

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN

**KTUNAXA NATION COUNCIL and KATHRYN TENESE,
ON THEIR OWN BEHALF AND ON BEHALF OF ALL
CITIZEN OF THE KTUNAXA NATION**

APPELLANTS
(Appellants)

AND

**MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE
OPERATIONS and GLACIER RESORTS LTD.**

RESPONDENTS
(Respondents)

AND

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PASSAMAQUODDY NATION AT SCHOODIC, KATZIE FIRST NATION, AND
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PART 1 – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW¹

1. This appeal involves the decision of the Respondent Minister of Forests, Lands and Natural Resource Operations (the “Minister”) to approve a Master Development Agreement in 2012 (the “MDA”), which would allow the Respondent, Glacier Resorts Ltd. (“Glacier”) to construct a ski resort (the “Resort”) in the Upper Jumbo Valley in British Columbia (the “Resort Site”).
2. The review regulatory process in connection with the Resort commenced in 1991 and has involved the Ktunaxa from the outset. The specific decision under review followed a series of prior regulatory decisions and approvals sought and obtained by Glacier over many years. Throughout the process, up to at least mid-2009, the Ktunaxa represented that their concerns with regard to development of the Resort, including spiritual concerns, could be addressed. Glacier went to extraordinary lengths and made many changes to the Resort plans to address those concerns.
3. In 2009 the Ktunaxa fundamentally changed their position. The Ktunaxa asserted that could be no accommodation in respect of development of the Resort, and that development could not proceed in any form.² The Ktunaxa raised, for the first time, s.2(a) of the *Charter*. The chambers judge found the Ktunaxa’s position articulated in 2009 was in “significant contrast” to its position throughout the Resort’s lengthy review process that accommodation was possible.³
4. The Ktunaxa’s assertion that the Minister’s decision to approve the MDA would infringe their rights, individual or collective, under s.2(a) of the *Charter*, was rightly rejected by the Minister, the chambers judge and the Court of Appeal. The Ktunaxa assert rights based on an alleged requirement for protection of a ‘sacred site’ which simply do not fall within the scope of s.2(a). If s.2(a) could, generally, be extended to require protection of a sacred site, such an

¹ The Respondent, Glacier, adopts the defined terms from the Appellant’s factum, except where indicated.

² *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at paras. 229 – 230 [“BCSC Reasons for Judgment”] (Appellants’ Record (“AR”) Vol. 1 at pp. 68 – 69).

extension is not appropriate here. The facts concerning the nature and content of the s.2(a) right, and the facts concerning raising of that right so late in the regulatory review process, should be fatal to the Ktunaxa's arguments.

5. Glacier generally relies on and adopts the statements of fact and arguments made on behalf of the Minister in the Minister's factum, except where indicated in this Factum. Glacier restricts its facts to certain specific matters on which Glacier believes that its perspective, as proponent in connection with the extensive 20-year review process,⁴ is relevant.

FACTS

Summary of the Regulatory Process

6. The Resort has been the subject of an extremely lengthy regulatory process, including a number of approvals made prior to the MDA approval. None of the prior approvals were challenged by the Ktunaxa. The Ktunaxa participated fully in the process, on the basis that their concerns, including spiritual concerns, could be dealt with.⁵

7. The prior processes and approvals are referred to in the BCSC Reasons for Judgment at paragraphs 38 – 105, 203 – 205, 229 and 238. In summary those processes and prior approvals are:

- a) the "CASP" process (Commercial Alpine Ski Policy), which commenced in 1991;⁶
- b) the "CORE" process (Commission on Resources and Environment), which completed in 1994;⁷

³ BCSC Reasons for Judgment at paras. 315 – 316 (AR Vol. 1 at pp. 93).

⁴ BCSC Reasons for Judgment at para. 38 (AR Vol. 1 at p.16).

⁵ BCSC Reasons for Judgment at paras. 74, 80, 207 – 208, and 210 (AR Vol. 1 at pp. 24, 26, and 62 – 64); Affidavit #1 of Oberto Oberti ["Oberti Affidavit"] at para. 118 (Glacier's Respondent Record ["GRR"] Vol. 2 at pp. 24) and Exhibit 43 (GRR Vol. 3 at pp. 9 – 62).

⁶ BCSC Reasons for Judgment at paras. 39-41 and 204 (AR Vol. 1 at pp. 16 – 17); Oberti Affidavit at paras. 14-22 (GRR Vol. 2 at pp. 7 – 8).

⁷ BCSC Reasons for Judgment at paras. 42-46 and 204 (AR Vol. 1 at pp. 17 – 18); Oberti Affidavit paras. 24-29 (GRR Vol. 2 at pp. 8 – 9).

- c) the Interim Agreement in 1995;⁸
- d) issuance of the EA Certificate in 2004;⁹
- e) approval of the Master Plan in 2007;¹⁰ and
- f) renewal of the EA Certificate in 2009.¹¹

CASP Review

8. As of 1990 the site had been identified by the Province as particularly suitable for development of a ski resort. Between 1991 and 1993, the project was the subject of review under the CASP process. As early as September 1991, the Ktunaxa had requested consultation with the Minister in conjunction with the CASP review.¹²

CORE Review

9. The project was subsequently required to be reviewed under the CORE process, which took place from early 1993 to late 1994. One of the three primary objectives of the CORE process was “to address Aboriginal concerns about land and resource use in the traditional territories of first nations”.¹³

10. In August 1994, during the CORE review, the Columbia Lake (now Akisqnuq) Indian Band, one of the bands forming the Ktunaxa, communicated certain concerns to the Minister, including a request the project be assessed under the new *Environmental Assessment Act* (the “EAA”), use of the site by the Ktunaxa and Shuswap Indian Band (the “SIB”) for hunting and

⁸ BCSC Reasons for Judgment at para. 47 (AR Vol. 1 at p. 18); Oberti Affidavit at para. 22 (GRR Vol. 2 at p. 8); Affidavit #1 of Psyche Brown at Exhibit 21 [“Brown Affidavit”] (GRR Vol. 1 at pp. 5 – 34).

⁹ BCSC Reasons for Judgment at paras. 48 – 63 and 204 (AR Vol. 1 at pp. 18 – 22 and 60); Oberti Affidavit at paras. 25 – 39 (GRR Vol. 2 at pp. 8 – 12); Brown Affidavit at Exhibit 58 (GRR Vol. 1 at pp. 53 – 62).

¹⁰ BCSC Reasons for Judgment at paras. 64 – 80 and 204 (AR Vol. 1 at pp. 22 – 26); Oberti Affidavit at para. 46 and Exhibit 21 (GRR Vol. 2 at pp. 13 and 122 – 226).

¹¹ BCSC Reasons for Judgment at para. 63 (AR Vol. 1 at p. 22); Oberti Affidavit at para. 51 (GRR Vol. 2 at p. 14); Affidavit #1 of Kathryn Teneese at Exhibit 41 [“Teneese Affidavit”] (GRR Vol. 3 at pp. 154 – 155).

¹² BCSC Reasons for Judgment at paras. 38 – 41 (AR Vol. 1 at pp. 16 – 17); Brown Affidavit at Exhibit 5 (GRR Vol. 1 at p. 1).

¹³ Oberti Affidavit at Exhibits 13 and 21 (GRR Vol. 2 at pp. 71 – 73 and 122 – 226).

gathering; and employment or other participation opportunities.¹⁴ The SIB is most closely located to the Resort Site, and the SIB claim the area described by the Ktunaxa as Qat'muk to be within its traditional territory.¹⁵

11. All of these concerns were addressed during the EAA process, Master Plan approval and Master Development Agreement and consideration of the Resort.¹⁶

Interim Agreement

12. In July 1995 Glacier and the Minister entered into an interim agreement in respect of the Resort (the "Interim Agreement"). Pursuant to the Interim Agreement Glacier committed to submit the Resort to an environmental assessment, and if an environmental assessment certificate ("EA certificate") issued after assessment, the Minister would be required to "negotiate and in good faith attempt to conclude" a MDA for the Resort.¹⁷

Environmental Assessment Act Review

13. In July 1995 the Resort began its review under the *Environmental Assessment Act*, with the Province noting, at the time, that 'the proponents of this project have shown a great deal of understanding and cooperation while awaiting the completion of the land use plan.' The EAA process took place over nearly a three year period between July 1995 and May 1998. First Nations, including the Ktunaxa, were involved in the process and were invited to provide their input.¹⁸

14. During this process the Ktunaxa and Glacier engaged in discussions regarding term of reference for a Traditional Use Study. According to the Ktunaxa proposal, forwarded to Glacier in September 1996, the benefits of such a study included development of information on

¹⁴ BCSC Reasons for Judgment at paras. 42 – 45 and Schedule "C" (AR Vol. 1 at pp. 17 – 18 and 103 – 105); Brown Affidavit at Exhibit 13 (GRR Vol. 1 at pp. 2 – 4).

¹⁵ BCSC Reasons for Judgment at para. 20. (AR Vol. 1 at p. 11).

¹⁶ BCSC Reasons for Judgment at paras. 47, 56, 77 and 236 (AR Vol. 1 at pp. 18, 21, 25 and 70 – 72).

¹⁷ BCSC Reasons for Judgment at para. 47 (AR Vol. 1 at p. 18).

¹⁸ BCSC Reasons for Judgment at paras. 48 – 55 (AR Vol. 1 at pp. 18 – 20); Oberti Affidavit at paras. 24 – 34 (GRR Vol. 2 at pp. 8 – 10).

traditional and cultural uses to ensure development of the Resort in a manner consistent with Aboriginal rights, and inclusion of a First Nations cultural tourism component in the Resort.¹⁹

15. Project specifications were issued by the EA office in May, 1998. The list of reporting requirements was 41 pages long and covered numerous matters, including First Nations consultation, protection of wildlife (including grizzly bears) and other matters.²⁰

16. The new *Environmental Assessment Act* came into force in December 2002. Glacier submitted its Project Report in December 2003. The Project Report comprised 13 volumes and included studies and analyses on virtually every aspect of the Resort. The table of contents is 40 pages.²¹

17. Prior to and following submission of the Project Report, meetings and discussions with First Nations continued, including the Ktunaxa and SIB.²² The Ktunaxa and Glacier exchanged correspondence regarding participation of the Ktunaxa in the Project. By March 2004, Glacier had successfully negotiated with the SIB an initial agreement covering SIB participation in certain aspects of the Resort.²³

18. Prior to approval of the EA certificate by the Environmental Assessment Office Glacier continued to meet and exchange positions with the Ktunaxa and the SIB. In July 2004 the Ktunaxa wrote to the EAO and sought four additional steps to be included taken by Glacier, specifically:

- a) Further review of grizzly bear impact mitigation;
- b) Further review of other wildlife issues;
- c) A direction to Glacier “to attempt to negotiate an IMBA with the Ktunaxa within a specified timeframe; and

¹⁹ Brown Affidavit at Exhibit 33 (GRR Vol. 1 at pp. 35 – 52).

²⁰ BCSC Reasons for Judgment at para. 51 (AR Vol. 1 at p. 19).

²¹ BCSC Reasons for Judgment at para. 56 (AR Vol. 1 at p. 21); Oberti Affidavit at para. 37 and excerpts from Exhibit 18 (GRR Vol. 2 at pp. 11 and 74 – 118).

²² BCSC Reasons for Judgment at paras. 57 – 60 (AR Vol. 1 at p. 21).

²³ BCSC Reasons for Judgment at para. 62 (AR Vol. 1 at p. 22); Oberti Affidavit at para. 110 (GRR Vol. 2 at 22) and Exhibits 31 and 39 (GRR Vol. 3 at pp. 1 – 5 and 6 – 8).

