Goodmans LLP Update

Mining and Natural Resources and Environmental Law

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SCC Green Lights Jumbo Ski Resort Development, Dismisses Infringement Claim on Grizzly Bear Spirit

On November 2, 2017, the Supreme Court of Canada (SCC) released *Ktunaxa Nation v. British Columbia*, 2017 SCC 54 (the *Ktunaxa Decision*) regarding the judicial review of British Columbia's Minister of Forests, Lands and Natural Resource Operations' (the Minister) approval of a ski resort development brought by the Ktunaxa Nation Council ("Ktunaxa"). The Ktunaxa claimed the Minister (i) breached Ktunaxa's constitutionally protected freedom of religion when it approved the development of a ski resort on Ktunaxa's sacred lands and (ii) erred in concluding the Crown adequately fulfilled its consultation obligations.

The SCC dismissed the appeal, giving the green light to development of a ski resort on Ktunaxa's sacred lands. The decision signals that development can move forward despite absolute opposition by Aboriginal claimants where there is strong evidence that the Crown engaged in adequate consultation and accommodation and acted honourably throughout the process. The key takeaways from the decision are:

- The Charter-protected freedom of religion protects an individual's freedom to hold religious beliefs and the freedom to manifest those beliefs. It does not protect the spiritual object of a religious belief. To do so would invite judicial scrutiny over personal belief systems.
- Section 35 guarantees a process of consultation and where applicable, accommodation. While the optimal outcome is agreement and reconciliation between Aboriginal and non-Aboriginal groups, section 35 does not guarantee a particular outcome or accommodation nor does it give an Aboriginal claimant a veto over development.
- Aboriginal groups should clearly assert their interests and claims early in the consultation process.
- The SCC reaffirmed the Crown's duty to consult and accommodate applies not only to treaty and settled claims, but to unproven claims of Aboriginal interest.

Background and Facts

In 1991, Glacier Resorts began the approval process to develop a year-round ski resort in an area the Ktunaxa call Qat'muk located in the upper Jumbo Valley of British Columbia, both within the traditional territories of the Ktunaxa. The Ktunaxa assert, and the SCC accepts, that Qat'muk is a place of spiritual significance to their community and is home to Grizzly Bear Spirit, a spirit of central significance to the Ktunaxa's religious beliefs and practices.

The Ktunaxa engaged in consultations and participated in the regulatory process with Glacier Resorts and the Crown since early on in the process, driving significant changes to the original development plan. In June 2009, the Ktunaxa provided the Minister with a list of outstanding concerns, which was silent on the sacred nature of Qat'muk. Days later, the Ktunaxa adopted an "uncompromising position" stating that accommodation was now impossible because the ski resort would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair the Ktunaxa's religious beliefs and practices. Further consultations were unsuccessful, and in 2010 the Ktunaxa issued the "Qat'muk Declaration", which prohibited development over certain lands and declared that negotiations were over. Notwithstanding this declaration, the Minister proceeded with approval of the project and in response, the Ktunaxa brought proceedings in judicial review to overturn the approval of the Minister. The two issues before the SCC were as follows:

1. whether the Minister's decision violated Ktunaxa's freedom of conscience and religion under section 2(a) of the *Charter of Rights and Freedoms* (the "*Charter*"); and
2. whether the Minister's decision, that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* (the "*Constitution*"), was reasonable?

Freedom of Religion

The Ktunaxa asserted the ski resort and the overnight accommodations in particular would drive away Grizzly Bear Spirit from Qat'muk and would in essence "remove the basis of their beliefs and render their practices futile".[1]

The freedom of religion as protected by section 2(a) of the Charter encompasses (i) the freedom to hold religious beliefs and (ii) the freedom to manifest those beliefs. To establish an infringement, a claimant must show: (i) the individual sincerely believes in a practice or belief that has a nexus with religion; and (ii) the impugned state conduct interferes with the individual's ability to act in accordance with that practice or belief.[2]

The SCC was not convinced that the second part of the test was met. To succeed, Ktunaxa would have to show that the Minister's decision to approve development of the ski resort interfered with either their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. The Ktunaxa instead sought protection over the object of their religious beliefs; the presence of Grizzly Bear Sprit in Qat'muk.

While the SCC noted the importance of protecting Indigenous religious beliefs and practices and the value of such protection in achieving true reconciliation between Indigenous and non-Indigenous communities, it ultimately found that the Ktunaxa's claim fell outside the scope of section 2(a) because it sought protection of the spiritual object of their beliefs, "the Charter protects the freedom to worship, but does not protect the spiritual focal point of worship".[3] The SCC expressed the concern that to extend the application of section 2(a) as proposed would in effect place belief systems under judicial scrutiny and would require a court to assess their content and merit.

Duty to Consult

On the facts before it, the SCC was satisfied that deep consultation had taken place and that the Minister's conclusion that sufficient consultation had taken place was not unreasonable.[4]

The decision notes lengthy and substantial efforts undertaken by the Crown and Glacier Resorts to consult with the Ktunaxa. Throughout the years, several accommodations were made with respect to the Ktunaxa's concerns and spiritual claims. For example, changes were made to protect grizzly bear populations in Qat'muk, the resort's "controlled recreation area" was reduced by 60% and the province agreed to pursue the establishment of a Wildlife Management Area.

In the *Ktunaxa Decision*, the SCC provided a helpful summary of major principles regarding the duty to consult and reaffirmed that the Crown's duty to consult and accommodate applies not only where there are treaty or settled claims, but also to potential as-yet unproven Aboriginal claims. This obligation flows from the honour of the Crown and is constitutionally protected by section 35.[5] As previously noted, section 35 does not grant a veto to Aboriginal claimants over development and a project may proceed without consent of the affected Aboriginal group. Rather, the duty to consult regarding unproven claims is a right to a process and not to a particular outcome.[6] The goal of the process is reconciliation of Aboriginal and state interests and is one of "give and take".[7]

For further information, please contact any member of our Mining and Natural Resources or Environmental Law Groups.

1 *Ktunaxa Nation v. British Columbia,* 2017 SCC 54 (*Ktunaxa*) at para 59.
2 *Ktunaxa* at para 68.
3 *Ktunaxa* at para 71.
4 *Ktunaxa* at para 87.
5 *Ktunaxa* at para 78.
6 *Ktunaxa* at para 83.
7 *Ktunaxa* at para 114.