Willms & Shier

Environment
Indigenous
Energy Law

Supreme Court Finds Development of Jumbo Valley Ski Resort Does Not Impair Ktunaxa Nation's Freedom of Religion

By Julie Abouchar, Partner and Certified Environmental Law and Indigenous Legal Issues Specialist, Charles Birchall, Partner and Certified Environmental Law Specialist, Nicole Petersen, Associate, Serin Remedios, Associate and Raeya Jackiw, Student-at-Law.
© Willms & Shier Environmental Lawyers LLP.

November 10, 2017

In *Ktunaxa Nation v British Columbia*,[1] the Supreme Court considered the application of freedom of religion to Indigenous spirituality for the first time. The Ktunaxa Nation claims that the construction of a year-round ski resort in their traditional territory will drive away the Grizzly Bear Spirit, irremediably impairing their religious beliefs and practices. The Supreme Court held that the scope of the right to freedom of religion under the *Charter* does not protect the presence of the Grizzly Bear Spirit.

The **key takeaway points** from the decision are as follows

i. Indigenous sacred beliefs are religious and, in certain circumstances, can receive protection under s. 2(a) of the *Charter*.

ii. Even if s. 2(a) of the *Charter* is engaged where an administrative decision affects Indigenous spirituality, a Minister's decision to approve a project may be reasonable if it proportionately balances the s. 2(a) right with relevant statutory objectives.

iii. Section 35 of the Constitution guarantees a process not a particular result.

iv. Aboriginal rights and title claims should be settled by courts through declarations of rights, not through the judicial review of administrative decisions.

Background

In 1991, Glacier Resorts Ltd. ("Glacier") sought permission to build a year-round ski resort in Jumbo Valley in British Columbia's Purcell Mountains.

Glacier and the Government of British Columbia engaged in over 20 years of consultation with the Ktunaxa.[2] The Ktunaxa identified that Jumbo Valley held cultural and sacred significance to their Nation. The Ktunaxa proposed accommodation options to mitigate potential impacts of the proposed resort, and gave formal notice that they were interested in negotiating an accommodation and benefits agreement.[3] The lengthy consultation process resulted in several changes to the resort proposal to address the Ktunaxa's spiritual concerns.[4]

---

[1] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*].

[2] *Ktunaxa* at para 4.

[3] *Ktunaxa* at para 26 and 30.

[4] *Ktunaxa* at para 33.

In 2009, when it seemed an agreement had been reached, the Ktunaxa adopted a new position.[5] The Ktunaxa's new position, which they assert today, is that adequate accommodation is impossible.[6] The Ktunaxa assert that the site of the proposed resort, a place which they call Qat'muk, is the home of the Grizzly Bear Spirit. The proposed resort necessarily involves overnight accommodation for guests and staff. The Ktunaxa believe that permanent overnight accommodation in Qat'muk would desecrate the site and drive away the Grizzly Bear Spirit.

The Ktunaxa believe that the departure of the Grizzly Bear Spirit would sever the Ktunaxa's connection to the land. Consequently, "the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals, and ceremonies associated with Grizzly Bear Spirit would become meaningless."[7]

In 2012, the Minister of Forests, Lands and Natural Resource Operations ("Minister") approved the Master Development Agreement ("MDA") for the proposed resort. In the rationale for his decision, the Minister characterized the Ktunaxa's *prima facie* claim to an Aboriginal right to the presence of the Grizzly Bear Spirit as "weak" for the purposes of section 35.[8] The Minister's characterization was based on the lack of evidence that the Ktunaxa had engaged in particular practices in Qat'muk prior to European contact,[9] and that the significance of the Grizzly Bear Spirit was not known to the general Ktunaxa population.[10]

The Ktunaxa explained that knowledge of the significance of the Grizzly Bear Spirit was held by one elder. The elder had refrained from disclosing the knowledge for five years due to health problems and secrecy concerns.[11] The Ktunaxa also explained that certain practices or beliefs, including those relating to the Grizzly Bear Spirit, are held by knowledge keepers in the community, and are not shared with the general population or with outsiders for spiritual reasons.[12]

Despite the characterization of the Aboriginal right to the presence of the Grizzly Bear Spirit, the Minister engaged in deep consultation with respect to the Ktunaxa's general claim of spiritual connection to the land.[13]

The Ktunaxa Nation petitioned for a judicial review of the Minister's decision. The Chambers judge dismissed the Ktunaxa's petition. The Ktunaxa Nation appealed the Chambers judge's decision to the British Columbia Court of Appeal, which again dismissed the Ktunaxa's claim. The Ktunaxa appealed to the Supreme Court of Canada arguing that:

i. Approval of the MDA violated the Ktunaxa Nation's right to freedom of religion, and

ii. The Minister failed to properly consult and accommodate the Ktunaxa in approving the MDA.

---

[5] *Ktunaxa* at para 6.
[6] *Ktunaxa* at para 36.
[7] *Ktunaxa* at para 117.
[8] *Ktunaxa* at para 99 and 141.
[9] *Ktunaxa* at para 100.
[10] *Ktunaxa* at para 99.
[11] *Ktunaxa* at para 36.
[12] *Ktunaxa* at para 95.
[13] *Ktunaxa* at para 105.

On November 2, 2017, the Supreme Court of Canada dismissed the Ktunaxa Nation's case.

Freedom of Religion (*Charter*, s 2(a))

The Supreme Court noted that "with respect to the s. 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants."[14] To establish infringement of the right to freedom of religion, a claimant must demonstrate that:

i. He or she sincerely believes in a practice or belief that has a nexus with religion.

  a) the Supreme Court unanimously found that the Ktunaxa sincerely believe in the existence and importance of the Grizzly Bear Spirit and believe that the development of the ski resort will drive away the Grizzly Bear Spirit.

  b) the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that belief or practice.[15]

  c) on the issue of whether the Minister's decision to approve the ski resort interferes with the Ktunaxa's ability to act in accordance with their beliefs and practices, the Supreme Court split 7 to 2, but agreed (on different grounds) that the Minister's decision should be upheld.

With respect to the second part of the test, the majority of the Court held that the Minister's approval of the ski resort did not interfere with the Ktunaxa Nation's ability to act in accordance with their beliefs and practices associated with the Grizzly Bear Spirit. Freedom of religion protects a citizen's freedom to hold and manifest beliefs. The Court found that freedom of religion does not protect the existence or presence of focal points of worship. The Court held that seeking to protect the presence of a spirit "would extend s. 2(a) beyond its scope and would put deeply held personal beliefs under judicial scrutiny."[16]

By contrast, the minority held that the scope of s. 2(a) is not limited to the right to hold or manifest a belief through religion, but rather, that s. 2(a) protects the "religious or spiritual essence of an action."[17]

With this in mind, the minority held that the Ktunaxa's right to freedom of religion was infringed by the Minister's approval of the ski resort in a non-trivial manner because:

> "When [religious] significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(a). This is exactly what happened in this case. The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them."[18]

---

[14] *Ktunaxa* at para 58.
[15] *Ktunaxa* at para 8, *citing R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at p. 336.
[16] *Ktunaxa* at para 70-71.
[17] *Ktunaxa* at para 130.
[18] *Ktunaxa* at para 118.

The minority stated that the approval would also interfere with the Ktunaxa's ability to pass their traditions relating to the Grizzly Bear Spirit on to future generations, an essential and protected aspect of religious freedom.[19]

The minority emphasized that spiritual connection to land is at the heart of Indigenous religion[20] and found that the majority's restrictive reading of s. 2(a) "risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(a) protection."[21]

However, the minority went on to hold that the infringement of the Ktunaxa's religious freedoms was proportionate. The Minister had reasonably balanced the Ktunaxa's *Charter* right with the Minister's statutory objective to "administer Crown land and dispose of it in the public interest."[22] The minority concluded that the Minister had limited the Ktunaxa's right as little as reasonably possible given his statutory objective.[23] Specifically, "[t]he fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over fifty square kilometers of public land."[24]

Given the minority's reasoning, it is likely that we have not seen the last s. 2(a) claim relating to Indigenous spirituality. The Ktunaxa's case also highlights that where the religious freedom of Indigenous groups may be affected by an approval, administrative decision-makers are required to demonstrate that they have proportionately balanced that right with relevant statutory objectives.

Duty to Consult and Accommodate (Constitution Act, 1982, s 35)

The Court concluded that the Minister's conclusion that the Crown had met its duty to consult and accommodate under the *Constitution Act, 1982,* s. 35 was reasonable.[25] As a result, in the Court's view, the conclusion was entitled to deference.[26] The Court determined that the Minister's decision was reasonable because:

i. The record demonstrated that the Minister had properly understood the nature of the Ktunaxa's spiritual claim and assessed the adverse impact of the proposed resort on that claim[27]

ii. The Minister had engaged in two decades of negotiation and deep consultation with the Ktunaxa Nation[28]

iii. The original project proposal had been significantly changed to accommodate the Ktunaxa's concerns about the resort's impact on their spiritual claims.[29] Notably the size of the controlled recreational area was reduced by approximately 60%, the total resort area was reduced, and special provisions were made to protect grizzly bear habitat[30]

---

19 *Ktunaxa* at para 125.
20 *Ktunaxa* at para 127.
21 *Ktunaxa* at para 131.
22 *Ktunaxa* at para 119, 136 and 145.
23 *Ktunaxa* at para 120.
24 *Ktunaxa* at para 154.
25 *Ktunaxa* at para 77.
26 *Ktunaxa* at para 77.
27 *Ktunaxa* at para 93.
28 *Ktunaxa* at para 87.
29 *Ktunaxa* at para 87.
30 *Ktunaxa* at para 32-33.

iv. The Ktunaxa adopted a new, uncompromising position that accommodation was impossible late in the consultation process when it appeared that all major issues had been resolved[31]

v. When the Ktunaxa raised this new position the Minister tried to consult further with the Ktunaxa but was told that further consultation would be fruitless as only rejection of the proposed resort could accommodate the Ktunaxa's spiritual claim,[32] and

vi. The Minister provided extensive reasons for his decision to approve the proposed project which included a detailed account of the consultation and accommodation that had occurred.

The Court confirmed that section 35 does not guarantee a particular result or give unsatisfied claimants a veto over state action.[33] When there has been adequate consultation and accommodation, development may proceed without the consent of affected Indigenous peoples, particularly where claims are asserted and unproven.[34]

The Court emphasized that consultation is a "process of give and take"[35] and a "two-way street."[36] An Indigenous group involved in consultation is "called on to facilitate the process of consultation and accommodation by setting out its claims clearly and as early as possible."[37] In its reasons, the Court focused on the persistent attempts of the Minister to engage in consultation and accommodation with the Ktunaxa over a 20 year period, and highlighted the fact that the Ktunaxa adopted a new "uncompromising" and "absolute" position late in the process.

It remains to be seen if or how the Supreme Court's reasoning might change with the application of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") and, in particular, the principle of Free Prior and Informed Consent ("FPIC") to Indigenous rights in Canada. The Supreme Court notably did not reference UNDRIP or FPIC in its reasons. This is likely attributable to the fact that the Ktunaxa's claim was filed before UNDRIP was adopted by the United Nations or endorsed by the federal government.

Judicial Review of Consultation is Not the Forum for Resolving Aboriginal Rights Claims

The Supreme Court interpreted the Ktunaxa's claim of inadequate consultation as a petition for a declaration of an Aboriginal right to a sacred site and associated spiritual practices "in the guise of a judicial review of an administrative decision."[38] The Court emphasized that a declaration of Aboriginal right:

> "cannot be made by a Court sitting in judicial review of an administrative decision. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation."[39]

---

[31] *Ktunaxa* at para 87.
[32] *Ktunaxa* at para 87.
[33] *Ktunaxa* at para 79 and 83.
[34] *Ktunaxa* at para 80.
[35] *Ktunaxa* at para 114.
[36] *Ktunaxa* at para 80.
[37] *Ktunaxa* at para 79.
[38] *Ktunaxa* at para 84.
[39] *Ktunaxa* at para 84.

The Court's reasoning clarifies that Aboriginal rights cannot be indirectly asserted. There is a clear distinction between the process of settling Indigenous rights claims and the duty to consult which is applied to ensure that the impact on asserted rights is fairly considered pending the resolution of claims.

Looking Forward

But for certain facts including the length and extent of consultation activities and the scope and timing of the Ktunaxa's new claim, the majority of the Court could have found that the Ktunaxa's freedom of religion had been infringed by the Minister's approval of the resort. In other words, the Court's decision will likely not preclude future freedom of religion claims based on Indigenous spiritual practices. Further, it remains to be seen how the proportionality test will be applied in circumstances where an infringement of s. 2(a) of the *Charter* is found to exist.

It also bears noting that Glacier will likely continue to face difficulty and opposition in developing the ski resort. The proposed resort has faced backlash from the local community including Indigenous and non-Indigenous residents, environmental groups, and outdoor industry companies such as Patagonia. The debate has even been the focus of a documentary film, "Jumbo Wild".[40]

Glacier will also face future regulatory and judicial obstacles. On June 18, 2015, the British Columbia Minister of Environment found that the Environmental Assessment Certificate ("EAC") for the proposed report had expired in October 2014.[41] The EAC is necessary for Glacier to continue any development of the proposed resort. Glacier has announced its intention to seek a judicial review of the Minister of Environment's decision.[42]

Julie Abouchar, is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and certified as a Specialist in Environmental Law and in Indigenous Legal Issues by the Law Society of Upper Canada. Julie recently co-authored Ontario Water Law, published by Canada Law Book. Julie may be reached at 416-862-4836 or by e-mail at jabouchar@willmsshier.com.

Charles (Chuck) J. Birchall, is a partner at Willms & Shier Environmental Lawyers LLP in Ottawa and certified as a Specialist in Environmental Law by the Law Society of Upper Canada. Chuck may be reached at 613-761-2424 or by e-mail at cbirchall@willmsshier.com.

Nicole Petersen is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Nicole may be reached at 416-642-4872 or by e-mail at npetersen@willmsshier.com.

Serin Remedios is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Serin may be reached at 416-862-4823 or by e-mail at sremedios@willmsshier.com.

The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.

Document #: 1279662

---

[40] *Jumbo Wild*. (2017). [DVD] Canada: Sweetgrass Productions.

[41] Ministry of Environment, "Reasons for Minister's Determination: Jumbo Glacier Resort Project" (June 18, 2015), online: <https://projects.eao.gov.bc.ca/api/document/5886a67feed3c0016f855c6d/fetch>.

[42] Pheidias Project Management Corporation, "Jumbo Glacier Resort Project", Letter to M. Read, CAO of Jumbo Glacier Mountain Resort Municipality (July 20, 2015), online: <http://www.keepitwild.ca/wp-content/uploads/2015/07/July20PheidiasJGMRMLetter.pdf>.