

Accepting a history other than  
your own

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)

**BACKGROUND**

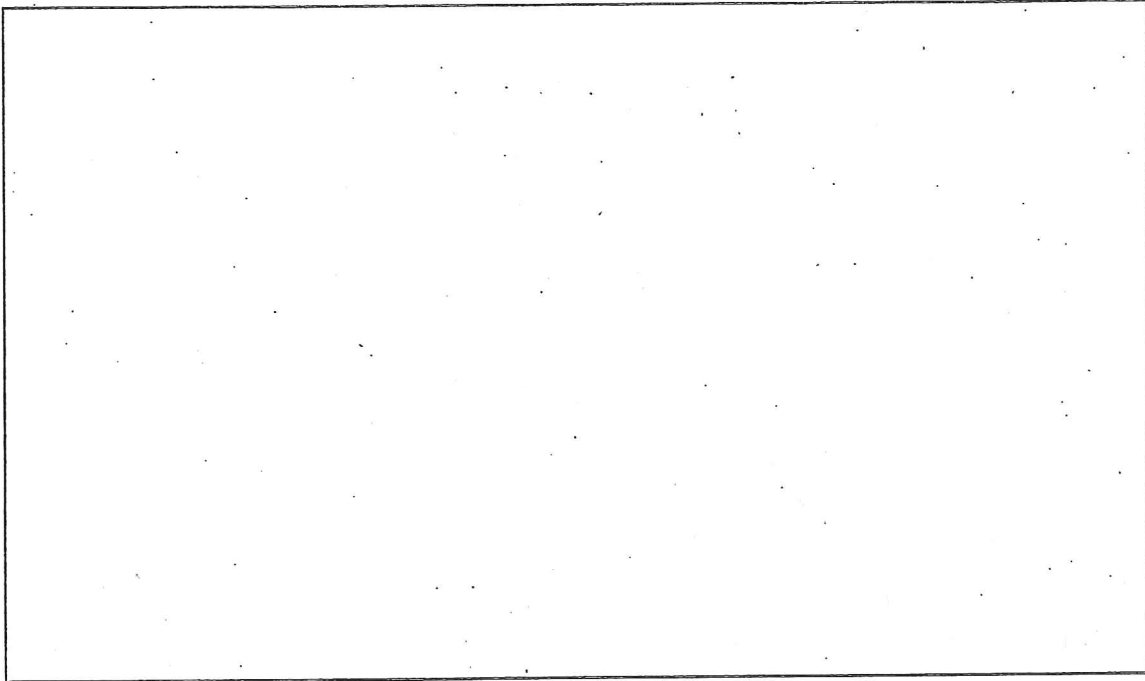
**LEGAL ISSUE(S)**

1. Did the Crown's approval of Glacier Resorts project violate the Ktunaxa Nation's constitutional right to freedom of religion?
2. Did the decision by the Minister of Forests, Lands and Natural Resource Operations breach the Crown's duty of consultation and accommodation?

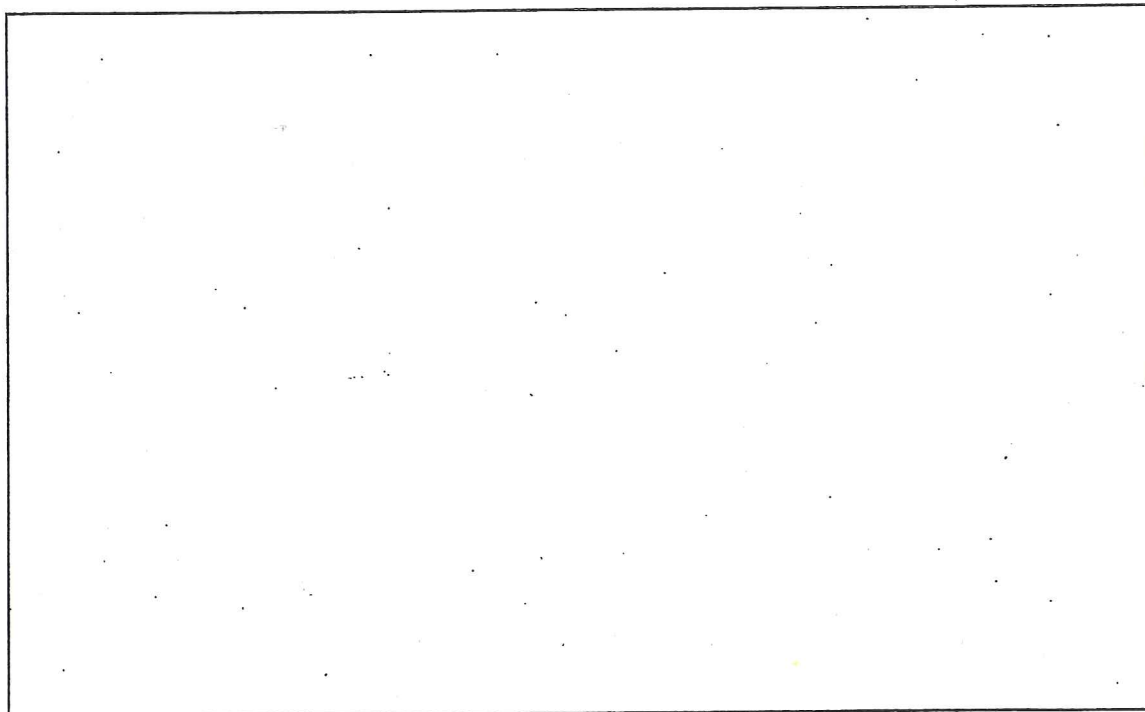
**SECTION 2(a) BREACH**

*not to be used as a guide*

## DUTY TO CONSULT



## RATIO



SOURCE <<http://www.millerthomson.com/en/publications/communiques-and-updates/aboriginal-law-update/february-2-2018-aboriginal/ktunaxa-case-summary/>>

Case Brief by a law firm post BCCA decision, but before the SCC decision

O K T O L T H U I S K L E E R  
T O W N S H E N D - L L P

<http://www.oktlaw.com/indigenous-religious-freedom-case-heads-supreme-court/>

The Supreme Court of Canada granted leave to appeal the decision of the British Columbia Court of Appeal in *Ktunaxa Nation v British Columbia*. This case has important implications for indigenous communities seeking to protect their sacred sites from desecration.

### What is the case about?

After a long process, the British Columbia Minister of Forests, Lands and Natural Resource Operations approved a Master Development Agreement for a ski hill operation proposed by Glacier Resorts.

*vs. a flat out claim that overnight accommodation is irreconcilable*

Since the beginning of the process, the Ktunaxa have said that they have important spiritual interests in the area, which is known as Qat'muk. In 2009, they disclosed that their traditional knowledge was that overnight stays by humans in the Qat'muk area would destroy its spiritual value. The Qat'muk is the home of Klawla Tuklulak, the Grizzly Bear Spirit. Overnight stays, such as in the proposed ski resort, would cause the Grizzly Bear Spirit to abandon the Ktunaxa, leaving them without its spiritual guidance and rendering many of their religious and cultural practices meaningless[1]. As a result, the community's view was that no accommodation was possible since any development would lead to this result.

The Ktunaxa challenged the Minister's approval of the development by judicial review, arguing that the decision infringed their freedom of religion protected under s. 2(a) of the Charter of Rights and Freedoms, and that the Minister had failed to fulfill the duty to consult and accommodate as required for Crown decisions affecting Aboriginal rights protected by s. 35 of the Constitution Act, 1982. Notably, they did not argue their Aboriginal rights under s. 35 and religious freedom under s. 2(a) of the Charter intersected; rather they argued their s. 2(a) right should be interpreted as if it were asserted by a non-Aboriginal group. [2]

### The decisions so far

The chambers judge denied the Ktunaxa's application for judicial review. In the context of judicial review of an administrative decision, the test for religious freedom under the Charter requires the claimant to establish that they have a sincere belief that is in some way connected to religion ("having a nexus with religion", as the courts put it), and that the government has interfered with their belief in a way that is more than trivial or insubstantial[3]. If the claimant shows this, then the court will ask whether the decision reflects a proportionate balancing of the Charter protection and the Minister's objectives[4].

The Ktunaxa's claim failed at the first step of this analysis before the chambers judge. A restriction on an otherwise lawful use of land simply because it would result in a loss of meaning for a religious practice carried out elsewhere was, in his view, only a "trivial or insubstantial" interference with religious freedom. The judge concluded that s. 2(a) was not infringed.

The British Columbia Court of Appeal agreed with the chambers judge's conclusion, but held that he had taken too narrow an approach to religious freedom by focusing only on the



individual component of religious freedom and ignoring its important communal dimension[5]. In this case, a central part of the claim was that the proposed development would undermine the vitality of the religious community by severing "the deep linkage between the asserted Ktunaxa belief and the Ktunaxa "communal institutions and traditions"[6]. Nonetheless, the Court of Appeal concluded freedom of religion was not infringed because s. 2(a) "does not apply to protect the vitality of religious communities where the vitality of the community is predicated on the assertion by a religious group that, to preserve the communal dimension of its religious beliefs, others are required to act or refrain from acting and behave in a manner consistent with a belief that they do not share."[7]

On the issue of the duty to consult, the chambers judge and the Court of Appeal both held that the consultation had been adequate. The Ktunaxa argued that the Minister had made a mistake by narrowly characterizing the Aboriginal right that triggered the duty to consult and accommodate as "a right to preclude permanent development" rather than as a right to "exercise spiritual practices which rely on a sacred site and require its protection"[8]. The Court of Appeal disagreed, concluding that "the Minister (and the chambers judge) properly considered the scope of the s. 35 right by focusing on the effects of the state action on the general Aboriginal right."[9]

### Some implications

This appeal could have significant implications for communities whose religious and cultural practices are deeply connected to sacred sites. If the Supreme Court of Canada affirms the BC Court of Appeal's reasoning on the religious freedom issue, it will be very difficult for other indigenous communities to use s. 2(a) of the Charter to prevent state-sanctioned interference with their sacred sites, especially if courts have not yet recognized their title to the lands on which those sacred sites are located. And the Court of Appeal's reasoning is not limited to cases where a religious belief requires the total exclusion of other individuals from a sacred site; it suggests that a belief that imposes any constraint on the freedoms of other people would not be protected under s. 2(a).

It is easy to understand why a court would be nervous about allowing the beliefs of the members of one spiritual tradition to dictate the behaviour of non-members. One angle to consider is whether this concern should be used to narrow the scope of s. 2(a). In Canadian constitutional law, consideration of the competing rights of other individuals is often left for the second stage of the analysis—whether the interference with the constitutional right is acceptable because it is proportionate. This approach would allow for an explicit balancing of different rights and rights holders. It is also worth noting that, partially because the Ktunaxa argued their religious freedom should be interpreted as if it were asserted by a non-Aboriginal group, the process by which the sacred site came to be subject to settler private property rights is absent from the Court's story.

This kind of case may be more easily argued as an Aboriginal title claim. Canadian law usually thinks of the right to exclude others as a property right, not as a fundamental freedom. For example, settler religious sites like temples, churches and cemeteries are protected as private property from trespass by non-members. It is possible to argue that the exclusion of others from a particular site as a principle of indigenous law should be considered proof of Aboriginal title.[10]

If gov't allows,  
admission of  
"exclusive use" /  
to land

Not just  
individual  
BUT  
communal

RATIO

b/c  
covered  
the s.35  
claim from  
s.2(a) claim



However, this approach, too, would face challenges. The land may be considered by the courts to have been “surrendered” or the title to have been “extinguished” by government action. The community might have moved away from a particular sacred space at some point in their history. Or—as in this case—the land may be subject to overlapping title claims. (Both the Ktunaxa and the Shuswap identify the Qat’muk area as part of their traditional territories). In such circumstances, Aboriginal title is unlikely to get communities much further towards protecting their sacred sites.

On the duty to consult issues in this case, I will only note that it is difficult to see how you can assess the negative impact of a proposed state action on an asserted s. 35 right—an essential step in the duty to consult analysis—without first defining that s. 35 right in terms of the culture and practices of the indigenous community. By skipping this step, you risk failing to appreciate what the protected practices mean to the community, and as a result, discounting the ways the state action would harm those practices. This seems at odds with the Supreme Court’s direction in cases like *R v. Sparrow* that “it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”

The way in which this case deals with religious freedom rights under s. 2(a) of the Charter and Aboriginal cultural rights under s. 35 of the Constitution Act will have significant impacts on indigenous communities across Canada. There is limited case law in Canada dealing with protection of indigenous sacred and burial sites, in large part because indigenous communities have been cautious about trusting Canadian law to protect these sites. The Ktunaxa Nation case will set an important precedent that will determine whether the Canadian courts are seen as an effective remedy for indigenous groups seeking to protect the most important spiritual aspects and sites of their cultures.

By Krista Nerland

[1] Court of Appeal decision at para. 9.

[2] Court of Appeal decision at para. 45.

[3] *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, 2004 SCC 47 at paras. 56-63.

[4] *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613, 2015 SCC 12 at para. 39.

[5] Court of Appeal decision at paras. 63-64.

[6] Court of Appeal decision at para. 68.

[7] Court of Appeal decision at para. 74.

[8] Court of Appeal decision at para. 81.

[9] Court of Appeal decision at para. 82.

[10] See, eg, “The Law of the Land: New Jurisprudence on Aboriginal Title”, *The Supreme Court Law Review* v. 67, 2014.

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.<sup>10</sup>

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

<sup>9</sup> *Ibid.* at 8-9.

<sup>10</sup> 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,<sup>11</sup> but of any opportunity to do so.



# SCC Decision Fall 2017 - Summary

## 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 give 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*.

