GOWLING WLG

2017: THE SCC YEAR IN REVIEW

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This article summarizes the 10 most important Supreme Court of Canada decisions from 2017, as selected by Gowling WLG's Supreme Court of Canada Services Group.

1. *Ernst v Alberta Energy Regulator*, 2017 SCC 1

This appeal arose in the context of a claim by a property owner, Ms. Ernst, who was seeking various remedies for harm done to her property as a result of hydraulic fracturing activities, including advancing a claim against the Alberta Energy Regulator (the "Board"), a statutory, quasi-independent energy regulator. Among other grounds for relief, Ms. Ernst alleged she was "punished" for publicly criticizing the Board and prevented by the Board from speaking out for a period of sixteen (16) months. Ms. Ernst argued that the Board breached her right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms and claimed Charter damages to remedy that breach. Both the Alberta Court of Queen's Bench and the Court of Appeal found that the immunity clause pursuant to section 43 of the Energy Resources Conservation Act (the "Act"), barred Ms. Ernst's claim for Charter damages and struck out her claim. On appeal to the SCC, Ms. Ernst reformulated her claim to include a challenge to the constitutional validity of section 43 of the Act, which immunizes the Board from civil claims for actions it takes pursuant to its statutory authority.

In a divided 5-4 decision, the majority (per Cromwell J.) concluded that Ms. Ernst's claim for Charter damages must be struck out as, to them, it was plain and obvious that section 43 of the Act on its face barred Ms. Ernst's claim for Charter damages and that Ms. Ernst

had not succeeded in establishing that the section was unconstitutional. Therefore, they dismissed the appeal. The minority (per McLachlin C.J.) felt it was not immediately obvious that section 43 barred Ms. Ernst's claim, and stated that the application to strike should be set aside. The "swing judge" (Abella, J.), in a concurring judgment, dismissed the appeal on the basis that Ms. Ernst failed to provide notice of her section 43 constitutional challenge until her SCC appeal. Justice Abella held that this failure was problematic because the Court is limited in its abilities to answer newly raised constitutional questions. The test for whether new issues should be considered is a stringent one, and the discretion to hear new issues should only be exercised exceptionally and only when there is no prejudice to the parties.

On the issue of Charter remedies, the Court stated that section 24(1) of the Charter confers on the courts a broad remedial authority. However, it clarified that Charter breaches should not always, or even routinely, be remedied by damages. The Court cited Vancouver (City) v Ward, 2010 SCC 27, the leading case on determining when Charter damages are an appropriate and just remedy. The Court reiterated that, if damages further one or more of the objectives of compensation, vindication, and deterrence, it would be open to the state to raise countervailing factors to establish that damages are not an appropriate and just remedy. The Court concluded that in Ms. Ernst's case, when such countervailing factors were considered collectively, they negated the appropriateness of an otherwise functionally justified award for Charter damages against the Board. It followed that the immunity clause must be applied and Ms. Ernst's claim for Charter damages struck out.

2. *Saadati v Moorhead*, 2017 SCC 28

The plaintiff, Mr. Saadati, suffered damages as a result of multiple motor vehicle accidents. At a trial concerning the second accident, for which the defendants had admitted liability, the trial judge awarded damages for psychological injuries, based on the testimony of Mr. Saadati's friends and family but in the absence of expert evidence from a psychologist and of any diagnosis of a recognized psychiatric or psychological illness. The Court of Appeal reversed the trial judge's decision on the basis that a claimant is required to prove, with medical opinion evidence, that he or she suffered a "recognizable [or recognized] psychiatric illness".

On appeal to the SCC, with leave, Justice Brown, for a unanimous Court, held that claimants are not required to demonstrate a recognizable psychiatric illness as a precondition to recovery for mental injury. He cautioned courts from allowing "dubious

perceptions of psychiatry and of mental illness" to govern judicial decision-making in such matters and further criticized historical attempts to "control recovery for mental injury" on such grounds. While a claimant must still establish the basic elements for recovery in negligence law, such as demonstrating that the defendant owed a duty of care to the claimant and that the injury in question was caused by the negligent actions of the defendant, "the trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not whether a label could be attached to them." Justice Brown allowed the appeal and restored the trial judge's award. The Court did note that leading expert evidence, including reference to a recognized diagnosis, might make it easier to establish damages and causation, but it is not a necessary precondition. It is also open to the defendant to rebut a claim for mental injury by leading expert evidence to the contrary.

3. *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34

This was an appeal by Google Inc. ("Google") from a judgment of the British Columbia Court of Appeal, which affirmed an interlocutory injunction granted against Google in the respondents's favour. Equustek Solutions Inc. ("Equustek"), a small technology company in British Columbia, had commenced an action against Datalink. Equustek alleged that Datalink, while acting as Equustek's product distributor, began to re-label their products and pass it off as its own. Equustek also claimed that Datalink acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product. Datalink subsequently failed to comply with court orders which, among other things, prohibited it from referring to Equustek or any of Equustek's products on its websites and required it to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek products. Datalink continued to carry on its business from an unknown location, selling its impugned product on its websites all over the world. Further court proceedings by Equustek against Datalink and its principal proved to be ineffective, as well as steps taken by Google, a non-party, to de-index specific webpages associated with Datalink. Equustek discovered that Datalink simply moved the objectionable content to new pages within its websites, circumventing the court orders. The de-indexing also did not have the necessary protective effect since Google had limited the de-indexing to searches conducted on google.ca.

Accordingly, Equustek sought and obtained an interlocutory injunction enjoining Google from displaying any part of the Datalink websites on any of its search results worldwide.

The British Columbia Court of Appeal dismissed Google's appeal, concluding that the Court had in personam jurisdiction over Google and could, therefore, make an order with extraterritorial effect. The Appeal Court upheld the lower court's ruling that courts of inherent jurisdiction could grant equitable relief against non-parties.

Writing for the majority in a 7:2 split decision, Justice Abella dismissed Google's appeal. She held that there was no reason to interfere with the lower court's discretionary decision. She found that the test, as set out in the Court's RJR-MacDonald decision, for determining whether the court should exercise its discretion to grant an interlocutory injunction against Google had been met in these circumstances: there was a serious issue to be tried; Equustek was suffering irreparable harm as a result of Datalink's ongoing sale of its competing product through the Internet; and the balance of convenience was in favour of granting the order sought.

Google advanced a number of arguments in opposition. It did not dispute that there was a serious issue to be tried or that Equustek was suffering irreparable harm as a result of Datalink's actions. It first argued that as a non-party, it could not be the subject of an interlocutory injunction. Justice Abella rejected this contention and likened the interlocutory injunction to a Norwich order or a Mareva injunction. The injunction against Google stemmed from the need to prevent the facilitation of Datalink's wrongful conduct in breaching the court orders. Google then contended that any injunction should be limited to Canada or google.ca. This was also rejected. Justice Abella indicated that when a court has in personam jurisdiction, and where necessary to ensure the effectiveness of the injunction, the court can grant an injunction enjoining conduct anywhere in the world. This type of injunction was necessary in the present circumstances. Given that there are no borders online, limiting the injunction to Canada or google.ca would not prevent the harm. Justice Abella also dismissed Google's argument that a global injunction violated international comity. She held that if Google had evidence that complying with the injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is was free to apply to the British Columbia courts to vary the interlocutory order accordingly.

Justices Côté and Rowe dissented. They held that while the court had jurisdiction to issue the injunction against Google, it should have refrained from doing so. In their view, a number of factors affecting the grant of an injunction strongly favoured judicial restraint. They noted that this case established a novel form of equitable relief - effectively a permanent injunction, against an innocent third party, which required court supervision, and for which alternative remedies were available.

4. *Douez v. Facebook, Inc.*, 2017 SCC 33

This appeal concerned the enforceability of forum selection clauses in online contracts. Facebook, an American corporation headquartered in California, operates one of the world's leading social networks and generates most of its revenues from advertising. The plaintiff, a resident of British Columbia, had been a member of Facebook since 2007. In 2011, Facebook created a new advertising product, which used the name and picture of Facebook members to advertise companies and products to other members.

The plaintiff commenced an action in British Columbia against Facebook, alleging that the company used her name and likeness without consent for the purposes of advertising, in violation of BC's Privacy Act. The plaintiff also sought certification of her action as a class proceeding, where the proposed class action would include all British Columbia residents who had their name or picture used in the advertising product. The estimated size of the class was 1.8 million people.

Facebook brought a preliminary motion to stay the action based on a forum selection and choice of law clause contained in its terms of use agreed by users as part of the registration process. The clause required disputes to be resolved in California. The chambers judge declined to enforce the clause and certified the class action. The British Columbia Court of Appeal reversed the decision and held that the clause was enforceable and that the plaintiff had failed to show "strong cause" not to enforce it.

The SCC reversed the Court of Appeal's decision and held that the forum selection clause was **not** enforceable. The three justices whose decision formed the majority (Karakatsanis, Wagner and Gascon JJ.) recognized that forum selection clauses serve a valuable purpose, are commonly used and regularly enforced. Where no legislation overrides the forum selection clauses, the two-step approach from the Court's 2003 decision in Z.I. Pompey Industrie v ECU-Line N.V. ("Pompey") applies to determine whether to enforce such a clause or stay an action brought contrary to it. The first step requires the party seeking a stay to establish that the clause is valid, clear and enforceable, and that it applies to the cause of action before the court. The justices affirmed that the forum selection clause in question was enforceable. Once the first branch of the test is met, the onus shifts to the plaintiff to show strong cause why the court should not enforce the clause and stay the action. At this stage of the inquiry, courts must consider all of the circumstances, including the convenience of the parties, fairness between the parties, the interests of justice, as well as public policy. The justices noted that although the strong cause factors had been interpreted and applied restrictively in the

commercial context, the consumer context could provide strong reasons not to enforce forum selection clauses. They determined that courts should take into account public policy considerations with respect to the gross inequality of bargaining power between the parties, and the nature of the rights at stake. They found that the plaintiff had met the burden of establishing that there was strong cause not to enforce the forum selection clause.

Justice Abella joined the majority and concluded that the forum clause in question was a "classic case of unconscionability" that was unenforceable under the first step of Pompey. She emphasized the non-negotiated nature of online contracts and questioned the validity of the consent given by the consumer. She concluded that it would be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party access to a statutorily mandated court.

Chief Justice McLachlin and Justices Moldaver and Côté dissented. They concluded that the plaintiff had failed to establish "strong cause" for not enforcing the forum selection clause and, therefore, the action should be tried in California, as required by the terms of the contract.

5. *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32

Teal, a forestry company, held licenses to harvest Crown timber in BC. The province reduced the volume of Teal's allowable harvest and deleted certain areas from the related Crown land base. The parties were unable to settle how much compensation the province owed to Teal for reducing the latter's access to certain improvements (ex: roads and bridge). Their dispute was submitted to arbitration in accordance with the Forestry Revitalization Act ("FRA"). The arbitration was seized of two questions of statutory interpretation and one of contractual interpretation. The arbitrator awarded Teal $9,150,000 and BC appealed. On appeal, the B.C. Court of Appeal found that the issues relied upon by the arbitrator were questions of law subject to the appellate review, and that the arbitrator was in error regardless of the standard of review applied.

Teal appealed this decision to the SCC. The decision cleared up the confusion about how to apply the top court's ruling handed down less than three years earlier in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53. The majority provided guidance on issues which remained uncertain post-Sattva: the scope of appellate review of arbitral awards; and the question of when a contract's interpretation in the light of its surrounding

circumstances or "factual matrix" is a question of law, as distinct from a question of mixed fact and law.

The Court elaborated on the comments in Sattva that courts should be cautious about identifying "extricable questions of law" in disputes over contractual interpretation, noting that a narrow scope for extricable legal questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. The Court explained extricable questions of law are better understood not as a fourth category, but as "a covert form of legal question" - where an arbitrator's or judge's legal test is implicit to their application of the test, rather than explicit in their description of the test. The court admonished counsel not to strategically frame a mixed question of law and fact as a legal question in order to, for example, gain jurisdiction to appeal arbitration awards, or to gain a more favorable standard of review in appeals from judgments in civil litigation.

The Court noted that while the nature of the question (legal, mixed, or fact) is dispositive of the standard of review in the civil litigation context, it is not in the arbitration context. Thus it would be an error to claim that statutory interpretation by an arbitrators demands correctness review simply because it engages a question of law.

6. *AstraZeneca Canada Inc. v. Apotex Inc.*, 2017 SCC 36

AstraZeneca appealed a decision of the Federal Court of Appeal dismissing their appeal from a decision of the Federal Court that had found their patent invalid for inutility. The main issue on appeal was whether AstraZeneca's patent was invalid for lack of utility under section 2 of the Patent Act on the basis of the "promise of the patent doctrine". In this decision, the Supreme Court found the Promise Doctrine is not the correct approach to determine whether a patent has sufficient utility. Utility is a necessary requirement of an invention to be patentable. Prior precedent that developed in the Federal Court had ruled that if a patent application promised a specific utility, the promised utility must be fulfilled for the invention to be said to have utility and, therefore, be patentable. The Promise Doctrine involved the Court determining the promise made in the patent, as a whole, including the specification.

The Court found the Promise Doctrine to be unsound. In its decision, the Supreme Court noted claim construction precedes considerations of validity, and other issues of validity focus on the claims alone. This approach was found to conflate ss. 2 and 27(3) of the Patent Act. The subject matter of an invention is set out in the claims of a patent, which

determines the scope of the monopoly granted under the patent. The Court noted the difference between the requirement that a patent be useful and the requirement that a patentee disclose an invention's use per s. 27(3). The Promise Doctrine was found to import s. 27(3) into s. 2 of the Patent Act, which incorrectly meant any disclosed use had to be demonstrated or soundly predicted else the entire patent could be found invalid. Further, the Promise Doctrine required all promised uses disclosed to be fulfilled for a patent to have utility under s. 2. Such approach created the risk that an otherwise useful invention could be deprived of patentability because not every promised utility was demonstrated or predicted at the time of filing. The Supreme Court found that to invalidate a patent for an unintentional overstatement of a single use would discourage patentees from disclosing their invention, contrary to the purpose of the patent quid pro quo.

The Supreme Court ruled that utility of an invention will relate to the nature of the subject matter of the invention. To determine utility, courts must first identify the subject matter of the invention claimed and then ask whether the subject matter is useful. A scintilla of utility is all that is required for an invention to be patentable, and use must be demonstrated or soundly predicted as of the patent filing date. A patentee is not required to disclose the utility of an invention to fulfill the utility requirement.

7. *Nour Marakah v. Her Majesty the Queen*, 2017 SCC 59

Nour Marakah sent text messages to his accomplice, Mr. Winchester, regarding illegal transactions in firearms. The police obtained warrants to search both men's homes. During the course of their searches, they seized Mr. Marakah's BlackBerry and Mr. Winchester's iPhone, searched both devices, and found incriminating text messages. They charged Mr. Marakah and sought to use the text messages as evidence against him. Mr. Marakah argued that the messages should not be admitted against him because they were obtained in violation of his s. 8 right against unreasonable search and seizure.

The application judge held that the warrant for Mr. Marakah's residence was invalid and that the text messages recovered from his BlackBerry could not be used against him, but that Mr. Marakah had no standing to argue that the text messages recovered from Mr. Winchester's iPhone should not be admitted against him. He admitted the text messages and convicted Mr. Marakah of multiple firearms offences.

McLachlin C.J., for the majority, held that "depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under

s. 8 and that, in this case, Mr. Marakah had standing to argue that the text messages at issue enjoy s. 8 protection." To claim s. 8 protection, a claimant must first establish a reasonable expectation of privacy in the subject matter of the search, which must be assessed in the totality of the circumstances. In considering the totality of the circumstances, four lines of inquiry guide the court's analysis: (i) What was the subject matter of the alleged search? (ii) Did the claimant have a direct interest in the subject matter? (iii) Did the claimant have a subjective expectation of privacy in the subject matter? (iv) If so, was the claimant's subjective expectation of privacy objectively reasonable? "Only if the answer to the fourth question is 'yes' - that is, if the claimant's subjective expectation of privacy was objectively reasonable - will the claimant have standing to assert his s. 8 right." In this case, McLachlin C.J. concluded that the four lines of inquiry establish that Mr. Marakah had a reasonable expectation of privacy, and therefore that he had standing to challenge the search.

The Crown conceded that, if Mr. Marakah had standing, the search was unreasonable and violated Mr. Marakah's right under s. 8 of the Charter. The remaining question, therefore, was whether the evidence of the conversation should have been excluded under s. 24(2).

McLachlin C.J. held that consideration of the three lines of inquiry described in R. v. Grant (2009 SCC 32) lead to the conclusion that the evidence must be excluded. The search of Mr. Winchester's iPhone was not Charter compliant - though there is no suggestion that Mr. Winchester's arrest was anything but lawful, the police did not search his iPhone until more than two hours later. The Court recognized that society's interest in the adjudication of the case on its merits is significant, but ultimately held that "the admission of the evidence would bring the administration of justice into disrepute" and therefore that it must be excluded under s. 24(2).

In the companion case of Tristin Jones v. Her Majesty the Queen in Right of Canada, et al. (2017 SCC 60), the Court confirmed that it is objectively reasonable for the sender of a text message to expect that a service provider (in this case, TELUS) will maintain privacy over the records of his or her text messages stored in its infrastructure. However, the Court held that the appellant's s. 8 rights were not breached because records of historical text messages were lawfully seized by means of a production order under s. 487.012 of the Code (now s. 487.014).

8. *R v Oland*, 2017 SCC 17

This was an appeal from the judgment of the New Brunswick Court of Appeal, upholding a

decision of an application's judge denying Mr. Oland bail pending appeal of his conviction on second degree murder of his father. The SCC clarified the law that appellate courts should apply when deciding whether a convicted person should be released on bail pending the determination of an appeal. This decision effectively clarified the interpretation of section 679(3) of the Criminal Code. Three criteria for consideration are set out under the section:

a. The appeal is not frivolous;
b. The appellant will surrender himself into custody; and
c. The detention is not necessary in the public interest.

The Court of Appeal specifically considered the public interest criterion, finding that it consists of components of both public safety and public confidence in the administration of justice. This was first established in the Ontario Court of Appeal decision R v Farinacci. The public confidence component is nuanced and requires weighing two competing interests: enforceability and reviewability. Enforceability refers to the immediate enforceability of judgments, whereas reviewability supports access to a meaningful review process and recognizes that the justice system is not infallible. Appellate judges have had difficulty resolving this tension, particularly when they are faced with a serious crime and a strong candidate for bail pending appeal.

The SCC looked to the statutory factors provided for assessing whether bail should be granted pending trial, modifying the factors to reflect the post-conviction context. Ultimately, the following factors should be considered when an appellate judge assesses whether detention is necessary in the public interest, pursuant to section 679(3)(c) of the Criminal Code:

1. The enforceability interest includes:
    a. The seriousness of the crime (determined by: the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment);
    b. Public safety concerns that fall short of the substantial risk mark;
    c. Flight risks that do not rise to the substantial risk level; and
    d. The absence of flight or public safety risks.
2. The reviewability interest considers the strength of the grounds of appeal. As such, an appellate judge should examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. The remedy sought may also inform the reviewability interest. This is a more pointed assessment than the "not frivolous" requirement provided for in section 679(3)(a) of the Criminal

Code.

The final balancing should be measured through the eyes of a reasonable member of the public. The SCC thereby allowed the appeal on the basis that Mr. Oland's detention was unwarranted.

On another note, the SCC proceeded to hear and decide the appeal relating to the proper test for bail pending appeal notwithstanding that the New Brunswick Court of Appeal had already allowed Mr. Oland's appeal from conviction and had ordered a new trial. Because he was then released pending his re.trial, Mr. Oland's appeal of the review panel's decision to the SCC was rendered moot. However, in accordance with Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, the Court decided to hear the appeal on its merits to provide guidance needed to resolve conflicting jurisprudence on the issue of bail pending appeal, which is otherwise evasive of appellate review.

9. *R v Bingley*, 2017 SCC 12

At issue in this appeal was whether the opinion of a certified drug recognition expert (DRE) is automatically admissible at trial, pursuant to section 254(3.1) of the Criminal Code, or whether it was admissible as expert evidence under the common law rules of evidence. At trial, the prosecution called the DRE to explain the results of his drug recognition evaluation as evidence of the impairment of the accused, Bingley, relying on section 254(3.1) to establish the admissibility of the testimony without the requirement of a voir dire. The Ontario Court of Appeal agreed with this position.

Writing for the majority, Chief Justice McLachlin dismissed the appeal. When Parliament intends to make evidence automatically admissible, it says so expressly. It has not said so in section 254(3.1), in respect of evidence obtained through the use of investigative tools which that section opens to police. As section 254(3.1) does not speak to admissibility, the common law rules of evidence apply. Pursuant to these rules, the DRE opinion is admissible. Applying the Mohan factors (relevance, necessity, absence of an exclusionary rule, and special expertise), the main issue is whether the DRE has special expertise that is outside the experience and knowledge of the trier of fact. DREs have such expertise as they receive special training and are experts in administering the 12-step drug evaluation and determining whether a person is impaired and requires further testing. Where it is clear that the requirements of a rule of admissibility are established, a voir dire is not required at trial.

10. Four important cases on the duty to consult[1]:

a. *Clyde River (Hamlet) v. Petroleum Geo Services Inc.*, 2017 SCC 40

Petroleum Geo-Services Inc. ("Petroleum") applied to the National Energy Board ("NEB") for offshore seismic testing for oil and gas in Nunavut. The Inuit of Clyde River opposed the seismic testing alleging that the duty to consult had not been fulfilled. The NEB authorized the testing and found that Petroleum made sufficient efforts to consult with the Inuit of Clyde River and that the Inuit had an adequate opportunity to participate in the process. Before the Supreme Court, the Inuit appealed the Federal Court of Appeal's decision that the Crown's duty to consult had been satisfied by the NEB's process.

While the NEB is not an agent of the Crown, the NEB's approval process triggers the Crown's duty to consult since it constitutes Crown action. Crown conduct that triggers the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The Crown is ultimately responsible for ensuring adequate consultation but it may rely on the NEB since the NEB has the procedural powers necessary to implement consultation and the remedial powers to accommodate affected Aboriginal rights. The NEB has broad powers to determine relevant matters and its decisions must conform to s. 35(1) the Constitution Act, 1982. Any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

The Supreme Court allowed the Inuit of Clyde River's appeal and quashed the NEB's authorization on the basis that the consultation and accommodation efforts were inadequate and fell short in several respects.

b. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41

The Supreme Court held that when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights, the NEB's decision

would itself be Crown conduct that implicates the Crown's duty to consult. A statutory body that makes decisions that could affect Aboriginal and treaty rights act on the behalf of the Crown. Therefore, the NEB acted on behalf of the Crown in approving Enbridge's application.

The Crown may rely on steps taken by an administrative body to fulfill its duty to consult if the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval.

The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it intended to rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met. The NEB's statutory powers were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult.

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

The Ktunaxa challenged a proposed ski resort located at the heart of Qat'muk, a sacred site that is home to the Grizzly Bear Spirit who is of central spiritual importance to the Ktunaxa. The Ktunaxa believe the proposed permanent human habitation at the Proposed Ski Resort will cause the Grizzly Bear Spirit to leave Qat'muk and that this will have a profound negative impact and cause irreparable harm on the Ktunaxa's identity and culture, and mean that the Ktunaxa will no longer be able to receive physical and spiritual guidance from the Grizzly Bear Spirit.

The Ktunaxa sought judicial review of the Master Development Agreement entered into by the Minister of Forests, Lands and Natural Resource Operations and the proponent, Glacier Resorts Ltd. on March 20, 2012, regarding a proposed ski resort on Crown land in the Upper Jumbo Valley west of Invermere, British Columbia (the "Proposed Ski Resort"). Both the British Columbia Supreme Court ("BCSC") and the British Columbia Court of Appeal ("BCCA") previously dismissed the Ktunaxa's case.

The SCC considered three matters: the duty to consult; whether sacred sites could be protected through the Charter freedom of religion; and the use of judicial review proceedings for the adjudication of rights.

On the duty to consult, the Court viewed the overall conduct of the consultation as adequate to discharge the duty. In response to what the Court characterized as the "uncompromising position" taken by the Ktunaxa, the Court stated that "[w]hile 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."

With respect to Freedom of Religion, the Court concluded that the right claimed by the Ktunaxa does not fall within the scope of s. 2(a) of the Charter because it does not constitute a freedom to "hold religious beliefs" or "to manifest those beliefs." The Court concluded that s. 2(a) does not extend to the "object of beliefs" or the "spiritual focal point of worship". The Court stated that the Ktunaxa "seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it" and that this was beyond the scope of s. 2(a). The Court's rejection of the position that the freedom of religion could protect the Grizzly Bear Spirit effectively means that the Charter protects the Ktunaxa's belief in the Grizzly Bear Spirit but does not protect this location of the Grizzly Bear Spirit in their territory.

Finally, the Court concluded that an administrative decision maker, and subsequently a judge on judicial review, is not able to pronounce on the existence of a claim to a s. 2(a) Charter right. On judicial review, the Ktunaxa had sought a declaration that "Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site." The Court found that this declaration could only be made at a trial, not on judicial review.

d. *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58

The Umbrella Final Agreement ("the UFA") established a collaborative regional land use planning process that was adopted into modern land claims agreements between Yukon, Canada, and the First Nation of Nacho Nyak Dun and recognized the First Nation's right to participate in the management of public resources that fell within its traditional territory.

The First Nation sought a declaration that Yukon did not properly conduct a second consultation, as required by the UFA, after it decided to make modifications to a Plan that

had been the subject of prior consultation. The First Nation sought orders (a) quashing Yukon's plan (b) directing Yukon to re-conduct the second consultation, and (c) limiting Yukon's power to modify or reject the Recommended Plan.

The SCC upheld the lower court order quashing Yukon's approval of its modified plan and the parties were ordered to return to a certain stage of the consultation process.

The Court characterized the appeals as an application for judicial review of Yukon's decision to approve its land use plan. It stated that it is not appropriate for courts to closely supervise the parties at each stage of the treaty relationship. However, judicial forbearance should not come at the expense of judicial supervision of Crown conduct to ensure compliance with section 35 of the Constitution.

The Court found that the changes to the Recommended Plan were neither partial nor minor and should be quashed. The effect of quashing Yukon's approval was to return the parties to the position they were in prior to the invalid decision being made.

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[1] Okay, so technically not a "Top 10 List"; but rather a Top 14 List.

Related Supreme Court of Canada Services

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