Court File No.: 36664

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

KTUNAXA NATION COUNCIL and KATHRYN TENEESE, ON THEIR OWN BEHALF AND BEHALF OF ALL CITIZENS OF THE KTNUAXA NATION

Appellants

and

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

Respondents

and

THE ATTORNEY GENERAL OF CANADA; THE ATTORNEY GENERAL FOR SASKATCHEWAN; THE CANADIAN MUSLIM LA WYERS ASSOCIATION, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO and KOOTNEAY PRESBYTERY (UNITED CHURCH OF CANADA); THE EV ANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN LEGAL FELLOWSHIP; THE ALBERTA MUSLIM PUBLIC AFFAIRS CONCIL; THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; THE COUNCIL OF THE PASSAMAQUODDY NATION AT SCHOODIC; THE CANADIAN CHAMBER OF COMMERCE; THE SHIBOGAMA FIRT NATIONS COUNCIL; THE CENTRAL COAST INDIGENOUS RESOURCE ALLIANCE; AMNESTY INTERNATIONAL CANADA; THE TE'MEXW TREATY ASSOCIATION; THE KATZIE FIRST NATION and THE WEST MOBERLY FIRST NATIONS and PROPHET RIVER FIRST NATION

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PART I
OVERVIEW AND FACTS

1. The Attorney General for Saskatchewan ("Attorney General") was granted leave to intervene by Order of Wagner J., dated August 31, 2016.

2. The Attorney General adopts the facts set out in the factums of the Minister of Forests, Lands and Natural Resource Operations ("the Minister") and Glacier Resorts Ltd. ("Glacier").

3. This factum will address issues surrounding the process of reconciliation between the Crown and Aboriginal peoples. The bulk of judicial attention to this subject has focused on the Crown's duty to consult and accommodate. This appeal provides an opportunity for this Court to clarify the obligations of Aboriginal peoples on the other side of the balancing ledger.

4. Reconciliation is a two way street requiring a "give and take" from both the Crown and Aboriginal peoples. Aboriginal claimants have a reciprocal obligation to fully and clearly inform the Crown of their concerns early in the consultation process, and should not take unreasonable positions in the face of meaningful attempts by the Crown at accommodation. Failure of an Aboriginal claimant to uphold its obligations may prejudice its position. Untimely disclosure from the Aboriginal claimant may negatively impact the strength of their asserted claim.

5. Aboriginal claimants having rules restricting the release of important cultural or spiritual information to third parties should nevertheless inform the Crown of such restrictions at the earliest available opportunity in the process. It would then be up to both parties to accommodate the timely transfer of the sensitive information in a way that addresses the Aboriginal community's concerns and the Crown's need to satisfy its honourable obligations.

PART II
STATEMENT OF ISSUES

6. The Attorney General will address issues surrounding the duty to consult and accommodate specifically related to the Ktunaxa Nation Council's ("the Ktunaxa") reciprocal obligations.

PART III
ARGUMENT

A. Saskatchewan's Interest

7. Saskatchewan has a particular interest in this appeal because it is currently engaged in consultations related to an asserted Aboriginal sacred site, details of which were provided in the Attorney General's application for leave to intervene. The outcome of this appeal may directly affect how Saskatchewan conducts consultations in that matter and in future cases where Aboriginal rights to sacred sites are asserted in the Province.

B. Reciprocal Duties

8. In *Haida Nation* this Court held that Aboriginal peoples have reciprocal duties in the consultation process:

> […] As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts [at consultation], nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.[1]

9. The Court cited as authority *Halfway River First Nation v British Columbia* where the British Columbia Court of Appeal held that:

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided

[1] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42, [2004] 3 SCR 511 [Minister's BOA at TAB 9].

> by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.[2]

10. These statements impart two distinct obligations: Aboriginal claimants cannot take unreasonable positions that frustrate reconciliation; and they must fully and clearly express their interests and concerns. The Attorney General will address these obligations in turn.

C. Unreasonable Positions

11. The Ktunaxa's position that no accommodation is possible was first articulated in June of 2009; was re-asserted in September and December of that year; and culminated in the Qat'muk Declaration of 2010, which purported to prohibit the construction of buildings or permanent residences in Qat'muk.[3] They sought declarations that the resort is incompatible with Qat'muk's sacredness and will irreparably harm the Ktunaxa's traditional religious practices. They also asked for a permanent injunction enjoining any development in the Qat'muk area except as permitted in the Qat'muk Declaration.[4] The Chambers Judge held that the Ktunaxa's position "lies at the extreme end of the spectrum of required accommodation and is, in essence, seeking to veto the MDA and the Proposed Resort entirely."[5]

12. This position is contrary to *Haida Nation* where this Court held that Aboriginal claimants do not hold a veto over Crown decisions affecting asserted section 35 rights:

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no

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[2] *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161 [Glacier's BOA at TAB 10].
[3] BCCA Reasons for Judgment at paras 27-30; BCSC Reasons for Judgment at paras 89-96. The Declaration is found at Schedule "E" of the BCSC Reasons at pgs 115-116.
[4] BCSC Reasons at para 21.
[5] At para 208.

> means in every case. Rather, what is required is a process of balancing interests, of give and take.[6]

13. This Court reiterated the point in *Mikisew Cree First Nation v Canada, Beckman v Little Salmon/Carmacks,* and *Behn v Moulton Contracting*.[7] Jack Woodward, Q.C. summarizes the law as follows:

> If an aboriginal group's only objective is to prevent a particular project from being approved, the courts will not normally consider this to be a good-faith effort, because the Supreme Court of Canada has emphasized that the consultation process generally does not give aboriginal groups a veto over Crown decision-making.[8]

14. A veto may be available to an Aboriginal group where a Crown decision impacts proven Aboriginal title lands.[9] Aboriginal title is not at issue here. However, in seeking to quash the Minister's decision, the Ktunaxa are in effect asserting a right akin to proven Aboriginal title when their claim is based on an asserted but unproven Aboriginal right.

15. An analogous situation arose in *Heiltsuk Tribal Council v British Columbia*.[10] The Heiltsuk opposed the licencing of a commercial fish hatchery in an area over which they asserted Aboriginal rights and title. Despite various meetings and correspondence with the Crown, the Heiltsuk claimed a right to veto all aquaculture operations in their claimed territory.[11] They claimed that allowing the proposed activity would violate Heiltsuk law and that they had "zero tolerance" for such transgressions.[12] They would not advise the Crown of any terms upon which they would be willing to withdraw their opposition.[13] The British Columbia Supreme Court concluded that the Heiltsuk's position frustrated the consultation

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[6] *Haida Nation, supra,* at para 48.
[7] *Mikisew Cree First Nation v Canada*, 2005 SCC 69 at para 66, [2005] 3 SCR 388; *Beckman v Little Salmon/Carmacks*, 2010 SCC 53 at para 14, [2010] 3 SCR 103 [Glacier's BOA at Tab 3]; *Behn v Moulton Contracting*, 2013 SCC 26 at para 29, [2013] 2 SCR 227.
[8] *Native Law* (Toronto: Thomson Reuters, 1994) looseleaf, vol 1 at 5-91.
[9] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 76, [2014] 2 SCR 257.
[10] *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 [Glacier's BOA at TAB 11].
[11] At para 107
[12] At para 110
[13] At para 109

process.[14] This Court subsequently cited *Heiltsuk* as authority for the proposition that Aboriginal claimants have a reciprocal obligation not to frustrate reconciliation by taking unreasonable positions.[15]

16. The Ktunaxa advised the Crown in 2009 that "it was not that they were unwilling to compromise, but simply that no accommodation was possible."[16] This is the same view taken by the Heiltsuk who, while saying that they were willing to consult, took a position that "reflected an unwillingness to consult."[17] The Ktunaxa argue at paras 133-138 of their Factum that the Minister did not accommodate their concerns. It is not clear what acceptable accommodations were possible. As in *Heiltsuk*, the Ktunaxa have not suggested what accommodations could have addressed their concerns, short of denying the project.

17. Having finally heard the Ktunaxa's position in 2009, the Minister nevertheless made further attempts at accommodation for nearly three years before the project was approved.[18] While such measures are commendable, they were not required. The Crown is not obligated to try to move an Aboriginal claimant off of an intractable position. As this Court stated at paragraphs 42 and 49 of *Haida Nation*, there is no duty to agree. After fully and fairly listening to the Ktunaxa's position in 2009, and having already made good faith attempts at reconciliation, no further attempts at accommodation by the Crown were necessary.

D. Duty of Timely Disclosure

18. Both the Crown and Aboriginal groups have informational obligations in the consultation process. The Crown must disclose all necessary information about its proposed decision. This obligation must be complied with "in a timely way"[19] so that Aboriginal groups have a sufficient opportunity to consider the information and respond accordingly.

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[14] At para 118
[15] *Haida Nation* at para 42
[16] At para 95.
[17] *Heiltsuk supra* at para 113
[18] BCSC Reasons for Judgment at para 231.
[19] *Halfway River First Nation, supra* at para 160, quoted with approval by this Court in *Mikisew Cree First Nation, supra* at para 64.

19. For their part, Aboriginal claimants must "outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements."[20] There is a growing body of case law in which Courts have held that Aboriginal claimants failed to satisfy this informational obligation.[21]

20. At paragraph 22 of its reasons, the Court of Appeal found that it was not until June of 2009 that the Ktunaxa indicated that the proposed resort was inimical to their spiritual beliefs and that no accommodation was possible. This position was only fully and clearly articulated to the Minister approximately eighteen years after the resort was first proposed.

21. It is important to note how much water under the bridge had accumulated in the intervening years. The Ktunaxa had various opportunities to fully and clearly articulate its concerns – including its "no accommodation" position - to the Crown since the resort was first proposed in the early 1990's. However, even during the lengthy environmental assessment process from 1995 to 2004, "it was not the case that the Ktunaxa took a clear position that developing the Proposed Resort was inimical to their asserted spiritual (or religious) beliefs".[22]

22. Up until the June, 2009 meetings with the Minister, it appeared as if accommodation was possible.[23] Both before and following the approval of the Master Plan in 2007, the parties had discussed specific accommodation possibilities.[24] In early 2009 the Ktunaxa proposed negotiating an accommodation and benefits agreement, and the Minister offered additional capacity funding to the Ktunaxa for this process.[25] The Ktunaxa gave the Minister a list of specific possible accommodation measures in May of 2009, which included land transfers, land reserves, revenue sharing and other measures.[26]

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[20] *Haida Nation*, *supra* at para 36.

[21] For example, *Sepotaweyak Cree Nation v Manitoba*, 2015 MBQB 35 at para 210; *Pimicikamak Cree Nation v Manitoba*, 2014 MBQB 143 at paras 75-79; *Louis v British Columbia*, 2011 BCSC 1070 at para 225, aff'd 2013 BCCA 412; *Nalcor Energy v NunatuKavut Community Council Inc.*, 2012 NLTD 175 at para 96; *R v Douglas*, 2008 BCSC 1097 at para 105.

[22] BCCA Reasons for Judgment at para 25

[23] BCCA Reasons for Judgment at para 18

[24] BCCA Reasons at para 19; BCSC Reasons at paras 75 & 76

[25] BCSC at para 84

[26] BCSC Reasons at para 85

23. By the time the Ktunaxa finally articulated its "no accommodation" position the following month, the Minister had already determined and communicated to the Ktunaxa that reasonable consultation and accommodation had occurred.[27] A number of Ktunaxa's concerns had been addressed over the years by a variety of significant accommodations, including, but not limited to, a substantial reduction in the size and scope of the project.[28]

24. The Attorney General urges upon this Court the finding of the Saskatchewan Court of Appeal in *Buffalo River Dene Nation* that "the duty to consult is, at its core, a practical doctrine."[29] It held that no duty is triggered in relation to mineral licences that permitted no land access, and where it was highly uncertain whether land access would even be sought. The Court held that "it would be a great waste of time, effort and public resources to require the Crown to […] consult about something that is, at this time, so terribly contingent and unquantifiable."[30]

25. It is likewise wasteful of time, effort and resources for the Crown to meaningfully consult and accommodate for years only to have the claimant declare categorically, in the eleventh hour, that no accommodation was possible after all. The Minister's previous accommodations, and attempted accommodations, were made superfluous upon the Ktunaxa disclosing only in 2009 that its asserted right could not be accommodated.

26. This case demonstrates why Aboriginal claimants should clearly and fully articulate their asserted claims *early in the process*. As the Chambers Judge put it:

> Identifying the asserted Aboriginal right and the basis of concern guide the whole process of consultation and accommodation. This specifically involves identifying what particular aspect of the contemplated Crown conduct infringes the Aboriginal right and why it does so. Only by addressing these questions early on in negotiations can the process of consultation and accommodation properly achieve the salutary goal of reconciliation.[31]

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[27] BCSC Reasons at Schedule "D"
[28] BCCA Reasons at para 21
[29] *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31 at para 91.
[30] At para 99.
[31] BCSC Reasons for Judgment at para 210. Emphasis added.

27. Where a claimant takes the position that no accommodation is possible, it may either attempt to convince the Crown to deny the project, or seek redress in the courts. Either way, the claimant should bring forth its position early in the process to save the parties from engaging in lengthy consultations where Crown offers of compromise are doomed to be rejected.

E. Breach of Reciprocal Duties

28. A breach of the Crown's duty to consult gives rise to various possible legal remedies. The Court has not addressed what ramifications might flow from a failure of an Aboriginal group to uphold its reciprocal duties. While this issue cannot be fully explored in this appeal, the Attorney General offers the following observations.

29. At the least, the failure of an Aboriginal claimant to fully and clearly articulate its claims in a timely manner may prejudice its legal position. For example, it may affect its ability to adduce evidence on a judicial review application.[32] Indeed, the Chambers Judge in the present matter rejected the bulk of the Ktunaxa's proposed evidence on this basis.[33]

30. Late disclosure may also implicate the strength of an asserted claim. The Chambers Judge pointed to this conclusion in his brief discussion, at paragraph 242, of *Tlowitsis Nation v MacMillan Bloedel Ltd.* and *Siska Indian Band v British Columbia (Minister of Forests).* In *Tlowitsis Nation*, the British Columbia Court of Appeal upheld the denial of injunctive relief in part because the applicant disclosed the sacred nature of the area in question only a few days before bringing its application.[34] In *Siska Indian Band* the British Columbia Supreme Court found that a lack of timeliness in adducing evidence of harm to an asserted right may impact the weight to be given to such evidence.[35]

31. In the present matter, the Ktunaxa's late disclosure of the sacred nature of the Qat'muk supports the Minister's determination that their claim to an Aboriginal spiritual right was

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[32] For example, see *Pimicikamak Cree Nation v Manitoba*, supra at paras 75-79
[33] At para 137.
[34] *Tlowitsis Nation v MacMillan Bloedel Ltd.* (1990), 53 BCLR (2d) 69, 1990 CanLII 2335 at pg 23 and 24 (CA).
[35] *Siska Indian Band v British Columbia (Minister of Forests),* 1999 CanLII 2736 at para 43 (BCSC).

weak. It was not until June of 2009 that the Minister was told that only certain members of the community have information about the sacred nature of Qat'muk and of the secretive nature of that information.[36] In September of that year, the Ktunaxa advised that the issue was a "life and death" matter, and that the construction of permanent buildings would destroy the area's spiritual value such that no accommodation would be possible.[37]

32. It should be expected that critically important details of an asserted right, which an Aboriginal claimant should be presumed to know, would be shared with the Crown early in the process. This is not a case where new information *about the project* came to light that caused the community to reconsider its position. The project plan was well known for years.

F. Secret Knowledge

33. At paragraph 29 of their Factum, the Ktunaxa refer to the doctrine of secrecy that imposes strictures on sharing their sacred beliefs with outsiders. The Court of Appeal noted that this doctrine of secrecy was cited by the Ktunaxa as a justification for the late disclosure of the spiritual significance of the Qat'muk.[38] The Chambers Judge found that there was no evidence that the specific belief at issue was not disclosed earlier because of secrecy concerns.[39]

34. In any event, this appeal provides an opportunity for the Court to give some direction around the disclosure of sensitive information in the consultation process. The Attorney General acknowledges that Aboriginal communities may have rules restricting the release of important cultural or spiritual information to third parties. Consultations should be (and were in this case) conducted by the Crown in a manner that is sensitive and respectful of these issues. On the other hand, the disclosure of such information to the Crown may be critically important to how consultations are conducted and what accommodations might be proposed. Secrecy concerns should not be allowed to undermine the process of reconciliation.

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[36] BCCA Reasons at para 27
[37] BCCA Reasons at para 29
[38] At para 27
[39] BCSC Reasons at para 241

35. In such situations, Aboriginal claimants should at least inform the Crown *of their secrecy concerns* at the earliest available opportunity in the process. An obligation would then arise for *both parties* to accommodate the timely transfer of the sensitive information in a way that addresses the claimant's needs (i.e, for confidentiality) and the Crown's need to satisfy its honourable obligations. Challenges that might arise over the disclosure of sacred information can be overcome though the very "give and take" required by reconciliation.

PART IV
COSTS

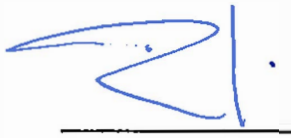
36. The Attorney General does not seek costs and asks that no costs be awarded against him.

PART V
NATURE OF THE ORDER SOUGHT

37. The Attorney General requests the Court's leave to make oral argument of no more than ten minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 23RD day of October, 2016.



R. James Fyfe
Counsel for the Intervener
The Attorney General for Saskatchewan

PART VI

LIST OF AUTHORITIES

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