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Ktunaxa Nation: On the "Spiritual Focal Point of Worship" Test

By: Howard Kislowicz and Senwung Luk

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

On 2 November 2017, the Supreme Court of Canada rendered its long awaited decision in *Ktunaxa Nation*. As noted by David Laidlaw in the initial post concerning *Ktunaxa Nation*, the decision raised significant issues surrounding the scope of religious freedom and its particular application to Indigenous groups, the Crown's duty to consult and accommodate Indigenous groups, and administrative law more generally. In this blog post, we focus on the first issue: what this case says and means for religious freedom claims.

Facts

In *Ktunaxa Nation*, a ski hill developer proposed a ski resort development for an area known by the Ktunaxa as Qat'muk, in the early 1990s. It is an area not covered by any treaty with Indigenous peoples, and which British Columbia characterized as Crown land. The Ktunaxa had not objected to the use of the area for heli-skiing (in which skiers are airlifted by helicopter to begin their descent) but they objected to the ski resort development. The SCC found that by 2009, BC had consulted with the Ktunaxa and accommodated their concerns by mandating the reduction in size of the proposed resort.

At around the same time, the Ktunaxa disclosed that Qat'muk was the home of the Grizzly Bear Spirit, which would go away if humans overnighted in the area. They said they had not disclosed this information earlier because of the secret nature of this information.

In spite of this new information, by 2011, BC decided sufficient consultation had taken place, and gave permission for the resort to go ahead. The Ktunaxa commenced a judicial review of the decision, an application that was rejected by both the trial court and Court of Appeal. At issue in both lower courts was whether the Ktunaxa's religious freedom rights under the Charter were triggered at all.

At the Supreme Court, the appeal thus focused squarely on the issue of whether the Charter protected a claim in the nature of that which the Ktunaxa were making.

New Religious Freedom Jurisprudence

The test for infringement of the right of religious freedom protected by s 2(a) of the *Canadian Charter of Rights and Freedoms* has been relatively stable since 2004. A claimant must establish (1) a sincere belief that (2) a practice or belief has a nexus with religion and (3) that some state

action has interfered in a non-trivial way with their ability to act in accordance with the belief or practice (see eg *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII) at paras 56-59, *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII) at para 34). While the first two elements of this test are treated as subjective, the third has an objective component (*SL v Commission scolaire des Chênes*, 2012 SCC 7 (CanLII) at paras 23-25). In an even longer-standing case, the right to religious freedom has consistently been held to include "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" (*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) at para 94).

As explained above, the Ktunaxa claim was that Qat'muk was sacred because of the presence of the Grizzly Bear Spirit, and that any development of permanent structures would destroy the sacredness of the territory by making the Grizzly Bear Spirit go away, which would render ceremonies involving the Grizzly Bear Spirit meaningless. On the face of the generally established case law, it seemed that, as long as the Ktunaxa could prove their beliefs were sincere, they had a fairly strong case for demonstrating an infringement of religious freedom. There is arguably some subtext in the majority decision that calls into question the sincerity of the Ktunaxa (see paras 30, 34-36), but that was not how the majority disposed of the claim. Instead, the majority held that the Ktunaxa claim was outside the ambit of s 2(a) of the *Charter*. The key reasoning here is at para 71:

> 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*.... 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*.... 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). (emphasis added)

This innovation in the case law strikes us as likely to have a disproportionate impact on Indigenous spiritual beliefs that relate to the sacredness of particular lands. One way to illustrate this is by asking what is the "spiritual focal point of worship" in some of the cases the SCC has already addressed. Presumably, for religious traditions with beliefs in a supernatural and/or omnipotent god, that god is the focal point of worship. The majority's approach seems to say that the state is under no obligation to protect that god, but that the state must justify infringements of a person or group's ability to worship that god. So, prohibitions on particular rituals, such as carrying a kirpan or erecting a succah, must be justified, but if the state proposed to murder the god of some religious group, this would not qualify as an infringement of religious freedom. The problem, of course, is that for the religious beliefs of Abrahamic monotheistic faiths, the possibility of killing a god is nonsensical, precisely because of the way that god is understood by most believers (at least in the present era).

What seems to be driving this rule is a concern that an individual or group's religious freedom interest will unjustifiably limit the freedoms of others. So, to stay with the examples in the case law, if I believe that a succah is in itself a sacred object, that should not prevent another person from expressing their disbelief, even opposition to, the rituals associated with the holiday. I could not, therefore, seek an injunction against a person who sought to publicly destroy a succah as an act of protest on the basis of my own religious freedom (though, depending on the context, there may be hate speech legislation that limits such activities). This is fine as far as it goes, but again will tend to impact disproportionately groups with beliefs in the sacredness of a specific place. I can't stop you from destroying your succah, but I can stop you from destroying my succah—not only because of my religious freedom, but because of my property right in the succah. And this is the nub of the majority's reasoning: they do not want the religious freedom right, exercisable against the state, to be transformed into a kind of property right, exercisable against all. And here again we see the disproportionate impact on Indigenous groups, historically dispossessed by colonizing powers, whose rights to be on the land are never presumed, but instead must be proven through lengthy and expensive litigation in which the legal tests are difficult to meet. Compare this to the position of dominant religious groups such as Anglicans in what was Upper Canada and Catholics in what was Lower Canada, who were often the beneficiaries of state land grants on which they built their religious structures. To the extent that these groups have any beliefs in the sacredness of a church or burial site, for example, they will not likely need to rely on a religious freedom right to protect these lands because they already own them.

Additionally, it is by no means clear how the "spiritual focal point of worship" test applies to other spiritual practices, be they Indigenous or settler. Elsewhere, one of us has written that the test leaves unclear how to decide whether a *practice* (which the majority says *is* protected by 2(a)) that requires being *present* on the land would be captured by the "spiritual focal point of worship" formulation.

The difficulty of the "focal point of worship" as a test for the limits of s 2(a) can be further illustrated by considering the Christian Eucharist as an example. The Eucharist commemorates the Last Supper of Christ (on the last night before He, whom Christians hold to be God, was killed by the Roman state). Christian ritual commemorates this meal through a breaking of bread, yet the commemoration has slightly different meanings to different sects of Christianity. It is an article of faith among Catholics that the Eucharistic bread transubstantiates into the body of Christ, and that the Eucharist, as the centrepiece of the ritual of the Mass, becomes the Real Presence of Christ, i.e. the spiritual focal point of worship. The practice is the heart of weekly church services for Catholics.

For Protestant sects of Christianity, the Eucharist is only a symbolic commemoration of the Last Supper, and there is no doctrine of transubstantiation. One might therefore conclude that the Eucharist is not a "focal point of worship" for Protestants, while it is for Catholics. If this is so, then it would appear that the Eucharist is a protected religious practice for Protestants, and not for Catholics, by dint of the very fact that it is a more important ritual for Catholics than for Protestants.

In recent years, the recognition of the rights of allergy sufferers has produced demands for gluten-free Eucharistic bread that accommodates the needs of people with celiac disease and the gluten intolerant. Yet the Catholic Church has held fast to the belief that it is necessary for there to be wheat in the Eucharistic bread in order for it to transubstantiate into the Body of Christ. The paradoxical result of the "focal point of worship" test could be that s 2(a) would not protect the Catholic Church from human rights law protections insisting on reasonable accommodations for the gluten intolerant. On the other hand, merely because the Eucharist was not a "focal point of worship", but nonetheless still a ritual practice for Protestants, that Protestant Churches could invoke s 2(a) protection to insist on a wheat based Eucharistic bread. We use this example merely as a hypothetical to illustrate the difficulty of the "focal point of worship" test. In posing this category as outside of s 2(a)'s protection, the majority of the Court seems to interject Canadian law precisely into the very theological inquiries it has sought to avoid.

These paradoxical and counterintuitive impacts to us suggest that the majority of the Court has charted a path for religious freedom inconsistent with the Charter's own admonition that it be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (s 27). If part of the idea of religious freedom is that all should be *equally* free, as the SCC has held (*Big M Drug Mart* at para 94), a religious freedom right that works better for some religions than others is not living up to its promise. The fact that it will likely be Indigenous groups most directly impacted by this jurisprudential development certainly seems to be at odds with the spirit of reconciliation between Canada and Indigenous groups. What's more, if the majority is concerned with religious freedom acquiring dimensions of a property right, that ship seems to have already sailed, at least in Quebec where religious freedom is protected as between private parties. Recall that *Amselem* was a dispute among co-owners of a condominium-style complex, and that the balconies and terraces were allocated to the common portions. That the claimants in Amselem were allowed to erect their own succoth certainly had an impact on the property rights of others. One might argue that the impact on the co-owners was small, but the point is that the ritual was still protected even though it implicated property rights; that some infringements may be justified and others not is a separate question reserved for the proportionality analysis stage. Indeed, if the concern with recognizing certain religious freedom rights is the impact of those rights on others, then it would seem that the proportionality analysis is the correct place for the balancing of those rights, rather than foreclosing the recognition of those rights at the first stage of the test (see the work of Natasha Bakht and Lynda Collins).

For the law of religious freedom, we much prefer the approach taken by Justice Moldaver, in which Justice Côté concurred. For Justice Moldaver, "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" (at para 130). This is in part because "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" (at para 130). Indeed, Justice Moldaver recognized that the majority's approach "risks excluding Indigenous religious freedom claims involving land from the scope of s 2(a) protection… [because] there is an inextricable link between spirituality and land in Indigenous religious traditions" (at para 131). While it is true that Justice Moldaver concurred in the result, his approach required a consideration of whether the Minister's decision proportionately balanced the interests at stake. Though we perhaps take issue with the result, his approach to s 2(a) is more consistent with the previous jurisprudence,

which endeavoured to treat religious beliefs even-handedly by taking a highly subjective approach to the proof of infringement.

Senwung Luk, one of the authors of this post, represented the Shibogama First Nations Council as intervener in the Ktunaxa Nation decision; the views here are his own and do not necessarily represent those of Shibogama First Nations Council.

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