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First Nation challenge based on spiritual interests rejected in Jumbo case

On April 3, 2014, the BC Supreme Court issued its decision in the judicial review of a Master Development Agreement between the provincial Minister of Forests, Lands and Natural Resource Operations (the "**Minister**") and a proponent in respect of the proposed Jumbo Glacier Resort (the "**Project**").[1] The Court dismissed the petition of the Ktunaxa Nation, which sought a number of remedies related to the alleged infringement by the Minister of the duty to consult and of the nation's right to freedom of religion set out under the *Canadian Charter of Rights and Freedoms*.

Project history

The Project has been in the works for nearly a quarter century. It was first proposed in 1991 and underwent a provincial environmental assessment process from 1995 to 2004, when it was issued an environmental assessment certificate. A comprehensive Master Plan for the Project, dealing with a variety of environmental and economic considerations, was also approved by the province in 2007, following which the Master Development Agreement was developed and signed in 2012.

[1] 2014 BCSC 568

Ktunaxa Nation arguments

The Ktunaxa Nation argued that in executing the Master Development Agreement, the Minister failed to fulfill the duty to consult with respect to its asserted aboriginal right to "exercise a spiritual practice by which its nature requires the protection of a sacred site" – the site being the area of the Project.[2]

The Ktunaxa Nation also argued that the Master Development Agreement violated its *Charter* right to freedom of religion, taking issue with the language in the Minister's reasons for the decision, which referred to "spiritual interests" rather than "practices and beliefs".

Analysis

Consideration of spiritual claims and interests in sites described by aboriginal groups as sacred poses a challenge for regulators. Such assertions do not necessarily comport with the definition of an aboriginal right under governing case law, but at the same time, they may at least in some cases involve "customs, practices and traditions" that can be recognized as aboriginal rights.

In this case the Minister tackled this issue directly, in reasons that are appended to the decision in full. In the reasons, the Minster stated:

> With respect to the Ktunaxa Nation's asserted spiritual interests in the area (referred to as Qat'muk), the Consultation/Accommodation Summary notes how the Crown has endeavored to honourably give consideration to those interests, while at the same time applying the tests for determination of aboriginal rights as set out in relevant case

[2] Para. 222

> law. In this regard, the Consultation/Accommodation Summary states at pages 49-51:
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> It is... not clear whether any of these values can take the shape of a constitutionally protected aboriginal right or whether such a claimed right can be reconciled with other claimed aboriginal rights and Ktunaxa access to the valley for a variety of traditional and modem uses, including hunting, gathering and fishing. The Ministry's challenge is to give due respect and recognition to this sensitive spiritual information, which has been provided by the Knowledge Keepers in a trusting way, and at the same time, assess it in the context of the Crown's consultation and accommodation obligations in respect of aboriginal rights recognized by section 35 [of the] *Constitution Act* 1982....[3]

The Minister's decision was clear that while he respected these interests, he was required to apply the governing law on aboriginal rights. The decision stated:

> The [Ministry] sincerely recognizes the genuinely sacred values at stake for Ktunaxa leadership and the Knowledge Keepers in particular, however it has determined on a preliminary basis that a *prima facie* claim to an aboriginal right of this nature is weak. In particular, there is no indication that valley would have been under threat from permanent forms of development at the time of contact such that the right claimed would have been one that was exercised or an aboriginal tradition, practice or activity integral to the culture of Ktunaxa. In addition, in the Ministry's view the claim to such a right is weakened where the details of the spiritual interest in the valley have not been shared with or known by the general Ktunaxa population. The Ministry makes these preliminary statements because the

[3] Schedule F to the decision at page 122

> nature of the consultation obligation requires it be done, and hopes that no personal or cultural disrespect is perceived. The [Ministry] believes that there is difference in respecting certain personal and spiritual beliefs or values, which the ministry hopes it has done, and then weighing this information in the context of a legal aboriginal rights claim, which the Ministry believes it has done in as respectful a way as possible.[4]

The Court concluded that in light of the broader, extensive consultation that occurred in respect of the Project since 1991, the Minister's consultation with the Ktunaxa Nation regarding its spiritual claims was reasonable and appropriate. The Court found that a number of changes had been made to the Project during the development process to specifically accommodate the Ktunaxa Nation's asserted aboriginal rights, and that these accommodations fell within a range of reasonable responses so as to satisfy the Crown's duty to accommodate the Ktunaxa Nation.

With respect to the *Charter* argument, the Court stated:

> In my opinion, constitutional protection of 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. That is, the otherwise lawful use of land by others is not a form of coercion or a constraint on freedom of religion which s. 2(a) of the Charter protects.[5]

The Court went on to find that even if the Ktunaxa Nation's right to freedom of religion had been violated, the approval of the Master Development Agreement, with numerous conditions and

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[4] Schedule F to the decision at page 122

[5] Para. 296

accommodations, represented a reasonable balancing of *Charter* values and legislative objectives.[6]

Other key holdings

There are a number of interesting issues considered and statements made by the Court in its decision that may have relevance to other aboriginal law cases. These include the following.

The Court objected to the First Nation elevating concerns to a spiritual level late in the consultation:

> Regardless of the doctrine of secrecy surrounding Ktunaxa religious practices and beliefs, 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]
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> ...
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> The Ktunaxa first elevated their concern for the sacred values in Qat'muk to the principal ground on which they say no accommodation is possible in June 2009. By that time, the Proposed Resort had undergone the CASP review and the CORE review, had been issued an EAC, and had had the MP approved. These processes took over 15 years and involved extensive opportunity for the Ktunaxa to express their concerns regarding the Proposed Resort and efforts were made to accommodate those concerns through changes to the specifications of the Proposed Resort and other measures.[8]

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[6] Para. 326

[7] Para. 208

[8] Para. 229

The Court was critical of the use of evidence that was not before the original decision-maker:

> In my opinion, extrinsic evidence that goes to characterising an asserted Charter right is not admissible where it could and should have been placed before the decision-maker tasked with the responsibility of balancing Charter values with statutory objectives. In short, simply characterizing the issue as the infringement of a Charter right in the later stages of the decision-making process does not absolve the party asserting the infringement from the obligation to bring the relevant evidence before the decision-maker.[9]

The Court was critical of the use of expert evidence to buttress claims regarding aboriginal rights:

> There is no reason why this information was not provided to the Minister prior to his decision. The sacred nature of the area to the Ktunaxa for spiritual and or religious reasons was squarely before the Minister. It is not open to a party to provide significant expert opinion only after a decision-maker has rendered the impugned decision, and then seek to rely on such opinion to support impugning the decision.[10]
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> ...
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> No attempt is made to support many conclusory statements by the collection of data and the application of an ascertainable and objective methodology. As stated in *Native Council* at para. 25, "there are occasions where the experts go beyond their expertise, become less than objective, and

[9] Para. 134

[10] Para. 149

> become too closely aligned with their clients' interests". That seems to be the case with the Walker Report.[11]

The Court confirmed the ability of a decision-maker to rely upon past consultation that occurred through the environmental assessment process:

> The Minister says that when reviewing the procedural aspects of the duty to consult, it is appropriate to consider all these past regulatory processes. I agree.
>
> The case law supports this position...[t]he court found that available, adequate, and accessible regulatory processes which allow First Nations to participate in a meaningful way should be used, and a failure to use such processes does not justify a demand for separate or discrete consultation (at para. 42). In *Taku*, the Supreme Court of Canada found that participation in an earlier environmental assessment of a project satisfied the Crown's duty to consult and accommodate.[12]

Conclusion

This decision confirms that officials charged with fulfilling the Crown's duty to consult can and should continue to be guided by the law respecting asserted aboriginal rights and title, and that the process should not be fundamentally altered simply because an interest is described as spiritual or a project site described as sacred – particularly where that occurs at a late stage in the consultation process.

by Robin Junger and Brittnee P. Russell

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[11] Para. 153

[12] Paras. 205-206

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a cautionary note