COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2015 BCCA 352

Date: 20150806
Docket: CA41783

Between:

Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation

Appellants
(Petitioners)

And

Minister of Forests, Lands and Natural Resource Operations and Glacier Resorts Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Lowry
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated April 3, 2014 (*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, Vancouver Docket S128500).

Counsel for the Appellants:	P.R.A. Grant J. Huberman K.L. Williams
Counsel for the Respondent, Minister of Forests, Lands and Natural Resource Operations:	P.G. Foy, Q.C. M.S. Kerwin
Counsel for the Respondent, Glacier Resorts Ltd.:	G.J. Tucker P. Sheppard
Place and Date of Hearing:	Vancouver, British Columbia May 29, 2015
Place and Date of Judgment:	Vancouver, British Columbia August 6, 2015

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Bennett

Summary:

Appeal from an order dismissing a petition for judicial review of the decision of the Minister of Forest, Lands and National Resource Operations to approve a Master Development Agreement (MDA) with Glacier Resorts Ltd. The Ktunaxa Nation Council assert that the Minister, in approving the MDA, violated their freedom of religion guaranteed under s. 2(a) of the Charter of Rights and Freedoms and breached his duty to consult and accommodate asserted Aboriginal rights under s. 35 of the Constitution Act, 1982. Held: Appeal dismissed. The approval of the MDA did not infringe the s. 2(a) right of the Ktunaxa. The consultation and accommodation process mandated by s. 35 was reasonable.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] It has been 24 years since Glacier Resorts Ltd. ("Glacier") began the process to obtain permission to build a year-round ski resort on Crown land in the Jumbo Valley in southeastern British Columbia's Purcell Mountains. On March 20, 2012, Glacier cleared the final administrative hurdle when the Minister of Forests, Lands and National Resource Operations (the "Minister") approved a Master Development Agreement ("MDA") with Glacier.

[2] This is an appeal from an order dismissing a petition for judicial review of the decision of the Minister to approve the MDA. The Ktunaxa Nation Council ("KNC") asserted that the Minister, in approving the MDA, violated their freedom of religion guaranteed under s. 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and breached his duty to consult and accommodate a host of asserted Aboriginal rights under s. 35 of the *Constitution Act*, 1982.

[3] The Chambers judge, in reasons indexed at 2014 BCSC 568, dismissed the petition. He held,

> (a) 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 practises carried on elsewhere; and

(b) the process of consultation and accommodation of asserted Aboriginal rights was reasonable.

[4] The KNC now appeals both findings. For the reasons that follow I would dismiss the appeal.

BACKGROUND

A. Overview

[5] The background to the present appeal is considerable, encompassing two decades of negotiations and regulatory proceedings. The present litigation is concerned with whether the Minister, in approving the MDA, failed to properly consider and give effect to the KNC's constitutionally protected s. 2(a) and s. 35 rights.

[6] The background to the dispute is long and complex. Below, I have set out only the most essential facts that are necessary for the determination of this appeal. A more complete treatment of the factual background is set out in the reasons of the chambers judge at paras. 29-111.

B. Aboriginal Groups

[7] The appellant, the KNC, was formed in or about the fall of 2005 to represent the four Ktunaxa communities in Canada: A·kisq̓nukniḵ (Columbia Lake Indian Band), Yaqaón Nuñkiy (Lower Kootenay Indian Band), Aq'am (St. Mary's Indian Band) and Akan'kunik (Tobacco Plains Indian Band). Previously, in the earlier stages of the regulatory process, the Ktunaxa had been represented by the Ktunaxa/Kinbasket Tribal Council ("KKTC"). The decision to form the KNC was prompted by the withdrawal of the Shuswap Indian Band ("SIB") from the KKTC; the withdrawal stemmed from a difference of opinion as to the Proposed Resort (the SIB support its development; the KNC communities oppose it). I note that the SIB and Ktunaxa both claim the Proposed Resort falls in their traditional territory. In general, I

will refer to the appellants as the "Ktunaxa" unless there is a clear and necessary reason to identify the particular Council or Ktunaxa community.

C. The Proposed Resort

[8] The Proposed Resort is to be located in the Upper Jumbo Valley, at the foot of Jumbo Mountain and Jumbo Glacier. It is 55 km west of Invermere, 36 km west of the existing Panorama ski resort, and north of the Purcell Wilderness Conservancy. The Proposed Resort, which will provide both winter and summer skiing, will have lift serviced access to several nearby glaciers. The Proposed Resort's base area will be located at a previously cleared but now abandoned saw mill site; access to it will be along an existing forest service road.

D. The Qat'muk Area

[9] The Ktunaxa believe that the Proposed Resort lies at the heart of a central area of paramount spiritual significance: Qat'muk. The Ktunaxa assert that Qat'muk is the Grizzly Bear Spirit's home or territory, deriving from an ancient covenant. According to the Ktunaxa, allowing the development of the Proposed Resort within the area of Qat'muk would constitute a desecration, the effect of which would be to irreparably harm their relationship with the Grizzly Bear Spirit. If the Proposed Resort is constructed the Grizzly Bear Spirit will leave Qat'muk and the Ktunaxa would no longer receive spiritual guidance. Their rituals and songs about the Grizzly Bear Spirit would become meaningless.

[10] According to the Ktunaxa, the desecrating action is the permanent overnight accommodation of humans in the area where the Proposed Resort will come to be built. Their position is that there is no way in which the construction of the Proposed Resort could be reconciled with their spiritual belief given the sanctity of Qat'muk.

E. The Regulatory Review Process

[11] The Proposed Resort has been the subject of extensive review since Glacier initially proposed the resort in March 1991. Following a public input period and call

for other proposals, Glacier was granted sole proponent status in 1993. Following a land-use planning review for the Kootenay region by the Commission on Resources and Environment in July 1995, a detailed environmental assessment process, lasting nearly a decade, was conducted. In October 2004, Glacier obtained an Environmental Assessment Certificate ("EAC") for the Proposed Resort. The EAC was unsuccessfully challenged in both the Supreme Court (*R.K. Heli-Ski Panorama v. Glassman et al*, 2005 BCSC 1622) and in this Court (*R.K. Heli-Ski Panorama Inc. v. Glassman*, 2007 BCCA 9).

[12] The next stage of the review, following issuance of the EAC by the Ministry, was the drafting by Glacier of a Master Plan ("MP"). I note that the draft MP was approved in July 2007. The approved MP outlines the nature, scope, and pace of the Proposed Resort's development, identifies land tenure requirements, and incorporates recommendations arising from consultation with the public and First Nations. The MP runs to 13 volumes; the index alone is 21 pages in length.

[13] The final stage of the review, the drafting and approval of the MDA, ran until March 2012. It was originally scheduled to run only until mid-2009. During that time period, the Minister sought agreement with the Ktunaxa over matters described herein. The eventual signing of the MDA represented the final approval that Glacier required prior to development of the Proposed Resort.

F. Ktunaxa Participation in the Regulatory Review Process

[14] While the Ktunaxa have participated in the review process, they have generally opposed the Proposed Resort from the outset. Participation of the Ktunaxa in the review process is well-summarized by the chambers judge at paras. 48-111. In this section, I will only describe events that are material to the present appeal.

[15] When Glacier submitted the draft MP to the Ministry, the Ktunaxa took the position that the "First Nations" section of the draft was inadequate. As a result, the Ktunaxa sought additional opportunities for direct consultation beyond what they were afforded through the environmental assessment process.

[16] By way of letter, dated May 19, 2006, the KNC entered into discussions with the Minister with the aim of concluding a consultation agreement that would form the basis for all subsequent negotiations. Subsequently, in June 2006, a consultant for the Ktunaxa completed a "Gap Analysis" that identified a series of concerns with the draft MP and the EAC. This analysis highlighted the need for further information to ground the negotiation of a consultation agreement. The "Gap Analysis" included a mention of the cultural significance and sacred value of the Jumbo area. It set out that cultural impacts remained unassessed, that no measures were proposed to address that issue, and that a traditional land-use study did not provide adequate information to assess the effect of the Proposed Resort.

[17] On September 27, 2006, the Ktunaxa and the Minister entered into a formal consultation agreement. The purpose of the consultation agreement was, among other things, to identify and exchange sufficient information to allow the two parties to decide whether to begin negotiating an accommodation and benefits agreement. From 2006 to 2009, several workshops and meetings took place, studies were commissioned, and accommodation offers were exchanged between the parties.

[18] On July 12, 2007, the Minister approved the draft MP. In general, at this time and up to June 2009, it appeared as if accommodation of the Ktunaxa, in a manner that would allow for the developed of the Proposed Resort, was possible.

[19] Following the approval of the MP, the Ktunaxa and the Ministry entered into discussions concerning the appropriate accommodations that would permit Glacier to develop the Proposed Resort. The proposed accommodations included a financial component. An offer was made in February 2008, which was rejected on the basis that, among other things, the financial compensation was inadequate. A further offer was made in September 2008, which was rejected on the basis that, among other things, the Jumbo Valley is a "place unique and sacred to the Ktunaxa".

[20] Although negotiations over possible accommodation measures were ongoing, the Minister advised the Ktunaxa, on June 3, 2009, that in his opinion a reasonable consultation process had occurred and that most of the outstanding issues were

interest-based rather than driven by asserted Aboriginal rights and title claims. Thus, the Minister took the position that the Proposed Resort development could proceed subject to an extensive list of mitigation measures. The Minister indicated that, because of the interests implicated, the conclusion of an agreement with the Ktunaxa was not a necessary precondition to his final approval of the MDA.

[21] During the various regulatory processes and consultations, extensive changes were made to the Proposed Resort to accommodate Ktunaxa concerns and asserted Aboriginal rights. These accommodations include:

(a) reduction of the Controlled Recreational Area for the Proposed Resort by approximately 60% from the original proposal (from 14,866 hectares to 5,935 hectares);

(b) exclusion of the Lower Jumbo Creek area from the Controlled Recreational Area;

(c) reduction of the Proposed Resort base area, including all residential lots and lift-access parking, to 104 hectares, which keeps it entirely within the logged area around the former sawmill site in Upper Jumbo Creek.

(d) reduction of the Proposed Resort bed base to 5,500 tourist bed-units and 750 staff bed-units. Glacier says this is one-tenth the size of Whistler's official 52,500 bed base and even smaller than nearby Panorama's approved 7,084 bed base;

(e) removal of the Glacier Dome Lodge and deletion of an initial phase at the base of Glacier Dome, which was moved to within the Proposed Resort base area;

(f) removal of parking area and bus access facilities at the abandoned mine site along the access road;

(g) removal of two ski lifts and ski runs at the south end of the Controlled Recreational Area to eliminate any visual or physical impact on the current recreational use of the Jumbo Pass area;

(h) removal of ski lifts on the west side of the valley where impact to grizzly bear habitat was expected to be greatest;

(i) design of access road improvements to minimize environmental impacts, cost and traffic speed;

(j) introduction of an Employment Equity Plan providing for preferential hiring of local residents and First Nations members, and outlining training and education opportunities;

(k) creation of a First Nations Interpretive Centre and an Environmental Monitoring Centre at the Proposed Resort;

(l) provision for on-site independent environmental monitors during all phases of construction;

(m) provision for the Ktunaxa's continued use of portions of the Controlled Recreational Area for the practice of traditional activities; and

(n) the designation and establishment of a Wildlife Management Area outside the Controlled Recreational Area, with ongoing Ktunaxa involvement in its implementation and the development of Wildlife Management Area objectives.

G. Assertion of a breach of s. 2(a) of the Charter of Rights and Values

[22] At a meeting held on June 9-10, 2009, the Ktunaxa advised the Minister that the consultation was deficient because it failed to properly consider the sacred significance of the Jumbo Valley to the Ktunaxa (the "June Meeting"). The material facts concerning the asserted impact on the religious freedoms guaranteed by s. 2(a) are best organized by way of reference to the June Meeting. It was at that time

the Ktunaxa indicated that the development of the Proposed Resort was inimical to their spiritual belief, with no room for accommodation. I will review assertions of the sacred significance of the Jumbo Valley and Qat'muk both prior and subsequent to the June Meeting.

i. Assertion of Spiritual Value Prior to June 9, 2009

[23] The Ktunaxa, through the KKTC, first asserted their opposition to the development of the Proposed Resort at a public meeting in Invermere on September 25, 1991 by way of a position paper. In that paper, and among other things, the KKTC asserted that grizzly bears "hold a very sacred place within our cultural spiritualism" and referenced that the destruction of "culturally significant sites" informed their opposition to the project. I note that, for completeness, certain of the Ktunaxa communities also separately made their objection to the project known during this initial period.

[24] The next notable development occurred during the 1995-2004 period of environmental assessments. In September, 1995, four of the five KKTC bands (the SIB standing apart) set out, in a prepared statement, their opposition to the Proposed Resort. According to that document, the Ktunaxa were "adamantly opposed" to the proposed resort, and were of the view that it would not succeed in the EAC application. The statement set out that, if the environmental review were to succeed, several issues would have to be addressed through consultation, including a "full assessment of traditional and contemporary First Nations use of the Jumbo Valley". The sacred nature of Qat'muk, and its relationship to the Grizzly Bear Spirit, was not disclosed at this time.

[25] The sacred value of Jumbo Valley area was mentioned in several documents that were prepared for the environmental assessment process, including in the "Gap Analysis". However, there was no clear indication in the materials prepared (or in the communications between the KKTC and the Ministry, or subsequently the KNC and the Ministry) that indicated that the spiritual significance of Qat'muk was such that no accommodation measures could rectify the impact on the Ktunaxa. Put differently, it

was not the case that the Ktunaxa, at the time, took a clear position that developing the Proposed Resort was inimical to their asserted spiritual (or religious) beliefs.

[26] Subsequent to the approval of the draft MP in June 2007, further negotiations took place between the Ministry and the Ktunaxa. Several issues were addressed, including the sacred significance of the Jumbo Valley.

ii. Assertion of Spiritual Preeminence Subsequent to June 9, 2009

[27] The Ktunaxa, through the KNC, took the position at the June Meeting that the consultation process was deficient because, among other things, it failed to consider the significance of Qat'muk to the Ktunaxa. At the June Meeting, the Ktunaxa advised the Minister that only certain members of their community, entitled knowledge keepers or holders, have information about the sacred significance of Qat'muk. The Ktunaxa further advised that the knowledge keepers must be selective about the distribution of information regarding their beliefs, which was later cited as justification for the late disclosure of the plenary spiritual significance of Qat'muk.

[28] In response to the June Meeting, the Minister agreed to extend the consultation process with the Ktunaxa to address the issue of the sacred value of the area that would come to be called Qat'muk.

[29] On September 19, 2009, the Ktunaxa conveyed that Qat'muk was "a life and death matter", that "Jumbo is one of the major spiritual places", that the sacredness of the area to the Ktunaxa was of preeminent importance, and that the construction of permanent structures would desecrate the area and destroy its spiritual value. At this meeting, the Ktunaxa stressed that it was not that they were unwilling to enter into a compromise, but rather that no accommodation of their belief was possible.

[30] The assertion of the spiritual predominance of Qat'muk culminated in the Qat'muk declaration in November 2010, whereby the Ktunaxa made it unequivocally clear that construction of the Proposed Resort was inimical to their religious beliefs. It was through the Qat'muk declaration that the Ktunaxa conveyed the precise area

of land in respect of which they were asserting a deep spiritual connection. The chambers judge summarized their position at paras. 101-103 of his reasons:

> [101] The Qat'muk Declaration, based in part on a claim to "pre-existing sovereignty", proclaims that Qat'muk "includes the entirety of the Toby-Jumbo watershed and the uppermost parts of the South Fork Glacier Creek, Horsethief Creek and Farnham Creek Watersheds" (an area estimated to be 14,714 hectares). The Qat'muk Declaration attaches a map that identifies a "refuge" area (approximately 5,915 hectares) and "buffer" area (approximately 8,799 hectares).
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> [102] The Qat'muk Declaration asserts that both the refuge and buffer areas cannot be subject to the construction of buildings or structures with permanent foundations or permanent human occupation. The Qat'muk Declaration also asserts that no disturbance or alteration of the ground of any kind is permitted within the refuge area. The Proposed Resort is partially within the refuge area and the access road is within the buffer area.
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> [103] After issuing the Qat'muk Declaration, the Ktunaxa took the position that the only purpose of consultations was to ensure that decision-makers fully understood why the Proposed Resort could not be approved.

[31] The chambers judge then summarized the essential basis for what he termed the "no middle ground position" (i.e., the position that the Proposed Resort is inimical to the religious belief of the Ktunaxa, and that no accommodation is possible):

> [106] The "no middle ground" position appears to be primarily based on the beliefs of a Ktunaxa elder (Chris Luke, Sr.). Mr. Luke was born in 1948 and raised in Yaqan Nukiy, south of Creston. It appears that Mr. Luke only acquired the belief that no accommodation was possible in 2004, when he realized that he had to speak up for and be the voice of the Grizzly Bear Spirit.
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> [107] Mr. Luke's belief that the Proposed Resort was incompatible with the sacred values in the area was not immediately shared with other Ktunaxa. He did not share it with any third parties until 2009, seemingly for health reasons. The Ktunaxa also explain that they have a cultural reluctance to share specific spiritual beliefs although there is less difficulty sharing such in general terms and did so, as recorded in the Anielski Report and on other occasions as noted above.
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> [108] The Ktunaxa say that "if the ski resort is built where it is intended to be built, Grizzly Bear Spirit will leave that area, the Ktunaxa will no longer have access to it or the gifts it provides to them, and that their religious rituals involving Grizzly Bear Spirit will become meaningless". Various affiants make statements in support of this assertion (e.g. Ms. Birdstone, Mr. Alpine, Mr. Joseph, Ms. Nicholas, Mr. Auld, Mr. Pierre, Ms. Friedlander, Ms. Jimmy, Mr. Finley, Mr. Luke, and Ms. Stevens).
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> …

> [110] Overall there is little evidence that the Ktunaxa physically visit the area of the Proposed Resort for the purpose of carrying out religious rituals or ceremonies on a consistent basis. There are no specific sites identified. The camp referred to is at the abandoned mine site near the forestry access road at the confluence of Toby Creek and Jumbo Creek. However, as I understand the Ktunaxa's argument, they do not need to physically go to any particular place within Qat'muk for it to be of significance to their culture and religion. Rather, it is the spiritual meaning of Qat'muk that is essential to Ktunaxa religion and spirituality. More specifically, it is the continuing presence of the Grizzly Bear Spirit, whose home is in Qat'muk, which is of critical importance to their religious rituals and ceremonies.
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> [111] The Ktunaxa say that the Proposed Resort, a place of permanent human habitation, will violate their freedom of religion by causing the Grizzly Bear Spirit to leave. The departure of the Grizzly Bear Spirit will render meaningless their rituals and ceremonies involving the Grizzly Bear Spirit, regardless of where they are performed, which is mostly elsewhere. Thus, the proposed accommodations, indeed any accommodations short of disallowing the Proposed Resort, are incapable of addressing their concerns.
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> [Emphasis in original.]

H. Approval of the MDA

[32] The Minister approved the MDA on March 20, 2012. The Minister's reasons for approving the MDA are set out in his Rationale for Decision ("Rationale"). The Rationale can be found at Schedule F of the chambers judge's reasons. In approving the MDA, the Minister relied on the Consultation/Accommodation Summary prepared by his department. Neither the Rationale, nor the Consultation/Accommodation Summary upon which it is based, made specific reference to the Ktunaxa's s. 2(a) *Charter* rights.

THE CHAMBERS HEARING

[33] The Ktunaxa sought judicial review of the Minister's decision to approve the MDA. It submitted that the MDA violated: (1) their right to freedom of religion under s. 2(a) of the *Charter* and (2) the duty to consult under s. 35 of the *Constitution Act*. The chambers hearing took place over 10 days. The chambers judge was asked to consider more than 20 affidavits and in excess of 2,000 pages of documentary evidence.

[34] On judicial review, the Ktunaxa argued that the proposed resort lies at the heart of a sacred area of paramount spiritual importance within their claimed

traditional territory, as it is the Grizzly Bear Spirit's home. They claimed that if the development of the resort was permitted, the Spirit would leave, and they would no longer be able to receive physical or spiritual assistance and guidance from the Spirit, which would have a profound negative impact on their identity and culture.

[35] On the s. 2(a) issue, the chambers judge first noted that on judicial review of a discretionary administrative decision for compliance with the *Charter*, the reviewing court must ask whether the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right.

[36] One of the arguments advanced by the Ktunaxa addressed the Minister's failure to directly address s. 2(a) in his written reasons approving the MDA. The chambers judge rejected this position, holding that what mattered were the Minister's actions and the accommodations offered, and whether these addressed the substance of the asserted *Charter* right.

[37] The chambers judge moved on to hold that there was no issue that the Ktunaxa's system of beliefs constituted a religion. The nature of the religious right asserted under s. 2(a), as characterized by the judge, did not involve the right to practice a religion without constraint, but to continue to derive religious meaning and fulfillment from a spiritual place without government obstruction. He addressed the question of whether s. 2(a) extends to protect against state action that reduces, or causes loss of, the meaning of a religious practice, absent coercion of individuals. He held that s. 2(a) did not encompass "subjective loss of meaning without some associated coercion or constraint on conduct".

[38] After deciding that the religious right asserted was not protected by s. 2(a), the chambers judge held that if he was wrong about the scope of s. 2(a), he would find that the Minister's actions and accommodations represented a reasonable balancing of the *Charter* value and statutory objective.

[39] On the issue of consultation, the chambers judge found that the consultation process taken by the Minister was reasonable and appropriate, and that the Minister's proposed accommodations fell within a range of reasonable responses

which upheld the honour of the Crown, and satisfied the Crown's duty to consult and accommodate.

[40] The chambers judge summarized his conclusions as follows:

> [324] The Ktunaxa assert that by approving the Proposed Resort within Qat'muk, the Minister breached a duty to consult and accommodate their aboriginal spiritual rights and violated their right to freedom of religion under s. 2(a) of the *Charter*. Though seeking two avenues of constitutional protection, the substance of what the Ktunaxa seek to protect under each provision is the same.
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> [325] The Minister approached the matter of the approval of the MDA as requiring deep consultation. I have not been asked to and do not pass on the strength of the asserted aboriginal rights. The process of consultation and the accommodation offered in my opinion passes the reasonableness standard.
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> [326] The approval of the MDA does not infringe section 2(a) of the *Charter*. In any event, the decision to approve the MDA with the various conditions and accommodations represents a reasonable balancing of *Charter* values and statutory objectives.

THE APPEAL

[41] On the appeal, the Ktunaxa submit that the chambers judge erred in his approaches to s. 2(a) of the *Charter* and to the duty to consult and accommodate. They ask that this Court set aside his decision and quash the Minister's approval of the MDA.

[42] In regard to s. 2(a) the Ktunaxa submit that after the chambers judge found that the Minister never directly analyzed the s. 2(a) right, it was a legal error to consider something which was never addressed by the Minister. The Ktunaxa further submit that the chambers judge erred in holding that the approval of the MDA did not infringe section 2(a).

[43] In regard to the s. 35 right and the issue of consultation and accommodation, the Ktunaxa submit the chambers judge erred in holding that the Minister engaged in deep consultation and erred in finding that the asserted right was accommodated.

[44] The Minister and Glacier support the findings of the chambers judge. They note that he was asked by all parties to determine the threshold question of whether there was an infringement of s. 2(a) and point out that absent an infringement it is of

little moment that the Minister did not specifically consider the question. They further submit that the chambers judge was correct in finding that the Minister did not breach his duty to consult and accommodate the Ktunaxa's s. 35 rights.

DISCUSSION

A. Overview

[45] I will first discuss the alleged violation of the Ktunaxa's s. 2(a) rights and then turn to the alleged violation of s. 35. In regard to s. 2(a) claim it is important at the outset to note the Ktunaxa advance their s. 2(a) claim as a standalone right to be determined on the same basis as if it were asserted by a non-Aboriginal group. The Ktunaxa submit that their constitutional identity as Aboriginal people is not relevant to their s. 2(a) claim.

B. The s. 2(a) Infringement

i. The Legal Framework

[46] The Ktunaxa assert that the Minister's approval of the MDA amounts to a breach of s. 2(a) of the *Charter*. This claim is made in the context of an administrative decision. In the typical case of an administrative decision with a consequential assertion of a breach of the *Charter*, the proper framework for analysis is set down in *Doré v. Barreau du Québec*, 2012 SCC 12 and affirmed, in the context of Ministerial decisions, in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 39-42 [*Loyola*].

[47] The threshold issue of whether the *Charter* right is infringed is not affected by *Doré*. Madam Justice Abella explains the two-step analysis at para. 39 of *Loyola*:

> [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.

[48] The Minister, in its submissions, takes the position that, when discretionary administrative decisions are challenged on the basis of *Charter* rights, the standard of review of reasonableness applies generally, citing *J.D. Irving, Limited v. North Shore Forest Products Marketing Board,* 2014 NBCA 42 at para. 14. This proposition is true only insofar as the reviewing court is focused on the question of whether an alleged infringement of the *Charter* is "proportional" within the meaning of *Doré*. The threshold issue of whether the *Charter* right is infringed at all is a constitutional question to be assessed on a standard of correctness: see e.g., *Canadian National Railway Co. v. Canada (Attorney General),* 2014 SCC 40 at para. 55; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 16; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 18; and *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 58.

[49] In summary, the *Doré* framework involves a two-step analysis: (i) a determination of whether the *Charter* right, *qua Charter* right, has been infringed; and (ii) an inquiry into whether, having found that the *Charter* right is engaged, the administrative "decision reflects a proportionate balancing of the *Charter* protections at play". The issue of whether a *Charter* right is implicated at all is a constitutional question that is to be assessed on a standard of review of correctness. In contrast, whether infringement of that right by state action is "demonstrably justified in a free and democratic society" is to be assessed on a standard of reasonableness.

[50] The chambers judge properly framed the s. 2(a) issue as requiring him to apply the *Doré* analysis. The reasons for judgment provide as follows at paras. 264 and 268:

> [264] The approach to reviewing the constitutionality of a law is different than the approach to reviewing an administrative decision that is argued to have violated the Charter right of an individual: [*Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37*] at paras. 66-67. It is stating the obvious to say that administrative decision-makers must act in accordance with *Charter* values. However, until *Doré v. Barreau du Québec*, 2012 SCC 12 [Doré] there was some uncertainty as to the correct approach to take on judicial

> review for determining whether an administrative decision complied with the Charter.
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> …
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> [268] On judicial review of a discretionary administrative decision for compliance with the Charter, the reviewing court must ask whether the decision-maker disproportionately, and therefore unreasonably, limited a Charter right: is there an appropriate balance between rights and objectives, and are the rights at issue not unreasonably limited (*Doré* at para. 6). The nature of the reasonableness analysis is contingent on context and centres on proportionality, namely, ensuring that the decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objectives: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 at para. 18; *Doré* at para. 7.

[51] The Ktunaxa took the position before the chambers judge that the Minister had not turned his mind to consider the s. 2(a) right. The judge summarized the submission at para. 269:

> [269] The Ktunaxa submit that based on the Minister's Rationale, it is clear the Minister "never even put his mind to the Charter right at issue" despite the Ktunaxa having raised it several times. The Ktunaxa further argue that the Minister's focus on "spiritual interests" rather than the associated "practices and beliefs" is evidence that the Minister never considered the asserted s. 2(a) right.

[52] The chambers judge considered the merits of the submission (at paras. 270-274) and concluded that the Minister had considered "the substance of the asserted *Charter* right where necessary", thereby providing sufficient reasons to apply the framework of analysis set out in *Doré*:

> [270] …[T]he substance of [the] claimed s. 2(a) right was clearly before the Minister since at least 2009, when the Ktunaxa took the position that the Proposed Resort was fundamentally irreconcilable with their spiritual connection to the area. The spiritual aspect in a more general sense had been asserted since at least 2003. The Ktunaxa's subsequent explicit assertion of their s. 2(a) *Charter* right added a new description to a live issue in the decision-making process that was, in substance, already entirely before the Minister.
>
> [271] In my opinion it does not matter whether the Minister's Rationale contains the specific language of the *Charter*. What matters is that the Minister's actions and the accommodations offered address the substance of the asserted *Charter* right where necessary.
>
> [272] This is neither the rejection nor the acceptance of the Ktunaxa's assertion that the balancing of *Charter* values with statutory objectives is fundamentally different than the balancing of asserted but unproven

> Aboriginal rights with competing societal interests. In my view the issue is whether the substance of the asserted *Charter* issue was appropriately addressed by the impugned decision-maker in the particular circumstances of the case. As such, the questions to be answered in my analysis are: (1) is the Ktunaxa's asserted right protected by s. 2(a) of the *Charter* and infringed by the MDA, and, if so, (2) did the actions of the Minister and the accommodations offered reasonably balance the *Charter* value at issue with the applicable statutory objectives?
>
> [273] In my view, both the Minister's Rationale and the preceding consultation process address the substance of the Ktunaxa's asserted s. 2(a) *Charter* right. In the circumstances of this case, I do not think it would add anything to my consideration here if the Minister had sought to specifically analyze the asserted *Charter* right with the spiritual practices and the various accommodation measures proposed.
>
> [274] The question in each case must be, did the impugned decision engage the asserted *Charter* right and, if so, does the decision reflect a proportionate balancing of the relevant *Charter* value with the applicable statutory objectives within the relevant factual context?

[53] In summary, the chambers judge took the view that the ultimate question to be decided was whether the Minister properly grappled with the proportionality analysis. The chambers judge addressed this by first considering whether the s. 2(a) right could be engaged on the facts of the case, and then asking, if the right was engaged, whether the Minister's decision achieved a proportionate balance. This is important, because the threshold question of whether the s. 2(a) right exists at all is not necessarily predicated on the reasons offered by the Minister. It is in the context of this analysis that the Ktunaxa put forward the issue of sufficiency of reasons. In essence, the Ktunaxa submit that the chambers judge had "created reasons for something which was never addressed by the Minister" (i.e., an analysis of s. 2(a)).

[54] The Ktunaxa maintain the chambers judge was wrong in saying that the Minister had considered the substance of their claimed s. 2(a) right, but, while this may be so, it is of little import. As previously discussed the issue as to whether the Minister, in approving the MDA, breached the Ktunaxa's s. 2(a) rights is a constitutional question that must be determined on a correctness standard. In the hearing below, all of the parties invited the chambers judge to determine the issue. In the circumstances, it matters not how the Minister would have decided the question. The question is whether the chambers judge decided the question

correctly. If he was correct in finding that the Ktunaxa's s. 2(a) rights were not breached then that is the end of the matter and there is no need to go on to the second stage of the analysis (and determine whether the decision reflects a proportionate balancing of the *Charter* protections). I do agree with the Ktunaxa that if the chambers judge erred in determining whether a breach occurred it would be necessary to refer the matter back to the Minister because it is for the Minister, not the chambers judge, to determine the proportionate balancing of the relevant *Charter* value with the applicable statutory objectives within the relevant factual context.

ii. The Scope of s. 2(a) Protections in the Context of Spiritual Beliefs

[55] Having set out the preliminary question of the appropriate framework for the analysis of the s. 2(a) issue, I turn to a consideration of the merits.

[56] The governing test for determining whether state action infringes s. 2(a) of the *Charter* was most recently set out in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 32 as follows:

> [32] An infringement of s. 2(*a*) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. ...

[57] At the outset, I note that the chambers judge accepted (at para. 275) that the Ktunaxa have asserted a sincere spiritual belief that has a clear nexus with religion. I agree with that determination.

[58] In general, the Ktunaxa take the position that whenever state action can be said to interfere with the "meaning and raison d'être" of a religious belief, the state action interferes more than trivially or insubstantially with the belief. The Minister defines the s. 2(a) right more narrowly, as concerning the notion of "stewardship"

over a plot of sacred land and submits that state action will not interfere with that stewardship in a more than trivially or insubstantial manner absent coercion.

[59] The chambers judge set out the ultimate question to be determined as follows at para. 278:

> [278] The question in this case is whether s. 2(a) extends to protect against state action that reduces, or causes loss of, the meaning of or fulfillment gained from a religious practice, without coercing or constraining individual action. [Emphasis in original.]

[60] In my view, the ultimate question to be determined was properly framed to the extent that it focused on the effects of the impugned state action on the s. 2(a) right. It is a well-established feature of the s. 2(a) *Charter* jurisprudence that the ultimate focus of the judicial inquiry on infringement is on the effect of the state action that allegedly interferes with a profoundly held religious belief: see e.g., *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759 [*Edwards Books*], citing with approval the dissenting analysis of Madam Justice Wilson in *R. v. Jones*, [1986] 2 S.C.R. 284 at 314. The passage from *Jones*, which was further cited with approval in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 58 [*Amselem*], sets out:

> Section 2(*a*) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. [Emphasis added.]

[61] It is not the role of s. 2(a) of the *Charter* to engage in a purely conceptual and academic inquiry regarding the hypothetical scope of the freedom of religion. Rather, the courts focus on the more narrow and practical inquiry: whether a particular state action (or a series of state actions) amount to an impermissible interference with the asserted s. 2(a) right based on the effects of state interference on religious practices or beliefs. In this case, the material effect on the asserted s. 2(a) right is, ultimately, the loss of meaning produced by the alleged desecration of a sacred site.

[62] For the chambers judge, the determinative question on s. 2(a) turned on whether the state interference could be said to be "coercive" within the meaning of the traditional s. 2(a) jurisprudence. His analysis is set out at paras. 296-299:

> [296] 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.
>
> [297] Specifically, the Ktunaxa say that if the Proposed Resort is built as planned, with overnight human accommodation in permanent structures within the heart of Qat'muk, the Grizzly Bear Spirit will leave that area. Consequently, the Ktunaxa will no longer have access to the Grizzly Bear Spirit or the gifts it provides to them, and their religious rituals involving the Grizzly Bear Spirit will become meaningless. The Ktunaxa do not assert any specific site or defined area within Qat'muk that is used for religious purposes, such as a meeting place, place of worship or ceremonial locale. The actions involved in these religious practices are thus unconstrained by the Proposed Resort.
>
> [298] There is no coercion or constraint on what the Ktunaxa can do or must omit from doing, as, for example, in the Sunday observance cases, *Hutterian Brethren*, and the religious education cases. There is no coercion or constraint on what one can or cannot wear, as, for example, in the religious symbol cases. There is no coercion or constraint on the right to entertain such beliefs as a person chooses (such as requiring non-believers to submit to majoritarian practice, dogma, or ritual), to declare such beliefs openly, or to manifest such beliefs by worship, practice, teaching and dissemination: *Big M Drug Mart* at 336.
>
> [299] To put the matter in the language of the test for the infringement of s. 2(a), as articulated in *Hutterian Brethren*, where the otherwise lawful use of land is asserted to cause the loss of meaning to or fulfillment from religious practices carried out elsewhere, the interference cannot exceed the threshold of being beyond "trivial or insubstantial". The infringement of s. 2(a) must be established based on facts that can be established and determined objectively: *S.L.* at para. 23. I do not think a subjective loss of meaning without some associated coercion or constraint on conduct can meet that required threshold.

[63] With respect, the chambers judge took too narrow an approach. The presence of coercion or constraint on individual conduct is not the only means by which a claimant may demonstrate an infringement of s. 2(a): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 347 [*Big M*]. Where a claimant has established a sincere belief in a practice having a nexus with religion, state actions that are "coercive" within the meaning of *Big M* are clearly interferences that are more than trivial or insubstantial. That coercion of this type is always sufficient to demonstrate a breach of s. 2(a) does not mean that proof of such coercion is always necessary to establish that a breach of s. 2(a) exists. I note that the Ktunaxa submit that the judge erred by

requiring proof of such coercion to establish a breach of s. 2(a). While I agree with this submission, as I indicate below, s. 2(a) does not extend to protect the particular religious belief asserted by the Ktunaxa in this case.

[64] The notable feature of the chambers judge's analysis in this case is the focus on whether individual members of the Ktunaxa community are restrained in either an ability to express their beliefs or to freely participate in religious practices. However, this inquiry focuses only on the individual aspect of religious belief. There is still a further communal aspect of religious belief that must also be considered.

[65] In *Loyola*, the Court held that the interference with the "vitality" of a religious community may constitute a breach of s. 2(a) of the *Charter.* Madam Justice Abella sets out the governing principles of the collective aspect of the individually held right that arises under s. 2(a) at para. 59-60, with reference to *Big M*, as follows:

> [59] Justice Dickson's formulation of religious freedom is founded on the idea that no one can be forced to adhere to or refrain from a particular set of religious beliefs. This includes both the individual *and* collective aspects of religious belief: *Hutterian Brethren*, at paras. 31, 130 and 182; *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713, at p. 781. In the words of Justice LeBel: "Religion is about religious beliefs, but also about religious relationships" (*Hutterian Brethren*, at para. 182).
>
> [60] Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions…
>
> [Emphasis added.]

[66] Notwithstanding the general language used to articulate the role of communal institutions in the context of individually held s. 2(a) rights, the ultimate question was still if state action had an impermissible effect. The core issue concerned the manner in which the Minister restricted the transmission of the Catholic faith. As Madam Justice Abella explains at paras. 62-64 and 67:

> [62] I agree with Loyola that the Minister's decision had a serious impact on religious freedom in this context. To tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.

> [63] As Justice Dickson observed in *Big M Drug Mart*, "whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose" (p. 347). Although the state's purpose here is secular, requiring Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism.
>
> [64] It also interferes with the rights of parents to transmit the Catholic faith to their children, not because it requires neutral discussion of other faiths and ethical systems, but because it prevents a Catholic discussion of Catholicism. This ignores the fact that an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions.
>
> …
>
> [67] Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.
>
> [Emphasis added.]

[67] In this case, the individually asserted s. 2(a) right implicates the vitality of the Ktunaxa religious community as a whole. Therefore, a further question must be addressed: would the subjective loss of meaning more than trivially or substantially interfere with the communal dimension of the s. 2(a) right by diminishing the vitality of the Ktunaxa religious community through a disruption of the "deep linkages" between the asserted religious belief and its manifestation through communal Ktunaxa institutions? To answer this question, I turn to discuss the belief at issue.

[68] The alleged state interference consists of a type of prohibited human activity that, within the Ktunaxa spiritual framework, has a consequential impact on the spiritual fulfillment of the Ktunaxa religious community as a whole. Specifically, the impugned state interference consists of a course of action that is fundamentally inconsistent with a preeminent tenet of the Ktunaxa faith: building a prohibited form of human accommodation in Qat'muk. The vitality of the religious community allegedly derives, in respect of the asserted belief, from all people − regardless of whether they share the asserted religious preference − acting in a manner compliant

with it (i.e., refraining from the development of Qat'muk). The "deep linkage" between the asserted Ktunaxa belief and Ktunaxa "communal institutions and traditions" is severed if the accommodation is built on Qat'muk and, critically, regardless of who builds the accommodation.

[69] The traditional framework of analysis for s. 2(a) has been predicated on the understanding of asserted religious belief as private, belonging to the individual. The offending state action is then an imposition on this private sphere of human self-expression. Chief Justice Dickson explains this principle in *Big M* at 346-47 as follows:

> What unites enunciated freedoms in the American First Amendment, s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation… It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.
>
> It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own…
>
> [Emphasis added.]

[70] This fundamental limit was reiterated in *Amselem* at para. 62 with due regard to whether s. 2(a) protects beliefs that "interfere with the rights of others":

> 62 … [O]ur jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that

> they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.
>
> [Emphasis added.]

[71] The Ktunaxa derive subjective meaning from a practice that requires others, including but not limited to the state as a whole, to refrain from the development of the Jumbo Valley area they have identified as Qat'muk. Notionally, the Ktunaxa have a relationship with Grizzly Bear Spirit central to their belief that is predicated on the observance of several customs. One of these customs, which is framed in negative terms ("do not") rather than in positive terms ("do"), must be performed by all people, of every faith and creed. This custom is what the Minister, in its submissions, terms the "stewardship" of the Qat'muk area. In essence, the Ktunaxa submit that s. 2(a) includes within its ambit the freedom to, on the basis of an asserted religious belief, control (or at least modify) the behaviour of others on their own property, so as to preserve, to the fullest extent possible, the vitality of their religious community. The issue is whether, on the authority of *Loyola*, a breach of s. 2(a) is then established.

[72] The way in which religious vitality is implicated in *Loyola* is fundamentally different from the way in which it was implicated in this case. *Loyola* concerned the creation of a private high school, teaching in the Catholic tradition, where the only persons who had to comply with the Catholic teaching were those students who were voluntarily enrolled. The state regime, the impugned decision at issue in that case, sought to determine how this community was to pass on those values. It is this feature that led to the conclusion that "disrupt[ing] the vitality of religious communities represents a profound interference with religious freedom." This follows because of the "deep linkages between this [religious] belief and its manifestation through communal institutions and traditions": *Loyola* at para. 60.

[73] 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 underpinning principles 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 name of preserving subjective religious meaning.

[74] In my view, in this case, s. 2(a) does not apply to protect the vitality of religious communities where the vitality of the community is predicated on the assertion by a religious group that, to preserve the communal dimension of its religious beliefs, others are required to act or refrain from acting and behave in a manner consistent with a belief that they do not share.

[75] For the above reasons, I would not accede to this ground of appeal.

C. The Duty to Consult and, if necessary, to Accommodate

i. The Legal Framework

[76] As a matter of constitutional imperative under s. 35 of the *Charter*, the Crown has a legal obligation to consult with Aboriginal peoples where it contemplates any decision that may adversely impact on asserted or established Aboriginal or treaty rights: see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 16-38 [*Haida Nation*]; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 31-50 [*Rio Tinto*]. In *Rio Tinto*, the Court summarized the framework governing duty to consult as follows at para. 51:

> [51] As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[77] The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the asserted right, and to the seriousness of the potentially adverse effect upon the right claimed: *Haida Nation* at para. 39. Fundamentally, the Crown is not under a duty to reach an agreement; the commitment is to a meaningful process of consultation in good faith: *Haida Nation* at para. 41. Good faith is central, as the Court explains in *Haida Nation* at para. 42:

> [42] At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised, through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.
>
> [Emphasis added. Citation omitted.]

[78] The duty to accommodate requires a balancing of interests. The Court in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 explained, at para. 2:

> [2] … Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process …

[79] The applicable standard of review was set out at para. 62 of *Haida Nation* as reasonableness. The focus is not on the outcome, but on the process of consultation and accommodation: *Haida Nation* at para. 63. The Court explained as follows at para. 62:

> [62] Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult …

[80] Having briefly set out the general principles applicable to this case, I will turn to the submissions of the parties and an analysis of their positions.

ii. The Consultation Process

[81] The Ktunaxa submit the Minister erred in law by narrowly characterizing the potential Aboriginal right as "a right to preclude permanent development" rather than as a right to "exercise spiritual practices which rely on a sacred site and require its protection". The Ktunaxa further submit that the difference in the characterization is significant because it led the Minister, in essence, to understate (i) the centrality of the spiritual belief to the Ktunaxa, thereby understanding the scale of the potential infringement to the Ktunaxa; and (ii) the strength of the evidence that supports the case for the right, which undermined the foundation of the consultation process (in their submission, rendering it "meaningless"). The Minister submits, in reply, that the process it adopted is fully consistent with the description of "deep" (or "meaningful") consultation, citing *Haida Nation* at para. 44.

[82] Turning to the first submission, in my opinion, the Minister (and the chambers judge) properly considered the scope of the s. 35 right by focusing on the effects of the state action on the general Aboriginal right. The Court in *Rio Tinto* explained the scope of the right implicated in the consultation process at paras. 45-48 and 53:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> …
>
> [48] An underlying or continuing breach … is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33…
>
> …
>
> [53] … [*Haida Nation*] grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult

> to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part…
>
> [Emphasis added.]

[83] In this case, the "adverse impacts flowing from the specific Crown proposal at issue" concerns the spiritual consequences that follow from permitting development of the Proposed Resort in the Qat'muk area. In the Qat'muk declaration, this is the adverse impact that the Ktunaxa describe:

> The refuge and buffer areas will not be shared with those who engage in activities that harm or appropriate the spiritual nature of the area. These activities include, but are not limited to:
>
> - The construction of buildings or structures with permanent foundations;
> - Permanent occupation of residences
>
> To further safeguard spiritual values, no disturbances or alteration of the ground will be permitted within the refuge area.

[84] In my view, the Minister reasonably characterized the above adverse impact on the s. 35 right as concerning the impact of development of the Proposed Resort on the Ktunaxa and, in particular, as a claim that development in the Qat'muk area was fundamentally inimical to their belief.

[85] Turning to the second submission, the consultation process accurately reflected the significance of the asserted s. 35 to the Ktunaxa. The Court explains the spectrum of consultation as follows at paras. 43-44 of *Haida Nation*:

> [43] …I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful... At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding".
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in

> the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> [Emphasis added. Citations omitted.]

[86] The consultation was, as the chambers judge discusses at paras. 203-245 of his reasons, "deep consultation" as defined above in *Haida Nation*. The consultation process in this case was reflective of a process that the Crown would follow "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high."

[87] The signing of the MDA was the final step in a highly sophisticated regulatory review process that lasted for almost two decades. Formal consultation between the Ktunaxa and the Minister commenced on September 7, 2006, when the Ktunaxa had sought additional opportunities for direct consultation beyond what they were afforded through the environmental assessment process. The triggering point for this consultation was, as I said above, the adequacy of the draft MP when it came to the "First Nation" section. The chambers judge reviews the steps taken during this part of the regulatory process at paras. 64-85 of his reasons for judgment.

[88] When the Ktunaxa had indicated in mid-2009 that no accommodation of their belief was possible, the Minister engaged in a further period of consultation. In my opinion, this approach is consistent with the emphasis that the Court in *Haida Nation* placed on flexibility in the process of consultation at para. 45:

> [45] … Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its

> response to Aboriginal concerns. Balance and compromise will then be necessary.

[89] The chambers judge summarized the further consultation process at paras. 81-105 and, alongside his analysis, at paras. 234-245. In this regard, I note that the Ktunaxa contend that he made a palpable and overriding error "in determining that it was not until 2009 that the Ktunaxa first asserted that it is the permanent nature of the proposed project which will infringe their s. 35 aboriginal right".

[90] With greatest respect, the chambers judge made no such finding. Instead, the chambers judge found that the Ktunaxa's position that "no accommodation" was possible first surfaced in mid-2009. He said, at paras. 208, 229, 230 and 240:

> [208] While not dispositive of this case, the fact that those earlier regulatory approvals were not challenged is noteworthy because the Ktunaxa's position is that no accommodation of their asserted right is possible. This position lies at the extreme end of the spectrum of required accommodation and is, in essence, seeking to veto the MDA and the Proposed Resort entirely. 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.
>
> …
>
> [229] 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.
>
> [230] Further, when the Ktunaxa did say that no accommodation of the Proposed Resort is possible, it seems that their position was based on the epiphanial reflection of one elder which arose in 2004 but was only communicated to third parties in 2009. The specific belief was not widely held among the Ktunaxa.
>
> …
>
> [240] The Proposed Resort area was first identified as suitable for an all season ski resort as early as 1991. The assertion that no accommodation was possible first surfaced in mid-2009. The Ktunaxa argue that they advised the Minister of the sacred values in the Jumbo Valley as early as 1991, but

> acknowledge that the "no middle ground" position was only articulated from mid-2009 onwards.

iii. The Possibility of Accommodation

[91] The relationship between the Crown's duty to consult and its corollary duty to accommodate is first set out at para. 47-50 of *Haida Nation* as follows:

> [47] … [T]he effect of good faith consultation may be to reveal a duty to accommodate. …
>
> [48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> [49] This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.
>
> [50] The Court's decisions confirm this vision of accommodation … Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

[92] The Ktunaxa take the position that the chambers judge erred in his analysis of the accommodation offered by the Minister with respect to their spiritual right. I disagree. He summarized the accommodations offered to the Ktunaxa at paras. 236-245. For reference, I set out some of those referenced accommodations below:

> [238] It is clear that many changes were made to the specifications for the Proposed Resort in response to the Ktunaxa's concerns. The assessment of whether this accommodation is reasonable must, in my opinion, be viewed within the broader context of the various regulatory approvals the Proposed Resort has been through since 1991. I will not repeat that history here.
>
> [239] In written submissions, the Minister summarises its response to the list of aboriginal rights asserted by the Ktunaxa in July 2011. The summary references sections of the Consultation/Accommodation Summary that the

Minister submits show reasonable accommodation of the asserted Aboriginal rights. Reformatted slightly, this summary reads as follows:

> *1. The right to continue to practice and benefit from our spiritual-religious relationship with Grizzly Spirit, individually and collectively, in our traditional ceremonies, songs and dances;*
>
> Response: The evidence was that these ceremonies took place on reserve. As a condition to the MDA, the developer will be required to provide for continuing use by the Ktunaxa of portions of the CRA for the practice of traditional activities.
>
> …
>
> The pursuit of the establishment [of] a WMA, with an invitation to the Ktunaxa to engage with the Province in the development and implementation of the WMA objectives.
>
> …
>
> *2. The right to continue the tradition of vision quests and other spiritual-religious practices seeking and benefitting from Grizzly Spirit's special guidance, whether for the sake of the individual or the community;*
>
> Response: There was no evidence of vision quests within the CRA. In any event, as a condition to the MDA, the developer will be required to provide for continuing use by the Ktunaxa of portions of the CRA for the practice of traditional activities.
>
> …
>
> *3. The right to continue to journey, individually and collectively, to Grizzly Spirit's home to experience his presence and power, and take away and share the benefits of the experience;*
>
> Response: As a condition to the MDA, the developer will be required to provide for continuing use by the Ktunaxa of portions of the CRA for the practice of traditional activities.
>
> …
>
> *4. The right to maintain our people's kinship with grizzly bears and to continue our traditional practices expressing our kinship;*
>
> Response: As noted below, those traditional practices take place on reserve. As a condition to the MDA, the developer will be required to provide for continuing use by the Ktunaxa of portions of the CRA for the practice of traditional activities.
>
> …
>
> *5. The right to continue to join, individually and collectively, with our brother and sister grizzlies at Qat'muk, whether in times of celebration or in times of difficulty;*

> Response: The approved Master Plan shows the removal from the CRA of the lower Jumbo Creek area that has been perceived as having greater visitation potential from grizzly bears. It has also been amended to remove ski lifts on the west side of the valley, where impact to grizzly bear habitat was expected to be greatest...
> …
>
> [245] … Although the Ktunaxa adduce various criticisms of the process, in my opinion, viewed globally, the record before me reveals a record of meetings, exchanges, and accommodation offers that amounts to a reasonable process of consultation and accommodation between the Minister and the Ktunaxa, even if not necessarily regarded as such by the Proponent, Glacier Resorts, whose involvement from proposal to final approval has spanned 21 years. In my opinion the accommodations offered fall within a range of reasonable responses which upholds the honour of the Crown and satisfied the Crown's duty to consult and accommodate the Ktunaxa's asserted Aboriginal rights.

[93] On this point, the chambers judge made an affirmative finding that the Minister acted in good faith throughout the consultation process: at para. 124. In my view the chambers judge did not err with respect to the consultation or the accommodation analysis. I agree with the chambers judge that the process of consultation and the accommodation offered meets the reasonableness standard. I would not accede to this ground of appeal.

SUMMARY

[94] The decision of the Minister to approve the MDA did not violate the Ktunaxa's freedom of religion guaranteed under s. 2(a) of the "*Charter*". The Minister did not breach his duty to consult and accommodate under s. 35.

[95] I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I agree:
"The Honourable Mr. Justice Lowry"

I agree:
"The Honourable Madam Justice Bennett"