENT

A. The Nature and Scope of the 2(a) Right

i. Section 2(a) Protects Subjective Religious Meaning and Spiritual Fulfillment

3. Freedom of religion protects the right not merely to engage in certain practices or activities but to do so *as the manifestation of* and *in accordance with* sincerely held religious or spiritual beliefs.[1] In other words, spiritual fulfillment and subjective religious meaning are the *sine quibus non* of spiritual or religious practice. It is precisely the connection to the divine and the ascription of particular kinds of significance that imbue certain practices with a religious or spiritual character and thus bring them within the ambit of section 2(a).[2]

4. The chambers judge held that section 2(a) does not extend to protect the meaning behind spiritual practices, without some associated coercion or constraint on conduct;[3] the respondents urge this Court to adopt this restrictive interpretation as well.[4] To hold that section 2(a) protects

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[1] See e.g. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 336; *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 759 [*Edwards Books*]; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 59 [*Amselem*]; *Multani v Commission scolaire Marguerite Bourgeoys*, 2006 SCC 6 at paras 25-26 [*Multani*].

[2] *Amselem*, *supra* at paras 46 and 47 ("...freedom of religion consists of the freedom to undertake practices...having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith..."; "It is the religious or spiritual essence of an action...that attracts protection"); *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32, quoting from *Edwards Books*, *supra* at 759 ("The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices...").

[3] *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2014 BCSC 568 at para 299 [*BCSC Reasons*] [Appellants' Record ("AR") Tab 2].

[4] Factum of the Respondent Minister of Forests, Lands and Natural Resource Operations at paras 64-73; Factum of the Respondent Glacier Resorts Ltd at para 67.

only practice and not subjective meaning is entirely at odds with the broad and purposive interpretation of *Charter*-protected rights and fundamental freedoms this Court has consistently adopted. With respect to religious freedom in particular, this Court has affirmed that the interpretation should be "a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."[5] An interpretation that excludes subjective spiritual meaning or fulfillment from the scope of section 2(a) fails to comply with this direction. Such an interpretation fundamentally misunderstands the nature of the right, including the necessary nexus between belief and practice, and reduces freedom of religion to the right to perform empty gestures and hollow rituals.

5. State action can interfere with religious freedom through coercion or constraint of not only religious or spiritual observances – so-called "objective acts" – but also of subjective beliefs, including belief in the presence of the divine which is often sought to be engaged through those observances. Where this has the effect of desacralizing otherwise religious or spiritual practice – that is, stripping it of spiritual fulfillment and meaning – it will almost invariably constitute an interference with religious freedom that is more than trivial or insubstantial, and thus engage section 2(a).[6] Desacralization does not merely threaten religious practice[7] but renders it nugatory.

6. Accordingly, the guarantee of religious freedom must protect against state interference not simply with the performance of rituals, ceremonies and devotional practices, but also with the presence of or access to the divine, as subjectively understood and experienced, through which those performances acquire spiritual or religious significance, value and efficacy.

ii. Section 2(a) Embraces Sacred Sites

7. Many if not most traditional Aboriginal spiritual beliefs and practices are intimately and inextricably tied to specific areas of land: sites and spaces that are sacred.[8] In many instances, these are sites of spiritual practice, that is, places of ceremonial or ritual significance. In others,

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5 *Big M*, *supra* at 344.

6 *Amselem*, *supra* at para 59.

7 *Hutterian Brethren*, *supra* at para 32 ("'Trivial or insubstantial' interference is interference that does not threaten actual religious beliefs or conduct").

8 Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2015) at 3.

they are sites of divinity, that is, sites that are home to aspects of the divine.[9] While there may be considerable overlap between the two, either practice or divinity is sufficient on its own to establish the sacred character of a particular site.

8. Where sacred sites are located on Crown land, state actions and decisions concerning the use and disposition of that land may have profound effects on section 2(a) rights. Perhaps most obviously, this can occur where the state approves or engages in land use that interferes with or constrains religious or spiritual practices that would otherwise be undertaken at the site in question. It can also, however, occur where that use interferes with or constrains an individual or community's access to the divine. In other words, just as section 2(a) protects belief as well as practice, section 2(a) can be infringed by non-trivial interference with the object of that belief as well as its manifestation.

9. From the perspective of religious or spiritual traditions that understand and experience the divine as otherworldly and/or omnipresent, the notion that state action might have any impact on the presence of the divine – much less effectively banish it – may be difficult to comprehend. From the perspective of traditional Aboriginal spiritualities, however, which understand and experience the divine as dwelling within specific parts of the natural world, it is a very real threat. Whereas many faiths conceive of the divine as transcendent of creation and beyond the reach of human activity, traditional Aboriginal spiritualities conceive of the divine as not only manifest in creation but profoundly influenced by what occurs there. As the Royal Commission on Aboriginal Peoples observed:

> The fundamental feature of Aboriginal world view was, and continues to be, that all of life is a manifestation of spiritual reality. ... All perceptions are conditioned by spiritual forces, and *all actions have repercussions in a spiritual reality.* Actions initiated in a spiritual realm affect physical reality; conversely, *human actions set off consequences in a spiritual realm.* The consequences in turn become manifest in the physical realm.[10]

10. Considered within the framework of traditional Aboriginal spiritualities, there is no question that state action can infringe section 2(a) rights through its effects on the spiritual as well as the physical realm – that is, on the divine itself as well as on the practices through which

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9 *Ibid.* at 8-9.

10 Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back.* (Ottawa: The Commission, 1996) at page 628 [Emphasis added] [*RCAP*].

the divine is experienced and engaged. The impact of these effects will undoubtedly vary from case to case, and it may well be that in some instances interference with the divine, like interference with spiritual or religious practice, may be sufficiently trivial or insubstantial so as not to give rise to any violation. In other instances, however, the impact of state action may be to render otherwise sacred sites wholly incompatible with continued practice, or wholly incompatible with the continued presence of and access to the divine. Desecrating sacred sites – stripping them of their religious or spiritual character and significance – constitutes a profound interference with the right to practice traditional Aboriginal spirituality and thus infringes section 2(a). In such instances, state action does not deprive claimants merely of a meaningful choice whether to follow their practices and beliefs,[11] but of any opportunity to do so.

11. Excluding physical locations from the scope of section 2(a), although an apparently neutral internal limit on the right, has profoundly discriminatory effects. To hold, as Glacier Resorts urges, that section 2(a) of the *Charter* does not contemplate protection of sacred sites, or even, as the courts below implicitly found, that section 2(a) does not contemplate protection of sacred sites that are not sites of practice, is categorically to exclude many if not most traditional Aboriginal spiritualities from *Charter* protection.

12. Given the centrality of sacred sites to traditional Aboriginal spiritualities, an interpretation of section 2(a) that excludes sacred sites creates an insupportable distinction between different religious and spiritual traditions – those that are and those that are not dependent on and grounded in relationships with specific lands. It makes the availability of *Charter* protection contingent on a particular understanding and experience of the nature and presence of the divine – one that, perhaps not coincidentally, is largely shared by majoritarian religious groups. It betrays the promise of "equality with respect to the enjoyment of fundamental freedoms"[12] and fails to give effect to section 27 of the *Charter*,[13] as well as to *Charter* values of multiculturalism, equality, and human worth, autonomy, and dignity more generally. Finally, but by no means least significantly, it treats Aboriginal spiritual traditions as

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11 *Hutterian Brethren*, *supra* at para 88.

12 *Big M*, *supra* at para 94.

13 See *eg Big M*, supra at para 99.

inferior and unequal.[14]

13. Such an approach must be rejected. What precisely is protected by section 2(a) will necessarily vary among Canadians depending on their specific religious or spiritual beliefs and practices. Some will be entitled to engage in certain activities, because of the nexus between those activities and their religious beliefs, whereas those same activities may be prohibited to others. Thus, for example, students of the Sikh faith may be entitled to carry a metal object resembling a dagger (the kirpan) at school, whereas that same activity is legitimately prohibited for other students. Section 2(a) therefore will not be identically *applied* to all Canadians, but it must be consistently *available* to all Canadians. Accordingly, section 2(a) must be interpreted to include sacred sites.

iii. The "Coercion of Others" Criterion Does Not Bear Scrutiny and Inappropriately Imports Proportionality Considerations into the Infringement Analysis

14. The Court of Appeal's analysis turns entirely upon the determination that it is not "consonant with the underpinning principles of the *Charter*" to provide protection for religious beliefs whose significance or vitality requires the imposition of "constraints on people who do not share that same religious belief".[15] The Court of Appeal thus adopted the criterion of coercion or constraint of "others" as an internal limit on the scope of section 2(a) rights, such that constitutional protection is not engaged when the religious belief in question would require others "to act or refrain from acting and behave in a manner consistent with a belief they do not share".[16] The Court of Appeal expressly included "the state as a whole" within the class of "others" whose freedom from constraint attracted the court's concern.[17]

15. This internal limit on the scope of section 2(a) rights does not provide a meaningful basis for excluding certain religious freedom claims from the ambit of constitution protection. To the contrary, the criterion is blunt, and its application promotes non-principled and non-purposive distinctions between different religious freedom claims.

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[14] *Cf* Government of Canada "Statement of Apology to Former Students of Indian Residential Schools", June 11, 2008.

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

[16] *BCCA Reasons*, *supra* at para 74.

[17] *BCCA Reasons*, *supra* at para 71.

16. While this Court has recognized that freedom of religion may be subject to internal limits "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others",[18] the Court has also held that such internal limits constitute an exception rather than the general rule,[19] and that it is appropriate to consider such internal limits only when a conflict arises between more than one fundamental right.[20] There is no authority for the proposition that an internal limit on section 2(a) is appropriately imposed when the religious belief in question occasions constraint on the freedom of action of "others". Rather, in the rare cases in which the scope of section 2(a) rights have been delimited at the infringement stage of analysis, it is because a conflicting fundamental *right* has been identified.[21] Even in such cases of conflicting rights, the "general rule" remains that competing rights and interests are properly to be balanced under s. 1.[22]

17. The criterion of "coercion of others" adopted by the Court of Appeal is quite simply too blunt to permit the nuanced and contextual analysis required to evaluate the myriad of competing interests and rights engaged by freedom of religion claims. In addition, it must be recognized that this criterion will operate in a particularly detrimental manner in the context of religious beliefs and practices that are grounded in specific physical spaces. The protection of sacred spaces will almost always result in some constraint on the actions of others: protection of a given space necessarily means that others cannot use this same space in incompatible ways, but constraint of this kind is not equivalent to requiring others to adhere to practices in which they do not believe.

18. Furthermore, this Court's jurisprudence similarly provides no authority for the proposition that the impacts on state interests resulting from constitutional protection might justify an internal limitation on the scope of s. 2(a) rights. A principled framework for the analysis of the scope of s. 2(a) cannot treat the state as a competing rights-holder, as the Court of Appeal's analysis effectively does. Constitutional rights properly operate as a brake on state

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18 *Multani*, *supra* at para 26, citing *Big M*, *supra* at 337 and *Amselem*, *supra* at para 62.

19 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 154 [*Whatcott*]; *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para. 109 ("This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the Charter.")

20 *Multani*, *supra* at paras 28-29.

21 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at paras 28-29; *Multani*, *supra* at paras 28-29.

22 *Whatcott*, *supra* at para 154.

power, and limitations on the state's conduct result by definition from the protection of *Charter* rights. Moreover, the fact that the limitation on the state's freedom of action operates in the realm of physical property (public property or Crown land) – as opposed to existing only in the realms of governmental policy, statutory law or governmental decision-making – does not provide a principled basis for distinguishing between religious beliefs that are deserving of constitutional protection and those that are not.[23]

19. The effect of the Court of Appeal's approach is to import proportionality considerations into the infringement analysis. Collapsing or conflating the two stages artificially narrows the scope of the right – or indeed, renders it non-existent. Consistent with the approach that has been adopted by the Court in the interpretation of other section 2 *Charter* rights,[24] the determination of whether a section 2(a) right is engaged and whether it is infringed must be made prior to and separate from the determination of the proportionality of any such infringement.

20. The question whether the right to practise traditional Aboriginal spirituality constrains the state in its use and disposition of Crown lands is one that properly falls to be determined at the proportionality stage. It has no bearing on the question whether the right is infringed, much less whether it exists.

B. The Proportionality Analysis

21. Whether proportionality is assessed under section 1 of the *Charter* or in the administrative law context, it exercises the same "justificatory muscles".[25] In both instances, the question is whether an appropriate balance has been struck between the right and the objective, and the aim is to ensure that the rights at issue are not unreasonably limited. A right will be unreasonably limited where it is interfered with more than necessary, or where the severity of the impact on the right is disproportionate to the public good achieved by the infringement.

22. The proportionality analysis to be undertaken by administrative decision makers is necessarily fact-specific and highly contextual.[26] A contextual approach to the statutory objective

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[23] Consider, by analogy, this Court's jurisprudence concerning the scope of s. 2(b) rights in relation to government-owned spaces: see *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at paras 61-79 [*Montréal*].

[24] *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927 at 969-971; *Montréal*, *supra* at para 58; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 30, 76.

[25] *Doré v Barreau du Québec*, 2012 SCC 12 at para 5.

[26] *Ibid* at paras 48, 57.

– the public good to be achieved – must consider the degree to which that objective has already been achieved absent the infringement, and the marginal, rather than absolute, benefit associated with the action or decision in question. In weighing the purpose against the extent of the infringement, "[t]he stated objective is not an absolute and should not be treated as a given."[27]

23. A contextual approach to the severity of the impact – the extent to which the *Charter* right is infringed – must similarly take into account the degree to which the religious freedom in question has historically been affected. With respect to this issue, the respondent Minister submits that one of the factors relevant to the balancing exercise is the "factually...tenuous nature of the s. 2(a) claim."[28] This assertion appears to relate to the chambers judge's findings, reproduced at paragraphs 15 and 16 of the Minister's factum, that the spiritual belief at issue was of "recent understanding", was not widely held, and was not communicated to the Minister until late in the planning and consultation process. Glacier Resorts similarly submits that the proportionality analysis undertaken by the chambers judge was correct on the facts as he found them, including those regarding the "nature and timing of the beliefs in issue."[29]

24. To the extent that the apparent longevity, distribution and publicity of a religious or spiritual belief may be relevant factors, they must be considered within their proper social and historical context. Where the belief at issue is part of traditional Aboriginal spirituality, that context includes past laws, policies and practices aimed at eradicating Aboriginal belief systems and practices. These included prohibitions on Aboriginal spiritual practices, confiscation of sacred objects, and the jailing of Aboriginal spiritual leaders.[30] Most horrifically, and most shamefully, they also included the imposition of the residential school system, which forcibly removed Aboriginal children from their families and communities, denigrated their spiritual traditions, and sought to convert them to Christianity. As the Truth and Reconciliation Commission notes, these measures worked in tandem:

> Aboriginal children were taught to reject the spiritual ways of their parents and ancestors in favour of the religions that predominated among settler societies....The impact of such treatment was amplified by federal law and policies that banned traditional Indigenous

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27 *Hutterian*, *supra* at para 195 (*per* LeBel J., dissenting).

28 Factum of the Respondent Minister of Forests, Lands and Natural Resource Operations at para 94.

29 Factum of the Respondent Glacier Resorts Ltd at para 90.

30 Canada. Truth and Reconciliation Commission. *What We Have Learned: Principles of Truth and Reconciliation* (Winnipeg: The Commission, 2015) at p 5.

spiritual practices in the children's home communities for much of the residential school era.[31]

25. "The cumulative impact of residential schools was to deny First Nations, Inuit and Métis peoples their spiritual birthright and heritage."[32] Given this history, and the profound and persistent effects of the various forms of spiritual violence visited on Aboriginal people and communities, it is hardly surprising that the knowledge of certain beliefs and practices may not be widespread, or that strictures on the sharing of information with outsiders may have been imposed or acquired greater force.

26. A contextual proportionality analysis must take into account this past interference with the intergenerational transmission of beliefs and practices. As this court has recognized, "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children."[33] Measures that "disrupt the vitality of religious communities" – such as the imposition of the residential school system and other forms of spiritual violence – "represent a profound interference with religious freedom."[34]

27. It is not difficult to imagine that in the process of rediscovering, reclaiming and revitalizing Aboriginal spirituality, individuals and communities may revive ceremonies and reaffirm beliefs that had been temporarily lost, driven underground or rendered invisible. Thus, in deciding what if any significance should attach to the fact that a particular belief appears to be of recent vintage and has not been widely known or shared either within or outside the community, decision makers must take into account historic constraints on the freedom to proclaim and manifest that belief, to affirm it through communal ceremonies, and to transmit it from one generation to the next. Failure to consider these important contextual factors risks minimizing or discounting the severity of the impact on the right to religious freedom on the basis that the right has been violated in the past, and may in some instances be tantamount to concluding that the right has effectively been extinguished.

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31 Canada. Truth and Reconciliation Commission. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Commission, 2015) at 220.

32 *Ibid* at p 226.

33 *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at para 64.

34 *Ibid* at para 67.

28. Further, decision makers must consider whether past infringements in fact *increase* the severity of the impact on the claimant's right to religious freedom, and do so in a manner that appropriate reflects both the individual and communal dimensions of freedom of religion. A contextual proportionality analysis must take into account the degree to which dispossession and relocation have already impaired the intimate spiritual relationship between an Aboriginal people and its traditional territory,[35] and caused the loss or desecration of other sacred sites. The severity of the impact of the infringement associated with the site at issue cannot be fully or appropriately measured if it is abstracted and considered in isolation from that historical context.

29. This approach to the proportionality analysis does not conflate Aboriginal rights recognized and affirmed under section 35 of the *Constitution Act, 1982* with the right to religious freedom guaranteed under section 2(a) of the *Charter*. There is no dispute that the two must be kept analytically distinct. That does not, however, mean that decision makers cannot consider the history and effects of colonialism and of past state policy and practice in conducting the balancing exercise. To the contrary, if those factors are not included and accorded appropriate weight in that process, the contextual analysis will be undermined and the result will not reflect a proportionate balancing of the right and the objective.

PARTS IV & V – COSTS & ORDER SOUGHT

30. The BCCLA does not seek costs, and asks that no costs be awarded against it.

31. The BCCLA respectfully requests that the appeal be decided in accordance with the above principles. The BCCLA requests the right to make oral argument of no more than 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Ottawa, this 26th day of October, 2016

C. Bauman for

Jessica Orkin
Adriel Weaver
Counsel for the intervener, the British Columbia Civil Liberties Association

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35 *RCAP*, *supra* at 490-491.

PART VI – TABLE OF AUTHORITIES

Jurisprudence	Para	Location
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37	3, 5, 10, 22	Respondent GR's BOA, Tab 2
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R v Edwards Books and Art Ltd., [1986] 2 SCR 713	3	Appellants' BOA, Tab 32
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Ross, Michael Lee. *First Nations Sacred Sites in Canada's Courts.* Vancouver: UBC, 2015	7	BCCLA's BOA, Tab 10