Cassels

Adequate Consultation Confirmed by the Supreme Court of Canada: *Ktunaxa Nation*

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On November 2, 2017, the Supreme Court of Canada released *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)*[1] relating to the decision by the British Columbia Minister of Forests, Lands and Natural Resource Operations to approve a ski resort development, despite claims by the Ktunaxa Nation that the Crown had failed to fulfill its duty to consult and that the development would breach their constitutional right to freedom of religion. This decision illustrates that even in circumstances of strong Indigenous opposition, the Crown can fulfill its consultation obligations, respect *Charter* rights, and allow the advancement of development projects.

Facts

In 1991, Glacier Resorts filed a formal proposal to build a year-round ski resort in the upper Jumbo Valley. Jumbo Valley is located in the traditional territory of the Ktunaxa and the Shuswap Nations. The application by Glacier Resorts started a twenty year review process which involved both First Nations. Public hearings were held between 1991 and 1994, which included input from the First Nations. These were followed by a ten year environmental assessment process which concluded in 2004. Near the end of this process, the First Nations proposed that Glacier Resorts should be required to negotiate an Impact Management and Benefits Agreement (IMBA) to mitigate the potential impact of the ski area.

In October 2004, an Environmental Assessment Certificate was issued subject to a number of conditions, including that Glacier Resorts negotiate with the First Nations and attempt to conclude an IMBA before the next stage of the regulatory process.

Following the issuance of the Certificate, Glacier Resorts submitted a draft Master Plan, which was reviewed between 2005 and 2007. At the outset of the review, the government offered to enter into additional consultation with the Ktunaxa Nation. The Ktunaxa identified 34 issues for discussion, including ‘areas of cultural significance and sacred values’.

In 2006, the Ktunaxa suggested a framework for how their concerns could be addressed, including through (a) a fee simple land transfer to the Ktunaxa; (b) the establishment of a land reserve; and (c) the establishment of a conservancy area in proximity to the ski-run site. By late 2006, according to the Ktunaxa, the only issues remaining related to funding, and by early 2007, Glacier Resorts wrote to the Minister to say that they believed they had reached an “agreement in principle” with the Ktunaxa.

Between 2007 and 2008, the government made several accommodation proposals including the payment of $650,000 in cash or lands, and later, a form of revenue sharing. Both proposals were rejected by the Ktunaxa. In early 2009, the Ktunaxa gave formal notice to the Minister that they wished to enter into a process to negotiate an accommodation and benefits agreement. The Minister accepted the offer and offered additional capacity funding for the process. By mid-2009, the Minister advised the Ktunaxa that a reasonable consultation process had occurred and most outstanding issued were interest-based rather than legally driven by asserted Aboriginal rights and title claims.

To this point, accommodation had reduced the size of the proposed ski resort by approximately 60%. Protections for Ktunaxa access and activities were put in place, and environmental protections were established.

Within a few days of the Minister's statement, the Ktunaxa asserted that the consultation process had not properly considered information that Jumbo Valley was a sacred site. Only certain "knowledge keepers" in their community knew about the value of the sacred site. The movement of the earth and the construction of permanent structures would desecrate the area and destroy its spiritual value. The construction of the ski resort would drive out the Grizzly Bear Spirit, a principal spirit within the Ktunaxa religious beliefs and cosmology. The effect would be to destroy the foundations of the Ktunaxa spiritual practice. At this point, the Ktunaxa asserted that no accommodation was possible.

The Minister persisted in consultation efforts, but was unsuccessful. In November 2010, the Ktunaxa issued a unilateral declaration of rights, which asserted that no disturbance or alteration of the ground would be permitted within an area covering the proposed site. Despite attempts to continue to explore potential mitigation and accommodation measures, negotiations were at an end.

In 2012, the Minister signed an agreement with Glacier Resorts which approved the development and contained a number of measures responding to concerns raised by the Ktunaxa.

Issues

Two significant issues were raised. The first related to freedom of religion in s. 2(a) of the *Canadian Charter of Rights and Freedoms*: specifically, whether the Minister's decision to allow the project to proceed violated the Ktunaxa's right to freedom of conscience and religious protection.

The second issue related to the Crown's consultation efforts: specifically, was the conducted consultation, and the accommodation offered, reasonable.

Issue 1: Religious Freedom

Though the focus of this summary is on Aboriginal law, the examination of s. 2(a) of the Charter is

important, both to understand the case at large, and to understand the intersection between s. 2(a) and s. 35.

The Ktunaxa had suggested that by potentially allowing development that would scare the Grizzly Bear Spirit away, the government would remove the basis for their belief and render their practices futile. The Ktunaxa stressed that the vitality of their religious community depends on maintaining the presence of the Grizzly Bear Spirit on the mountain.[2]

The majority of the Court started its analysis by identifying that the Ktunaxa had no unique claims to s. 2(a) on account of their Indigenous identity. With regard to s. 2(a), "the Ktunaxa stand in the same position as non-Aboriginal litigants."[3] Section 2(a), the Court noted, has two aspects: the freedom to hold religious beliefs, and the freedom to manifest those beliefs.[4] The Court focused on the freedom to manifest beliefs, which includes the right to worship, teach, practice and observe.[5] To establish the infringement, the claimant must demonstrate that they sincerely believe in a practice or belief that has a nexus with religion (which was undisputed in this decision), and that 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 practice or belief.[6]

The majority noted that the focus of the Ktunaxa was wrong. The Ktunaxa were not seeking to be able to believe in the existence of the Grizzly Bear Spirit, or pursue practices related to that belief – instead they sought to protect the Grizzly Bear Spirit itself.[7] Such an approach is not only inconsistent with s. 2(a), it would also require the state and the courts to assess the content and merits of religious belief.

While the majority separated s. 2(a) from issues of Indigenous identity and s. 35, the concurring judgement saw an opportunity for overlap, noting that "the connection to the physical world, specifically to land, is a central feature of Indigenous religions... state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance."[8] The concurring judgement argued that "where state conduct renders a person's sincerely held beliefs devoid of all religious significance, this infringes a person's right to religious freedom."[9] According to the concurring judgement, activities conducted on lands with sacred value to an Indigenous community could violate the community's freedom of religion, though such an infringement could be justified.

Issue 2: Consultation

The consultation record noted in the decision, sets out the substantial and lengthy consultation effort undertaken by Glacier Resorts and the Minister. In assessing the adequacy of this consultation, the Court relied on existing jurisprudence, but effectively summarized a few key elements of the Crown's duty to consult.

Section 35 guarantees a process of consultation and not a particular result. The obligation on the Aboriginal group is to facilitate the process of consultation and accommodation by setting out its claims as clearly and

as early as possible. Once complete, the duty shifts to the Crown. There is no guarantee that accommodation sought by the Aboriginal group will be granted. The Crown has broad discretion on how to act so long as it meets its ultimate obligation to act honourably.[10]

As stated previously by the Court, s. 35 does not give an unsatisfied claimant a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.[11] The Court noted that deep consultation had occurred over two decades, resulting in many changes to accommodate Ktunaxa's spiritual claims. Near the end, the Minister continued to seek consultation, but was rebuffed.[12]

The Court also noted that the claim regarding the Grizzly Bear Spirit was not a specific claim, but rather claim for a specific accommodation structured as an asserted right. Rights under s. 35 relate to practices, and no evidence was put before the Minister of specific spiritual practices.[13] What the Ktunaxa sought was instead to assert a general authority of exclusion over the land, something that may not have been available even if Aboriginal title were proven.

The length of time that consultation occurred was not considered determinative by the Court – the adequacy of consultation is not determined by the length of the process, although this can be a factor. Instead, the Court relied on the fact that by 2012, given the position of the Ktunaxa, additional consultation would be fruitless.[14]

Implications of Ktunaxa Nation

On its face, *Ktunaxa Nation* suggests that development can be advanced in Canada despite the existence of absolute opposition from Aboriginal groups. As the Court makes clear, all parties have a role. The role of Aboriginal peoples is to clearly, and at an early stage, communicate their asserted Aboriginal rights and interests. While the Crown must engage in communication, it ultimately has discretion on how it chooses to pursue consultation and accommodation, so long as it maintains the honour of the Crown. "The process is one of 'give and take', and outcomes are not guaranteed."[15]

While the decision has been received positively by developers and government decision makers, *Ktunaxa Nation* also raises real questions regarding reasonable expectations for all parties. At the time of writing, more than a quarter-century has passed since the initial application was filed by Glacier Resorts. In that time, both Glacier Resorts and government have expended substantial resources in advancing the project, consulting, and funding Ktunaxa efforts.

The Minister, at apparently every stage, was open to funding and consulting with the Ktunaxa. This consultation continued for decades and only came to a conclusion when the Ktunaxa terminated the discussion. The Court does not suggest that the Crown's duty to consult was satisfied before consultations were abruptly ended, and it is unclear whether the Minister could have concluded consultations had the

Ktunaxa continued to actively engage.

An opportunity was missed within *Ktunaxa Nation* to provide guidance on reasonable timelines – something that could have increased the value of the decision to all parties. While much focus has been put on the importance of consultation, little has been made of the economic costs. Many of the major infrastructure developments in Canada were built long ago, with expectations of entering service within five, or at most 10, years, and in a time when the regulatory costs were significantly lower. The Court does not discuss when Glacier Resorts originally intended to commence development, but given the time-value of money, it seems unlikely they would have entered into the process knowing of the substantial up-front regulatory cost, risk, and nearly 30-year delay.

The Court's approach to consultation has been balanced and measured. However, if the process of consultation, including the cost and decade-long delays, makes most development in Canada uneconomical, it will have failed as a tool to provide meaningful reconciliation for Aboriginal and non-Aboriginal Canadians alike.

For further information regarding this matter, please contact Thomas Isaac and Arend Hoekstra or any other member of the Aboriginal Law Group.

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[1] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*].
[2] *Ibid*, at 59.
[3] *Ibid*, at 58.
[4] *Ibid*, at 63.
[5] *Ibid*, at 66.
[6] *Ibid*, at 68.
[7] *Ibid*, at 71.
[8] *Ibid*, at 127.
[9] *Ibid*, at 118.
[10] *Ibid*, at 79.
[11] *Ibid*, at 83.
[12] *Ibid*, at 87.
[13] *Ibid*, at 114.
[14] *Ibid*, at 110.
[15] *Ibid*, at 114.