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SUPREME COURT OF CANADA CLARIFIES THE SCOPE OF FREEDOM OF RELIGION

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A. INTRODUCTION

On November 2, 2017, the Supreme Court of Canada (the "SCC") delivered its judgement in the case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*,[1] which arose after the British Columbia Minister of Forests, Lands and Natural Resource Operations (the "Minister") declared that reasonable consultation had occurred prior to the approval of a proposed ski resort development in an area of spiritual significance for the Ktunaxa people. The Ktunaxa people played an active role in a lengthy regulatory approval and consultation process extending over twenty years and some of their concerns were addressed. However, the Ktunaxa eventually rejected the development altogether claiming it would drive Grizzly Bear Spirit, "a principal spirit within Ktunaxa religious beliefs and cosmology", away from their sacred land, and irrevocably impair their freedom of religion under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[2] Although the SCC took into account many considerations in rendering its judgment, this Church Law Bulletin provides only a brief overview of its ruling on freedom of religion under s. 2(a) of the *Charter*.

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[1] 2017 SCC 54.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

B. CASE SUMMARY

The Ktunaxa brought an application for judicial review claiming, among other things, that the Minister's decision infringed their *Charter* right to freedom of religion under s. 2(a) of the *Charter*. The *Charter* claim was dismissed at trial, on appeal and by a majority of seven judges in the SCC. In the opinion of the majority, the Minister's approval did not violate the Ktunaxa's freedom to hold or manifest their beliefs. The majority relied on a long-standing definition that the right to freedom of religion has two aspects: the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been affirmed and reaffirmed by the SCC and was further amplified in the 2004 leading SCC case of *Syndicat Northcrest v Amselem*,[3] which held that the right to freedom of religion is triggered when 1) the claimant has a sincere belief in a practice or belief that has a nexus with religion, irrespective of whether it is required by religious dogma or religious leaders; and 2), the state conduct interferes in a non-trivial or not-insubstantial manner with the claimant's ability to act in accordance with that practice or belief.

The majority found that the Ktunaxa people sincerely believe in Grizzly Bear Spirit and that they sincerely believe that the development project will drive this Spirit away from the area. However, the second part of the test was not met because the Minister's decision did not interfere with the Ktunaxa's freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. The majority found the Ktunaxa were not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Instead, they were seeking to protect the *presence* of Grizzly Bear Spirit and the subjective spiritual meaning they derived from it, a claim that would go beyond the scope of s. 2(a) of the *Charter,* which "protects the freedom to worship, but does not protect the spiritual focal point of worship."[4]

The majority found that to protect the "spiritual focal point of worship" would require it to scrutinize the sincerely held beliefs of the claimant, something that the *Amselem* decision clearly decided it could not do, choosing to "protect *any* sincerely held belief rather than examining the specific merits of religious beliefs."[5] In other words, the Charter protects the freedom to worship but not the object of worship. While the right to freedom of religion protects the right to hold a belief, teach and manifest certain practices

[3] 2004 SCC 47.
[4] *Supra* note 1 at para 71.
[5] *Ibid* at para 72.

such as wearing a kirpan, it is beyond the scope of section 2 (a) of the *Charter* to protect a spirit, even if the court knew how to go about protecting a spirit.

While reiterating and reaffirming that religion has communal aspects, the majority opinion held that the scope of freedom of religion is the same whether dealing with the individual or communal aspects.

The concurring minority opinion of two judges, while agreeing with the majority in the final result, stated that the Minster's decision had in fact infringed the Ktunaxa's right to freedom of religion. With regard to the second part of the test relied on by the majority, the minority opinion held that there is an infringement of the right to religious freedom when state conduct takes away the religious significance of a person's sincerely held religious beliefs, reducing the *Charter* to protecting empty gestures and hollow rituals. It stated:

> In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself. Unlike in Judeo-Christian faiths for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world. For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with a believer's ability to act in accordance with his or her religious beliefs and practices.
>
> …To ensure that all religions are afforded the same level of protection, courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.[6]

The minority found that the religious beliefs of the Ktunaxa would become devoid of religious significance and leave them unable to pass on their beliefs and practices to future generations. However, it found the Minister's decision had been reasonable and proportionally balanced both the Ktunaxa's rights under the *Charter* and the administration of Crown land in the public interest.

[6] *Ibid* at paras 127, 128.

C. CONCLUSION

While this decision was framed in the specific context of the Crown's duty to consult and accommodate in consideration of indigenous rights, the insights of both the majority and the minority opinions of the SCC in this case are sure to inform future cases on the scope of the right to freedom of religion. The minority's opinion of the importance of being "alive to the unique characteristics of each religion" could also influence future decisions on charity law about relatively new religions.