SECTION 2(a) BREACH

To establish an infringement of the right to freedom of religion, two steps must be met. First, the claimant must demonstrate a sincere belief in a practice or belief that has a nexus with religion; second, that the impugned state conduct interferes, in a manner that is non-trivial, with their ability to act in accordance with that practice or belief.
The Court clarified that in respect to s. 2(a) claims, the Ktunaxa stand in the same position as non-Aboriginal litigants. The communal aspects of freedom of religion do not, and should not, extend protection beyond the freedom to have beliefs and freedom to manifest them. The state's duty in ensuring freedom of religion does not extend to protection of the object of beliefs or the spiritual focal point of worship, but to protect everyone's freedom to hold such beliefs and manifest them in worship and practice, or by teaching and dissemination.
This was a novel claim, which fell beyond the scope of s. 2(a). The band was seeking to protect the presence of the Grizzly Bear Spirit itself, and the subjective spiritual meaning they derived from it, which failed to meet the second step of the test. The Court therefore concluded that approval of the ski resort did not breach the band's religious freedom.

DUTY TO CONSULT

The Court also found that the government fulfilled its duty to consult under s. 35. The band played an active part in all phases of the lengthy regulatory process leading to the approval of the resort process.
The decision clarified that the obligation to consult and accommodate is a right to a process, not a particular outcome. It does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.
The group is called on to facilitate the process of consultation and accommodation by setting out its claims clearly and as early as possible. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. While the goal of the process is reconciliation of the Aboriginal and state interests, in some cases this may not be possible. The process is one of "give and take", and the outcomes are not guaranteed. The ultimate obligation is that the Crown act honourably.

MINORITY REASONS

Justices Moldaver and Cote agreed with the majority's conclusions, however disagreed with the majority's analysis and conclusion surrounding s. 2(a). It was their opinion that "where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom." They do however agree that the Minister's decision was reasonable, limiting Ktunaxa's right "as little as reasonably possible", resulting in proportionate balancing of Charter rights and statutory objectives to administer Crown land and dispose of it in the public interest.

In *Ktunaxa Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, the Supreme Court of Canada ("SCC" or the "Court") decided that Qat'muk, a place of spiritual significance for the Ktunaxa Nation (the "Ktunaxa"), was not protected by the s. 2(*a*) *Charter* right to freedom of religion. With this decision, development of the area containing Qat'muk for a proposed ski resort is allowed to proceed by Crown approval.
The SCC's decision confirms the importance of raising early in the consultation process all primary concerns with a proposed development. It also confirms that s. 2(*a*) of the *Charter* is not a useful tool for protecting specific Indigenous spiritual sites. The SCC does not make any

finding in this case about protecting sacred sites under s. 35(1) of the *Constitution Act, 1982* (relying on Aboriginal and Treaty rights).

DECISION

The Ktunaxa sought judicial review of the Master Development Agreement entered into by the Minister of Forests, Lands and Natural Resource Operations and the proponent, Glacier Resorts Ltd. on March 20, 2012, regarding a proposed ski resort on Crown land in the Upper Jumbo Valley west of Invermere, British Columbia (the "Proposed Ski Resort"). Both the British Columbia Supreme Court ("BCSC") and the British Columbia Court of Appeal ("BCCA") previously dismissed the Ktunaxa's case.

The Ktunaxa put forward evidence that the Proposed Ski Resort is located at the heart of Qat'muk, a sacred site that is home to the Grizzly Bear Spirit who is of central spiritual importance to the Ktunaxa. The Ktunaxa believe the proposed permanent human habitation at the Proposed Ski Resort will cause the Grizzly Bear Spirit to leave Qat'muk and that this will have a profound negative impact and cause irreparable harm on the Ktunaxa's identity and culture, and mean that the Ktunaxa will no longer be able to receive physical and spiritual guidance from the Grizzly Bear Spirit.

The SCC considered three matters: the duty to consult; whether sacred sites could be protected through the *Charter* freedom of religion; and the use of judicial review proceedings for the adjudication of rights.

1. Duty to Consult

The SCC (like the BCSC and the BCCA) concluded that the Crown consultation in this case was adequate. The courts have consistently focused on several factual matters specific to this case: a) consultation in this case spanned more than two decades; b) accommodation measures were offered by the Crown in response to concerns by the Ktunaxa, and some of them taken up, such as reducing the footprint of the project by 60%; c) the Shuswap Indian Band was satisfied with the Crown's consultation and accommodation efforts; and d) as framed by the Court, "late in the process, the Ktunaxa adopted an uncompromising position — that accommodation was impossible…"

The Court viewed the overall conduct of the consultation as adequate to discharge the duty. In response to what the Court characterized as the "uncompromising position" taken by the Ktunaxa, the Court stated that "[w]hile the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development."

Implications for the Duty to Consult

In Canadian law, the duty to consult is contextual, or fact-specific. In this case, the Court appears critical of a) the issue of the sacred site being raised "late" in the consultation process; and b) that the Ktunaxa were not willing to accept any of the accommodations offered, or compromise on the matter of the destruction of the sacred site through human occupation. The SCC restated what they said in *Haida*, that the "s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome."

It is clear from reasons of the SCC – and each prior level of court – that late disclosure of the primary issue related to Qat'muk and the Grizzly Bear Spirit was viewed as the Ktunaxa not having asserted their rights in a timely way. Given how late in the process these concerns were raised, the Court did not given them much weight nor did the Court find them persuasive in the outcome of consultation.

2. Freedom of Religion

The Court concluded that the right claimed by the Ktunaxa does not fall within the scope of s. 2(*a*) of the *Charter* because it does not constitute a freedom to "hold religious beliefs" or "to manifest those beliefs." The Court concluded that s. 2(*a*) does not extend to the "object of beliefs" or the "spiritual focal point of worship".

The Court states that the Ktunaxa "seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it" and this is beyond the scope of s. 2(*a*). The Court's

rejection of the position that the freedom of religion could protect the Grizzly Bear Spirit effectively means that the *Charter* protects the Ktunaxa's belief in the Grizzly Bear Spirit but does not protect this location of the Grizzly Bear Spirit in their territory.

The Court referred to the importance of protecting Indigenous religious beliefs and practices and its role in achieving reconciliation. However, on the facts of this case, the Court found that s. 2(*a*) of the *Charter* could not be relied upon to protect the site itself from the development of the Proposed Ski Resort.

Implications for Protecting Sacred Sites

While the decision and legal analysis is specific to the facts and record in this case, it does clarify that the SCC is not inclined to rely on s. 2(*a*) of the *Charter* to protect sacred sites from proposed development.

The approach taken by the Court within s. 2(*a*) of the *Charter* is grounded in an understanding of religion that does not account for spiritual beliefs and practices being fundamentally connected to specific locations. The outcome of such an understanding is that there may be little or no protection available within the *Charter* context for Indigenous traditions that are land based.

One effect of this decision is that s. 2(*a*) of the *Charter* will not be a preferred legal tool to protect the spiritual importance of specific geographic locations from industrial/commercial development. Given the Court's approach to s. 2(*a*) as it relates to land-based religious and sacred places, the best legal grounding for a claim seeking to protect such a place will be within s. 35 of the *Constitution Act, 1982*.

3. The Use of Judicial Review

In its decision, the Court concludes that an administrative decision maker, and subsequently a judge on judicial review, is not able to pronounce on the existence of a claim to a s. 2(*a*) *Charter* right. On judicial review, the Ktunaxa had sought a declaration that "Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site." The Court finds that this declaration could only be made at a trial rather than on judicial review.

Implications for Judicial Review

The comments of the Court highlight a limit to what can be determined on judicial review in the context of the duty to consult and accommodate, indicating that judicial review does not function as a forum for the adjudication of the existence of rights. The Court states that such a declaration must take place in the context of a trial.

In summary:

1. The *Haida* framework was reviewed and applied to the facts. The Court reviews the Crown-Aboriginal engagement in some detail and decided the consultation was adequate.
2. A sacred Indigenous place is not protected by s. 2(*a*) of the *Charter*. The Court made no finding on the recognition and protection of Indigenous religious and spiritual practices, traditions and places under s. 35 of the *Constitution Act, 1982*.

RATIO

The decision clarifies that religious freedom does not include protection of the objects of the religion, and that the duty to consult does not convey on Aboriginal people a right to veto development.

The SCC's decision confirms the importance of raising early in the consultation process all primary concerns with a proposed development. It also confirms that s. 2(*a*) of the *Charter* is not a useful tool for protecting specific Indigenous spiritual sites. The SCC does not make any finding in this case about protecting sacred sites under s. 35(1) of the *Constitution Act, 1982* (relying on Aboriginal and Treaty rights).

“the Charter protects the freedom to worship, but does not protect the spiritual focal point of worship.” para. 71.