



SUPREME COURT OF CANADA

CITATION: Ktunaxa Nation v. British Columbia
(Forests, Lands and Natural Resource Operations),
2017 SCC 54

APPEAL HEARD: December 1, 2016
JUDGMENT RENDERED: November 2, 2017
DOCKET: 36664

BETWEEN:

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

and

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

- and -

**Attorney General of Canada, Attorney General of Saskatchewan, Canadian
Muslim Lawyers Association, South Asian Legal Clinic of Ontario, Kootenay
Presbytery (United Church of Canada), Evangelical Fellowship of Canada,
Christian Legal Fellowship, Alberta Muslim Public Affairs Council, Amnesty
International Canada, Te'mexw Treaty Association, Central Coast Indigenous
Resource Alliance, Shibogama First Nations Council, Canadian Chamber of
Commerce, British Columbia Civil Liberties Association, Council of the
Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First
Nations and Prophet River First Nation**
Intervenors

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

JOINT REASONS FOR JUDGMENT: McLachlin C.J. and Rowe J. (Abella, Karakatsanis, Wagner,
(paras. 1 to 115) Gascon and Brown JJ. concurring)

PARTIALLY CONCURRING

Moldaver J. (Côté J. concurring)

REASONS:

(paras. 116 to 156)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

KTUNAXA NATION v. B.C.

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

Appellants

v.

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

Respondents

and

**Attorney General of Canada,
Attorney General of Saskatchewan,
Canadian Muslim Lawyers Association,
South Asian Legal Clinic of Ontario,
Kootenay Presbytery (United Church of Canada),
Evangelical Fellowship of Canada,
Christian Legal Fellowship,
Alberta Muslim Public Affairs Council,
Amnesty International Canada,
Te'mexw Treaty Association,
Central Coast Indigenous Resource Alliance,
Shibogama First Nations Council,
Canadian Chamber of Commerce,
British Columbia Civil Liberties Association,
Council of the Passamaquoddy Nation at Schoodic,
Katzie First Nation, West Moberly First Nations
and Prophet River First Nation**

Interveners

**Indexed as: Ktunaxa Nation v. British Columbia (Forests, Lands and Natural
Resource Operations)**

2017 SCC 54

File No.: 36664.

2016: December 1; 2017: November 2.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Freedom of religion — First Nation alleging that ski resort project would drive spirit central to their religious beliefs from their traditional territory — Provincial government approving ski resort despite claim by First Nation that development would breach right to freedom of religion — Whether Minister's decision violates s. 2(a) of Canadian Charter of Rights and Freedoms.

Constitutional law — Aboriginal rights — Crown — Duty to consult — Provincial government approving ski resort despite claim by First Nation that development would breach constitutional right to protection of Aboriginal interests — Whether Minister's decision that Crown had met duty to consult and accommodate was reasonable — Constitution Act, 1982, s. 35.

The Ktunaxa are a First Nation whose traditional territories include an area in British Columbia that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it is home to Grizzly Bear Spirit, a principal spirit within Ktunaxa religious beliefs and cosmology. Glacier Resorts sought government approval to build a year-round ski resort in Qat'muk. The Ktunaxa were consulted and raised concerns about the impact of the project, and as a result, the resort plan was changed to add new protections for Ktunaxa interests. The Ktunaxa remained unsatisfied, but committed themselves to further consultation. Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. After efforts to continue consultation failed, the respondent Minister declared that reasonable consultation had occurred and approved the project. The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion, and that the Minister's decision breached the Crown's duty of consultation and accommodation. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and **Rowe JJ.**: The Minister's decision does not violate the Ktunaxa's s. 2(a) *Charter* right to freedom of religion. In this case, the Ktunaxa's claim does not fall within the

scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. In this case, the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place.

The second part of the test, however, is not met. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. Yet the Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. This is a novel claim that would extend s. 2(a) beyond its scope and would put deeply held personal beliefs under judicial scrutiny. The state's duty under s. 2(a) is not to protect the object of beliefs or the spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such

beliefs and to manifest them in worship and practice or by teaching and dissemination.

In addition, the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* was reasonable. The Minister's decision is entitled to deference. A court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* raised in isolation on a standard of correctness, and therefore does not decide the issue for itself. Rather, it must ask whether the decision maker's finding on the issue was reasonable.

The constitutional guarantee of s. 35 is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

In this case, the Ktunaxa's petition asked the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Nor can administrative

decision makers themselves pronounce upon the existence or scope of Aboriginal rights without specifically delegated authority. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. In the interim, while claims are resolved, consultation and accommodation are the best available legal tools for achieving reconciliation.

The record here supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation. The process protected by s. 35 was at an end.

The record does not suggest, conversely, that the Minister mischaracterized the right as a claim to preclude development, instead of a claim to a spiritual right. The Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in Qat'muk, which the

Ktunaxa believed would be driven out by the development. Spiritual practices and interests were raised at the beginning of the process and continued to be discussed throughout. Nor did the Minister misunderstand the Ktunaxa's secrecy imperative, which had contributed to the late disclosure of the true nature of the claim: an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. The Minister understood and accepted that spiritual beliefs did not permit details of beliefs to be shared with outsiders. Nothing in the record suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred. In addition, the Minister did not treat the broader spiritual right as weak. The Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the new, absolute claim that no accommodation was possible because the project would drive Grizzly Bear Spirit from Qat'muk. The record also does not demonstrate that the Minister failed to properly assess the adverse impact of the development on the spiritual interests of the Ktunaxa.

Ultimately, the consultation was not inadequate. The Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge and the Court of Appeal. Moreover, the record does not establish that no accommodation was made with respect to the spiritual right. While the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project — the Crown met its obligation to consult and accommodate. Section 35 guarantees a process, not a particular result. There is no

guarantee that, in the end, the specific accommodation sought will be warranted or possible. Section 35 does not give unsatisfied claimants a veto. Where adequate consultation has occurred, a development may proceed without consent.

Per Moldaver and Côté JJ.: The Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 of the *Constitution Act, 1982* was met; however, the Minister's decision to approve the ski resort infringed the Ktunaxa's s. 2(a) *Charter* right to religious freedom.

The first part of the s. 2(a) test is not at issue in this case. The second part focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. Where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(a).

This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. 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. In many Indigenous religions, land is not only the site of spiritual practices; land itself can be sacred. As such, state action

that impacts land can sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with the ability to act in accordance with religious beliefs and practices.

In this case, the Ktunaxa sincerely believe that Grizzly Bear Spirit inhabits Qat'muk, a body of sacred land in their religion, and that the Minister's decision to approve the ski resort would sever their connection to Qat'muk and to Grizzly Bear Spirit. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. Their religious beliefs in Grizzly Bear Spirit would become entirely devoid of religious significance, and accordingly, their prayers, ceremonies, and rituals associated with Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. Moreover, without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, the Ktunaxa would be unable to pass on their beliefs and practices to future generations. Therefore, the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial.

The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's s. 2(a) *Charter* right and the Minister's statutory objectives: to administer Crown land and dispose of it in the public interest. A proportionate balancing is one that gives effect as fully as possible

to the *Charter* protections at stake given the particular statutory mandate. When the Minister balances the *Charter* protections with these objectives, he must ensure that the *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives.

In this case, the Minister did not refer to s. 2(a) explicitly in his reasons for decision; however, it is clear from his reasons that he was alive to the substance of the Ktunaxa's s. 2(a) right. He recognized that the development put at stake the Ktunaxa's spiritual connection to Qat'muk.

In addition, it is implicit from the Minister's reasons that he proportionately balanced the Ktunaxa's s. 2(a) right with his statutory objectives. The Minister tried to limit the impact of the development on the substance of the Ktunaxa's s. 2(a) right as much as reasonably possible given these objectives. He provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. Ultimately, however, the Minister had two options before him: approve the development or permit the Ktunaxa to veto the development on the basis of their freedom of religion. Granting the Ktunaxa a power to veto development over the land would effectively give them a significant property interest in Qat'muk — namely, a power to exclude others from constructing permanent structures on public land. This right of exclusion would not be a minimal or negligible restraint on public ownership. It can be implied from the Minister's reasons that permitting the Ktunaxa to dictate the use of a large tract of land

according to their religious belief was not consistent with his statutory mandate. Rather, it would significantly undermine, if not completely compromise, this mandate. In view of the options open to the Minister, his decision was reasonable, and amounted to a proportionate balancing.

Cases Cited

By McLachlin C.J. and Rowe J.

Applied: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **Referred to:** *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Saskatchewan (Human Rights Tribunal) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, rev'd *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *India v. Badesha*, 2017 SCC 44; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Congrégation des témoins de*

Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48, [2004] 2 S.C.R. 650; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

By Moldaver J.

Applied: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; **Referred to:** *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Figuerola v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(a).

Constitution Act, 1982, s. 35.

Environmental Assessment Act, S.B.C. 1994, c. 35.

Environmental Assessment Act, S.B.C. 2002, c. 43.

Land Act, R.S.B.C. 1996, c. 245, ss. 4, 11(1).

Ministry of Lands, Parks and Housing Act, R.S.B.C. 1996, c. 307, s. 5(b).

Treaties and Other International Instruments

American Convention on Human Rights, 1144 U.N.T.S. 123, art. 12(1), (3).

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [*European Convention on Human Rights*], art. 9(1).

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 18(1).

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 18.

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(Lowry, Bennett and Goepel JJ.A.), 2015 BCCA 352, 387 D.L.R. (4th) 10, 78

B.C.L.R. (5th) 297, 376 B.C.A.C. 105, 646 W.A.C. 105, 89 Admin. L.R. (5th) 63, 93 C.E.L.R. (3d) 1, [2015] 4 C.N.L.R. 199, 339 C.R.R. (2d) 183, [2016] 3 W.W.R. 423, [2015] B.C.J. No. 1682 (QL), 2015 CarswellBC 2215 (WL Can.), affirming a decision of Savage J., 2014 BCSC 568, 306 C.R.R. (2d) 211, 82 Admin. L.R. (5th) 117, 86 C.E.L.R. (3d) 202, [2014] 4 C.N.L.R. 143, [2014] B.C.J. No. 584 (QL), 2014 CarswellBC 901 (WL Can.), dismissing an application for judicial review of a decision of the Minister to approve a ski resort. Appeal dismissed.

Peter Grant, Jeff Huberman, Kareenna Williams and Diane Soroka, for the appellants.

Jonathan G. Penner and Erin Christie, for the respondent the Minister of Forests, Lands and Natural Resource Operations.

Gregory J. Tucker, Q.C., and Pamela E. Sheppard, for the respondent Glacier Resorts Ltd.

Mitchell R. Taylor, Q.C., and Sharlene Telles-Langdon, for the intervener the Attorney General of Canada.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Justin Safayeni and *Khalid Elgazzar*, for the interveners the Canadian Muslim Lawyers Association, the South Asian Legal Clinic of Ontario and the Kootenay Presbytery (United Church of Canada).

Albertos Polizogopoulos and *Derek Ross*, for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship.

Written submissions only by *Avnish Nanda*, for the intervener the Alberta Muslim Public Affairs Council.

Joshua Ginsberg and *Randy Christensen*, for the intervener Amnesty International Canada.

Robert J. M. Janes, Q.C., and *Claire Truesdale*, for the intervener the Te'mexw Treaty Association.

Written submissions only by *Lisa C. Fong*, for the intervener Central Coast Indigenous Resource Alliance.

Senwung Luk and *Krista Nerland*, for the intervener the Shibogama First Nations Council.

Neil Finkelstein, *Brandon Kain* and *Bryn Gray*, for the intervener the Canadian Chamber of Commerce.

Jessica Orkin and *Adriel Weaver*, for the intervener the British Columbia Civil Liberties Association.

Paul Williams, for the intervener the Council of the Passamaquoddy Nation at Schoodic.

Written submissions only by *John Burns* and *Amy Jo Scherman*, for the intervener the Katzie First Nation.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the interveners the West Moberly First Nations and the Prophet River First Nation.

The judgment of McLachlin C.J and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND ROWE J. —

I. Introduction

[1] The issue in this case is whether the British Columbia Minister of Forests, Lands and Natural Resource Operations (“Minister”) erred in approving a ski resort development, despite claims by the Ktunaxa that the development would breach their

constitutional right to freedom of religion and to protection of Aboriginal interests under s. 35 of the *Constitution Act, 1982*.

[2] The appellants represent the Ktunaxa people. The Ktunaxa's traditional territories are said to consist of land that straddles the international boundary between Canada and the United States, comprised of northeastern Washington, northern Idaho, northwestern Montana, southwestern Alberta and southeastern British Columbia.

[3] This case concerns a proposed development in an area the Ktunaxa call Qat'muk. This area is located in a Canadian valley in the northwestern part of the larger Ktunaxa territory, the Jumbo Valley, about 55 kilometres west of the town of Invermere, B.C.

[4] The respondent Glacier Resorts Ltd. ("Glacier Resorts"), wishes to build a year-round ski resort in Qat'muk with lifts to glacier runs and overnight accommodation for guests and staff. For more than two decades, Glacier Resorts has been negotiating with the B.C. government and stakeholders, including the Aboriginal peoples who inhabit the valley, the Ktunaxa and the Shuswap, on the terms and conditions of the development.

[5] Early on in the process, the Ktunaxa and Shuswap peoples raised concerns about the impact of the resort project. The Ktunaxa asserted that Qat'muk was a place of spiritual significance for them. Notably, it is home to an important

population of grizzly bears and to Grizzly Bear Spirit, or Kławła Tukłwakʔis, “a principal spirit within Ktunaxa religious beliefs and cosmology”: A.F., at para. 18.

[6] Consultation ensued, leading to significant changes to the original proposal. The Shuswap declared themselves satisfied with the changes and indicated their support for the proposal given the benefits it would bring to their people and the region. The Ktunaxa were not satisfied, but committed themselves to further consultation to remove the remaining obstacles and find mutually satisfactory accommodation. Lengthy discussions ensued, and it seemed agreement would be achieved. Then, late in the process, the Ktunaxa adopted an uncompromising position — that accommodation was impossible because a ski resort with lifts to glacier runs and permanent structures would drive Grizzly Bear Spirit from Qat’muk and irrevocably impair their religious beliefs and practices. After fruitless efforts to revive the consultation process and reach agreement, the government declared that reasonable consultation had occurred and approved the project.

[7] The appellants, the Ktunaxa Nation Council and the Chair of the Council, Kathryn Teneese, brought proceedings in judicial review before the British Columbia Supreme Court to overturn the approval by the Minister of the ski resort on two independent grounds: first, that the project would violate the Ktunaxa’s freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*; and second, that the government breached the duty of consultation and accommodation imposed on the Crown by s. 35 of the *Constitution Act, 1982*. The chambers judge dismissed

the petition for judicial review, and the Court of Appeal affirmed his decision. The Ktunaxa now appeal to this Court.

[8] We would dismiss the appeal. We conclude that the claim does not engage the right to freedom of conscience and religion under s. 2(a) of the *Charter*. Section 2(a) protects the freedom of individuals and groups to hold and manifest religious beliefs: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336. The Ktunaxa's claim does not fall within the scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

[9] We also conclude that the Minister, while bound by s. 35 of the *Constitution Act, 1982* to consult with the Ktunaxa in an effort to find a way to accommodate their concerns, did not act unreasonably in concluding that the requirements of s. 35 had been met and approving the project.

[10] We arrive at these conclusions cognizant of the importance of protecting Indigenous religious beliefs and practices, and the place of such protection in achieving reconciliation between Indigenous peoples and non-Indigenous communities.

II. Facts

[11] The Jumbo Valley and Qat'muk are located in the traditional territory of the Ktunaxa. The Ktunaxa believe that Grizzly Bear Spirit inhabits Qat'muk. It is undisputed that Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices.

[12] The Jumbo Valley has long been used for heli-skiing, which involves flying skiers to the top of runs by helicopter, whence they ski to the valley floor. In the 1980s, Glacier Resorts became interested in building a permanent ski resort on a site near the north end of the valley and sought government approval of the project.

[13] The regulatory process for approval of the ski resort was a protracted matter, involving a number of cascading processes: (1) The Commercial Alpine Ski Policy ("CASP") process to determine sole proponent status; (2) The Commission on Resources and the Environment ("CORE") process to determine best uses of the land; (3) An environmental assessment process to resolve issues related to environmental, wildlife and cultural impact and culminating in an Environmental Assessment Certificate ("EAC"); and (4) submission of a Master Plan which, if approved, would lead to a Master Development Agreement ("MDA") between the developer and the government. These processes involved public consultation, and the Ktunaxa participated at every stage. In the course of the various reviews, many changes were made to the original plan. The entire process, until the Minister determined consultation was adequate, took place from 1991 to 2011 — over 20 years.

[14] Until 2005, the Ktunaxa participated in the regulatory processes jointly with the Shuswap as part of the Ktunaxa/Kinbasket Tribal Council (“KKTC”). However, in 2005, the Shuswap parted company with the Ktunaxa over the proposed ski resort and left the KKTC. The Shuswap support the project, believing their interests have been reasonably accommodated and that the project will be good for their community. The Ktunaxa, by contrast, say their interests cannot be accommodated and demand the project’s rejection.

[15] Adequacy of consultation is a central issue in this appeal. It is therefore necessary to set out in some detail what occurred at each step of the regulatory process.

A. *Stage One: The CASP Process*

[16] In 1991, Glacier Resorts filed a formal proposal to build a year-round ski resort in the upper Jumbo Valley. The government conducted public hearings on the project under the CASP, the first phase in the regulatory approval process. The predecessor of the appellants, the KKTC, participated in public hearings in the fall of 1991. After a call for proposals, Glacier Resorts was granted sole proponent status and moved up to the next step on the regulatory ladder.

B. *Stage Two: The Land Use or CORE Process*

[17] In 1993 and 1994, the second phase of the regulatory process began. The government conducted a site utilization review under the CORE process, with the goal of producing a new land use plan for the region focusing specifically on construction of the ski resort. The CORE process involved public hearings, which the KKTC attended as an observer. In 1994, the CORE process concluded with a report that assigned very high recreational and tourism values to the area of the proposed ski resort and recommended that the approval process for the resort include a statutory environmental assessment.

[18] In March 1995, the government released a summary of the CORE east Kootenay Land Use Plan and west Kootenay-Boundary Land Use Plan, identifying a ski resort development as an acceptable land use of the upper Jumbo Creek Valley. In July 1995, the government and Glacier Resorts entered into an interim agreement pursuant to the CASP, and the third step on the regulatory ladder, review under the *Environmental Assessment Act*, S.B.C. 1994, c. 35, began.

C. *Stage Three: The Environmental Assessment Process*

[19] The environmental assessment process lasted almost a decade, from 1995 to 2004. The KKTC, representing both the Ktunaxa and the Shuswap peoples, and supported by government funding, was extensively involved in the environmental assessment process for the ski resort. It was invited to participate in the technical review committee and to comment on the project report. It raised the issue of “sacred values” in the valley, which were discussed in the “First Nations Socio-Economic

Assessment: Jumbo Glacier Resort Project, A Genuine Wealth Analysis”, a 2003 report of consultants retained by the B.C. government’s Environmental Assessment Office (“EAO”).

[20] In parallel, Glacier Resorts submitted the information required to complete the environmental review under the new *Environmental Assessment Act*, S.B.C. 2002, c. 43, in a comprehensive “Project Report” in December 2003 that was accepted by the EAO in the following months.

[21] In response to this report, the KKTC submitted a document to the EAO entitled “Jumbo Glacier Resort Project: Final Comments on Measures Proposed to Address Issues Identified by the Ktunaxa Nation” stating that the Jumbo Valley area is invested with sacred values, and Glacier Resorts should be required to negotiate an Impact Management and Benefits Agreement (“IMBA”) to mitigate the potential impact of the ski resort. The KKTC submitted detailed comments, under protest, on the measures proposed by the EAO to address the concerns of the valley’s Indigenous inhabitants.

[22] On October 4, 2004, an EAC was issued, approving the development subject to numerous conditions. Among them was a requirement that Glacier Resorts negotiate with the KKTC and attempt to conclude an IMBA before the next stage of the regulatory process. The KKTC did not seek judicial review of the conditional EAC. At this point, from the government’s perspective, the consultation was proceeding smoothly toward mutually acceptable accommodation.

D. *Stage Four: Development of a Resort Master Plan*

[23] The regulatory process moved to the fourth stage — the development of a Master Plan and an MDA for the ski resort.

[24] Glacier Resorts submitted a revised draft Master Plan in 2005. The process of reviewing this plan took place from December 2005 to July 2007.

[25] At the outset of the review process, the government offered to enter into additional consultations with the Ktunaxa Nation Council, which was formed following the withdrawal of the Shuswap from the KKTC. In June 2006, a consultant retained by the Ktunaxa and funded by the government prepared a “Gap Analysis” to identify what the Ktunaxa considered to be the outstanding issues for discussion. The Gap Analysis highlighted the need for further information to facilitate discussion on: (1) contemporary land and resource use by the Ktunaxa of the Jumbo Valley; (2) the effectiveness of proposed mitigation measures to reduce disturbance, displacement, and mortality impacts to key wildlife populations from road traffic on the access road; and (3) project-induced socio-economic effects to the regional economy, including land use and cost of living that might affect Ktunaxa well-being. One of the 34 issues identified in the Gap Analysis was that the Jumbo Valley is an “area of cultural significance and has sacred values”: chambers judge’s reasons, 2014 BCSC 568, 306 C.R.R. (2d) 211, at para. 69. In this regard, the analysis stated that “the cultural impacts remain unassessed” (*ibid.*).

[26] The Ktunaxa met with the Minister and they agreed on further consultation built around the Gap Analysis. As part of this process, the cultural significance/sacred values issue was discussed at the “Land Issues” workshop held on October 12 and 13, 2006 in Cranbrook, B.C. Following the workshop, the Ktunaxa consultant circulated a document entitled “Working Outline: Ktunaxa-British Columbia Accommodation”, which identified the cultural and sacred significance of the valley as an issue to be addressed, and suggested a conceptual framework for accommodating the Ktunaxa land use concerns through (a) a fee simple land transfer to the Ktunaxa; (b) the establishment of a land reserve; and (c) the establishment of a conservancy area in proximity to the ski-run site. The land use issues workshop was followed by workshops in November and December 2006 and January 2007. These addressed grizzly bear, other wildlife, and residual issues.

[27] In November 2006, prospects for agreement on accommodation looked bright. The Minister received a copy of a letter where the Ktunaxa informed Glacier Resorts that they had made “considerable progress in setting up a process for the negotiation of an [IMBA]”: chambers judge’s reasons, at para. 76. Only two issues appeared to stand in the way of final agreement — “funding” and “the outstanding issue of unpaid monies” (*ibid.*). In April 2007, Glacier Resorts wrote the Minister that it believed it had reached an “agreement in principle” with the Ktunaxa (*ibid.*). On July 12, the Minister approved a Master Plan, which outlined the nature, scope and pace of the proposed development, identified land tenure requirements, and

incorporated recommendations arising from consultation with Glacier Resorts, the public and First Nations and from the environmental review process.

[28] The Minister advised the Ktunaxa that Master Plan approval did not preclude additional mitigation measures based on ongoing consultation. In the months following the approval, the discussion turned to economic issues. The Minister made an accommodation proposal to the Ktunaxa in December 2007, which included \$650,000 in economic benefits to be taken in cash or Crown land, plus nine non-financial accommodations. In February 2008, the Ktunaxa rejected the proposed accommodation on the basis that (1) the financial component was “grossly insufficient” and (2) it was inappropriate for the Minister to provide identical financial accommodation to the Shuswap, given the Ktunaxa’s “far greater history in the Jumbo area”: chambers judge’s reasons, at para. 82. The rejection letter did not mention the sacred nature of the Jumbo Valley or Grizzly Bear Spirit.

[29] The Minister came back in September 2008 with a second offer of accommodation to the Ktunaxa, in the form of revenue sharing in an Economic and Community Development Agreement. The Ktunaxa rejected this proposal in December. While the negotiations suggested that an agreement could be reached regarding the construction of the ski resort project, the Ktunaxa rejected this proposal on the basis that the Jumbo Valley is a “place unique and sacred” to them: chambers judge’s reasons, at para. 83. Again, there was no special mention of Grizzly Bear Spirit.

[30] Discussions continued. In February 2009, the Ktunaxa gave formal notice to the Minister that they wished to enter into a process to negotiate an accommodation and benefits agreement. In April, the Minister accepted and offered additional capacity funding for the process. In May, the Ktunaxa provided the Minister with a list of outstanding issues and possible accommodation measures to be discussed, including land transfers, land reserves, a wildlife conservancy, development-free buffer zones beside the access road, access rights in the controlled recreation area, a stewardship framework for economic compensation, revenue sharing, ongoing supervision of environmental commitments, and other measures. The Ktunaxa did not place the sacred nature of the Jumbo Valley on the list of outstanding issues.

[31] On June 3, 2009, the Minister advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were “primarily interest-based rather than legally driven by asserted Aboriginal rights and title claims”: chambers judge’s reasons, at para. 86. Accordingly, he was of the view that approval for the resort could be given. The Minister expressed the intention to continue negotiating a benefits agreement with the Ktunaxa.

[32] At this point, the big issues appeared to have been resolved. In deference to the Ktunaxa claim, the MDA changed the scope of the proposed development and added new protections for Ktunaxa interests. The size of the controlled recreational area was reduced by approximately 60% and the total resort area was reduced to

approximately 104 hectares. Protections for Ktunaxa access and activities were put in place, and environmental protections were established.

[33] To accommodate the Ktunaxa's spiritual concerns, changes had been proposed to provide special protection of grizzly bear habitat:

- The lower Jumbo Creek area was removed from the recreation area because it was perceived as having greater potential visitation from grizzly bears;
- Ski lifts were removed on the west side of the valley, where impact to grizzly bear habitat was expected to be greatest; and
- The province committed to pursuing a Wildlife Management Area to address potential impacts in relation to grizzly bears and Aboriginal claims relating to the spiritual value of the valley.

[34] On June 8, 2009, five days after the Minister had concluded that all major issues had been resolved, the Ktunaxa responded with a table of outstanding concerns. They did not list the sacred nature of the area or a threat to the grizzly bear population among their concerns.

[35] At meetings on June 9 and 10, however, the Ktunaxa took a very different and uncompromising position regarding the spiritual value of Qat'muk. They asserted

that the consultation process was deficient, not because interest-based issues like money and land reserves had not been concluded, but because the process had not properly considered information that the Jumbo Valley was a sacred site. They advised the Minister that only certain members of the community, knowledge keepers, possessed information about these values. Elder Chris Luke Sr. was better placed to speak to the issue. The Minister agreed to meet Mr. Luke on June 22, 2009 but the meeting did not proceed on that date. The Minister agreed to extend the consultation process with the Ktunaxa until at least December 2009 to specifically address the issue of the sacred nature of the Jumbo Valley.

[36] After ongoing efforts to arrange a meeting about sacred values, the Minister was finally able to meet with the Ktunaxa and Mr. Luke on September 19, 2009 in Cranbrook, B.C. Mr. Luke, through translators, advised the Minister that Qat'muk was "a life and death matter", that "Jumbo is one of the major spiritual places", and that to say the sacredness of the area for the Ktunaxa was important would be an understatement: chambers judge's reasons, at para. 94. He stated that any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley's spiritual value. The Ktunaxa at the meeting told the Minister that there was no middle ground regarding the proposed resort. Simply put, no accommodation was possible. The Ktunaxa confirmed this position in a second meeting in Creston, B.C. on December 7, 2009. It emerged that the revelation that led to the position that permanent structures would desecrate and irrevocably devalue the

sacred site came to Mr. Luke in 2004, but that health problems and secrecy concerns had prevented him from disclosing the revelation to others until 2009.

[37] The Minister persisted. After further study of the Ktunaxa's spiritual claims, on June 11, 2010 he sent the Ktunaxa a 71-page draft "Consultation/Accommodation Summary" that included seven pages devoted to describing the consultation and accommodation specifically related to the Ktunaxa's assertions regarding the sacred nature of the Jumbo Valley and invited the Ktunaxa's comments. He met with the Ktunaxa on July 8, 2010 and revisions were made to the document.

[38] The Ktunaxa responded with a 40-page document that devoted the first page and a half to sacred values. A few months later, in November 2010, the Ktunaxa issued the "Qat'muk Declaration" — a unilateral declaration of rights based on "pre-existing sovereignty". The Qat'muk Declaration mapped an area in which the Ktunaxa would not permit development. No disturbance or alteration of the ground would be permitted within an area identified as the "refuge area". Construction of buildings with permanent foundations or permanent human habitation was forbidden within the refuge area and the access road and buffer area. This amounted to saying that the resort could not proceed, as the proposed resort was partially within the refuge area and its access road ran through the buffer area.

[39] Consistent with the Qat'muk Declaration, the Ktunaxa now took the position that negotiations were over. The only point of further discussion was to make decision makers understand why the proposed resort could not proceed. The Minister

continued to explore potential mitigation and accommodation measures through additional consultations, without success. Negotiations were at an end.

[40] On March 20, 2012, the Minister signed the MDA with Glacier Resorts. The MDA contained a number of measures responding to concerns raised by the Ktunaxa during the consultations: chambers judge's reasons, at paras. 236-39.

[41] In summary, the Ktunaxa played an active part in all phases of the lengthy regulatory process leading to the approval of the resort project. As a result of the consultation that occurred during the regulation process, the resort plan was significantly reduced in scope; safeguards for the grizzly bear population and the spiritual interests of the Ktunaxa were put in place; and economic and interest-based issues, including compensation, were discussed. Areas of significant frequentation by grizzly bears were removed from the project. Progress was made and agreement seemed imminent.

[42] This trajectory toward accommodation ended in 2010, with the issuance of the Qat'muk Declaration: Schedule "E" of 2014 BCSC 568, at pp. 115-16 (CanLII). The Ktunaxa said at the September 2009 meeting that their spiritual concerns could not be accommodated. The 2010 Qat'muk Declaration unequivocally changed the process from a search for accommodation to rejection of the entire project; from a search for protection of spiritual values inhering in the valley and the grizzly bear population, to the position that any permanent structures on the proposed

resort site would drive out Grizzly Bear Spirit and destroy the foundation of Ktunaxa spiritual practice.

[43] The stance taken by the Ktunaxa in September 2009 and again in late 2010 with the issuance of the Qat'muk Declaration amounted, in effect, to a different and uncompromising claim regarding suitable accommodation. The claim now was not a claim to generalized spiritual values that could be accommodated by measures like land reserves, economic payments, and environmental protections. Instead, it was an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. To identify this claim — which first arose in September 2009 and was affirmed in December 2009 and again by the Qat'muk Declaration — we refer to it below as the “Late-2009 Claim”. There was no way the proposed resort could be reconciled with this claim. The Minister made efforts to continue consultation, but, not surprisingly, they failed. In 2011, the Minister concluded that sufficient consultation had occurred and approved the resort development.

III. Decisional History

A. *The Minister's Rationale*

[44] On March 20, 2012, the Minister approved the resort MDA and issued the Rationale for his decision: Schedule “F” of 2014 BCSC 568, at pp. 117-24 (CanLII) (“Rationale”). The Rationale in turn referenced the detailed

Consultation/Accommodation Summary, which was finalized in March 2011: see R.R. (Minister), at pp. 66-154.

[45] The Minister stated that while the Aboriginal claims to the area remained to be proven, he was required to give them due respect and recognition, and consult with the groups with a view to accommodating their interests. The Shuswap had concluded that sufficient consultation had occurred, but the Ktunaxa had not.

[46] The Minister stated that he recognized the genuinely sacred values at stake for the Ktunaxa leadership and knowledge keepers. He stated that it was not clear whether the Ktunaxa spiritual claims would be found to be a constitutionally protected right or whether the claimed right could be reconciled with other claimed Aboriginal rights and Ktunaxa access to the valley for a variety of traditional and modern uses, including hunting, gathering, and fishing. He viewed the claim as weak, due to lack of indication that the claimed right was part of an Aboriginal tradition, practice, or activity integral to the Ktunaxa culture, and the fact that details of the spiritual interest were not shared with or known to the general Ktunaxa population. (The latter point must refer to the Late-2009 Claim, since the more general spiritual claims that had been advanced from the start of the process were broadly known and shared.)

[47] The Minister reviewed the extensive record of consultation with the Ktunaxa over the past two decades, and noted the many accommodations and adjustments that had been made in an effort to accommodate their interests. These

included a 60% reduction in the resort development area, on-site environmental monitors, continued use of the area for traditional practices, and measures designed to reduce the impact of the development on grizzly bears. The lower Jumbo Creek area and a ski lift on the west side of the valley had been removed from the development because of perceived greater visitation by grizzly bears in these areas. A wildlife management area had been established to address potential impacts in relation to grizzly bears and the spiritual value of the valley. And the province committed to continue to proactively manage the grizzly bear population through existing legislation and policies. The Minister stated in his Rationale:

For these reasons I have concluded that, on balance, the commitments and strategies in place are reasonable and minimize the potential impact to the environment and specifically, to grizzly bear habitat.
[p. 124]

[48] The Minister concluded that overall, consultation had been at the “deep end of the consultation spectrum” (p. 123). This, combined with the accommodation measures put in place, was adequate “in respect of those rights for which the strength of claim is strong, and for which potential impacts of the project could be significant” (*ibid.*). The extensive accommodation measures relating to the continued ability of the Ktunaxa to continue to exercise their Aboriginal rights, balanced against the societal benefits of the project (\$900 million in capital investment and 750 to 800 permanent, direct jobs), were reasonable.

[49] Noting once again the extensive consultation and assessment processes that had taken place, the Minister stated that he had decided to approve the MDA for the Jumbo Glacier Resort.

B. *The Chambers Judge's Reasons*

[50] The Ktunaxa sought judicial review of the Minister's decision. They filed a petition, claiming the decision violated their freedom of religion guaranteed by s. 2(a) of the *Charter*, and breached the Crown's duty to consult and accommodate their Aboriginal rights under s. 35 of the *Constitution Act, 1982*.

[51] The chambers judge, Savage J. (as he then was), dismissed the petition. On the *Charter* claim, he held that s. 2(a) protects against state coercion or constraint on individual conduct, but does not encompass "subjective loss of meaning" to a religion, without associated coercion or constraint on conduct (para. 299). He therefore rejected the claim that the state had a duty under s. 2(a) to stop the development because the Ktunaxa believe it would undermine their religious beliefs and practices.

[52] The chambers judge went on to say that if he were wrong in this conclusion about the scope of s. 2(a), the Minister's actions and accommodations represented a reasonable balancing of the s. 2(a) value and the statutory objectives, and thus did not unreasonably trench on freedom of religion.

[53] On the issue of consultation, the chambers judge found that the consultation process undertaken 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 under s. 35 of the *Constitution Act, 1982*.

C. *The Court of Appeal*

[54] The Court of Appeal dismissed the appeal: 2015 BCCA 352, 387 D.L.R. (4th) 10.

[55] The Court of Appeal held that the Minister's decision did not violate the Ktunaxa's right to freedom of religion under s. 2(a) of the *Charter*. The chambers judge's view that s. 2(a) protected only against state coercion or constraint on individual conduct was too narrow; s. 2(a) freedom implies the vitality of a religious community as a whole. The proper test was whether "the subjective loss of meaning more than trivially or substantially interfere[d] 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": para. 67 (emphasis in original). However, protection of the communal dimension of freedom of religion does not extend to "restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning" (para. 73). The court found that the Ktunaxa cannot, in the name of their own religious freedom,

require others who do not share that belief to modify their behaviour. As stated in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 62, “[c]onduct which would potentially cause harm to or interference with the rights of others [may not] be protected”.

[56] On s. 35, the Court of Appeal agreed with the chambers judge’s conclusion that “the process of consultation and the accommodation offered meets the reasonableness standard” (para. 93). It concluded that the chambers judge did not err in law by finding reasonable the Minister’s characterization of the potential Aboriginal right as a right to “preclude permanent development” rather than a right to “exercise spiritual practices which rely on a sacred site and require its protection” (para. 81). Nor did the chambers judge understate the scale of the alleged infringement to the Ktunaxa and apply too light a standard of consultation; in fact, deep consultation consistent with an important impact took place. Finally, the chambers judge did not err in finding that the Ktunaxa first asserted the permanent nature of the proposed project would infringe their s. 35 Aboriginal rights in 2009. In fact, the chambers judge found that what was first asserted in 2009 was the position that “no accommodation” was possible — a finding supported by the record.

IV. Issues

[57] A. Did the Minister’s decision violate the Ktunaxa’s freedom of conscience and religion?

- B. Was the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* reasonable?

V. Analysis

- A. *Did the Minister's Decision Violate the Ktunaxa's Freedom of Conscience and Religion?*

(1) The Claim

[58] The Ktunaxa contend that the Minister's decision to allow the Glacier Resorts project to proceed violates their right to freedom of conscience and religion protected by s. 2(a) of the *Charter*. This claim is asserted independently from the Ktunaxa's s. 35 claim. Even if the Minister undertook adequate consultation under s. 35 of the *Constitution Act, 1982*, his decision could be impeached on the ground that it violated the Ktunaxa's *Charter* guarantee of freedom of religion. We note that with respect to the s. 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.

[59] The Ktunaxa assert that the project, and in particular permanent overnight accommodation, will drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue

that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.

[60] The Ktunaxa fault the Minister for not having considered their right to freedom of religion in the course of his decision. The Ktunaxa raised the potential breach of s. 2(a) before the Minister. Nevertheless, the Minister's Rationale for approving the Jumbo Glacier Resort did not analyze the s. 2(a) claim. The Minister should have discussed the s. 2(a) claim. However, his failure to conduct an analysis of the Ktunaxa's right to freedom of religion is immaterial because the claim falls outside the scope of s. 2(a). This was the finding of both the chambers judge and the Court of Appeal and we agree, though for somewhat different reasons.

(2) The Scope of Freedom of Religion

[61] The first step where a claim is made that a law or governmental act violates freedom of religion is to determine whether the claim falls within the scope of s. 2(a). If not, there is no need to consider whether the decision represents a proportionate balance between freedom of religion and other considerations: *Amselem*, at para. 181.

[62] The seminal case on the scope of the *Charter* guarantee of freedom of religion is this Court's decision in *Big M Drug Mart*. The majority of the Court, per Justice Dickson (as he then was), defined s. 2(a) as protecting "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly

and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination” (p. 336).

[63] So defined, s. 2(a) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 68; *Saskatchewan (Human Rights Tribunal) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 32; *Amselem*, at para. 40.

[64] These two aspects of the right to freedom of religion — the freedom to hold a religious belief and the freedom to manifest it — are reflected in international human rights law. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at 71 (1948) (“UDHR”), first defined the right in international law in these terms: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

[65] Similarly, art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“ICCPR”) defined the right to freedom of religion as consisting of “freedom to have or to adopt a religion or belief of [one’s] choice” and

“freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. The relevance of art. 18(1) of the ICCPR to s. 2(a) of the *Charter* was considered by a noted human rights jurist, Tarnopolsky J.A., in *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 (C.A.). He observed that art. 18(1) defined freedom of religion “as including not only the right to have or adopt a religion or belief of one’s choice, but also to be able to ‘manifest’ the religion or belief” (p. 421 (emphasis deleted)), and added that s. 2(a) of the *Charter* — then a new and judicially unconsidered feature of Canada’s constitution — should be “interpreted in conformity with our international obligations” (at 420). On further appeal to this Court, Dickson C.J. approved Tarnopolsky J.A.’s approach to s. 2(a), noting that his definition of freedom of religion “to include the freedom to manifest and practice one’s religious beliefs . . . anticipated conclusions which were reached by this Court in the *Big M Drug Mart Ltd.* case”: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 735. Later, in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349, Dickson C.J. proposed, as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada’s international human rights obligations. The Court has since adopted this interpretive presumption: *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 22-23 and 25; *India v. Badesha*, 2017 SCC 44, at para. 38.

[66] The two aspects of freedom of religion enunciated in the UDHR and ICCPR are also found in international human rights instruments to which Canada is not a party. Article 9(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221, recognizes everyone's right to "freedom of thought, conscience and religion" including "freedom . . . to manifest [one's] religion or belief, in worship, teaching, practice and observance". The *American Convention on Human Rights*, 1144 U.N.T.S. 123, provides, at art. 12(1), that "[e]veryone has the right to freedom of conscience and of religion" including "freedom to profess or disseminate one's religion or beliefs", while art. 12(3) indicates that the "[f]reedom to manifest one's religion and beliefs" may be subject only to lawful limitations. While these instruments are not binding on Canada and therefore do not attract the presumption of conformity, they are nevertheless important illustrations of how freedom of religion is conceived around the world.

[67] The scope of freedom of religion in these instruments is expressed in terms of the right's two aspects: the freedom to believe and the freedom to manifest belief. This Court's definition from *Big M Drug Mart*, consistently applied in later cases, is in keeping with this conception of the right's scope. The question, then, is whether the Ktunaxa's claim falls within that scope.

(3) Application to This Case

[68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief

that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

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

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

[71] We would decline this invitation. The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to

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

[72] The extension of s. 2(a) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs. In *Amselem*, this Court chose to protect *any* sincerely held belief rather than examining the specific merits of religious beliefs:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of

theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

(para. 50, per Iacobucci J.)

The Court in *Amselem* concluded that such an inquiry into profoundly personal beliefs would be inconsistent with the principles underlying freedom of religion (para. 49).

[73] The Ktunaxa argue that the *Big M Drug Mart* definition of the s. 2(a) guarantee has been subsequently enriched by an understanding that freedom of religion has a communal aspect, and that the state cannot act in a way that constrains or destroys the communal dimension of a religion. Grizzly Bear Spirit's continued occupation of Qat'muk is essential to the communal aspect of Ktunaxa religious beliefs and practices, they assert. State action that drives Grizzly Bear Spirit from Qat'muk will, the Ktunaxa say, "constrain" or "interfere" with — indeed destroy — the communal aspect of s. 2(a) protection.

[74] The difficulty with this argument is that the communal aspect of the claim is also confined to the scope of freedom of religion under s. 2(a). It is true that freedom of religion under s. 2(a) has a communal aspect: *Loyola; Hutterian Brethren*, at para. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650. But the communal aspects of freedom of religion do not, and should not, extend s. 2(a)'s protection beyond the freedom to have beliefs and the freedom to manifest them.

[75] We conclude that s. 2(a) protects the freedom to have and manifest religious beliefs, and that the Ktunaxa's claim does not fall within these parameters. It is therefore unnecessary to consider whether the Minister's decision represents a reasonable balance between freedom of religion and other considerations.

B. *Was the Minister's Decision That the Crown Had Met its Duty to Consult and Accommodate Under Section 35 of the Constitution Act, 1982 Reasonable?*

[76] The Ktunaxa say that the Minister's decision that consultation and accommodation had been sufficient to satisfy s. 35 was unreasonable, which in turn rendered his decision to approve the resort unreasonable and invalid.

[77] The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

(1) The Legal Requirements of the Section 35 Consultation and Accommodation Process

[78] The constitutional guarantee of s. 35 of the *Constitution Act, 1982* is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests: *Haida Nation*, at paras. 25 and 27. Where, as here, a permit is sought to use or develop lands subject to an unproven Aboriginal claim, the government is required to consult with the affected Aboriginal group and, where appropriate, accommodate the group's claim pending its final resolution. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

[79] The extent of the Crown's duty to consult and accommodate in the case of an unproven Aboriginal claim varies with the *prima facie* strength of the claim and the effect the proposed development or use will have on the claimed Aboriginal right: *Haida Nation*, at paras. 43-44. A strong *prima facie* claim and significant impact may require deep consultation. A weak claim or transient impact may attract a lighter duty of consultation. The duty is to consult and, where warranted, accommodate. Section 35 guarantees a process, not a particular result. The Aboriginal group is called on to facilitate the process of consultation and accommodation by setting out its claims clearly (*Haida Nation*, at para. 36) and as early as possible. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. The ultimate obligation is that the Crown act honourably.

[80] The holdings of *Haida Nation*, as they pertain to this case, may be summarized as follows:

- The duty to consult and, if appropriate, accommodate pending the resolution of claims is grounded in the honour of the Crown, and must be understood generously to achieve reconciliation (paras. 16-17).
- The Crown, acting honourably, cannot “cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation”; it must consult and, if appropriate, accommodate the Aboriginal interest (para. 27).
- The duty to consult is triggered by the Crown having “[k]nowledge of a credible but unproven claim” (para. 37).
- The content of the duty to consult and accommodate varies with the strength of the claim and the significance of the potential adverse effect on the Aboriginal interest (para. 39). Cases with a weak claim, a limited Aboriginal right, or a minor intrusion may require only notice, information, and response to queries. At the other end of the spectrum, a strong *prima facie* case with significant intrusion on an important right may require the Crown to engage in “deep

consultation” and to accommodate the interest by altering its plans. Between these extremes lie other cases (paras. 43-45).

- When the consultation process suggests amendment of Crown policy, a duty to reasonably accommodate the Aboriginal interest may arise (para. 47).
- The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para. 36); not frustrating the Crown’s reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para. 42).
- The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for *proven* claims, and even then only in certain cases. What is required is a balancing of interests, a process of give and take (paras. 45, 48-49 and 50).

[81] The steps in a consultation process may be summarized as follows:

1. Initiation of the consultation process, triggered when the Crown has knowledge, whether real or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it;
2. Determination of the level of consultation required, by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest;
3. Consultation at the appropriate level; and
4. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.

This summary of the steps in a consultation process is offered as guidance to assist parties in ensuring that adequate consultation takes place, not as a rigid test or a perfunctory formula. In the end there is only one question — whether in fact the consultation that took place was adequate.

(2) Was the Minister's Conclusion that the Consultation Process Satisfied Section 35 Reasonable?

[82] After an extensive regulatory process and negotiations with the Ktunaxa spanning two decades, the Minister concluded that the s. 35 duty of consultation and accommodation had been satisfied, and authorized the Glacier Resorts ski project. As noted, a court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* for itself. Rather, it must ask whether the administrative decision maker's finding on the issue was reasonable. The question before us is whether the Minister's conclusion, that consultation and accommodation sufficient to satisfy s. 35 had occurred, was reasonable.

[83] The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

[84] The Ktunaxa's petition asked the chambers judge to issue a declaration that Qat'muk is sacred to the Ktunaxa and that permanent construction is banned

from that site. In effect, they ask the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. Aboriginal rights claims require that proper evidence be marshalled to meet specific legal tests in the context of a trial: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 109 and 143; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 26; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 26.

[85] Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the *prima facie* strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven: *Haida Nation*, at para. 37.

[86] The Ktunaxa reply that they must have relief now, for if development proceeds Grizzly Bear Spirit will flee Qat'muk long before they are able to prove their claim or establish it under the B.C. treaty process. We are not insensible to this point. But the solution is not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims. Injunctive relief to delay the project may be available. Otherwise, the best that can be achieved in the uncertain interim while claims are resolved is to follow a fair and respectful process and work in good faith toward reconciliation. Claims should be identified early in the process and defined as clearly as possible. In most cases, this will lead to agreement and reconciliation. Where it does not, mitigating potential adverse impacts on the asserted right ultimately requires resolving questions about the existence and scope of unsettled claims as expeditiously as possible. For the Ktunaxa, this may seem unsatisfactory, indeed tragic. But in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.

[87] On the face of the matter, the Minister's decision that consultation sufficient to satisfy s. 35 had taken place does not appear to be unreasonable. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa, in the

form of the Late-2009 Claim, adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation given the new Ktunaxa position that no accommodation was possible and that only total rejection of the project would satisfy them. The process protected by s. 35 was at an end.

[88] We conclude that on its face, the record supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. However, it is necessary to consider the arguments advanced by the Ktunaxa in support of their position that this conclusion was unreasonable.

[89] The Ktunaxa in their factum say that the consultation process was inadequate to satisfy s. 35 because: (1) the government failed to properly characterize the right; (2) the government failed to comprehend the role of knowledge keepers, which contributed to the late disclosure of the true nature of the claim; (3) the government erroneously treated the spiritual right as weak; (4) the government failed to properly address the adverse impact of the project on the Ktunaxa's rights; (5) consultation was inadequate, and (6) no accommodation was made with respect to the spiritual right. The Ktunaxa point to errors and omissions in the Minister's Rationale, which they say show the unreasonableness of his conclusion that adequate s. 35 consultation occurred. Overall, the Ktunaxa say the process of consultation was

flawed and did not fulfill the honour of the Crown or meet the goal of reconciliation. We will consider each of these submissions in turn. In this analysis we employ the term “spiritual” rather than “religious” only because this term was used by the parties in their submissions. As the chambers judge rightly noted (at para. 275), there is no issue here that the Ktunaxa’s system of spiritual beliefs constitutes a religion.

(a) Failure to Properly Characterize the Right

[90] The Ktunaxa say that while the right claimed was the right “to exercise spiritual practices which rely on a sacred site and require its protection” (A.F., at para. 112), the Minister erroneously characterized it as a right “to preclude permanent development”: *ibid.*, at para. 116. This mischaracterization, the Ktunaxa say, precluded proper consultation and accommodation. In short, the Ktunaxa say, the Minister viewed the Ktunaxa as making a claim to preclude development, instead of a making a claim to a spiritual right.

[91] The record does not support the contention that the Minister mischaracterized the right in this way. Spiritual practices and interests were raised at the beginning of the regulatory process and continued to be discussed throughout, leading to a number of accommodations. The Minister’s Rationale states:

With respect to the Ktunaxa Nation’s asserted spiritual interests in the area . . . 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 law. [p. 122]

[92] The Consultation/Accommodation Summary states:

With respect to an aboriginal rights claim, the Ministry has had to take the grizzly and spiritual values information presented and characterize it in terms of an aboriginal tradition, practice or activity that is integral to the culture of the Ktunaxa. In addition to the hunting, gathering and fishing rights claims discussed above, the Ministry has assessed the spiritual and cultural related information not as a rights claim to carry out a specific activity but more as a non-exclusive aboriginal right to ensure protection of Jumbo valley from permanent forms of development for the purposes of preserving a place for the spirit of the Grizzly bear which embodies a core spirit of the Ktunaxa people. The claim seems to amount to a right to preclude certain kinds of permanent development (excluding logging and other resource extraction which is more ephemeral) so that the grizzly and its spirit, together with the spirit of the Ktunaxa, can be maintained. [Emphasis added.]

(R.R. (Minister), at p. 115)

[93] It is clear from this and from many other statements throughout the process that the Minister understood that the Ktunaxa were claiming a broad spiritual right, not just a right to block development. It is also clear that the Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in the valley, which the Ktunaxa believed would be driven out by the development.

[94] Moreover, the Late-2009 Claim did not change the nature of the spiritual interests in play. Rather, it attempted to include a specific *accommodation* — no permanent construction — as part of the asserted right. The characterization of an

asserted right should not include any specific qualification of that right: *Mitchell*, at para. 23. These potential limitations are better examined in the consideration of adverse effects and the reasonableness of the accommodation, and are addressed below.

(b) *Failure to Understand the Role of Knowledge Keepers*

[95] The Ktunaxa say the Minister erred by failing to comprehend the role of the knowledge keepers. This criticism is based on a statement in the Rationale that “details of the spiritual interest in the valley have not been shared with or known by the general Ktunaxa population” (p. 122). This led the Minister to question “whether any of these values can take the shape of a constitutionally protected aboriginal right”, they contend (*ibid.*).

[96] The Minister’s query does not establish that the Minister misunderstood the secrecy imperative. The Rationale makes it clear that the Minister understood the special role of knowledge keepers, and accepted that spiritual beliefs did not permit details of beliefs to be shared with the population or outsiders. The Minister refers to “spiritual information” which has been imparted to him “in a trusting way”: Rationale, at p. 122. The need for knowledge keepers to keep details of spiritual beliefs secret was made plain to the Minister during the regulatory process, and in particular at his meeting in Cranbrook with knowledge keeper Mr. Luke and other Ktunaxa members in September 2009. The record is clear that the Ktunaxa at this meeting advised the Minister that only certain members of the community,

knowledge keepers, possessed information about spiritual values, and that only Mr. Luke could speak to these matters. Nothing in the Rationale suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred.

(c) *Treating the Constitutional Right as Weak*

[97] The Ktunaxa argue that the Minister treated their claimed spiritual interest in Qat'muk as weak. If the Crown significantly undervalues the Aboriginal right at stake, this may render a decision adverse to that interest reviewable: *Haida Nation*, at para. 63.

[98] The Minister took account of numerous asserted Aboriginal rights including the right to gather, the right to hunt and fish, and the right to Aboriginal title: Rationale, at p. 122. The Minister's assessment of the strength of these asserted rights and the consultation and accommodation flowing from them are not in dispute in this case. The main issue of contention is, rather, the Minister's appreciation and weighing of the spiritual significance of Qat'muk, particularly following the Ktunaxa's advancement of the Late-2009 Claim.

[99] The Minister at one point in his Rationale did indeed refer to the spiritual claim as "weak", stating that it had not been shown to be part of a pre-contact practice integral to the Ktunaxa culture, and that it had not been shared with and was not known to the general Ktunaxa population (p. 122). This comment may seem at odds

with the Minister's statement later in the Rationale that "[o]verall, the consultation applied in this case is at the deep end of the consultation spectrum" (p. 123). The explanation for this apparent tension lies in the fact that when the Minister described the claim as "weak" early in the Rationale he had in mind the Late-2009 Claim that the resort development could not proceed because this would drive out Grizzly Bear Spirit and irrevocably impair the foundation of the Ktunaxa spiritual practices. The Minister was not here referring to the broader claim to spiritual values in Qat'muk. This is apparent from the Minister's statement that the claim he characterized as "weak" had not been shared with and was not known to the Ktunaxa population generally. It is also supported by the Minister's reference to deep consultation being adequate "in respect of those rights for which the strength of the claim is strong" (p. 123). We view the Rationale as indicating that the Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the Late-2009 Claim.

[100] Even if the Minister had accepted the Ktunaxa's characterization of the Late-2009 Claim as a right "to exercise spiritual practices which rely on a sacred site and require its protection," it still would have been reasonable to find this aspect of the Ktunaxa's overall claim weak: C.A. reasons, at para. 81. As the Minister noted, in the negotiations the Ktunaxa did not advise the Crown of "specific spiritual practices": R.R. (Minister), at p. 113; see also chambers judge's reasons at para. 212. As such, the Minister did not have evidence that the Ktunaxa were asserting a particular practice that took place in Qat'muk prior to contact. The Late-2009 Claim seemed designed to require a particular accommodation rather than to assert and

support a particular pre-contact practice, custom, or tradition that took place on the territory in question.

(d) Failure to Properly Assess the Adverse Impact of the Development on the Spiritual Right

[101] The Ktunaxa assert that because the Minister mischaracterized the asserted right, he “could not have properly assessed the ski resort’s adverse impact on the right”: A.F., at para. 123. The Ktunaxa do not point to anything said by the Minister, but reference para. 83 of the Court of Appeal reasons.

[102] The record supports the view that after June 2009, the Minister understood the Ktunaxa position that any construction of permanent accommodation on the resort site would drive Grizzly Bear Spirit from Qat’muk and undermine the basis of their spiritual beliefs and practices. The Court of Appeal in the criticized passage summarized the adverse impact issue as follows, using the description provided by the Ktunaxa themselves in the Qat’muk Declaration, and concluded the Minister understood the adverse impact from the Ktunaxa perspective:

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.

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. [paras. 83-84]

[103] We agree with the Court of Appeal on this point. The record does not support the view that the Minister failed to properly assess the adverse impact of the development on the spiritual claim.

(e) *Inadequate Consultation on the Asserted Right*

[104] The overall contention of the Ktunaxa is that the Crown did not offer sufficient consultation on their asserted right. It is possible for a decision maker to mischaracterize a right and still fulfill the duty to consult: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 38-39. Thus, even in the face of any alleged mischaracterization or undervaluing, the key question is the level of consultation regarding the asserted right.

[105] We are satisfied that the Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge

(at para. 233) and the Court of Appeal (at para. 86) and we would not disturb that finding.

[106] Regarding the Late-2009 Claim that no permanent construction be built, the Ktunaxa argue that the Minister wrongly ended the consultation on June 3, 2009. There is a contradiction, it is argued, between the Minister's June 3, 2009 letter expressing the view that the s. 35 consultation process had been completed, and the chambers judge's conclusion that when post-2009 consultations were considered in the context of the extensive prior consultation, "the Minister's consultation in respect of the Ktunaxa's asserted spiritual claims was reasonable and appropriate": A.F., at para. 128, citing chambers judge's reasons, at para. 232; see also A.F., at para. 129.

[107] This argument takes the Minister's letter stating that he considered sufficient consultation had taken place by June 3, 2009 out of context and fails to take account of what the Minister actually said. The letter was written at a time when the sacred value of Jumbo Valley was no longer listed as an outstanding issue for the Ktunaxa's agreement, and before the Late-2009 Claim. Negotiations with the Ktunaxa had been going well, and the Minister reasonably believed that the only outstanding matters were unrelated to the Ktunaxa rights claims. The Minister's letter therefore advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were interest-based.

[108] Five days later, on June 8, 2009 the Ktunaxa responded to this letter with a list of concerns, not including the sacred nature of the area. At meetings the next

day, however, the Ktunaxa refocused on the sacred nature of the site and asked for more consultation on this issue. The Minister agreed to this, and lengthy in-depth consultations on this new spiritual claim took place, including the meeting between the Minister himself and the knowledge keeper, Mr. Luke, in Cranbrook in September. The Minister sent the Ktunaxa a “Consultation/Accommodation Summary” that included a description of the consultation and accommodation efforts specifically related to the Late-2009 Claim and invited them to comment on it. He then met with them and revisions were made to the document. Consultation continued until the Ktunaxa issued the Qat’muk Declaration in November 2010 declaring that no accommodation was possible and that the only point of further discussions was to make decision makers understand why the proposed resort could not proceed. Even after this, the Minister sought further consultation, without success.

[109] There is no contradiction between the Minister’s letter on June 3, 2009 and the chambers judge’s conclusion that negotiations from 2009 onwards indicated deep consultation on the Late-2009 Claim. On June 3, that claim was not in play. Six days later, with the Ktunaxa change of position, it assumed central importance, and renewed consultation focused on this issue ensued.

[110] The Ktunaxa also contend that the courts below relied too much on the length of the consultation process. We agree that adequacy of consultation is not determined by the length of the process, although this may be a factor to be considered. While the Minister’s Rationale mentions two decades of consulting, there

is no evidence that he made his decision simply because he felt the process had gone on too long. Rather, it was clear to all by the spring of 2012 that given the position of the Ktunaxa, more consultation would be fruitless.

[111] Finally, the Ktunaxa assert that although the Minister may have undertaken deep consultation on other issues, he did not engage in deep consultation with respect to the Late-2009 Claim. We cannot agree. Even after the Ktunaxa said further consultation was pointless, the Minister persisted in attempts to consult.

(f) Failure to Accommodate the Asserted Right

[112] As a consequence of the lengthy regulatory process, many accommodations were made with respect to Ktunaxa spiritual concerns. These included specific changes to protect the grizzly population in Qat'muk — the west chair lift was removed because of the grizzly bear population in that area and the resort was confined to the upper half of the valley — as well as extensive environmental reserves and monitoring. The findings of the chambers judge on this point (at para. 236) have not been impugned.

[113] The Ktunaxa say these changes were inadequate: “Changes to the ski resort were measures required by economic, environmental and wildlife protection concerns and, while they do set out some limited protection for grizzly bears, there was no accommodation to address the ability of the Ktunaxa to carry on their spiritual

practices dependent upon Grizzly Bear Spirit”: A.F., at para. 133; see generally paras. 133-38.

[114] In point of fact, there was no evidence before the Minister of “specific spiritual practices”. It is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate. The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of “give and take”, and outcomes are not guaranteed.

VI. Conclusion

[115] The Minister’s decision did not violate the Ktunaxa’s freedom of religion as their claim does not fall within the scope of s. 2(a) of the *Charter*. The Minister’s conclusion that consultation sufficient to satisfy s. 35 of the *Constitution Act, 1982* had occurred has not been shown to be unreasonable. For these reasons, we would dismiss the appeal.

The reasons of Moldaver and Côté JJ. were delivered by

I. Overview

[116] The Ktunaxa are an Aboriginal people who inhabit parts of southeastern British Columbia. They claim that the decision by the provincial Minister of Forests, Lands and Natural Resource Operations (“Minister”) to approve a ski resort development infringes their right to religious freedom under s. 2(a) of the *Canadian Charter of Rights and Freedoms* and constitutes a breach of the Crown’s duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

[117] I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues’ s. 2(a) analysis. In my view, the Ktunaxa’s right to religious freedom was infringed by the Minister’s decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. The Ktunaxa hold as sacred several sites within their traditional lands, and they revere multiple spirits in their religion. The Ktunaxa believe that a very important spirit in their religious tradition, Grizzly Bear Spirit, inhabits Qat’muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat’muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa’s connection to the land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit.

All songs, rituals, and ceremonies associated with Grizzly Bear Spirit would become meaningless.

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

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

apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.

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

II. Analysis

A. *Section 2(a) of the Charter*

(1) The Scope of Section 2(a)

[121] All *Charter* rights — including freedom of religion under s. 2(a) — must be interpreted in a broad and purposive manner (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 179, per McLachlin J., as she then was). As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, the interpretation of freedom of religion must be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection" (emphasis added). The interpretation of s. 2(a) must therefore be guided by its purpose, which is to "ensure

that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759).

[122] In light of this purpose, this Court has articulated a two-part test for determining whether s. 2(a) has been infringed. The claimant must show: (1) that he or she sincerely believes in a belief or practice that has a nexus with religion, and (2) that the impugned conduct interferes with the claimant's ability to act in accordance with that belief or practice "in a manner that is more than trivial or insubstantial" (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 34; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32).

[123] The first part of the test is not at issue in this case. None of the parties dispute that the Ktunaxa sincerely believe that Grizzly Bear Spirit lives in Qat'muk, and that any permanent development would drive Grizzly Bear Spirit out, desecrate the land and sever the Ktunaxa's spiritual connection to it. The central issue raised by this appeal concerns the second part of the test. The Chief Justice and Rowe J. maintain that the Minister's decision does not interfere with the Ktunaxa's ability to act in accordance with their religious beliefs or practices. With respect, I disagree. As I will explain, in my view, the Minister's decision interferes with the Ktunaxa's ability to act in accordance with their religious beliefs and practices in a manner that

is more than trivial or insubstantial, and the Ktunaxa's claim therefore falls within the scope of s. 2(a).

(2) The Ability to Act in Accordance With a Religious Belief or Practice

[124] As indicated, the s. 2(a) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are “deeply held personal convictions . . . integrally linked to one’s self-definition and spiritual fulfilment”, while religious practices are those that “allow individuals to foster a connection with the divine” (*Amselem*, at para. 39). In my view, where a person’s religious belief no longer provides spiritual fulfillment, or where the person’s religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

[125] The same holds true of a person’s ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community’s members to pass on their beliefs to their children is an essential aspect of religious freedom protected under s. 2(a) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this

interferes with one's ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

[126] Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual's ability to act in accordance with his or her religious beliefs or practices — whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

[127] This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. The connection to the physical world, specifically to land, is a central feature of Indigenous religions. Indeed, as M.L. Ross explains, "First Nations spirituality and religion are rooted in the land" (*First Nations Sacred Sites in Canada's Courts* (2005), at p. 3 (emphasis added)). 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.

[128] Taking this feature of Indigenous religions into account is therefore critical in assessing whether there has been a s. 2(a) infringement. The principle of state neutrality requires that the state not favour or hinder one religion over the other (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 32; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 72). To ensure that all religions are afforded the same level of protection under s. 2(a), 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.

(3) The Chief Justice and Rowe J.'s Position on the Scope of Section 2(a)

[129] The Chief Justice and Rowe J. take a different approach. They maintain that the *Charter* protects the “freedom to worship”, but not what they call the “spiritual focal point of worship” (para. 71). If I understand my colleagues' approach correctly, s. 2(a) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues' approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is

no infringement of s. 2(a), even where the effect of state action is to reduce these acts to empty gestures.

[130] I cannot accept such a restrictive reading of s. 2(a). As I have indicated, where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice. The scope of s. 2(a) is therefore not limited to the freedom to hold a belief and manifest that belief through religious practices. Rather, as this Court noted in *Amselem*, “[i]t is the religious or spiritual essence of an action” that attracts protection under s. 2(a) (para. 47). In my view, the approach adopted by my colleagues does not engage with this crucial point. It does not take into account that if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices. Indeed, that person would have no reason to do so. With respect, my colleagues’ approach amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with “profoundly personal beliefs”, the true purpose of s. 2(a)’s protection (*Edwards Books*, at p. 759).

[131] This approach also risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(a) protection. As indicated, there is an inextricable link between spirituality and land in Indigenous religious traditions. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual

significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of s. 2(a) of the *Charter* to substantial elements of Indigenous religious traditions.

(4) The Minister's Decision Infringes the Ktunaxa's Freedom of Religion Under Section 2(a) of the *Charter*

[132] I turn now to the facts of this case. The Ktunaxa's religion encompasses multiple spirits and several places of spiritual significance (see, e.g. A.R., vol. II, at pp. 119 and 197). The Ktunaxa sincerely believe that Qat'muk is a highly sacred site, home to a very important spirit — Grizzly Bear Spirit. The Ktunaxa assert that Grizzly Bear Spirit provides them with spiritual guidance and assistance. They claim that the proposed development would drive Grizzly Bear Spirit out, sever their spiritual connection with Qat'muk, and render their beliefs in Grizzly Bear Spirit devoid of spiritual significance.

[133] The Chief Justice and Rowe J. frame the Ktunaxa's religious freedom claim as one that seeks to protect the “spiritual focal point of worship” — that is, Grizzly Bear Spirit (para. 71). I disagree. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices, which falls squarely within the scope of s. 2(a). If the Ktunaxa's religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies, and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty

words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance. Members of the Ktunaxa assert that without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, they would be unable to pass on their beliefs and practices to future generations in any meaningful way, as illustrated in the following excerpt from an affidavit quoted in the appellants' factum:

If the proposed resort were to go ahead in the heart of Qat'muk, I do not see how I can meaningfully speak to my grandchildren about Grizzly Bear Spirit. How can I teach them his songs, what to ask from him, if he no longer has a place recognizable to us and respected as his within our world? [para. 28]

[134] Viewed this way, I am satisfied that the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The decision therefore amounts to an infringement of the Ktunaxa's freedom of religion under s. 2(a).

B. *The Minister's Decision Was Reasonable*

(1) The Doré Framework

[135] Having resolved the preliminary issue that the Minister's decision to approve the development infringes the Ktunaxa's s. 2(a) right, I turn now to the question of whether the Minister's decision was reasonable.

[136] This Court’s decision in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister reasonably exercised his statutory discretion in accordance with the Ktunaxa’s *Charter* protections (*Loyola*, at para. 3). On judicial review, the task of the reviewing court applying the *Doré* framework “is to assess whether the decision is reasonable because it reflects a proportionate balance” between the *Charter* protections — both rights and values — at stake and the relevant statutory objectives (*Loyola*, at para. 37; citing *Doré*, at para. 57). As this Court explained in *Loyola*, a proportionate balancing is one “that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (para. 39). That is, when the Minister balances the *Charter* protections with the relevant statutory objectives, he or she must ensure that the *Charter* protections are “affected as little as reasonably possible” in light of the state’s particular objectives (*Loyola*, at para. 40). This approach respects the expertise that decision makers like the Minister bring to balancing *Charter* protections and statutory objectives in the context of the particular facts before them (*Loyola*, at para. 42, citing *Doré*, at para. 47).

(2) A Reviewing Court May Consider an Administrative Decision Maker’s Implicit Reasons

[137] The Ktunaxa submit that the Minister did not consider their s. 2(a) claim at all when he made his decision and that his decision was therefore unreasonable. Although the Ktunaxa advised the Minister that their s. 2(a) right was implicated by

his decision regarding the development (A.F., at para. 17), the Minister did not refer to s. 2(a) explicitly in his reasons for his decision.

[138] The chambers judge, Savage J., held that the Minister did not need to specifically refer to the s. 2(a) claim made by the Ktunaxa, because the Minister addressed the “substance” of the asserted *Charter* right in his reasons: the Ktunaxa’s spiritual connection to Qat’muk, and the impact the development would have on this connection (2014 BCSC 568, 306 C.R.R. (2d) 211, at paras. 270 and 273). Although Savage J. found that the Minister’s decision did not infringe the Ktunaxa’s s. 2(a) right, he stated that if he was wrong in this regard, the Minister’s decision amounted to a proportionate balancing of the *Charter* protections with the statutory objectives (para. 301).

[139] As I will explain, I agree with Savage J. in two respects: (1) that the Minister addressed the “substance” of the Ktunaxa’s s. 2(a) right, and (2) that it is implicit from the Minister’s reasons that he proportionately balanced the *Charter* protections at stake for the Ktunaxa with the relevant statutory objectives. In this case, it is important to recall that reviewing courts may consider an administrative decision maker’s implicit reasoning for reaching a decision. As Abella J. held in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the reasons given by an administrative decision maker are not required to explicitly address every argument raised by the claimant:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion . . . [para. 16]

[140] Rather, the ultimate question for the reviewing court is whether “the reasons allow the reviewing court to understand why the [administrative decision maker] made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*ibid.*). Even if the reasons do not seem wholly adequate to justify the outcome, a reviewing court should seek to first supplement the reasons of the decision-maker before substituting its own decision (*ibid.*, at para. 12). Reasonableness review thus entails “a respectful attention to the reasons offered or which could be offered in support of a decision” (*Newfoundland Nurses*, at para. 12, citing D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286; see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58). For example, in *Newfoundland Nurses*, although the chambers judge and a dissenting judge at the Court of Appeal found that the administrative decision maker’s reasons disclosed no line of reasoning which could lead to his conclusion, this Court held that the decision maker was “alive to the question at issue and came to a result well within the range of reasonable outcomes” (para. 26). His decision was therefore reasonable.

(3) The Minister Was Alive to the Substance of the Ktunaxa's Section 2(a) Right

[141] In my view, it is clear from the Minister's reasons that he was alive to the "substance" of the Ktunaxa's asserted *Charter* right: the Ktunaxa's spiritual connection to Qat'muk, and the fact that any permanent development in Qat'muk would sever their spiritual connection to the land. The Minister did note that the Ktunaxa's *prima facie* claim to an Aboriginal right under s. 35 based on their spiritual connection to the land was "weak" (see Minister's Rationale, at Schedule "F" of 2014 BCSC 568, pp. 117-24 ("Rationale"), at p. 122 (CanLII)). However, as I will explain, this assessment of the s. 35 claim was based on factors which are irrelevant to the s. 2(a) inquiry and thus had no bearing on the Minister's consideration of the Ktunaxa's s. 2(a) right.

[142] In assessing the *prima facie* claim to an Aboriginal right as "weak", the Minister specifically referred to elements of the test under s. 35 for evaluating an Aboriginal right (see *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 46, 55 and 60). These elements include whether the tradition or practice was engaged in prior to contact with Europeans and whether it was integral to the distinctive culture of the aboriginal group. The Minister noted that there was no indication that Jumbo Valley was 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 [the] Ktunaxa", and that the

“details of the spiritual interest in the valley” were not shared with or known by the general Ktunaxa population (Rationale, at p. 122).

[143] These elements of the test for identifying an Aboriginal right under s. 35 are not part of the s. 2(a) inquiry. As indicated, in order to determine that there is an infringement of a s. 2(a) right, there are two requirements: (1) that the religious belief or practice is sincerely held, and (2) that state conduct has interfered with the ability to act in accordance with the belief or practice in a non-trivial way. It follows that the Minister’s comment that the *prima facie* claim concerning the Ktunaxa’s spiritual connection to the land was “weak” goes only to the strength of the s. 35 claim and has no bearing on the assessment of the Ktunaxa’s s. 2(a) right.

[144] In fact, in his Rationale, the Minister explicitly recognized that the proposed development put at stake the Ktunaxa’s spiritual connection to Qat’muk — the substance of their s. 2(a) right. Although the Minister assessed the strength of the s. 35 claim to an Aboriginal right as “weak”, he stated that he “sincerely recognize[d] the genuinely sacred values at stake for Ktunaxa leadership and the Knowledge Keepers in particular” (p. 122). In his Consultation/Accommodation Summary (reproduced in R.R. (Minister), at pp. 64-154), which the Minister refers to in his Rationale, he noted that Jumbo Valley is an area of cultural significance with sacred values, and that “the Land of the Grizzly Spirit” is a highly important spiritual site in the Ktunaxa’s traditional lands (p. 111). In my view, the Minister was thus alive to the substance of the Ktunaxa’s s. 2(a) right.

(4) The Minister Engaged in Proportionate Balancing

(a) *Statutory Objectives*

[145] Before turning to the question of whether the Minister engaged in proportionate balancing of the substance of the Ktunaxa's s. 2(a) right and his statutory mandate, I begin with the relevant statutory objectives in this case. The Minister referred to several of his statutory obligations under the *Land Act*, R.S.B.C. 1996, c. 245, and the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307, that were relevant to his decision. At page 119 of his Rationale, the Minister noted that under those Acts, he is "responsible for the administration of Crown land" (see *Land Act*, s. 4), "responsible to dispose of Crown land where [he] considers advisable in the public interest" (see *Land Act*, s. 11(1)), and "responsible for encouraging outdoor recreation" (see *Ministry of Lands, Parks and Housing Act*, s. 5(b)). When the reasons of the Minister are read fairly as a whole, it is apparent that he took these objectives into account in arriving at his decision.

(b) *The Minister's Efforts to Accommodate the Ktunaxa's Section 2(a) Claim*

[146] As I will explain, it is apparent from the Minister's reasons that he tried to limit the impact of the proposed development on the substance of the Ktunaxa's s. 2(a) right as much as reasonably possible given these statutory objectives. The Minister in fact provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. As Savage J. noted, these

accommodations were “clearly intended to reduce the footprint of the Proposed Resort within Qat’muk and lessen the effect of the Proposed Resort on Grizzly bears, within which the Ktunaxa say that the Grizzly Bear Spirit manifests itself” (para. 313). These measures included the following (Rationale, at p. 123):

- The area of the “controlled recreation area” was reduced by 60% and reductions were also made to the “total resort development area”;
- An area was removed “from the controlled recreation area of the lower Jumbo Creek area that has been perceived as having greater visitation potential from Grizzly bears”;
- The “controlled recreation area” was also “amended to remove ski lifts on the West side of the valley, where impact to Grizzly bear habitat was expected to be greatest”;
- The Province of B.C. would “pursue the establishment of a Wildlife Management Area (WMA)” in order “to address potential impacts in relation to Grizzly bears and aboriginal claims relating to spiritual value of the valley”. The Ktunaxa were invited to engage with the Province in the development and implementation of the WMA objectives.

[147] It is true that these accommodation measures were provided in the context of the Minister’s duty to consult and accommodate under s. 35. The Minister

provided these measures, as well as other accommodations, as part of a consultative process that occurred “at the deep end of the consultation spectrum” (Rationale, at p. 123). But, as indicated, the Minister provided the accommodation listed above to specifically address the Ktunaxa’s spiritual interest in the land, even though the Minister assessed the strength of the Ktunaxa’s *prima facie* s. 35 claim based on this interest as “weak”. In my opinion, it does not make sense that the Minister would provide significant accommodation for a “weak” s. 35 claim, which suggests that the Minister took into account the Ktunaxa’s broader spiritual interest in the land, distinct from the context of their s. 35 claim.

[148] The Chief Justice and Rowe J. take a different approach. They explain this apparent tension by asserting that the Minister assessed as “weak” only the Ktunaxa’s s. 35 claim that their spiritual connection to the land would be severed by any permanent development. For them, the Minister determined that the Ktunaxa’s “broader claim to spiritual values in Qat’muk” under s. 35 was strong, and he accordingly engaged in deep consultation (para. 99).¹ In my view, even if my colleagues are right that the Minister engaged in deep consultation to address the Ktunaxa’s “overall spiritual claim” (para. 99) under s. 35, it follows that the Minister provided the accommodation above to reduce the impact of the development on the Ktunaxa’s spiritual connection to Qat’muk. These measures indicate that the Minister

¹ To be clear, as I have indicated above, it is plain from the Minister’s reasons that he assessed the Ktunaxa’s s. 35 claim based on their spiritual connection to the land as “weak”. However, I am satisfied that the duty to consult and accommodate under s. 35 with respect to this claim was met by the deep consultation engaged in by the Minister.

made efforts to mitigate the impact on the substance of their s. 2(a) right as much as reasonably possible given his statutory mandate.

[149] Nonetheless, I acknowledge that these accommodation measures only reduce the footprint of the development in Qat'muk, a very important spiritual site in the Ktunaxa's religion. They do not prevent the loss of the Ktunaxa's spiritual connection to the land once the development is built and Grizzly Bear Spirit leaves Qat'muk. The Ktunaxa's position is that there is no "middle ground" available regarding the development: no accommodation is possible, as no permanent structures can be built on the land or Qat'muk will lose its sacred nature. The Minister therefore had two options before him: approve the development or permit the Ktunaxa to veto the development on the basis of their freedom of religion. As I will explain, it can be implied from the Minister's decision that permitting the Ktunaxa to veto the development was not consistent with his statutory mandate. Indeed, it would significantly undermine, if not completely compromise, this mandate.

(c) *The Right to Exclude*

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

Aboriginal group, the Shuswap Indian Band, that supports the development — a fact which the Minister explicitly took into consideration in his reasons. The Shuswap Indian Band is supportive of the development in part because of “the potential economic development opportunities it may provide” (R.R. (Minister), at p. 68).

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

[152] In granting a limited power of exclusion to the Ktunaxa, the Minister would effectively transfer the public’s control of the use of over fifty square kilometres of land to the Ktunaxa. This power would permit the Ktunaxa to dictate the use of the land — namely, preventing any permanent structures from being constructed — so that it does not conflict with their religious belief in the sacred nature of Qat’muk. A religious group would therefore be able to regulate the use of a vast expanse of public land so that it conforms to its religious belief. It seems implicit from the Minister’s reasons that permitting a religious group to dictate the use of a large tract of land according to its religious belief — and excluding the public from

using the land in a way contrary to this belief — would undermine the objectives of administering Crown land and disposing of it in the public interest. It can be inferred that the Minister found that granting the Ktunaxa such a power of exclusion would not fulfill his statutory mandate. Rather, it would significantly compromise — if not negate — those objectives.

[153] As indicated, the Ktunaxa's s. 2(a) claim left the Minister with two options: either to approve the development, or to grant the Ktunaxa a right to exclude others from constructing any permanent development on over fifty square kilometres of public land. This is distinct from a situation where some reasonable accommodation — a “middle ground” — is possible. For example, where a claimant seeks limited access to an area of land, or seeks to restrict a certain activity on an area of land during certain limited time periods, granting an accommodation may not have the effect of undermining the Minister's statutory objectives of administering Crown land and disposing of it in the public interest. As proportionate balancing under *Doré* requires limiting *Charter* protections “no more than is necessary given the applicable statutory objectives” (*Loyola*, at para. 4), in such cases, it may be unreasonable for the Minister not to provide these accommodations.

[154] But here, an accommodation that would not compromise the Minister's statutory mandate was unavailable. As indicated, the Minister did make an effort to provide the Ktunaxa with accommodation to limit the impact on their religious freedom, but the Ktunaxa took the position that no permanent development in the area

could be allowed. This placed the Minister in a difficult, if not impossible, position. He determined that if he granted the power of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest. In the end, he found that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over fifty square kilometres of public land.

[155] In view of the options open to the Minister, I am satisfied that this decision was reasonable in the circumstances. It limited the Ktunaxa's right "as little as reasonably possible" given the statutory objectives (see *Loyola*, at para. 40) and amounted to a proportionate balancing.

III. Conclusion

[156] For these reasons, I would dismiss the appeal.

Appeal dismissed.

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