SACRED PLACES AND THE DUTY TO CONSULT: SCC CONFIRMS GOVERNMENTS MUST BALANCE ABORIGINAL AND NON-ABORIGINAL INTERESTS

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The law defines Aboriginal rights as customs, practices and traditions integral to a distinctive culture at the time of contact with European settlers. In recent years it has become increasingly common for Aboriginal groups to raise interests that are not neatly confined to these categories, but instead focus on the importance of *place* - which may be described by terms such as sacred or spiritual. Do those interests fall within the duty to consult? If so, do they trump other interests or are they subject to the "balancing of interests" that the courts have charged governments with doing as between Aboriginal and non-Aboriginal society? Are such interests subject to protection by the freedom of religion provisions of the *Canadian Charter of Right and Freedoms (Charter)*?[1]

These are questions that have now been answered by the Supreme Court of Canada in the recent decision *Ktunaxa Nation v. British Columbia (Minister of Forests, Lands and Natural Resources Operations)*.[2]

The factual background

In the early 1990s Glacier Resorts Ltd. (Glacier) proposed to build a year-round ski resort in the Jumbo Valley of British Columbia (BC). The Jumbo Valley is located in the traditional territory of the Ktunaxa Nation, who believe that a portion of this area – which they refer to as Qat'muk – is a place of spiritual significance, being the home of Grizzly Bear Spirit, a "principal spirit within Ktunaxa religious beliefs and cosmology."[3] Lengthy consultations and negotiations regarding the project took place between Glacier, the BC government, and Aboriginal peoples, namely the Ktunaxa and the Shuswap, over two decades.

Although the parties were close to agreement at one point (which included a discussion of economic benefits), late in the consultation process, the Ktunaxa adopted the position that accommodation was impossible. The Ktunaxa asserted that the proposed ski resort would drive Grizzly Bear Spirit from Qat'muk, severing their connection to the spirit and impairing their religious beliefs and practices.[4] Efforts to further the consultation process and reach agreement failed. In March 2012, the Minister approved the development, determining that reasonable consultation had occurred.

The Ktunaxa brought a petition for judicial review of the Minister's decision to approve the project on the grounds that: (1) the project would violate the Ktunaxa's constitutional right to freedom of religion, protected under s. 2(a) of the *Charter*, and (2) the government breached the Crown's duty of consultation and accommodation, imposed by s. 35 of the *Constitution Act, 1982*. The chambers judge dismissed the petition for judicial review, and the Court of Appeal affirmed the chambers judge's decision. The Supreme Court of Canada ultimately dismissed the appeal.

The Supreme Court of Canada decision on Charter rights

The Ktunaxa's belief in the existence and importance of Grizzly Bear Spirit, and their belief that the proposed development would drive the spirit away were not disputed. As the Court indicated, whether the belief is historic or recent is irrelevant for the constitutional analysis, as the "*Charter* protects all sincere religious beliefs and practices, old or new."[5]

However, the Court held that the Ktunaxa had not demonstrated that the Minister's decision to approve the development interfered with their freedom to believe in Grizzly Bear Spirit or manifest that belief. The Court stated:

> The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the Charter protects the freedom to worship, but does not protect the spiritual focal point of worship.[6]

The Court noted that the right to freedom of religion protects any sincerely held belief and does not require judicial scrutiny of the content and merits of the belief. Such an inquiry would be inconsistent with the principles underlying the freedom of religion.

The Supreme Court of Canada decision on Aboriginal consultation

The Court started by noting that in judicial review of an administrative decision under s. 35, the Court does not assess the adequacy of consultation *de novo*. Rather, the standard of review of the Minister's decision is reasonableness, and as such the Minister's decision was entitled to deference. While this may sound like technical administrative law jargon, it is actually very important. It means that if decision makers act reasonably, the Courts must not disturb their decisions as to how to balance Aboriginal and non-Aboriginal interests. In other words, regulators need not be perfect in this balancing.

The Supreme Court of Canada went on to find that the duty to consult had been properly discharged. In doing so, the Court noted the lengthy history of consultations and substantial accommodations that had occurred:

> "To accommodate the Ktunaxa's spiritual concerns, changes had been proposed to provide special protection of grizzly bear habitat:
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> - The lower Jumbo Creek area was removed from the recreation area because it was perceived as having greater potential visitation from grizzly bears;
> - Ski lifts were removed on the west side of the valley, where impact to grizzly bear habitat was expected to be greatest; and
> - The province committed to pursuing a Wildlife Management Area to address potential impacts in relation to grizzly bears and Aboriginal claims relating to the spiritual value of the valley."[7]

The Court also appeared somewhat critical of the position taken by the Ktunaxa from late 2009 onward that no accommodation was possible. At paragraph 87, the Court stated:

> "...At a point when it appeared all major issues had been resolved, the Ktunaxa, in the form of the Late-2009 Claim, adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation given the new Ktunaxa position that no accommodation was possible and that only total rejection of the project would satisfy them. The process protected by s. 35 was at an end."[8]

The Court also noted that the Aboriginal right asserted was not tied to a particular practice (which is a key element of an asserted Aboriginal right), stating:

Even if the Minister had accepted the Ktunaxa's characterization of the Late-2009 Claim as a right "to exercise spiritual practices which rely on a sacred site and require its protection," it still would have been reasonable to find this aspect of the Ktunaxa's overall claim weak... As the Minister noted, in the negotiations the Ktunaxa did not advise the Crown of "specific spiritual practices"... As such, the Minister did not have evidence that the Ktunaxa were asserting a particular practice that took place in Qat'muk prior to contact. The Late-2009 Claim seemed designed to require a particular accommodation rather than to assert and support a particular pre-contact practice, custom, or tradition that took place on the territory in question.9] *[citations omitted]*

The Court added:

> In point of fact, there was no evidence before the Minister of "specific spiritual practices.[10]

Overall, the deep consultation engaged in by the Minister and the resulting accommodations, although not the particular one demanded by the Ktunaxa, were adequate. The Crown was deemed to have fulfilled its duty of consultation and accommodation.

It is also noteworthy that, despite all the recent attention given in public debate to the UN declaration on the Rights of Indigenous Peoples (UNDRIP) the Supreme Court of Canada makes no mention of this instrument in its decision. Presumably this is because the courts have held the UNDRIP is not part of the domestic law of Canada.

Conclusion

Reconciliation of Aboriginal and non-Aboriginal society is not an easy task, and the government's responsibility to "balance" interests" is not one many would many envy. This is especially true in the context of values and interests described as "sacred" or "spiritual". However, the Supreme Court of Canada has made it clear that these interests – while important and deserving of due consideration – are not trump cards, and characterization of a place as being of this nature does not displace the government's ongoing obligation to balance both Aboriginal and non-Aboriginal interests.

Finally, and perhaps most importantly, the Court has also made clear that the established legal framework for s. 35 jurisprudence must be applied, and it continues to distinguish between asserted and established Aboriginal rights in this regard. While this distinction may be one many are not comfortable discussing in the context of Aboriginal consultations, it is set out in the law and is important. This is affirmed both by the express wording of the *Ktunaxa* decision, and the fact that it makes no mention whatsoever of the UNDRIP, which is often the subject of political discussion but it is not the law of Canada and not part of our unique system for constitutionally protecting Aboriginal rights.

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[1] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] 2017 SCC 54 [*Ktunaxa*].
[3] *Ibid* at 5.
[4] *Ibid* at 6.
[5] *Ibid* at 69.
[6] *Ibid* at 71.
[7] *Ibid* at 33.
[8] *Ibid* at 87.
[9] *Ibid* at 100.
[10] *Ibid* at 114.

A Cautionary Note