Ktunaxa Nation v. B.C.

The Supreme Court of Canada heard arguments on December 1st about whether section 2(a) of the *Charter* – the section that protects religious freedom in our country—could be extended to include an Aboriginal spiritual connection to land. This is the first time the Supreme Court will consider an Aboriginal religious freedom claim under the *Charter*.

The facts, in brief, are as follows:

Glacier Resorts want to build a ski resort on a plot of Crown land. The Ktunaxa Nation claim that they have a spiritual connection to this plot of land (which they call Qat'muk), and that building a ski resort there would destroy that spiritual connection. The Minister of Forests, Lands, & Natural Resources approved Glacier Resorts' proposal to build the ski resort. The Minister considered the Ktunaxa's right to religious practices under section 35 of the *Constitution*, but there was some doubt as to whether the Minister properly considered the Ktunaxa's section 2(a) right to religious freedom in our *Charter*.

The Ktunaxa appealed the Minister's decision. They lost at trial and on appeal to the British Columbia Court of Appeal.

This *Charter* question has been framed before the Supreme Court in the following way: should section 2(a) of the *Charter* allow religious claims that seek protection for sacred land that may infringe on the rights of others (i.e. developers building on Crown land)?

The Argument of the Appellants (Ktunaxa Nation)

The Ktunaxa opened with a number of historical examples of Aboriginal people being forced to choose between those rights protected under the *Charter* (like the right to vote) or keeping their Indian status. The Ktunaxa argued that this case is similarly about Aboriginal people being told by the government that their religious practices are less worthy of *Charter* protection than other Canadians.

The Ktunaxa argued that where a right to religious freedom under section 2(a) and an Aboriginal right to religious practice under section 35 are jointly put forward, each provision must be considered separately. When Aboriginal groups negotiated for section 35 in 1982, they never once thought their *Charter* rights were going to be displaced. Aboriginal groups have the same right to section 2(a)'s promise of religious freedom that every other Canadian has. As such, the Minister's failure to consider section 2(a) was an error in law. The Ktunaxa argued that the correct standard of review of the Minister's decision is correctness, not reasonableness. The Minister had a *Charter* right addressed to him, and didn't address it—therefore, the standard is not whether this decision was within the range of reasonable alternatives (the reasonableness standard), but rather whether it was the correct decision.

The Argument of the Respondents (Minister of Forests, Lands, & Natural Resources and Glacier Resorts)

The arguments by Glacier Resort focused on how the resort went to "extraordinary lengths and made many changes to the Resort plans" to accommodate the needs of the Ktunaxa, and, up until 2009, the Ktunaxa never indicated that their concerns couldn't be adequately addressed.

Glacier Resorts focused on two main factual issues:

> That the resort did not proceed in the face of "constant and long-established" opposition, as the Ktunaxa claim, but rather engaged in an ongoing conversation premised on accommodation and negotiation, which the resort thought was succeeding until 2009.
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> It was not only the Ktunaxa's position that changed in 2009, but also the nature of the belief. The trial judge made detailed findings on this, determining that the Ktunaxa veto of overnight accommodation specifically was a belief of recent origins and was not held back during negotiations because of religious secrecy (i.e. that only elders held this religious knowledge), as the Ktunaxa claimed. Counsel noted that overnight human accommodation was key to this project since its proposal in 1991. If this aspect of their spiritual belief was core, why was it not raised much sooner?

The Minister of Forests, Lands, & Natural Resources argued that 2(a) was not engaged in the first instance in this case for the following reasons:

> No *Charter* right is absolute, including 2(a), with most *Charter* rights having some internal limits.
> One of section 2(a)'s internal limits is that it does not protect religious rights that involve the coercion of others.
> A second internal limit should be that section 2(a) does not protect sacred sites, particularly when there is no legal right to a sacred site (the Ktunaxa do not have title to the land in question). The "sheer scope of possible conflict" in allowing sacred sites within 2(a) is too much.
> Here, subjective meaning of religious belief has possible infinite value to the Ktunaxa, so the Minister cannot meaningfully weigh or balance the opposing interests.

The government concluded by arguing that the appropriate standard of review is reasonableness—the Court is limited to the reasons expressed by the decision maker (the Minister) and whether those reasons are within a range of reasonable outcomes. It was reasonable for the Minister to determine that section 2(a) was not engaged in this case for the above reasons.

The government argued that Crown consultation under section 35 was adequate in this case. The asserted right under section 35 here was the right to "exercise spiritual practices which rely on a sacred site and require its protection". The government argued that the difficulty with this asserted right was that it was framed in absolute terms, making it almost impossible for the Crown to accommodate. The Crown engaged in "deep consultation," with the whole consultation process lasting decades. And yet, the Ktunaxa now say they cannot reconcile the Proposed Resort with their spiritual beliefs in any way. The duty to consult, the *Haida case* says, does not mean a duty to agree, and the consultation process does not "give Aboriginal groups a veto over what can be done with land" (*Haida*, para 48).