The Qat'muk Grizzly Bear Spirit, the Jumbo Valley Ski Resort & the Protection of Sacred Lands in New Zealand

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In early November, the Supreme Court of Canada issued its much anticipated decision in Ktunaxa Nation v British Columbia (Forests, Land and Natural Resource Operations). In this case, the Ktunaxa sought review of a British Columbia Ministerial decision to approve the development of a year-round ski resort in the Qat'muk region (also known as Jumbo Valley). This decision was made despite assertions by the Ktunaxa that the development of a ski resort in this area would be a breach of their constitutional right to freedom of religion. This is because the Qat'muk region is the home of the Grizzly Bear Spirit – a principle spirit within Ktunaxa religious beliefs – who would be driven away by any permanent structures erected in the region meaning the Qat'muk would lose its sacred nature.

The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion, and that the Minister's decision breached the Crown's duty of consultation and accommodation. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision. Ultimately, the appeal to the Supreme Court of Canada was dismissed and the Minister's decision was allowed to stand.

The Supreme Court of Canada issued a majority decision and a minority decision which used differing legal analysis to arrive at the same result (i.e. dismissal of the appeal). Both the majority and minority decisions found that consultation and accommodation was sufficient to satisfy section 35 of the *Constitution*. It was noted that the Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset; that negotiations spanning two decades and deep consultation had taken place; and that many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. As stated by the majority:

[114] …The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: Haida Nation. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of "give and take", and outcomes are not guaranteed.

However, the majority and minority differed on whether the Minister's decision violated the Ktunaxa right to freedom of religion. The majority (*per* **McLachlin C.J.** and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.) found that the Minister's decision did not violate the Ktunaxa right to freedom of religion. The majority concluded that the Minister's decision to the project did not infringe on the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs:

[68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) 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: see Multani, at para. 34.

[69] In this case, it is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(a) analysis. The Charter protects all sincere religious beliefs and practices, old or new.

[70] The second part of the test, however, is not met in this case. This stage of the analysis requires an objective analysis of the interference caused by the impugned state action: S.L. v. Commission scolaire des Chênes, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 24. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister's decision does neither of those things. This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2(a) of the Charter protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(a) beyond the scope recognized in our law.

[71] We would decline this invitation. 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. We have been directed to no authority that supports the proposition that s. 2(a) protects the latter, rather than individuals' liberty to hold a belief and to manifest that belief. Section 2(a) protects the freedom to pursue practices, like the wearing of a kirpan in Multani or refusing to be photographed in Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567. And s. 2(a) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

The minority (*per* Moldaver and Côté JJ.) found that Minister's decision did violate the Ktunaxa right to freedom of religion; however, concluded that it was a proportionate, balanced infringement. The minority stated:

[117] … In my view, the Ktunaxa's right to religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. The Ktunaxa hold as sacred several sites within their traditional lands, and they revere multiple spirits in their religion. The Ktunaxa believe that a very important spirit in their religious tradition,

Grizzly Bear Spirit, inhabits Qat'muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat'muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa's connection to the land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals, and ceremonies associated with Grizzly Bear Spirit would become meaningless.

[118] In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(a). That is exactly what happened in this case. The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s. 2(a) breach.

[119] That being said, I am of the view that the Minister proportionately balanced the Ktunaxa's s. 2(a) right with the relevant statutory objectives: to administer Crown land and dispose of it in the public interest. The Minister was faced with two options: approve the development of the ski resort or grant the Ktunaxa a right to exclude others from constructing permanent structures on over fifty square kilometres of Crown land. This placed the Minister in a difficult, if not impossible, position. If he granted this right of exclusion to the Ktunaxa, this would significantly hamper, if not prevent him, from fulfilling his statutory objectives. In the end, it is apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.

[120] In view of the options open to the Minister, I am satisfied that his decision was reasonable. It limited the Ktunaxa's right "as little as reasonably possible" given these statutory objectives (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 40), and amounted to a proportionate balancing. I would therefore dismiss the appeal.

It is interesting to note that the minority found that granting the Ktunaxa power to veto land development would effectively amount to a property right:

[150] Granting the Ktunaxa a power to veto development over the land would effectively give the Ktunaxa a significant property interest in Qat'muk — namely, a power to exclude others from constructing permanent structures on over fifty square kilometres of public land. This right of exclusion is not a minimal or negligible restraint on public ownership. It gives the Ktunaxa the power to exclude others from developing land that the public in fact owns. The public in this case includes an Aboriginal group, the Shuswap Indian Band, that supports the development — a fact which the Minister explicitly took into consideration in his reasons.

[151] The power of exclusion is an essential right in property ownership, because it gives an owner the exclusive right to determine the use of his or her property and to ensure that others do not interfere with that use (see B. Ziff, Principles of Property Law (6th ed. 2014), at p. 6). Without the power of exclusion, the owner is unable to dictate how his or her property will be used. Even a person who has a limited power of exclusion — for example, the power to prevent development of the land — will be able to exercise control over the property and dictate its use to a significant extent.

[152] In granting a limited power of exclusion to the Ktunaxa, the Minister would effectively transfer the public's control of the use of over fifty square kilometres of land to the Ktunaxa. This power would permit the Ktunaxa to dictate the use of the land — namely, preventing any permanent structures from being constructed — so that it does not conflict with their religious belief in the sacred nature of Qat'muk. A religious group would therefore be able to regulate the use of a vast expanse of public land so that it conforms to its religious belief. It seems implicit from the Minister's reasons that permitting a religious group to dictate the use of a large tract of land according to its religious belief — and excluding the public from using the land in a way contrary to this belief — would undermine the objectives of administering Crown land and disposing of it in the public interest. It can be inferred that the Minister found that granting the Ktunaxa such a power of exclusion would not fulfill his statutory mandate. Rather, it would significantly compromise — if not negate — those objectives.

A Different Approach: New Zealand

Recognizing the indivisible connection between land and Indigenous peoples, a different approach has been adopted in New Zealand. Two areas of great significance to Indigenous peoples – Te Urewera (an area of mostly forested land) and Te Awa Tupua (the Whanganui Watershed) – have both been granted legal personhood.

The Te Urewera and the Whanganui Watershed were established as legal persons by legislation (section 11 and section 14 of their Acts, respectively). This means that each area has all the rights, powers, duties and liabilities of a legal person. The exercise and performance of those rights, powers and duties are handled by boards established for that purpose.

Both Te Urewera and the Whanganui watershed have significant cultural and spiritual value for New Zealand's Indigenous peoples. This significance is expressed in the Te Urewera legislation as follows:

3 Background to this Act

Te Urewera

(1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is

abundant with mystery, adventure, and remote beauty.

(2) Te Urewera is a place of spiritual value, with its own mana and mauri.

(3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Te Urewera and T?ho

(4) For T?hoe, Te Urewera is Te Manawa o te Ika a M?ui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor T?hoe.

(5) For T?hoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.

(6) Te Urewera expresses and gives meaning to T?hoe culture, language, customs, and identity. There T?hoe hold mana by ahik?roa; they are tangata whenua and kaitiaki of Te Urewera. Te Urewera and all New Zealanders

(7) Te Urewera is prized by other iwi and hap? who have acknowledged special associations with, and customary interests in, parts of Te Urewera.

(8) Te Urewera is also prized by all New Zealanders as a place of outstanding national value and intrinsic worth; it is treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection.

T?hoe and the Crown: shared views and intentions

(9) T?hoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, T?hoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand’s culture and values.

(10) The Crown and T?hoe intend this Act to contribute to resolving the grief of T?hoe and to strengthening and maintaining the connection between T?hoe and Te Urewera.

Similarly, the Whanganui Watershed legislation provides:

12 Te Awa Tupua recognition

Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.

13 Tupua te Kawa

Tupua te Kawa comprises the intrinsic values that represent the essence of Te Awa Tupua, namely—

Ko Te Kawa Tuatahi

(a) *Ko te Awa te m?t?puna o te ora*: the River is the source of spiritual and physical sustenance:

Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hap?, and other communities of the River.

Ko Te Kawa Tuarua

(b) *E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa*: the great River flows from the mountains to the sea:

Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

Ko Te Kawa Tuatoru

(c) *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me:

The iwi and hap? of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and wellbeing.

Ko Te Kawa Tuawh?

(d) *Ng? manga iti, ng? manga nui e honohono kau ana, ka tupu hei Awa Tupua*: the small and large streams that flow into one another form one River:

Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.

This innovative approach of granting legal personhood to land of significance to Indigenous peoples has enabled protection, along with collaborative management, planning and decision-making. This approach is also recognized as an important part of reconciliation with New Zealand's Indigenous peoples (see section 3 of both Te Urewera and the Whanganui Watershed legislation).

The approach taken in New Zealand may provide some inspiration for Canada. In Canada, granting legal personhood to sacred lands may provide a tool for reconciliation and a mechanism for effective co-management of those lands.

As expressed by David Laidlaw (in his Ablawg post dated November 6, 2017), the result in the Ktunaxa case is a "failure of imagination to consider the interests of the Qat'muk's Grizzly Bear Spirit". He suggests that the Supreme Court of Canada should have granted the Qat'muk Grizzly Bear Spirit status as a "juristic entity", directed appointment of a *next friend*, and remitted the matter back for further consultation to hear representations from the Grizzly Bear Spirit. Failure to do so, according to David Laidlaw, has silenced the Grizzly Bear Spirit forever.

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