



STELLAT'EN

FIRST NATION

SAIK'UZ



## Backgrounder: Rio Tinto Alcan Impact on the Nechako River

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In the recent British Columbia Supreme Court case, the Saik'uz and Stellat'en First Nations sought to hold Rio Tinto Alcan (RTA) liable for damage caused to their fisheries by the operation of the Kenney Dam and the diversion of the Nechako River.

Situated in the northern interior of BC, the Nechako River is one of the largest tributaries of the Fraser River. The Saik'uz and Stellat'en have lived in the Nechako River watershed since long before colonial incursion began and have relied on the area for countless generations for physical, cultural, and spiritual sustenance.

### History

In the 1950s, British Columbia authorized the construction of the Kennedy Dam and reservoir in the Nechako's headwaters to divert water to generate electricity for the Alcan aluminum smelter in Kitimat that is now owned by Australian mining company, Rio Tinto. The diversion dramatically changed the annual flow patterns of the river and has created profound effects on the geomorphology of the surrounding ecosystem.

While most dams ultimately release the water they hold back into the same watershed in which it originally flowed, most of the water impounded by the Kenney Dam is never released back into the Nechako River. The upper Nechako River now receives only 30% to 40% of its pre-dam water volume in an average year, and the timing of when RTA chooses to release water results in dramatic changes to its annual water flow pattern, or hydrograph.

Throughout the 1980s and 1990s, RTA entered into several rounds of litigation with the federal government and the Department of Fisheries and Oceans over a variety of issues related to access and control of the water and the flow regime. Despite repeated attempts during these eras to make their concerns known, the the Saik'uz and Stellat'en were not consulted about the impact to their rights, economic development, or culture.

In 2011, the Plaintiffs brought an action against three defendants: RTA, the government of British Columbia ("BC"), and the government of Canada ("Canada"). In doing so, they asked the Court to find that they had constitutionally protected Aboriginal rights to fish in the Nechako River and its tributaries. They also asked the Court to find that RTA, through its construction and operation of the Kenney Dam, was interfering with those rights by causing harm to sturgeon and salmon in the Nechako watershed. Finally, they asked the Court to recognize that interference as a private nuisance, and order RTA to release more water into the river to prevent further harm to fish. All



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of these points were the subject of extensive evidence and argument over the 189 day trial that began in October of 2019.

### **Recent Decision & Appeal**

On January 7, 2022 the British Columbia Supreme Court released it's judgement. In the result, the Court agreed that the Plaintiffs have constitutionally protected Aboriginal rights to fish, that the Kenney Dam has and continues to harm sturgeon and sockeye populations, and that RTA had committed the tort of private nuisance. However, the Court found that RTA could not be held liable because it had followed the approvals granted by the government. In doing so, the Court declared that, in light of its findings, both Crown governments have a responsibility to take action to protect the Plaintiffs' rights and the fish upon which the rights depend.

Significantly, the Court found that the Aboriginal right to fish can serve as the basis for a nuisance claim against a private party. This is the first time an Aboriginal right has grounded a tort claim.