**Case Brief – *Ktunaxa Nation v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2015 BCCA 352***

By: Caitlin Mason

Recently, the BC Court of Appeal (“BCCA”) dismissed Ktunaxa Nation’s (the “Ktunaxa”) appeal for judicial review of the Minister of Forests, Lands and Natural Resource Operations (the “Minister”) to approve a Master Development Agreement with Glacier Resorts Ltd. for a year-round ski resort in the Jumbo Valley. Ktunaxa claimed that the proposed resort lies at the heart of a sacred area of paramount significance called Qat’muk, which is the Grizzly Bear Spirit’s home. According the Ktunaxa, permanent human occupation of Qat’muk would constitute a desecration, which would irreparably harm their relationship to the Grizzly Bear Spirit. The Ktunaxa claimed their rituals and songs about the Grizzly Bear Spirit would become meaningless if the proposed resort were to go ahead.[[1]](#footnote-1) The Ktunaxa asserted that the Minister violated their freedom of religion guaranteed under s.2(a) of the Charter of Rights and Freedoms (the “Charter”) and breached his duty to consult and accommodate the Ktunaxa by failing to properly consider the scared significance of the Jumbo Valley.

The chambers judge dismissed the Ktunaxa’s petition on the basis that s.2(a) of the Charter “did not confer a right to restrict the otherwise lawful use of land on the basis that such use would result in a loss of meaning to religious practices carried on elsewhere” and that the process of consultation and accommodation carried out was reasonable.[[2]](#footnote-2) Ktunaxa appealed both findings.

**The Appeal**

**The s.2(a) Infringement**

The BCCA reaffirmed that the proper framework to examine an alleged s.2(a) infringement is the two-step analysis set out in *Dore v. Barreau du Quebec*, 2012 SCC 12. This analysis requires a court to determine:

1. whether the Charter right has been infringed; and
2. having found the Charter right is engaged, whether the administrative decision reflects a proportionate balancing of the Charter protections at play.[[3]](#footnote-3)

On appeal, the BCCA held while the legal framework does not require proof of the presence of coercion or constraint on individual conduct in order to demonstrate an infringement of s.2(a), that in this case, s.2(a) does not extend to protect the particular religious belief asserted by the Ktunaxa.[[4]](#footnote-4) In dismissing the claim that the decision infringed the Ktunaxa’s s.2(a) rights, the court explained that:

In this case, the Ktunaxa derive subjective spiritual meaning from, and submit that the vitality of their religious community as a whole depends on, a requirement imposing constraints on people who do not share that same religious belief. It is not, in my view, consonant with the underpinnings of the Charter to say that a group, in asserting a protected right under s.2(a) that implicates the vitality of their religious community, is then capable of restraining and restricting the behaviour of others who do not share that belief in the same of preserving subjective religious meaning.[[5]](#footnote-5)

**Duty to Consult and Accommodate**

The Ktunaxa claimed that the chambers judge erred in his analysis of the accommodation offered by the Minister with respect to their spiritual right. After summarizing the accommodations offered to the Ktunaxa, the court disagreed, finding that the process of consultation and accommodation offered met the standard of reasonableness and the Minister did not breach his duty to consult and accommodate under s. 35.

**Why this Case Matters**

There are two significant issues at play – the ability of First Nations to argue infringements of their Charter rights, such as freedom of religion – separate and apart from their Aboriginal and Treaty rights, as well as the proper test to be applied in the context of a judicial review proceeding. In our view, the same test would be applicable if a First Nation brought forth a claim of infringement of their Aboriginal or Treaty rights as well. The Crown has consistently taken the position that such matters must be determined in an action.

The second aspect is the question of delay in the context of large projects that require multiple authorizations. The key question for First Nations is when to challenge an authorization for lack of consultation. If the challenge is to an early authorization, the Crown will say its premature and there will be other opportunities for consultation. On the other hand, if the First Nation waits until a significant authorization that will actually have impacts on the ground, they are met with the argument that they are too late. In this case, the court suggests that the failure of the First Nation to challenge each discrete Crown decision should be held against them. That cannot be correct.

1. BCCA, at para. 9. [↑](#footnote-ref-1)
2. BCCA, at para. 3. [↑](#footnote-ref-2)
3. BCCA, at para 49. [↑](#footnote-ref-3)
4. BCCA, at para. 63. [↑](#footnote-ref-4)
5. BCCA, at para. 73. [↑](#footnote-ref-5)