COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.,* 2015 BCCA 154

Date: 20150415
Docket: CA041491

Between:

Jackie Thomas on her own behalf and on behalf of all members of the Saik'uz First Nation, and Reginald Louis on his own behalf and on behalf of all members of the Stellat'en First Nation

Appellants/
Respondents on Cross Appeal
(Plaintiffs)

And

Rio Tinto Alcan Inc.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia, dated December 13, 2013 (*Thomas v. Rio Tinto Alcan Inc.*, 2013 BCSC 2303, Vancouver Docket S116524).

Counsel for the Appellants/ Respondents on Cross Appeal:	G. J. McDade, Q.C. and M. J. Skeels
Counsel for the Respondent/ Appellant on Cross Appeal:	D. R. Bennett, Q.C. and R. D. W. Dalziel
Place and Date of Hearing:	Vancouver, British Columbia January 26, 27 and 28, 2015
Place and Date of Judgment:	Vancouver, British Columbia April 15, 2015

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

Summary:

The respondent constructed and operates a hydroelectric dam pursuant to an authorization granted by the British Columbia Government. The appellants are Aboriginal First Nations who assert Aboriginal rights, including Aboriginal title, to territory near the dam including the Nechako River. The appellants commenced the underlying action, claiming for nuisance and breach of riparian rights resulting from the operation of the dam, which they allege has harmed the Nechako River system and its fisheries. Alcan brought an application for summary judgment on the defence of statutory authority. It also sought an order striking out portions of the notice of civil claim and reply on the basis they constituted a collateral attack on the authorization underlying this defence. In the alternative, Alcan sought an order striking out the notice of civil claim on the basis that until rights or title are proven or acknowledged in a manner binding on the Crown they cannot form the basis for a claim against a private party. The chambers judge dismissed Alcan's application for summary judgment, but granted its application to strike out the notice of civil claim, and dismissed the action. The Nechako Nations appeal this order. Alcan cross appeals the dismissal of its application for summary judgment.

Held: Appeal allowed in part. The chambers judge erred in holding that no reasonable causes of action existed until Aboriginal rights and title were proven or acknowledged by the Crown. It is not plain and obvious that the appellants' notice of civil claim discloses no reasonable cause of action in respect of the claims of private nuisance, public nuisance and interference with riparian rights to the extent they are based on Aboriginal rights and title, and in respect of the claim of private nuisance to the extent it is based on occupation by the appellants of the lands set aside for them as reserves under the Indian Act, R.S.C. 1985, c. I-5. The order dismissing the action is set aside. Alcan's motion to strike is allowed only to the extent of striking the claim for breach of riparian rights claimed to arise from an interest in the reserve lands.

The cross appeal is dismissed. The chambers judge did not err in finding that there is a genuine issue for trial with respect to the applicability of the defence of statutory authority. In addition, the pleadings impugned by the respondent do not constitute an impermissible collateral attack and are not otherwise an abuse of process.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The Kenney Dam was constructed in northwestern British Columbia in the early 1950s by the predecessor of the respondent, Rio Tinto Alcan (I will refer to Rio Tinto Alcan and its predecessors collectively as "Alcan"). The purpose of the Kenney Dam was to provide water for Alcan's power generation facility in Kemano so that the resulting electricity could be used in Alcan's aluminum smelter located in Kitimat. The smelter has now been in production for over 60 years.

[2] The Kenney Dam spans one of the upper reaches of the Nechako River, creating the Nechako Reservoir. Water is released from the Nechako Reservoir in two places: in a westward direction through a 16-kilometre tunnel to the Kemano Powerhouse, where it pushes the generators creating the electrical power, and is then channelled into the Kemano River; and, also, in an eastward direction by way of the Skins Lake Spillway into Skins Lake, from which it flows into the Cheslatta River and then into the Nechako River. The Skins Lake Spillway is the main mode of release and is used to regulate the level of the Nechako Reservoir.

[3] Each of the Saik'uz and Stellat'en First Nations (the "Nechako Nations") is an Aboriginal First Nation and a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. They are neighbouring Carrier First Nations and members of the Carrier Sekani Tribal Council, the unsuccessful party in one of the decisions of the Supreme Court of Canada dealing with the Crown's duty to consult with groups claiming Aboriginal title and other rights: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

[4] In September 2011, the Nechako Nations commenced the underlying action against Alcan. In brief terms, the Nechako Nations claimed against Alcan in nuisance and for breach of riparian rights as a result of the operations of the Kenney Dam. They sought relief in the form of interlocutory and permanent injunctions to restrain Alcan from committing the nuisance and interfering with their riparian rights

(in their reply, the Nechako Nations claim damages in the alternative if one of Alcan's defences prevails).

[5] Alcan brought an application seeking two orders and an award of costs. The first was for summary judgment under Rule 9-6 of the *Supreme Court Civil Rules* dismissing the claim on the basis the defence of statutory authority was a full defence to the claim; it also included a request for an order striking out a paragraph in the Nechako Nations' notice of civil claim and five paragraphs of the Nechako Nations' reply on the basis they constituted an impermissible collateral attack in connection with Alcan's defence of statutory authority. In the alternative, they sought an order under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* striking out the whole of the notice of civil claim on the basis that it did not disclose a reasonable cause of action, and dismissing the action.

[6] The chambers judge dismissed Alcan's application for summary judgment but he granted Alcan's application to strike out the notice of civil claim. As a result, the action was dismissed.

[7] The Nechako Nations appeal the order striking out their notice of civil claim. Alcan cross appeals the dismissal of its application for summary judgment.

History of the Kenney Dam

[8] In 1949, the Legislature of British Columbia enacted the *Industrial Development Act*, S.B.C. 1949, c. 31, in order to facilitate the establishment or expansion of permanent industries (and, in particular, an aluminum industry) in undeveloped sections of British Columbia. It contemplated that an aluminum industry would require substantial quantities of electric power. The Act, among other things, gave the Lieutenant Governor-in-Council the authority to grant a water licence to any person who proposed to establish an aluminum industry in British Columbia and make other arrangements regarding the operations of the aluminum industry in British Columbia.

[9] Pursuant to the authority contained in the Act, the Province of British Columbia (the "Province") and Alcan entered into an agreement dated December 29, 1950 (the "1950 Agreement"). Alcan was authorized by the 1950 Agreement to construct and operate what was defined as the "Works", being what became known as the Kenney Dam, and the Province agreed to sell Alcan the Crown lands it needed for that purpose. Under the 1950 Agreement, the Province granted Alcan a conditional water licence authorizing Alcan to store, divert and use water as generally described in the licence, as well as a permit for the occupation of the Crown lands covered by the Nechako Reservoir. The conditional licence was replaced in 1997 by a licence referred to as the "Final Water Licence", the terms of which I will describe later in greater detail.

[10] The Kenney Dam was constructed pursuant to the 1950 Agreement, and a smelter was constructed in the settlement of Kitimat, which was incorporated as the District of Kitimat in 1953. The smelter began production in 1954, and it was expanded between 1955 and 1967.

[11] In 1980, a dispute arose between Alcan and the federal Minister of Fisheries and Oceans, who directed Alcan to release more water from the Nechako Reservoir into the Nechako River. Litigation ensued between these parties, and the Province was added to the action because it took the position that the water flow in question belonged to it. This litigation was settled by way of a settlement agreement dated September 14, 1987 (the "1987 Settlement Agreement").

[12] The 1987 Settlement Agreement primarily dealt with the release of water from the Nechako Reservoir. A recital of the Agreement stated that its purpose was to achieve an acceptable level of certainty that the water in the Nechako Reservoir would be managed so as to conserve and protect the salmon resources of the Nechako River and to ensure Alcan's continuing ability to generate hydroelectric power for its industrial purposes.

[13] It was contemplated under the 1987 Settlement Agreement that Alcan would construct a new release facility called the Kenney Dam Release Facility but there was no obligation on Alcan to do so (an affidavit of a lawyer representing the Nechako Nations deposed that it was never constructed). The Agreement provided, in s. 2.1 A.(b), that:

> … until such time as the Kenney Dam Release Facility is operating, Alcan will permit to escape through the Skins Lake Spillway into the Murray-Cheslatta System and the Nechako River an Annual Water Allocation equivalent to a mean annual water flow measured at Skins Lake Spillway of a least 36.8 cubic metres per second plus such additional flows as are determined to be required for cooling purposes by the Computer Models and Protocol (hereinafter referred to as the "Short Term Annual Water Allocation") ...

[14] The 1987 Settlement Agreement established two committees. The technical committee consists of one representative appointed by each of the three parties (Alcan, the federal Crown and the Province), and an independent expert selected by the other three members. The steering committee consists of one senior representative appointed by each of the three parties. Decisions of both committees must be unanimous. If the technical committee is not unanimous on a matter, it is referred to the steering committee. If the steering committee is not unanimous on a matter, it is referred to arbitration.

[15] Under the 1987 Settlement Agreement, Alcan is to release the Short Term Annual Water Allocation in accordance with the directions of the technical committee. Alcan is also to release flows in excess of the Short Term Annual Water Allocation in compliance with the directions of the technical committee.

[16] The 1987 Settlement Agreement also contained a section "Long Term Flow Obligation" under which provisions were made for a "Long Term Annual Water Allocation" once the Kenney Dam Release Facility became operational. "Long Term Annual Water Allocation" is defined similarly to "Short Term Annual Water Allocation" except that it contemplates release of the water at the Kenney Dam Release Facility "and/or" the Skins Lake Spillway, and the mean annual water flow is at least 19.6 cubic metres per second.

[17] Around the time of or shortly after the 1987 Settlement Agreement, Alcan commenced work on a new power generation facility referred to as the Kemano Completion Project. The Kemano Completion Project became controversial, and it was ultimately cancelled by the Province. Alcan sued the Province for cancelling the Project. The litigation was settled by way of an agreement dated August 5, 1997 (the "1997 Settlement Agreement").

[18] The parties executed several documents pursuant to the 1997 Settlement Agreement. One of them was a replacement electricity supply agreement that, subject to certain terms and conditions, obligated the Province to supply Alcan with electric power to replace in part the power Alcan would have generated from the Kemano Completion Project. Three of the other documents are of relevance to this appeal.

[19] The first of the other documents was an agreement amending the 1950 Agreement, the second was the Final Water Licence and the third was an amended permit to occupy Crown lands. The amending agreement amended the 1950 Agreement to limit Alcan's rights to store and use water and to occupy Crown lands as set out in the Final Water Licence and amended the occupation permit. It also provided that the assets constructed as part of the Kemano Completion Project would remain "Works" for the purposes of the 1950 Agreement. I think it is fair to say that the intent of the 1997 Settlement Agreement was that the Kenney Dam and Kemano Powerhouse are not to be expanded or changed by Alcan, at least without the further agreement of the Province.

[20] The Final Water Licence authorizes Alcan "to store, divert and use water and to construct, maintain and operate works". Attached to the Licence is a plan showing the approximate points of storage, diversion and use of the Nechako Reservoir. It sets out the maximum quantity of water than can be stored (23,850 cubic-hectometres) and the maximum rate of diversion and use for power purposes (170 cubic-metres per second). It provides that those works may be operated to divert, use and collect water into storage throughout the whole year. Finally, the

Licence authorizes Alcan to make releases into the Nechako River in accordance with the "Short Term Annual Water Allocation" as defined in the 1987 Settlement Agreement.

[21] In his affidavit in support of the application for summary judgment, the representative of Alcan deposed that Alcan's water storage and diversion operation is carried out in accordance with the terms of the Final Water Licence.

Claims of the Nechako Nations

[22] The Nechako Nations plead that they have used and exclusively occupied portions of the Central Carrier territory, including the Nechako River and the lands along the banks of the River, since the date at which British Sovereignty was asserted over British Columbia in 1846. They assert those lands and the bed of the Nechako River are subject to their Aboriginal title and rights, and claim proprietary interests in the waters and resources of the Nechako River. They also assert that at Sovereignty they used and exclusively occupied specific sites along the Nechako River and its tributaries for fishing purposes, and they claim proprietary rights to these fisheries. One of these fisheries was recognized as a fishing station in the 1916 Report of the Royal Commission on Indian Affairs for the Province of British Columbia. The Nechako Nations further plead that prior to and since first contact with Europeans they have harvested resources from the Nechako River system and carried out cultural and spiritual practices.

[23] In addition, the Nechako Nations plead that they have reserves on the bank of the Nechako River system that were set aside as Indian Reserves and now fall under the *Indian Act*. Legal title to the reserves is held by the federal Crown on behalf of the Nechako Nations, which claim to be the owners and lawful occupiers of the reserves. The Nechako Nation claim their ownership of the reserves along the Nechako River system carries with it riparian rights at common law, including the right to the natural flow of water undiminished in quality and quantity.

[24] The Nechako Nations say that the diversion of water by Alcan at the Kenney Dam has significant adverse impacts on the Nechako River, including alterations in the timing and quantity of water flow, impacts on water temperature, erosion of the banks, unnatural sedimentation in the river bed and interference with the surrounding ecological system. They allege these adverse impacts have negatively affected the fisheries resources of the Nechako River system, including a reduction in the fisheries resources (with a trend towards the extinction of the Nechako River Sturgeon as a result of their inability to spawn) and alteration of the health and demographics of the fish. They plead that they have suffered as a result of these adverse impacts, including interference with their ability to utilize fisheries resources, loss of use, enjoyment and value of the fisheries and lands subject to their Aboriginal title, and negative cultural impacts.

[25] The Nechako Nations base their request for injunctive relief (and damages in the alternative) on private nuisance, public nuisance and breach of (or interference with) riparian rights.

[26] As a result of defences pleaded by Alcan in its response to civil claim (including the defence of statutory authority), the Nechako Nations filed a reply that, among other things, pleaded that the statutory authority pleaded by Alcan is constitutionally inapplicable against the Nechako Nations' Aboriginal or proprietary rights. They plead in paras. 1 to 5 of the reply that the *Industrial Development Act*, the *Water Act*, R.S.B.C. 1996, c. 483, and its predecessors, the 1950 Agreement, the 1987 Settlement Agreement, the 1997 Settlement Agreement and the Final Water Licence are constitutionally inapplicable to their Aboriginal or proprietary rights to the extent that they purport to take away, diminish or extinguish those rights. In addition, para. 57 of the notice of civil claim had pleaded that the licences and agreements under which Alcan operates the Kenney Dam are of no force or effect against the Nechako Nations' proprietary interests. A notice of constitutional question was served on the Province and the federal Crown, but neither has responded to it.

Decision of the Chambers Judge

[27] In his reasons for judgment indexed as 2013 BCSC 2303, the chambers judge first dealt with Alcan's application for summary judgment on the basis of the defence of statutory authority. He reviewed the jurisprudence with respect to the granting of summary judgment under Rule 9-6 (paras. 25 to 33) and he then reviewed the authorities dealing with the merits of the defence (paras. 34 to 44).

[28] The judge accepted that the test for the defence of statutory authority is as set out in *Susan Heyes Inc. (Hazel & Co.) v. South Coast British Columbia Transportation Authority*, 2011 BCCA 77 at para. 79; namely, whether the act causing the nuisance was expressly or implicitly authorized by statute and, if so, whether the nuisance was the inevitable result of the statutorily authorized action (para. 71). He rejected Alcan's argument that the second branch of the test was automatically met in this case because the authorized act and the nuisance are the same (paras. 73 to 76).

[29] The judge observed that Alcan had provided no evidence to prove that there were no "practically feasible alternatives" (para. 89) and, therefore, he was not satisfied there was no genuine issue for trial with respect to the claim (para. 90). He found Alcan had failed to establish the defence of statutory authority and dismissed the application for summary judgment on that ground. He also rejected Alcan's argument that the position of the Nechako Nations in their reply as to the constitutional inapplicability of the statutory authority amounted to an impermissible collateral attack on the Final Water Licence (para. 91).

[30] The judge then turned to Alcan's application to strike the Nechako Nations' notice of civil claim as not disclosing a reasonable cause of action. He reviewed the authorities with respect to applications under Rule 9-5(1)(a) (paras. 92 to 102), and he then referred to leading authorities dealing with Aboriginal titles and other rights and the Crown's duty to consult and accommodate pending proof of those titles and rights (paras. 103 to 111). He did not have the benefit of the Supreme Court of Canada's most recent decision on Aboriginal title and other rights, *Tsilhqot'in Nation*

v. British Columbia, 2014 SCC 44. He also discussed the process of reserve creation (paras. 112 to 119).

[31] The judge noted that the common law concept of riparian rights has been extinguished by legislation in British Columbia, including the current *Water Act*, R.S.B.C. 1996, c. 483, s. 2, and its predecessors (paras. 120 to 124). He then reviewed case authorities dealing with public and private nuisance, including some decisions involving First Nations (paras. 125 to 146).

[32] The judge noted that the key problem with the intention of the Nechako Nations to prove their Aboriginal title and other rights in the underlying action was that their claim is against Alcan, not the Crown, and that the Crown is a key party and is the only party who can properly fulfill the role of adversary (paras. 158 to 162). He then concluded that a claim in private or public nuisance (or for breach of riparian rights) against Alcan, based on asserted but unproven claims to Aboriginal title and rights, had no reasonable chance of succeeding (para. 163 and 164).

[33] The judge next considered whether the claims of the Nechako Nations to private nuisance or for breach of riparian rights could be supported by their interests in *Indian Act* reserves. The judge made some comments about private nuisance (paras. 171 to 176), and he then addressed the claim based on riparian rights. He observed that all water rights were vested in the Province prior to the creation of the Nechako Nations' reserves, and that those rights were not conveyed to the federal Crown when the lands were transferred to it for the purpose of creating the reserves (para. 177). He concluded that a claim in private nuisance, or for breach of riparian rights, based on a reserve interest, had no reasonable chance of succeeding (para. 178).

Discussion on Appeal

[34] A pleading may be struck under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* if it discloses no reasonable claim. The test for striking out claims under

Rule 9-5(1)(a) is well known. It was most recently articulated by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17: "A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" or "the claim has no reasonable prospect of success". As the pleaded facts are assumed to be true, no evidence is admissible: *Imperial Tobacco* at para. 22.

[35] It is not determinative that the law has not yet recognized a particular claim; the court must err on the side of permitting a novel but arguable claim to proceed to trial: *Imperial Tobacco* at para. 21.

[36] The Nechako Nations' notice of civil claim advances three claims: private nuisance, public nuisance and breach of riparian rights. I will set out the elements of the torts of private nuisance and public nuisance, and I will describe riparian rights and the effect of the *Water Act* upon them. I will also review the nature of Aboriginal title and other Aboriginal rights.

Private Nuisance

[37] Mr. Justice Cromwell discussed the elements of the tort of private nuisance in the relatively recent decision in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable.* A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

[38] The above passage refers to an owner's use or enjoyment of land. There is some uncertainty in Canadian law as to what occupiers of land other than owners have the ability to pursue a claim in private nuisance. In *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 (H.L.), the House of Lords considered the issue of whether a licensee without exclusive possession of the land had the status to maintain a claim

in private nuisance. On behalf of the majority, Lord Goff summarized the current state of the law at 692:

> It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as *Foster v. Warblington Urban District Council* [[1906] 1 K.B. 648 (C.A.)] shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue.

[39] Lord Goff concluded that the law should not be developed to extend the category of persons who can sue in private nuisance to mere licensees, and he rejected the Court of Appeal's approach of expanding the category to all those who have a "substantial link" with the land.

[40] The reason I say there is some uncertainty in Canadian law is that there is a Canadian appellate decision which held that a mere licensee could sue in private nuisance. In *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 (Alta. S.C., App. Div.), the court held that the wife of the owner of the land had sufficient occupancy to found an action in private nuisance. In *Hunter*, Lord Goff considered *Motherwell* and concluded that the court in *Motherwell* had misunderstood *Foster v. Warblington Urban District Council* to hold that "occupancy of a substantial nature" was sufficient to enable the occupier to sue in private nuisance. In *Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024, Mr. Justice Holmes preferred the narrower approach advocated in *Hunter*, and it remains to be seen whether other Canadian courts follow the *Hunter* approach or the broader *Motherwell* approach.

Public Nuisance

[41] The Supreme Court of Canada discussed the doctrine of public nuisance in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513. Mr. Justice Major accepted the following definition:

> [52] … "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar,* [Lewis N. Klar, *Tort Law*, 2d ed. (Scarborough, Ont.: Carswell, 1996)] at p. 525. Essentially, "[t]he conduct complained of must amount to … an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G.H.L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage.

[42] Whether an activity is a public nuisance is a question of fact, taking into account factors such as the inconvenience caused by the activity, the difficulty in lessening the risk and the character of the neighbourhood: *Ryan* at para. 53.

Riparian Rights

[43] At common law, the owner of land adjoining water such as a river has riparian rights. Those rights include the right to access the water, the right of drainage, rights relating to the flow of water, rights relating to the quality of water, rights relating to the use of water and the right of accretion: see Gérard V. La Forest, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 200-201.

[44] In the present case, the Nechako Nations claim riparian rights as being the owners of land adjoining the Nechako River and its tributaries. They claim ownership of the land based on their ownership of their reserves and on their Aboriginal title. Issues arise in respect of those claimed riparian rights because the Province has abolished common law riparian rights in British Columbia.

[45] Shortly before the end of the 19th century, the Province enacted the *Water Privileges Act*, S.B.C. 1892, c. 47, which vested in the Province all water remaining unrecorded and unappropriated as of April 23, 1892. In *Cook v. Corporation of the City of Vancouver*, [1914] A.C. 1077, 18 D.L.R. 305, the Privy Council held that the effect of the Act was to take riparian rights away from land owners.

[46] In 1925, the *Water Act Amendment Act, 1925*, S.B.C. 1925, c. 61, amended the *Water Act*, R.S.B.C. 1924, c. 271, to replace s. 4 with the following:

> 4. The property in and the right to the use of all the water at any time in any stream in the Province is for all purposes vested in the Crown in the right of the Province, except only in so far as private rights therein have been established under special Acts or under licences issued in pursuance of this or some former Act relating to the use of water. …

Section 2 of the current version of the *Water Act* is to the same effect.

[47] This extinguishment of common law riparian rights preceded the creation of the reserves of the Nechako Nations. The lands for the reserves were conveyed by the Province to the federal Crown by Order-in-Council 1036/1938 enacted by the Lieutenant-Governor in Council on July 29, 1938.

Nature of Aboriginal Title and Other Rights

[48] The two leading authorities on Aboriginal title are *Tsilhqot'in Nation* and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

[49] Aboriginal title has been described as *sui generis* in order to distinguish it from fee simple proprietary interests and in order to understand it from both common law and Aboriginal perspectives: *Delgamuukw* at para. 112.

[50] Briefly stated, the test for Aboriginal title is whether the land in question was exclusively occupied by the First Nation at the time of British sovereignty: *Delgamuukw* at para. 143; *Tsilhqot'in Nation* at para. 30. Aboriginal title extends to tracts of land regularly used for hunting or fishing if the First Nation exercised effective control of the tracts of land at the time of British sovereignty: *Tsilhqot'in Nation* at para. 50.

[51] Aboriginal title is a beneficial interest in the land. It gives the First Nation the right to possess it, manage it, use it, enjoy it and profit from its economic development: *Tsilhqot'in Nation* at paras. 70 and 73.

[52] Aboriginal title is the Aboriginal right that creates an interest in land. Other Aboriginal rights are typically activities such as fishing, hunting, trapping, harvesting of timber and berry gathering. In order to qualify as an Aboriginal right, the activity

must be an element of a practice, custom or tradition integral to the distinctive culture of the First Nation: *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 46. In the present case, the Nechako Nations assert they have rights to fish and to a fishery, in addition to Aboriginal title.

Claims Relying on Aboriginal Title and Other Rights

[53] The chambers judge struck the claims in private nuisance, public nuisance and breach of riparian rights, to the extent they were based on Aboriginal title and other Aboriginal rights, because the title and other rights were merely asserted and not yet proven. I will first consider whether, if it is assumed the facts alleged in the notice of civil claim are true, a reasonable cause of action in each of private nuisance, public nuisance and breach of riparian rights has been disclosed.

[54] The Nechako Nations plead that they exclusively occupied portions of the Central Carrier territory, including the Nechako River and lands along its banks, at the time of British sovereignty. If this alleged fact is true, the Nechako Nations would have Aboriginal title to those lands. Although this is not ownership in fee simple, Aboriginal title would give the Nechako Nations the right to possess the lands. It is therefore not plain and obvious that the Nechako Nations do not have sufficient occupancy to found an action in private nuisance.

[55] In addition, the Nechako Nations plead facts that support a claim for an Aboriginal right to harvest fish. The rights to harvest fish and trap animals have been likened to a *profit a prendre* and, on an application for an interim injunction, the right to trap has been held to be sufficient to found an argument that the holder of the right can maintain an action in private nuisance: *Bolton v. Forest Pest Management Institute* (1985), 21 D.L.R. (4th) 242, 66 B.C.L.R. 126 (C.A. Chambers).

[56] The Nechako Nations plead the diversion of water by Alcan at the Kenney Dam has led to negative impacts on the fisheries resources of the Nechako River system. The alleged impacts are not trivial and are arguably unreasonable.

Accordingly, on the basis of the pleaded facts, it is not plain and obvious that the Nechako Nations do not have a reasonable cause of action in private nuisance.

[57] A public nuisance requires an activity that unreasonably interferes with the public's interest in such things as health, safety, morality, comfort or convenience. It is necessary in an action for public nuisance for the plaintiff to prove special damage. In my view, it is arguable that unreasonable interference with the public's interest in harvesting fish from the Nechako River system is a type of interference protected by the tort of public nuisance. The Aboriginal right to harvest fish pled by the Nechako Nations may be sufficient to demonstrate that they have suffered special damage as a result of the diversion of the Nechako River at the Kenney Dam. Hence, on the basis of the pleaded facts, it is not plain and obvious that the Nechako Nation do not have a reasonable cause of action in public nuisance.

[58] The Nechako Nations base their claim to riparian rights on their interest in the lands adjacent to the Nechako River as a result of both their interest arising from Aboriginal title and their interest flowing from the creation of reserves for them. I will deal separately with the reserve interest in the next section of these reasons.

[59] As I have stated, if the facts pled by the Nechako Nations are assumed to be true, they would have Aboriginal title to lands adjacent to the Nechako River. Although Aboriginal title is not the same as title in fee simple at common law, it is arguable that a similar kind of riparian rights associated with ownership in fee simple attach to Aboriginal title to lands adjacent to water. While the *Water Act* purports to vest all fresh water rights in the Province, it is arguable that, as asserted in the notice of constitutional question served by the Nechako Nations, this legislation is constitutionally inapplicable to the extent it purports to extinguish riparian rights held by them prior to the enactment of the *Water Privileges Act, 1892.* In my view, therefore, it is not plain and obvious that the pleading in connection with the claim for interference with riparian rights, to the extent it is based on Aboriginal title, discloses no reasonable cause of action. The constitutional question should be left for

determination until it has been decided whether the Nechako Nations have riparian rights based on Aboriginal title to lands adjacent to the Nechako River.

[60] Based on the above analysis, the claims of private nuisance, public nuisance and interference with riparian rights, to the extent they are based on Aboriginal title and other Aboriginal rights, should not have been struck because it is not plain and obvious that, assuming the facts pleaded to be true, the notice of civil claim discloses no reasonable cause of action in respect of those claims. However, the chambers judge did strike these claims because the assertions of Aboriginal title and other Aboriginal rights have not yet been proven (or accepted by the Crown). In my opinion, he was in error in doing so.

[61] The effect of the ruling by the chambers judge is to create a unique pre-requisite to the enforcement of Aboriginal title and other Aboriginal rights. Under this approach, these rights could only be enforced by an action if, prior to the commencement of the action, they have been declared by a court of competent jurisdiction or are accepted by the Crown. In my view, that would be justifiable only if Aboriginal title and other Aboriginal rights do not exist until they are so declared or recognized. However, the law is clear that they do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights.

[62] The proposition that Aboriginal rights exist prior to a court declaration or Crown acceptance is embodied in s. 35(1) of the *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11):

> 35 (1) The <u>existing</u> aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> [Emphasis added.]

The use of the words "recognized and affirmed" indicates that the Crown has already accepted the existing Aboriginal rights, and it is really just a matter of identifying what they are.

[63] The Supreme Court of Canada has commented on s. 35 many times. In *Van der Peet*, the Court acknowledged that Aboriginal rights were not created by s. 35(1):

> [28] In identifying the basis for the recognition and affirmation of aboriginal rights, it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

[64] A similar comment was made in *Delgamuukw*:

> [133] Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (emphasis [of Lamer C.J.C.]). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder, supra*), s. 35(1) has constitutionalized it in its full form.
>
> [Emphasis in original.]

[65] In *Tsilhqot'in Nation*, the Court confirmed that the Aboriginal rights existed before the arrival of the first European settlers:

> [69] … At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada …

[66] As whatever Aboriginal rights the Nechako Nations may have are already in existence, it seems to me there is no reason in principle to require them to first obtain a court declaration in an action against the Province before they can maintain an action against another party seeking relief in reliance on their Aboriginal rights. As any other litigant, they should be permitted to prove in the action against another party the rights that are required to be proved in order to succeed in the claim against the other party.

[67] As an example, assume that a lessee of land sued Alcan in private nuisance and that there was some issue with respect to the validity of the lessee's lease. In order to prove that it had sufficient occupancy to found an action in private nuisance, the plaintiff/lessee would have to prove the validity of its lease. The plaintiff/lessee would be entitled to prove the lease's validity in the action against Alcan, and no one would suggest that the plaintiff had no cause of action until it first sued the lessor and obtained a court declaration as to the validity of the lease. Nor would the lessor be required to be a party to the action, although it may be in the interests of the plaintiff/lessee to make the lessor a party so that the findings with respect to the validity of the lease would be binding on the lessor.

[68] Aboriginal people are part of Canada's community, and they should not be treated disadvantageously in comparison to any other litigant asserting claims for nuisance and breach of riparian rights. Setting a separate standard for Aboriginal people before they can sue other parties in order to enforce their rights is not only lacking in principle but could also be argued to be inconsistent with the principle of equality under the *Charter of Rights and Freedoms*.

[69] Alcan says it is unprecedented to allow "unrecognized" Aboriginal rights to ground common law claims in tort, and a change in the law to permit it would not be an incremental change of the nature that allows the courts to develop the common law. While it is true that there is no case where Aboriginal rights have founded a successful claim in tort, the real issue on this appeal is whether the Aboriginal rights have to be first "recognized" before the claim can be advanced.

[70] There are examples of cases where an Aboriginal person has been permitted to attempt to prove an Aboriginal right founding a claim or defence in the action in which the claim or defence is being put forward. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, and *Van der Peet* are examples of cases where Aboriginal persons were permitted to attempt to prove their Aboriginal fishing rights to defend charges of illegal fishing. In *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, Aboriginal persons charged with illegal logging were allowed to pursue a defence

based on Aboriginal title that had not been previously "recognized". While those cases did involve the Crown, it was not suggested there was no reasonable defence because the Aboriginal rights being relied upon had not been previously declared by the court or accepted by the Crown. Whether the Crown is party to the action should not be determinative of the issue whether the pleadings disclose a reasonable cause of action.

[71] There are also cases not involving the Crown. In *Hunt v. Halcan Log Services Ltd.* (1986), 34 D.L.R. (4th) 504, 15 B.C.L.R. (2d) 165 (S.C. Chambers), the court granted an interlocutory injunction to a First Nation to restrain the owner of an island from logging the island. The First Nation claimed both Aboriginal and treaty rights to hunt on the island, to harvest fish from a fishery on and adjacent to the island and to harvest fruits and berries on the island. Alcan says this case is distinguishable because it involved treaty rights and was dealing with an interlocutory injunction, which is only designed to stop interim harm. It is distinguishable on those bases, but it contains a similar point of principle. The first leg of the three-part test for interlocutory injunctions is whether there is a serious or fair question to be tried. In *Hunt*, Mr. Justice Trainor found there was a fair question to be tried with respect to both Aboriginal rights and treaty rights. If Alcan were right in its assertion that Aboriginal rights have to be proven before an action against a private party can be maintained, then Trainor J. would have found there was no fair question to be tried with respect to Aboriginal rights because they had not yet been proven.

[72] Another example is *Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council* (1989), 60 D.L.R. (4th) 453, 37 B.C.L.R. (2d) 352 (C.A.). In that case, this Court upheld, in large part, an interlocutory injunction restraining a logging company from building a bridge over a river and extending logging roads into an area claimed by the Gitksan First Nation to be subject to Aboriginal title in the *Delgamuukw* litigation. Although Mr. Justice Carrothers referred to the Aboriginal rights claimed by the Gitksan First Nation to be "speculative and prospective" (at 358, B.C.L.R.), it

was not suggested there was no fair question to be tried because those rights remained unproven.

[73] It should also be noted that another court has declined to follow the decision of the chambers judge in the present case. In *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 4403 (leave to appeal dismissed, 2015 QCCA 2), the First Nation sued the defendants, seeking recognition of Aboriginal title and other Aboriginal and treaty rights and a permanent injunction restraining mining and rail activity in the area in question. The defendants brought an application to dismiss the action on the basis that recognition of the Aboriginal title and rights binding on the Crown was a prerequisite to any other proceeding.

[74] The Quebec Superior Court dismissed the application and permitted the action to proceed. Mr. Justice Blanchard considered the reasoning of the chambers judge in the present case and he declined to follow it (and, in particular, paras. 161 to 163 of the judge's reasons).

[75] Alcan submits this decision is distinguishable because it involved Quebec civil law. However, it appears from para. 18 of the reasons of Blanchard J. ("[o]nly the clear and manifest absence of legal foundation allows an action to be dismissed pursuant to article 165(4) C.C.P.") that the test is similar to the test applicable to applications under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*.

[76] Alcan says one of the unmistakable characteristics of the s. 35 jurisprudence is that timing does matter. It cites *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, for the proposition that the Supreme Court of Canada disavowed the notion that third parties have any legal obligations to Aboriginal groups prior to proof of the rights in question. Alcan relies in this regard on the following passage:

> [53] It is suggested (*per* Lambert J.A. [in this Court's decision in *Haida Nation*, 2002 BCCA 147 and 2002 BCCA 462] that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely

> on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. …

[77] In my view, the above passage does not stand for the broad proposition advanced by Alcan. It simply stands for the proposition that the duty of consultation and accommodation that arises from the honour of the Crown pending proof of Aboriginal rights is not imposed on third parties. In *Haida*, Chief Justice McLachlin clarified (at para. 56) that while third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate, that does not mean they can never be held liable for infringement of Aboriginal rights.

[78] Alcan also submits that allowing a First Nation to sue a private party prior to recognition of its Aboriginal rights would be inconsistent with the reconciliation of Aboriginal rights with Crown sovereignty that has been advocated by the Supreme Court of Canada on numerous occasions. At para. 161 of his reasons, the chambers judge stated that "[c]onsultation, accommodation, and negotiation are without doubt the preferred routes of reconciliation of Aboriginal rights with the assertion of Crown sovereignty". One cannot argue with this sentiment, but parties cannot be forced to negotiate a settlement if one of them insists that the dispute be resolved by the court. More importantly, however, the goal of reconciliation cannot determine the issue of whether pleadings disclose a reasonable cause of action, which is a question of law.

[79] In conclusion on this point, it is not plain and obvious, assuming the facts pleaded to be true, that the notice of civil claim discloses no reasonable cause of action in respect of the claims of private nuisance, public nuisance and interference with riparian rights, to the extent they are based on Aboriginal title and other Aboriginal rights. The chambers judge erred in holding that no reasonable causes of

action existed until Aboriginal title and other Aboriginal rights were proven (or accepted by the Crown).

Claims Based on Reserve Interest

[80] As I noted above, the Nechako Nations ground their claim to riparian rights on their interest in lands based on both Aboriginal title and their interest in reserve lands. As I have held in the previous section, their claim based on Aboriginal title should not have been struck. I will now deal with their claim for interference with riparian rights based on their interest in reserve lands. I will also deal with their claim in private nuisance based on their interest in reserve lands.

[81] The reserves were created with land conveyed by the Province to the federal Crown in 1938. By that time, the Province had abolished riparian rights for land owners (except to the extent they were unrecorded and unappropriated). It follows that when the reserve lands were transferred to the federal Crown, riparian rights did not accompany the transfer of the lands.

[82] The Nechako Nations say that the transfer of the lands in 1938 is not the determinative point in time because the lands had been set aside by provincial authorities in the 19th century, prior to the passage of the *Water Privileges Act*, *1892*. They say the effect of the *Water Privileges Act, 1892* cannot be assessed in the absence of evidence of the reserve creation process, including evidence of the pre-existing rights of the Nechako Nations. However, there are no pleaded facts that would give the Nechako Nations an interest in the land supporting riparian rights prior to the 1938 Order-in-Council except for the pleaded facts giving rise to Aboriginal title. This section of the reasons deals only with riparian rights based on an interest in reserve lands, and is not addressing the issue of whether the Nechako Nations may have riparian rights on the basis of Aboriginal title.

[83] The Nechako Nations point to *Burrard Power Co. v. The King*, [1911] A.C. 87 (P.C.), where it was held that, in the absence of a reservation of rights, the transfer of lands for the railway belt from the Province to the federal Crown included all the

rights of the Province in the waters in the lakes and streams within the lands. They also point to the wording of Order-in-Council 1036/1938, which included the following provision:

> PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes is the vicinity of the said hereditaments, paying therefor a reasonable compensation.

The Nechako Nations say this wording would be unnecessary if no water rights were transferred by way of the Order-in-Council.

[84] In my view, these submissions overlook the wording of s. 4 of the *Water Act*, R.S.B.C. 1924, c. 271, as amended by the *Water Act Amendment Act, 1925*. It provided that the water rights were vested in the Province except only those rights established by special Acts or water licences issued under the *Water Act*. The Order-in-Council does not fall within either of these exceptions and, thus, the Order-in-Council could not have conveyed any water rights to the federal Crown. The proviso contained in the Order-in-Council was necessary to enable the Province to transport water over the reserve lands for mining or agricultural purposes.

[85] In my opinion, the chambers judge was correct in concluding that there was no reasonable prospect of success to the Nechako Nation's claim to entitlement to riparian rights based on their reserve rights. The notice of civil claim does not disclose a reasonable cause of action in respect of the claim for interference with riparian rights to the extent that those rights are said to arise from the Nechako Nations having an interest in the reserve lands.

[86] While the chambers judge acknowledged the Nechako Nations were relying on their interest in the reserves to ground a claim of private nuisance, the only comment he made about it was: "The only tenuous support of a reserve interest providing sufficient standing for a claim of nuisance is found in the remarks *in obiter* by Nunn J. in *Palmer* [*Palmer v. Nova Scotia Forest Industries*, [1983] N.S.J. 534 (S.C.)] that a right arising out of reserve lands 'stands on the same footing' as other

privately owned property (para. 509)" (para. 174). He then focused on the claim for riparian rights.

[87] I referred above to *Hunter v. Canary Wharf Ltd.*, which held that a substantial link to the property is not sufficient to enable one to maintain an action in private nuisance and that the plaintiff must have the right of exclusive possession. This represents the narrower view, while the decision in *Motherwell* is support for a more relaxed criteria.

[88] In my opinion, it is not plain and obvious that the Nechako Nations do not qualify as claimants in private nuisance under the narrower view. The term "reserve" is defined in s. 2 of the *Indian Act* to mean "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". This would seem to give the band the right to exclusive possession of the reserve lands, which is sufficient to found a claim in private nuisance.

[89] In *Joe v. Findlay* (1981), 122 D.L.R. (3d) 377, 26 B.C.L.R. 376 (C.A.), this Court upheld a finding of trespass on reserve lands. If the possession of reserve lands is sufficient to support a claim in trespass, it is not plain and obvious to me that it should not also be sufficient to support a claim in private nuisance. In my opinion, the chambers judge erred in striking the claim for private nuisance to the extent that it was based on the Nechako Nations having a right of possession to the reserve lands.

Conclusion on Appeal

[90] I would set aside the portion of the order dated December 13, 2013 striking out the whole of the notice of civil claim and dismissing the action. I would dismiss Alcan's application under Rule 9-5(1)(a) except that I would strike the claim of the Nechako Nations for interference with riparian rights to the extent that those rights are alleged to arise from an interest in their reserves.

Discussion on Cross Appeal

Defence of Statutory Authority

[91] Alcan's application for summary judgment dismissing the action on the basis of the defence of statutory authority was made pursuant to Rule 9-6(4) of the *Supreme Court Civil Rules*. Under Rule 9-6(5), the court is to dismiss the claim on hearing a summary judgment application "if satisfied that there is no genuine issue for trial".

[92] Alcan says there is no genuine issue for trial because its actions are protected by the defence of statutory authority. The Nechako Nations say there is a triable issue because Alcan must show that the impacts caused by the Kenney Dam are inevitable.

[93] The defence of statutory authority was imported into Canadian law from England. The classic statement of the defence was made by Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.) at 183:

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

[94] There were criticisms of the formulation of the defence, and, in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, 64 D.L.R. (4th) 620, the Supreme Court of Canada considered whether there should be modifications to the defence of statutory authority. Three of the judges wished to modify the defence in one respect, two of the judges wished to modify the defence in another respect and Mr. Justice Sopinka did not want to change it. This left uncertainty in the law until the subsequent decision of the Supreme Court of Canada in *Ryan v. Victoria (City)*,

[1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513, where the Court held that, as there was no majority position in *Tock*, the traditional view supported by Sopinka J. prevailed.

[95] In *Tock*, where the plaintiffs' house had been damaged as a result of a blocked storm sewer causing flooding in the basement, the defence of statutory authority was not available on the traditional view of the defence or as the judges other than Sopinka J. wished to modify it.

[96] The defence was also unavailable in *Ryan*, where the plaintiff was injured when the front tire of his motorcycle became trapped in a "flangeway" gap running alongside the inner edge of railway tracks located on a downtown street. Regulations issued by the Canadian Transport Commission provided that flangeways at crossings could be between 2.5 and 4.75 inches wide, and they were between 3.75 and 3.94 inches at the time of the incident. The trial judge found they could have been constructed at the minimum 2.5 inch width and the defence was not available. Upholding the trial judge, the Supreme Court of Canada held that the decision of the railways to exceed the minimum by more than one inch was a matter of discretion and was not an inevitable result of complying with the regulations.

[97] The defence of statutory authority has been applied by this Court on two occasions in the past two decades: the decision in *Susan Heyes Inc.* referred to earlier; and *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416. In *Sutherland*, the nuisance was noise resulting from the operation of a new runway at the Vancouver International Airport, and the plaintiffs were nearby residents. There was statutory authority for the location, construction and operation of the runway. The trial judge found that it was not possible to operate the runway to capacity without causing the noise of which the plaintiffs complained, but he did not apply the defence because the runway could have been built elsewhere on Sea Island and because the federal Crown could have expropriated the properties of the residents affected by the noise. This Court allowed the appeal, holding that the exact location of the runway was part of the statutory authorization and that the

possibility of expropriation was not relevant to the issue of whether the nuisance was an inevitable result of the authorization.

[98] The decision in *Susan Heyes Inc.* involved the construction of the Canada Line transportation system from Richmond and the Vancouver International Airport to downtown Vancouver. The plaintiff operated a retail outlet on a street under which a tunnel for the transportation system was constructed, using a method called "cut and cover", which involved excavation of a trench, the laying of pre-cast tunnel sections and the return of the excavated material to cover the tunnel. This construction created a nuisance, interfering with the operation of the plaintiff's store. The trial judge held that while the statutory authority approved of cut-and-cover construction, the method of bored tunnel construction could also have been used, and the defence of statutory authority was not available. In allowing the appeal and applying the defence to dismiss the plaintiff's action, this Court held that the cut-and-cover construction was the only practically feasible option for constructing the Canada Line.

[99] Alcan relies heavily on the following comments made by Sopinka J. in *Tock* at 1225-1226:

> The rationale of the defence is that if the legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation provision is included in the statute, all redress is barred. See Fleming, *The Law of Torts* (6th ed. 1983), at p. 407, and *City of Campbellton v. Gray's Velvet Ice Cream Ltd.*, [(1981), 127 D.L.R. (3d) 436 (N.B.C.A.)], at p. 439. There is no question that legislation may expressly authorize an interference with private rights by so providing in explicit language. Where the only reasonable inference from the legislation is that such interference is authorized, then the same result obtains by implication. Hence the language in the cases that the defence is made out if the nuisance is authorized expressly or by implication.
>
> A work is authorized by statute whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute …
>
> The criticism of the present state of the law which is the springboard for the desire to change it is largely based on the fact that the term "inevitable consequences" is too vague and uncertain. That term is the expression of the factual conclusion that the necessary causal connection exists between the work authorized and the nuisance. If the necessary connection exists, then it

> follows that the legislature authorized that which is the inevitable consequence of the work described in the statute.
>
> [Emphasis added by Alcan.]

[100] Alcan argues the "inevitable result" test is simply the means by which the court may satisfy itself of the factual correspondence between the authorization and the interference complained of by the plaintiff. Alcan says that as all material particulars of its works (the time, place and manner of its water diversion operations) are expressly described in the Final Water Licence, the very operations said to give rise to the nuisance have been authorized and it logically must follow that the necessary causal connection between the work authorized and the nuisance is present.

[101] The chambers judge rejected Alcan's argument for the following reasons:

> [78] The harm alleged by the plaintiffs is not, as Alcan suggests, the mere storage and diversion of water. The plaintiffs do not contest the fact that the Licence authorizes Alcan to store and divert water generally. Rather, the plaintiffs allege an interference with their rights on the basis of storage and diversion of water in a manner that results in very particular types of harm. The issue is not whether Alcan is authorized to store and divert water generally, but whether Alcan is authorized to store and divert water in a manner that results in the particular harms alleged.
>
> * * *
>
> [80] Simply because the impacts alleged by the plaintiffs are the result of acts authorized by the Licence does not make them one and the same, nor does it establish the "necessary causal connection" as claimed by Alcan. To treat the impacts in that way would render the inevitable result test largely redundant.
>
> [81] The question under the second branch of the statutory authority inquiry is whether the impacts were the *inevitable result* of the diversion of water authorized by the Licence. That involves a factual inquiry to determine if there are practically feasible alternatives that would avoid the impacts.

[102] I agree with the reasoning of the chambers judge. This is not a situation like *Sutherland* where the precise location and construction of the runway were prescribed by the statutory authority (and, even then, the trial judge in *Sutherland* considered evidence of whether the runway could have been operated to capacity without causing the nuisance). Here, the statutory authority did not prescribe how

the Kenney Dam was to be constructed, and it is not known whether it could have been constructed in a manner that could have avoided the alleged nuisance. While the 1987 Settlement Agreement (which is incorporated by reference into the Final Water Licence) sets out a minimum annual amount of water to be released from the Nechako Reservoir, it does not prescribe the timing or manner of the releases of additional amounts of water or the temperature of the released water, and it is not known whether water could be released in a fashion that could avoid the alleged nuisance. There are matters that need to be explored through the discovery process and at trial in order to determine whether the alleged nuisance is the inevitable result of what was authorized by the statutory authority.

[103] The chambers judge referred to one example which illustrates that the applicability of the defence of statutory authority cannot be determined on a summary judgment application. The 1987 Settlement Agreement contemplated that Alcan would construct a new release facility called the Kenney Dam Release Facility, which the affidavit evidence states was to be a cold water release facility. It appears that the construction of the Kenney Dam Release Facility was to be part of the Kemano Completion Project, which was cancelled, but it is not known whether it would have been practically feasible for Alcan to construct a cold water release facility as a separate project.

[104] Alcan points to the fact that the Final Water Licence only allows release of water in accordance with the "Short Term Annual Water Allocation" under the 1987 Settlement Agreement, not the "Long Term Annual Water Allocation" which was to come into effect upon the completion of the Kenney Dam Release Facility. Alcan says the die is cast, and a cold water release facility is not authorized by the Final Water Licence. However, it was authorized prior to the 1997 Settlement Agreement, and Alcan chose not to construct it. In addition, although the 1997 Settlement Agreement does not allow for any further changes to the Kenney Dam, there is no evidence the Province would refuse to authorize the construction of a cold water release facility.

[105] I agree with the chambers judge that there is a genuine issue for trial with respect to the applicability of the defence of statutory authority. In my view, he did not err in dismissing Alcan's application for summary judgment, and I would not give effect to this aspect of the cross appeal.

Collateral Attack/Abuse of Process

[106] Part of Alcan's application for summary judgment on the defence of statutory authority was a request for an order that para. 57 of the notice of civil claim and paras. 1 to 5 of the reply be struck (although this aspect of the application was technically under Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, which allows pleadings to be struck if they are an abuse of the process of the court). This was a necessary part of the application because the Nechako Nations, in those paragraphs, pleaded that the statutory authority relied upon by Alcan was constitutionally inapplicable against their Aboriginal or proprietary rights.

[107] Although Alcan has not been successful on the cross appeal in establishing that the chambers judge erred in holding there is a genuine issue for trial with respect to the defence of statutory authority, it is my understanding that Alcan nonetheless wishes an adjudication on its request for an order that these paragraphs be struck as an impermissible collateral attack or otherwise as an abuse of process. I say this because Alcan listed this aspect separately in the order it requested in the notice of cross appeal, and the issue was fully argued on the cross appeal. Also, it may be that the holding of the chambers judge would be binding on the judge hearing the trial.

[108] In brief terms, para. 57 of the notice of civil claim and paras. 1 to 5 of the reply plead that the legislation, agreements and licence are constitutionally inapplicable to the Aboriginal or proprietary rights of the Nechako Nations insofar as they may take away or diminish those rights. Relying on *Moulton Contracting Ltd. v. Behn*, 2011 BCCA 311, and *Canadian Forest Products Ltd. v. Sam*, 2013 BCCA 58, Alcan says the chambers judge erred in holding that these pleadings do not constitute an impermissible collateral attack on the Final Water Licence and in failing to strike the

pleadings as an abuse of process. It also says the judge erred in failing to consider whether these pleadings are an abuse of process for the reasoning employed by the Supreme Court of Canada in the *Moulton Contracting* case (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26).

[109] In *Moulton Contracting*, the Crown had issued timber harvesting licences to a logging company, which was intending to log one of the areas authorized by the licences. A number of members of the Fort Nelson First Nation set up a camp which had the effect of blocking the company's access to the logging site. The company sued the individuals in tort, and they pleaded in their defence that the licences were void on the bases that there had been insufficient consultation by the Crown before issuing the licences and that they violated treaty rights.

[110] This Court upheld the ruling of Mr. Justice Hinkson (as he then was) striking the relevant paragraphs from the statement of defence on the basis, among others, that they were an impermissible collateral attack on the licences and constituted an abuse of process. Madam Justice Saunders, for the Court, rejected the argument of the defendants that there could be no collateral attack because there was no order directed against them.

[111] An appeal by the defendants to the Supreme Court of Canada was dismissed. The Court found that the defendants' acts constituted an abuse of process but did not analyze the matter in terms of the doctrine of collateral attack. Instead, Mr. Justice LeBel, for the Court, held their actions were an abuse of process because it would bring the administration of justice into disrepute to allow the defendants to exercise self-help remedies in circumstances where they did not raise any concerns before the licences were issued.

[112] The decision in *Sam* was issued while this Court's decision in *Moulton Contracting* was pending before the Supreme Court of Canada. In *Sam*, a house of a First Nation objected to a logging company harvesting timber pursuant to a cutting permit issued to it by the Crown. Each applied for an interim injunction against the

other. The chambers judge refused the injunction sought by the logging company and granted the interim injunction requested by the house of the First Nation restraining the logging company from engaging in timber harvesting. The logging company appealed to this Court.

[113] In allowing the appeal, this Court held that the essence of the dispute giving rise to the interim injunction was the validity of the cutting permit. Following this Court's decision in *Moulton Contracting*, Mr. Justice Hall, for the Court, held that the action by the First Nation house was a collateral attack on the cutting permit and that a challenge of the cutting permit should properly have been brought as a judicial review proceeding in respect of the Crown's decision to issue the cutting permit. The interim injunction was set aside, but with the Court's order suspended for a period of two months in order to give the First Nation house time to apply to convert the action to a judicial review proceeding.

[114] In my opinion, both *Moulton Contracting* and *Sam* are distinguishable from the present situation. The Nechako Nations are not challenging the validity of the Final Water Licence (and related instruments) in their pleadings. Rather, the Nechako Nations are taking the position that the Final Water Licence and related instruments and legislation are constitutionally inapplicable to take away or diminish their Aboriginal or proprietary rights, with the result, they say, that Alcan cannot rely on the defence of statutory authority. I do not regard this position as constituting a collateral attack on the Final Water Licence.

[115] Nor is the position taken by the Nechako Nations the equivalent of taking a self-help remedy that would be an abuse of process because it would bring the administration of justice into disrepute. In my view, it is not an abuse of process for the Nechako Nations to argue that the defence of statutory authority is inapplicable to defeat their claim as a result of the constitutional protection given to Aboriginal rights. Whether such an argument is successful remains to be seen.

[116] I agree with the Nechako Nations that the current situation is more analogous to the circumstances in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, and *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. In *Garland*, the plaintiff sought the return of interest paid to a utility, whose rates and payment policies were governed by the Ontario Energy Board. In *TeleZone*, an unsuccessful applicant for licences issued by Industry Canada sued for breach of contract, negligence and unjust enrichment. In each case, the Supreme Court of Canada did not give effect to the argument the claims constituted impermissible collateral attacks and held the claims were private law matters that should be allowed to proceed. Similarly, in the present case, the claim is primarily a private law matter in which the Nechako Nations are claiming in nuisance and for breach of riparian rights. The impugned pleadings do not assert that the Final Water Licence is invalid and are being relied upon to resist the application of the defence of statutory authority in a private law matter.

Conclusion on Cross Appeal

[117] I would dismiss the cross appeal.

Disposition

[118] I would allow the appeal in part. I would set aside the portion of the order dated December 13, 2013 striking the whole of the notice of civil claim and dismissing the action. I would allow Alcan's application under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* to the extent of striking the claim of the Nechako Nations for breach of riparian rights to the extent that those rights are alleged to arise from an interest in their reserve lands, but I would dismiss the other aspects of the application. I would dismiss the cross appeal.

[119] Although I would strike a portion of the claim, the Nechako Nations have been substantially successful on the appeal, and I would order that they be entitled to the costs of the appeal, as well as the costs of the cross appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Bennett"