Court File No.:15-65299

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT – OTTAWA)

BETWEEN:

Douglas Cardinal
Romola V. Trebilcock Thumbadoo
Dan Gagne
Larry McDermott
Richard Jackman

Appellants (Moving Parties)

And

Windmill Green Fund LPV
and City of Ottawa

Respondents (Responding Parties)

APPELLANTS SUPPLEMENTARY FACTUM

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February 19th, 2016

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PART 1: STATEMENT OF THE CASE

1. The statement of the case is set out in the two previous factums of the Appellant and the Appellants, dated September 3rd 2015 and January 13th 2016, respectfully.

PART 2: ISSUES

2. The Appellants seek to deal with the following issues:

    a. Does the summary dismissal of the Notice of Constitutional Question by the Ontario Municipal Board Member on June 3rd 2015 infringe on the Appellant's freedom of religion and conscience, protected under Section 2(a), (b) and (d) of the Charter of Rights and Freedoms?; and

b. Does the proposed development of the Chaudiere and Albert Islands in the city of Ottawa infringe on the Appellant's freedom of religion and conscience, protected under Section 2(a), (b) and (d) of the Charter of Rights and Freedoms?; and

c. Is an administrative tribunal considered as a court of competent jurisdiction for the determination of a constitutional question?

PART 3: LAW AND ARGUMENT

Sacred Site

3. The Supreme Court of Canada, in Xeni Gwet'in, commonly referred to as Tsilhqot'in, established that aboriginal right or title must be evaluated through the prism of common law and indigenous laws, traditions and customs. The Court observed as follows:

> "The Principles developed in Calder Guerin and Sparrow were consolidated and applied in the context of a claim for Aboriginal title in Delgamuukw B.C. [1997] 3 S.C.R. 1010. This court confirmed the sui generis nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession before the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise afterward. The dual perspective of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title."

Xeni Gwet'in First Nations v B.C. 2014 Caswell BC 1814 at paragraph 14.

And Further

"The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective.

The Aboriginal perspective focuses on laws, practices, customs and traditions of the group."

Xeni Gwet'in ibid at pars. 34 and 35.

And Further

"Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty."

Xeni Gwet'in v B.C. ibid, at par 50

4. It is submitted that Xeni Gwet'in establishes that indigenous right or title must be evaluated through the common law and the laws, traditions, customs and practices of the indigenous group.

5. The Supreme Court of Canada dealt with the infringement of religion and conscience under the Charter of Rights and Freedoms. In Syndicat Northcrest v Anselem, 2004 SCC 47, observed as follows:

"In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) *Charter*? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. In *Big M*, *supra*, Dickson J. (as he then was) first defined what was meant by freedom of religion under s. 2(*a*) of the Canadian *Charter*, at pp. 336-37 and 351:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.

> Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

...Freedom means that ... no one is to be forced to act in a way contrary to his beliefs or his conscience.

With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. [Emphasis added.]

Dickson J. articulated the purpose of freedom of religion in *Big M Drug Mart*, *supra*, at p. 346:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [Emphasis added.]

Similarly, in *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 759, Dickson C.J. stated that 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. [Emphasis added.]

The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make; see, e.g., *Funk v. Manitoba (Labour Board)* (1976), 66 D.L.R. (3d) 35 (Man. C.A.), at pp. 37-38. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*R. v. Videoflicks Ltd.*, *supra*, at p. 735) and not that a particular belief is "valid".

To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, 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, irrespective of whether a particular practice or belief is required

by official religious dogma or is in conformity with the position of religious officials."

Syndicat Northcrest v Amselem 2004 Carswell QUE 1543 at pars 39, 40, 41, 43 and 46.

6. Furthermore the Supreme Court of Canada outlined the test which triggers a freedom of religion Charter challenge, as follows:

"Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

(2) Infringement of Religious Freedom

Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.

It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial*. The question then becomes: what does this mean?"

Syndicat Northcrest v Amselem, ibid at par 69.

7. The Court determined that once sincerity of belief is established and that the practice has a nexus to the religion, then the protection of the Charter is triggered. The Court observed as follows:

"Rather, as I have stated above, regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, *or* that he or she subjectively believes that it is required by the religion, *or* that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec *Charter* or that of s. 2(*a*) of the Canadian *Charter*, or both, depending on the context."

Syndicat Northcrest v Amselem, ibid at par 69.

8. The Court then found that in the facts of the case before them that the Appellants successfully made out an infringement of their freedoms of religion. The Appellants submit herein that the proposed development on a sacred site of the Algonquin's is an infringement of Section 2 of the Charter of Rights and Freedoms. It is submitted that the Algonquins are entitled to a hearing through the Notice of Constitutional Question herein. The Court concluded as follows:

> "In a multi-ethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies -, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, I must point out, with respect, that labelling an individual's steadfast adherence to his or her religious beliefs "intransigence", as Morin J.A. asserted at para. 64 of his reasons, does not further an enlightened resolution of the dispute before us."
>
> Syndicat v Amselem, ibid at par 87.

<u>Sacred Sites in Canadian Courts</u>

9. It is submitted that the Courts have not often dealt with the issue of indigenous sacred sites, however a recent book entitled "First Nations Sacred Sites in Canada's Courts"

outlines some of the difficulties in advancing these issues. The author, Michael Lee Ross, observed as follows:

> "The Translation/Interpretation Gauntlet
>
> In any dispute that comes before the courts, litigants are faced with a two-sided communication problem. On the one hand, they have to encapsulate and present their concerns, interest, and positions in legal language and ritual; on the other hand, it is up to judges to interpret those translated concerns, interests, and positions as they will (within fairly wide parameters). The litigant whose concerns, interests, and position can be fully encapsulated and presented in legal language and ritual is exceedingly rare. There is, then, at the outset a translatability problem. Litigants, moreover, must deal with the difficulty of ensuring that what is translatable is faithfully translated. Even then, if a litigant succeeds in more or less faithfully translating his or her concerns, interests, and position into legal language and ritual, a judge may still interpret those translated concerns, interests, and position in ways other than how they were intended. So long as the judge operates within the court's (fairly broad) interpretive parameters, such misinterpretation is difficult to impossible to challenge on appeal.
>
> I have briefly touched upon the fact that First Nations peoples have to run this translation/interpretation gauntlet any time they argue Aboriginal rights before the courts. As daunting as the challenge is generally, it is even more daunting if their arguments concern sacred sites specifically. There are numerous reasons for this. Here, however, I will mention only a few.

To begin with, sites sacred to First Nations are usually not sacred to those most responsible for the translation and interpretation of their concerns, interests, and position into and within a legal/judicial context. First Nations lawyers make up a small portion of the profession. Not all of them represent First Nations clients. Only rarely are First Nations lawyers members of the First Nations they represent. Hence, it is unlikely that a site that is sacred to the First Nation will also be sacred to its counsel. Similarly, First Nations people make up a small portion of the judiciary. It is highly improbable, then, that the site sacred to the litigating First Nation will also be sacred to the judge.

The question is this: How confident should a litigating First Nation be that its concerns, interests, and position regarding one of its sacred sites will be fairly translated into and interpreted within the legal/judicial context currently on offer? The answer that ultimately, if not immediately, suggests itself is: "Not very." Lawyers and judges are as prone as others to confuse *someone believing a site is sacred* with *a site being sacred to someone*. Whether they are religious, irreligious, or anti-religious is unlikely to make a difference. Any lawyer or judge who makes this mistake and who is presented with a First Nations site that is not sacred to him or her must, *a priori*, disbelieve the site's sacredness. While it is true that they may still be willing, given sufficient evidence, to believe that the First Nation believes that the site is sacred, they must, nonetheless and again *a priori*, believe that the Fist Nation is mistaken. For because the site is not sacred to them, they disbelieve its sacredness, and because they disbelieve its sacredness, they judge the contrary belief (the First Nation's belief) false. If a First Nation's

claims of sacredness are pre-stamped FALSE in the minds of those most responsible for translation and interpretation, it will be more difficult for its concerns, interests, and position regarding its sacred site to be fairly translated into and interpreted within the legal/judicial context.

Lawyers and judges are also as prone as others to extend their skepticism about a First Nation's bases for counting a site sacred to the site's sacredness. As before, whether they are religious, irreligious, or anti-religious is unlikely to matter. Some First Nations sites are sacred because of their practical religious use. Others are sacred because of their theological/cosmological significance. Still others are sacred for both reasons. Almost all Lawyers and judges are likely to be skeptical about the religious underpinnings of the site's use and/or its theological/cosmological significance. It does not follow *logically* that they must then also be skeptical about the site's sacredness. But if they are skeptical about the former, it will be hard for them to avoid entertaining the thought that if the First Nation got it wrong about the grounds for a place's sacredness, it must have it wrong about its sacredness. If therefore, those most responsible for translating and interpreting them into and within a legal/judicial context are skeptical towards a First Nation's bases for counting a site sacred, it will be more difficult for them to fairly translate and interpret them.

Supposing that lawyers and judges avoid committing either of the above mistakes, the status they finally assign to a First Nation's sacred site in the translation/interpretation process is unlikely to match the original status accorded by the First Nation. A site's sacred status differentiates it from other sites. Its

degree of sacredness situates it relative to other sacred sites. Thus, a sacred site's status is gauged relative to the status of other sites, sacred and non-sacred. A sacred site's status is situational. The translations and interpretations rendered by lawyers and judges are not, however, well suited to preserving situational complexities. At best, they preserve situational fragments. Thus, a First Nations' sacred site will lose some of its situatedness in the translation/interpretation process. Having lost some of its situatedness, it is unlikely that the site's assigned status will match its original status.

Perhaps more serious, however, is the new status it will gain. Lawyers and judges must, like everyone else, work from the familiar when encountering something new. Since they will not (except rarely) be familiar with a First Nation's sacred site before it becomes a subject of litigation, they will have to draw comparisons with familiar sites. The result will be, in terms of the translation/interpretation process, a conceptual relocation of the site. This relocation – or, one might not unfairly say, dislocation – cannot help but affect the site's status. And obviously, the lawyers' and judges' own prior views about the sacred sites with which they are familiar will come into play. The best that a litigating First Nation can hope for, it would seem, is that its sacred site is ultimately accorded a status analogous to its original status.

Of course, the process of translating into and interpreting within a legal/judicial context a First Nation's concerns, interests, and position regarding a sacred site involves more than a mere *conceptual* relocation of the site. It involves a *cultural* relocation. Thus, it involves the site's relocation within an alien network of

symbols, values (including priorities) and practice. Considered this way, the chances that a First Nation's sacred site will ultimately be accorded a status with the legal judicial context analogous to its original status seem slim indeed.

This then, is the context in which Canada's First Nations have had to fight for their sacred sites. They have had to fight for them because of the predicament that most of their sacred sites are off-reserve and therefore largely outside their control and because those who claim control pose the threat. As the threat has grown, First Nations have found it increasingly necessary to take their fight to the courts. But, to build on the metaphor, the legal weapons at their disposal have proven of limited efficacy. Indeed, the initially most promising legal weapon, Aboriginal rights, is currently of doubtful efficacy. Those First Nations who, in spite of the limited to doubtful efficacy of the legal weapons at their disposal, have carried their interpretation gauntlet just described. It is small wonder, then, that, although their sacred sites are among the things most precious to them, First Nations have only recently – rarely and usually in despite situations – taken their fight to Canada's courts. What has happened when they have done so is what I discuss next."

First Nations Sacred Sites in Canada's Courts, UBC Press 2005, Michael Lee Ross. At pages 21, 22, 23 and 24.

10. It is submitted that the above outline gives the Court an insight into the magnitude of the issue when it comes to the declaration of sacred site for the Algonquins in this matter.

ADMINISTRATIVE TRIBUNAL COMPETENCE TO DETERMINE A CONSITUTIONAL QUESTION

11. It is submitted that the Notice of Constitutional Question before the Ontario Municipal Board dealt with, among other things, the issue of sacred site and the inapplicability of Provincial legislation on unceded, unsurrendered Algonquin territory and in particular Albert and Chaudiere Islands. It is summited that the Board had an obligation to hear the constitutional question based on constitutional common law principles and by virtue of Article 4 of the Provincial Policy statement.

12. The Supreme Court of Canada in Martin v Nova Scotia 2003 Carswell NS 360 dealt with the issue of the jurisdiction of an administrative tribunal to consider constitutional validity of its own regime. The Court observed as follows:

> "First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to

every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: see *Douglas College*, *supra*, at pp. 603-604. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College*, *supra*, at p. 597). This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. As McLachlin J. (as she then was) stated in her dissent in *Cooper*, *supra*, at para. 70:

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.)."

Martin v Nova Scotia 2003 Carswell NS 360 at pars. 28 and 29.

13. The Court then further outlined the jurisdiction to consider a constitutional question and observed as follows:

"Often the statute will expressly confer on the tribunal jurisdiction to decide certain questions of law. Thus, in *Cuddy Chicks*, *supra*, the Ontario *Labour Relations Act* granted the Labour Relations Board jurisdiction "to determine all questions of fact or law that arise in any matter before it." This provision was held to provide a clear jurisdictional basis for the Labour Relations Board to consider the constitutional validity of a provision of the Act excluding agricultural employees from its purview. Yet, while obviously adequate, such a broad grant of jurisdiction is not necessary to confer on an administrative tribunal the power to apply the *Charter*. It suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision and that the

constitutional question relate to that provision."

Martin v Nova Scotia, ibid at par 37.

14. The Court summarized the current restated approach to the jurisdiction of administrative tribunal, as follows:

> "The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit *or* implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*. (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter* or (b) convincing the

court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations."

Martin v Nova Scotia, ibid at par 48.

15. The Court concluded that the administrative tribunal in the Martin case was competent to entertain the constitutional question and observed as follows:

"I conclude that the Appeals Tribunal has explicit jurisdiction to decide questions of law arising under the challenged provisions of the Act. It is thus presumed to have jurisdiction to consider the validity of these provisions under s. 15(1) of the *Charter* and to disregard these provisions if it finds them to be unconstitutional. This presumption is not rebutted by the statute, either explicitly or by necessary implication. Since the remedy requested arises from s. 52(1) of the *Constitution Act, 1982*, it is not necessary to determine whether the Appeals Tribunal is a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter*: see *Douglas College, supra,* at pp. 594-595 and 605. However, as the Appeals Tribunal's decision on the constitutionality of the challenged provisions is to be reviewed on a correctness standard, I now turn to the substantive *Charter* questions."

Martin v Nova Scotia, ibid at par 65.

16. It is submitted that the Ontario Municipal Board does have jurisdiction to hear constitutional challenges which deal with the assertion of the Islands as a sacred site and that the proposed development is an infringement of the Algonquins Charter of Rights and Freedoms, Section 2, 7, and 15(1) and Section 35(1) of the Constitutional Act. Furthermore, it is submitted that the Ontario Municipal Board is mandated to consider the Constitutional question by the Provincial Policy statement dated April 30th 2014, in particular Articles 4.0 through 4.7.

All of which is respectfully submitted this 19th day of February 2016.

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SCHEDULE “A”

Cases and Commentary

TAB

1. Syndicat Northcrest v Amselem, 2004 Carswell Que 1543
2. Martin v Nova Scotia, 2003 Carswell NS 360
3. First Nations Sacred Sites in Canada’s Courts, UBC Press 2005, Michael Lee Ross

DOUGLAS CARDINAL *et al.* Appellants	-and-	WINDMILL GREEN FUND LPV *et al.* Respondents

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