**Case Brief: Ktunaxa Nation v. British Columbia, 2014 BCSC 568**

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This recent decision involves a dispute over a proposed recreation area, specifically a ski resort in south-eastern British Columbia.  The overarching issue was the potentially adverse effect of the proposed ski resort on a significant spiritual area of the Ktunaxa Nation.

The Ktunaxa Nation sought judicial review of the master development agreement for the ski resort signed by the proponent and the responsible Minister.  The First Nation claimed that the proposed resort lies at the heart of a sacred area of paramount significance called Qat’muk, which is the Grizzly Bear’s spiritual home.  Permanent human occupation of Qat’muk would cause the Grizzly Bear Spirit to leave and, thereby, profoundly harm the identity and culture of the Ktunaxa.[1]  The Ktunaxa argued that the Minister failed to consult and accommodate their Aboriginal right to exercise a spiritual practice that required the protection of a sacred site.  In addition, the Ktunaxa argued that the approval of the MDA violated their freedom of religion.  Thus, the judicial review required consideration of both s.35(1) of the *Constitution Act, 1982* and s.2(a) of the *Canadian Charter of Rights and Freedoms*.

The court reviewed an extensive record of consultation, dating from 1991 to 2012.  While the Ktunaxa were opposed to the project from the start,[2] the court found that the consultation record up to 2009 did not show the Ktunaxa asserting that the project was irreconcilable with their sacred values.[3]  However, at a meeting in 2009 with the Minister, the Ktunaxa took the position that no accommodation was possible because the construction of permanent structures would desecrate the area and destroy its spiritual value.[4]  The court found that the Minister engaged in deep consultation as a result. Without ruling on whether the Minister was correct in his assessment that the Ktunaxa’s*prima facie* strength of claim was weak, the court found that the level of consultation would have been adequate even for a strong *prima facie*claim.[5]

The court observed that the proposed resort had undergone a number of regulatory reviews since 1991, none of which had been challenged by the Ktunaxa respecting adverse effects on Qat’muk and their spiritual practices.[6]  The court concluded that “one would reasonably expect such a staunch position to be articulated at the earliest available opportunity as it strikes at the very heart of the object of the regulatory processes already undertaken.”[7]  First Nations are obliged to articulate “early in negotiations the specific basis on which they oppose any particular project.”[8]  The Ktunaxa attempted to file a number of expert reports at the hearing which were ruled inadmissible as they had the opportunity to put them before the decision-maker.  The lateness with which the Ktunaxa raised their concerns about adverse effects to their spirituality was clearly the key factor when the court considered whether the balancing of interests achieved by the Minister was reasonable in the circumstances of the case.[9]

When reviewing the reasonableness of the consultation process conducted by the Minster, the court held many changes were made to the specifications of the proposed resort to accommodate the Ktunaxa’s concerns.[10]  In addition, significant financial compensation and land protection measures were offered and rejected.  Accommodation measures address the substance of an asserted right, not the legal foundation for a right.[11]  The court did not accept that the Minister had acted with cavalier disregard for the Ktunaxa’s spiritual or religious concerns and held that the Minister’s accommodations fell within a range of reasonable responses which upheld the honour of the Crown.[12]

With respect to the Ktunaxa’s arguments respecting freedom of religion and section 2(a) of the Charter, the court held that the master development agreement would not infringe the Ktunaxa’s freedom of religion. The court noted that the proposed resort area already included a variety of human uses, from a heli-ski operation to a former mill site and a former mine site.  The court concluded that freedom of religion does not extend to restricting the otherwise lawful use of land on the basis that such action would result in a loss of meaning to religious practices carried out elsewhere.[13]

Given the result, we expect that Ktunaxa will appeal the decision to the British Columbia Court of Appeal.

[1] *Ktunaxa Nation,*paras. 17 and 110

[2] *Ktunaxa Nation,*para. 40

[3] *Ktunaxa Nation,*para. 80

[4] *Ktunaxa Nation,*paras. 95, 211 and 229

[5] *Ktunaxa Nation,*para. 233

[6] *Ktunaxa Nation,*para. 203

[7] *Ktunaxa Nation,*para. 208

[8] *Ktunaxa Nation,*para. 210

[9] *Ktunaxa Nation,*paras. 315-317

[10] *Ktunaxa Nation,*para. 238

[11] *Ktunaxa Nation,*para. 309

[12] *Ktunaxa Nation,*paras. 245 and 313

[13] *Ktunaxa Nation,*para. 296; see generally paras. 281 to 292