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Silencing the Qat'muk Grizzly Bear Spirit

By: David Laidlaw

Case Commented On: *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (CanLII)

In the course of reading the recent decision of the Supreme Court of Canada in *Ktunaxa Nation v British Columbia*, I was struck by the number (13) of authorized non-party intervenors. There is a central omission – who speaks for Qat'muk's Grizzly Bear Spirit?

The Appellant Ktunaxa Nation described the Qat'muk region as a place of spiritual significance for them. As the Supreme Court said, "Notably, it is home to an important population of grizzly bears and to Grizzly Bear Spirit, or Kławła Tukłułak?is, 'a principal spirit within Ktunaxa religious beliefs and cosmology'" at paragraph 5 in the Majority Decision authored by Chief Justice McLachlin and Malcolm Rowe JJ, concurred in by Justices Abella, Karakatsanis, Wagner, Gascon, and Brown (Majority Decision).

What Happened?

The Supreme Court of Canada has determined that the Charter's protection of religious freedom applies to the Ktunaxa People and by extension other Indigenous people living in Canada.

The justices disagreed on the scope of that protection. The Majority Decision said the Ktunaxa's religious freedom was not infringed by the Minister's approval of development in Qat'muk, saying,

> [70] . . . The [Ktunaxa] 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.
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> [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(CanLII), [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*).

This result was justified on the basis that this claim "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" (at para 72). The Supreme Court refused to do this citing *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII), where "this Court chose to protect any sincerely held belief rather than examining the specific merits of religious beliefs" (at para 72).

The Minority Decision in contrast, said the Minister's approval of development in Qat'muk was an infringement of the Ktunaxa's religious freedom, saying

> [117] … 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.
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> [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 end result was the same: The Majority having determined there was no Charter breach of the Ktunaxa's religious freedom upheld the Minister's determination that the Crown had fulfilled the Crown's duty to consult and accommodate Aboriginal peoples (at para 115). The Minority agreed with the Majority on the satisfaction of the duty to consult (at para 117).

The Minority said the Minister's decision, breaching Ktunaxa's religious freedom, as an administrative decision satisfied the proportionate balancing analysis in *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII) (at para 136). It did so, by reading into the same consultation process the resulting Ministerial decision as *implicitly* considering the *substance* of the breach of the Ktunaxa's religious freedom (at para 139) with the Minister's wording of the Ktunaxa's claim "being weak" attributed to the determination of consultation obligations and *not relevant* to the breach of Ktunaxa's religious freedom (at paras 142 to 143).

The Minority characterized the consequences of the Ktunaxa's religious freedom claim, as "a power to veto development over the land [that] would effectively give the Ktunaxa a significant property interest in Qat'muk" (at para 150). The claim would,

> [152] … effectively transfer the public's control of the use of over fifty square kilometres of land to the Ktunaxa. … 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 … [and] would undermine the objectives of administering Crown land and disposing of it in the public interest… Rather, it would significantly compromise — if not negate — those objectives.

There was no compromise position available to the Minister, such as "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" that would apply (at para 153). The "…proportionate balancing under *Doré* requires limiting *Charter* protections 'no more than is necessary given the applicable statutory objectives'" (*Ktunaxa Nation* at para 153 quoting *Loyola High School v Quebec (Attorney General*), 2015 SCC 12 (CanLII) at para 4). In such cases, it may be unreasonable for the Minister not to provide these accommodations (at para 153).

The Minority decision found the Minister's 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" (at para 55). This was despite the Minority finding the accommodation measures in the Minister's decision were inadequate to address the breach of the Ktunaxa's religious freedom (at para 149).

In the end, the Minority privileged development over the Ktunaxa's religious freedom.

Failure of Imagination

Courts are not able to control the cases that come before them – although appellate courts can exert some control by requiring leave to appeal in some instances. What courts do, and indeed are obliged to do – is consider the arguments advanced by the parties and intervenors. In this case the parties and intervenors did not specifically consider the interests of Qat'muk's Grizzly Bear Spirit, aside from the factum of the Ktunaxa Nation detailing the impact. However, in extraordinary cases such as the first case to consider aboriginal spiritual beliefs, the Court is obliged *to exercise their imaginations* and look to overlooked arguments or case law for the resolution of the issue before them.

I suggest the result in this case was a failure of imagination to consider the interests of the Qat'muk's Grizzly Bear Spirit.

There are precedents in Commonwealth jurisprudence dealing with sacred objects or spaces. Most notably the Privy Council's decision in *Pramatha Nath Mullick v Pradyumna Kumar Mullick* (1925) L.R. 52 Ind. App. 245: 87 Ind. Cas. 305; 23 Allahabad Law Journal Reports, 537; 41 Calcutta Law Journal. 551; (1925) Madras Weekly Notes, 431:2 Oudh Weekly Notes, 557. This was a contest over the location of a Hindu idol consecrated and venerated by an extended family. The Privy Council in 1925 accorded the idol legal personality:

> 8. One of the questions emerging at this point is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a

> "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir, It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established. (emphasis added)

The idol was a movable object but precedents also exist for immovables such as the recent assignment of juristic personhood to the Whanganui River in New Zealand. This ascription was obtained in the settlement negotiations surrounding the Treaty of Waitangi, details here.

As to the practicalities, the Privy Council directed the appointment of a *next friend*, a person authorized to represent the idol's interests, saying:

> 41. While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting Shebaits. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience,
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> 42. Their lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols. (emphasis added)

It is undisputed, to my understanding, that land is a central conception for indigenous peoples with a sacred attachment to the indigenous people such that it can be said *the land is not owned but owns the Indigenous people.* I suggest that the closest analogy in Canadian law, authorized by the highest authority (the Privy Council was Canada's highest court until 1949) would be to ascribe to the sacred land of the Ktunaxa people the Qat'muk's Grizzly Bear Spirit status as a juristic entity. This recognition would advance the objective of reconciliation by persuading Indigenous peoples that their fundamental cultural and spiritual connection with their land has a recognition in imposed Canadian sovereignty.

The Supreme Court could have followed the Privy Council and assigned juristic entity status to Qat'muk's Grizzly Bear Spirit, directed the appointment of *a next friend* and remitted the decision back to the Minister for additional consultation taking into account representations from Qat'muk's Grizzly Bear Spirit.

The development of the Jumbo Valley Project will face additional permitting issues, but with this decision the Supreme Court has silenced Qat'muk's Grizzly Bear Spirit, forever.

This post may be cited as: David Laidlaw “Silencing the Qat’muk Grizzly Bear Spirit” (6 November, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/11/Blog_DL_Ktunaxa.pdf

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