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Case Summary

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc, 2022 BCSC 15

Introduction

On January 7, 2022, the British Columbia Supreme Court ("BCSC") released its judgment in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 ("*Saik'uz*").

In this case, the Saik'uz and Stellat'en First Nations (the "Plaintiffs") 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.

The Court made important recognitions of the Plaintiffs' Aboriginal rights, found the actions of RTA constituted a continuing nuisance, and made important declarations against the federal and provincial Crowns. However, the Court found that RTA could rely on the defence of statutory authority, and therefore did not make orders requiring RTA to release more water into the Nechako River watershed.

The decision follows a long and complex trial between the Plaintiffs and three defendants: RTA, the government of British Columbia ("BC"), and the government of Canada ("Canada").

The Plaintiffs asked Justice Kent 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 of these points were the subject of extensive evidence and argument over the 189 day trial.

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. In reaching its decision, 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.

However, the Court found that RTA could not be held liable for the otherwise proven nuisance or be ordered to change how it operates the Kenney Dam. Instead, RTA could rely on the defence of statutory authority, which protects parties from liability if the nuisance they cause is the inevitable result of government-authorized conduct.

The Plaintiffs had argued that the extensive harms caused by RTA are not the inevitable result of the government authorizations—there are alternatives to how RTA diverts the Nechako flows that would not cause the harm. Further though, if the harms are the inevitable result of government authorizations, those authorizations are unconstitutional to the extent they breach the

plaintiffs' rights under s. 35 *Constitution Act, 1982*, and are therefore of no force or effect to shield the company from the proven liability in nuisance. Justice Kent rejected this argument.

However, 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.

Background

The Saik'uz and Stellat'en are two of fourteen Dakelh (Carrier) First Nations (para. 220).[1] They have lived in the Nechako River watershed since long before colonial incursion began and are recognized as "bands" under the *Indian Act* (paras. 2, 6). Saik'uz's primary reserve community is located at Stoney Creek (para. 7). They also have a reserve at Noonla on the Nechako River and several traditional fishing sites downriver (para. 7). Stellat'en's primary reserve community is at the west end of Fraser Lake at the mouth of the Stellako River, where they have maintained a fishery, including for sockeye and sturgeon that migrate through the Nechako and Nautley systems into Fraser Lake and the Stellako (para. 8).

While the defendants put the Plaintiffs to the strict proof of their rights through trial, the Court had "no hesitation" in finding that fishing in the Nechako watershed, for a diversity of species, was and is fundamental to the Plaintiffs' physical, cultural, and spiritual sustenance and made a formal declaration that the Plaintiffs have a constitutionally protected right to fish for food, social, and ceremonial purposes in the Nechako watershed (paras. 252-253, see also paras. 246-251, 661).

Situated in the northern interior of BC, the Nechako River is one of the largest tributaries of the Fraser River (para. 1). In the 1950s, British Columbia authorized RTA to build a large dam and reservoir in the Nechako's headwaters to divert water to generate electricity for a smelter in Kitimat (see historical overview beginning at para. 66).

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. Instead, it flows west through a tunnel and generating station, and then out to the ocean via the Kemano River. Some water is released into the Cheslatta River via a spillway (the "Skins Lake Spillway"), where it flows downstream for about 80 km before eventually entering the Nechako River approximately nine kilometres below the Kenney Dam (see paras. 1-5). Only 30 to 40 percent of the natural, pre-dam flows now enter the upper Nechako River 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 (paras. 5, 390). These changes have had profound effects on the river's bed and banks (para. 5).

In the 1980s, the federal government directed RTA to release additional water into the Nechako for the protection of fish (paras. 111-112). RTA objected to the federal government's jurisdiction on this matter, leading to litigation that ultimately resulted in a settlement agreement (the "1987 Settlement Agreement") (paras. 113-116). During this time period, there was disagreement within the Department of Fisheries and Oceans ("DFO") as to the amount of water needed for the fish (see paras. 118-133). Twelve First Nations parties, including Stellat'en and Saik'uz, attempted, ultimately unsuccessfully, to join the case. They were excluded from negotiations

[1] All para references are to *Saik'uz* unless otherwise noted.

leading to the 1987 Settlement Agreement, which established the flow regime still in place today (paras. 134-137, 141).

In the late 1980s, RTA began work on the Kemano Completion Project to expand its ability to produce electricity. The project was controversial and in 1995 BC announced its cancellation. Following litigation, another settlement agreement was reached in 1997, which led to a new water licence (paras. 154-157). In 2012, a further project was approved, and a final amended water licence was issued to RTA (paras. 158-159).

All these authorizations were issued without consulting the Plaintiffs about the impact of the diversion on their rights (paras. 565, 582, 585-588), despite their repeated attempts to make their concerns and objections known since the 1980s (para. 613).

Discussion of Legal Issues

Following is a summary of the key findings in respect of the legal issues as they were framed by the Court.

1. Are the Plaintiffs the proper rights holders to bring this claim?

Yes. Before an Aboriginal right, including title, will be recognized by a court, the community in question must establish that they are the proper group to bring forward the claim and then the court moves on to analyze the right in the context of that group.

In this case, the Court found that each of the Plaintiff First Nations are proper rights holders for bringing forward this claim (para. 236). The defendants argued variously that either the smaller land-holding groups (*sadekus*) that collectively make up the First Nations or the larger Dakelh Nation are the proper claimants for Aboriginal title. BC's expert advocated for an approach that would require evidence of present-day *sadekus* and their lands (*keyohs*) and trace those back through space and time to 1846, the date of the assertion of European sovereignty. Justice Kent rejected both this approach and the argument that the proper rights-holder is the larger Dakelh Nation (see paras. 225-236).

2. Do the Plaintiffs have Aboriginal rights to fish in the Nechako River for food, social, and ceremonial purposes?

Yes. In deciding whether to find an Aboriginal right to fish, courts follow three steps. First, they characterize the right claimed. Next, they decide whether a pre-contact practice, relevant to the right, has been shown to be an integral part of the claimant's pre-contact distinctive culture. Last, the claimant must show that the right they claim in the modern context is "reasonably regarded as a continuation of the pre-contact practice" (para. 239).

The defendants put the Plaintiffs to strict proof of their Aboriginal rights to fish, requiring them to present substantial expert and lay witness evidence on the importance of fishing to their culture and way of life (para. 242).

Justice Kent described the lay witness evidence this way:

> The Saik'uz and Stellat'en witnesses described in their testimony the methods taught to them as children and which they have employed throughout their lives to catch salmon and Nechako White Sturgeon at various specific family-"owned" locations on the Nechako River, Fraser Lake, and the Stellako River. They also testified about specific spiritual or ritual practices related to fishing and the role that activity played in the intergenerational transmission of culture. The evidence corroborated the exclusivity of fishing sites and the requirement of permission for fishing to occur at sites traditionally occupied by other families. All of this evidence was uncontroverted and I accept it without reservation. (para. 249).

Justice Kent stated that he had "no hesitation" in finding that the Plaintiffs have Aboriginal rights to fish in their respective areas of the Nechako watershed (see paras. 252-253).

3. Do the Plaintiffs have Aboriginal title to land in locations in the Nechako River watershed?

Yes, but this was made as an alternative finding, as establishing title was not strictly necessary given the Court's finding that fishing rights could ground the claim in nuisance.

The Plaintiffs did not seek formal declarations of title, but rather findings of Aboriginal title to support their nuisance and breach of riparian rights claims (para. 267). The Court declined to make these findings on procedural grounds: the areas where these findings were sought are subject to overlapping claims by other First Nations who were not made parties to the action and whose evidence was not presented to the Court (paras. 276, 278).

Nonetheless, Justice Kent went on to review the evidence and make findings of fact that would permit the determination of the issue by appeal courts if necessary. The Court limited its consideration to two locations: Noonla IR #6, on the Nechako, and Stellaquo IR #1 on Fraser Lake at the mouth of the Stellako, as title to these locations "should suffice to ground the tort claims and, in any event, they likely represent the most obvious cases in respect of title to land and riverbeds" (para. 279).

The defendants argued that the Plaintiffs had not adduced sufficient evidence to establish exclusive occupation of Noonla by any Saik'uz members (para. 302). The Court considered evidence of a village located at Noonla described by early European visitors to the area (paras. 288-299), transcripts of oral history related by a Saik'uz elder in 1977 (paras. 293-301), and ethnographic evidence with respect to Dakelh legal traditions and cultural patterns (para. 303). Justice Kent found that it was a Dakelh cultural pattern to locate villages at fishing weir locations, that there was a weir at Noonla, that the fishery at Noonla would have been part of a *keyoh* controlled by a hereditary leader and exclusively used and occupied by a *sadeku* in accordance with Dakelh legal traditions (para. 303). He went on to find that the contemporary collective whose members have demonstrated a cultural connection to the historic community at Noonla is the Saik'uz First Nation (para. 304). On this basis, he had "no hesitation in finding that Aboriginal title to […] Noonla Indian Reserve #6 should be and is vested in Saik'uz First Nation" (para. 305).

The determination of title to Stellaquo IR #1 was less complicated (para. 306). There was no question that Stellaquo was occupied in 1846 and continues to be to this day (paras. 307-313). The question with which the Court had to grapple was whether it was exclusively occupied by Stellat'en First Nation. The early records seem to suggest that the village at the west end of Fraser Lake (Stellaquo IR 1) and the village at the east end of Fraser Lake (today the primary

reserve community of the neighbouring Nadleh Whut'en First Nation) were occupied by members of the same Dalkelh sub-tribe (para. 314). Justice Kent found this was of no import, as the descendants of the people who had lived in Stellaquo in 1846 continue to live there today while the descendants of the people at Nadleh continue to live there today. Whether they were historically one group or two, they are two separate First Nations today "and each is now the contemporary collective with a demonstrable ancestral connection to each of the two villages that existed in 1846 […] and continue to exist today" (paras. 314-315). On this basis, the Court concluded that the Stellat'en First Nation are the appropriate holders of Aboriginal title to Stellaquo IR#1 (para. 316).

4. Do the Plaintiffs have Aboriginal title to the riverbed in locations along the Nechako River?

The Court declined to decide on this issue, but wished to "make it clear, however, that [it is] not dismissing the plaintiffs' alternative claim for waterbed title on the merits. [The Court is] simply deferring determination of that issue to a case where the question can be decided on a more complete evidentiary record" (para. 334).

5. Can Aboriginal rights, such as a right to fish, ground an action against a non-government party under the law of nuisance?

Yes. The Court found that Aboriginal rights to fish can ground an action in private nuisance. Counsel for the Plaintiffs argued:

> Whether the conventional nomenclature of nuisance law (such as "proprietary interests") is technically descriptive of Aboriginal rights cannot dictate whether a claim in nuisance lies against a defendant whose use of land unreasonably interferes with those rights. As the SCC has emphasized, Aboriginal rights are *sui generis* and not to be compartmentalized by traditional common law terms.
>
> …
>
> More fundamentally, though, and apart from any characterization of Aboriginal rights as "usufructary" [a reference to *Tsilhqot'in*] or by comparison to a *profit à prendre*, the *sui generis* nature of Aboriginal rights, the important purpose they serve (reconciliation and provision of cultural security and continuity), and the fact that they are intimately related to a particular piece of land means that a claim in nuisance must be sustainable in law when there is an unreasonable interference with the right itself or the land to which the right is intimately related. If an extension of the common law is necessary to achieve that, this is the appropriate case in which to do so. (para. 376, emphasis added by Justice Kent).

After reviewing this argument, the Court said:

> I agree with every word of this submission and I have no hesitation in concluding that the plaintiffs' Aboriginal right to fish is a legally sufficient foundation for an action in private nuisance. (para. 377).

The Court also found that a case against a non-government entity can be grounded in Aboriginal rights, as well as First Nations' interests in their reserve lands, and Aboriginal title (paras. 356-359, 367, 383).

6. Do the Plaintiffs have riparian rights and if so, has there been a breach of those riparian rights?

In an alternative to their claim in nuisance, the Plaintiffs argued that they possessed riparian rights (water-related rights arising from their interests in the riverbank or land abutting the river) which had been interfered with by RTA. The Court declined to decide on this issue in this case (see paras. 514-522).

7. Has the regulation of the Nechako River, through the construction and operation of the Kenney Dam, harmed fish populations, including the Nechako White Sturgeon, sockeye salmon, and chinook salmon?

Yes, for sturgeon and sockeye.

To succeed in their nuisance claim, the Plaintiffs were required to establish that RTA's conduct has in fact caused harm to fish stocks, and in turn interfered with their rights by reducing the availability of fish. The standard of proof required is a balance of probabilities, meaning the Court must find it is more likely than not that RTA's actions have caused the harm complained of by the Plaintiffs (see paras. 345-347, 384-385). There is no requirement that the defendant be the only cause of the problem. Even if other factors (such as pollution, over-fishing, or climate change) have contributed to the decline in fish stocks, that does not mean the harm done by a defendant does not constitute a nuisance (see paras. 386-387).

The Court considered each species separately, as follows:

a) Sturgeon

The Nechako White Sturgeon population is at risk of imminent extirpation. Justice Kent held that there was "overwhelming" evidence that the installation and operation of the Kenney Dam is the cause of the harm to this population. Nechako White Sturgeon are experiencing a "chronic recruitment failure", in which viable offspring are not successfully transitioning into the juvenile stage or surviving to adulthood and reproducing. As the Court noted, this problem has also been observed in other dammed rivers including the Columbia and Kootenay systems. Although expert witnesses in this case disagreed about the precise mechanism through which this occurs, they all agreed that the operation of the dam and the diversion of water was the root cause (paras. 404-405).

BC led extensive evidence on the work of the Nechako White Sturgeon Recovery Initiative ("NWSRI") towards improving the plight of the sturgeon. However, the Court held that:

> The simple fact of the matter is that the physical habitat restoration experiments undertaken by the NWSRI have not (at least, not yet) produced any meaningful solution for reversing the recruitment failure, and the hatchery program has yet to produce meaningful long-term results and is not intended as a permanent solution to the problem in any event (para. 422).

b) Chinook

The Court found that the dam "initially had a devastating effect" on the Nechako Chinook population but that it has since recovered. Justice Kent was not convinced, on a balance of probabilities, that the population is still being harmed today (see paras. 424-441). He left open the possibility that "restoration of a somewhat more natural flow regime in the river, particularly a spring freshet, might improve the health of the Chinook population" (para. 441), but found that there was not sufficient evidence before him to find this as a fact.

c) Sockeye

The Court agreed with the Plaintiffs that the operation of the dam is causing increased temperatures in the Nechako River, contributing to the premature deaths of sockeye migrating through the Nechako on their way to their spawning grounds (see paras. 442-447, 463-464). As the Plaintiffs pointed out, the waters of the Nechako River are the warmest that these fish encounter in their lifetimes. In particular, the Court held that the temperature target to which the River is currently managed during the sockeye migration period, 20 degrees Celsius, is not sufficiently protective of sockeye and that a target of 19 or even 18 degrees would be more "much more effective" (para. 463). The Court also noted that the current, inadequate temperature target is regularly exceeded (paras. 449-450, 462-464).

8. Does this harm to fish and in turn to the Plaintiffs' rights constitute a nuisance in law?

Yes. The Court found that the impact on the Plaintiffs is substantial and "hugely disproportionate" to any effect on the non-Indigenous population. Justice Kent concluded that this interference with the Plaintiffs' rights goes beyond any expected 'give and take', meeting the legal threshold for nuisance, and therefore that "RTA must be found liable to the plaintiffs for the tort of private nuisance unless it is immunized by defences based on statutory authority or limitations legislation." (paras. 471-472, 493, for further discussion on nuisance law see paras. 346, 360-361).

9. Can RTA rely on the defence of statutory authority? Is such a defence inapplicable because of the constitutionally protected nature of the Plaintiffs' Aboriginal rights? What about limitation defences?

Yes. The Court found that the harm to fish and resulting interference with the Plaintiffs' rights is the inevitable result of the construction and operation of the Kenney Dam, and that RTA was authorized by government to construct and operate the dam in the manner it did. This meets the test for the defence of statutory authority (see paras. 525, 542-543).

The Court rejected an argument by the Plaintiffs that RTA's authorizations were constitutionally inapplicable insofar as they infringed the Plaintiffs' Aboriginal rights, and that therefore they could not be relied upon as a defence to nuisance (see paras. 572-573). The Court found that Alcan was entitled to rely on the "common law, legislation, and contracts which have throughout applied to and governed its conduct and commercial undertaking", noting that if this undertaking

has harmed the Plaintiffs' Aboriginal rights, "the plaintiffs' remedy should lie against the Crown and not RTA in the circumstances of this case" (para. 574).

The Court went on to consider whether there has been an unjustified infringement of the Plaintiffs' Aboriginal rights, something he noted could be relevant if an appeal court decides that he was wrong on the question of constitutional inapplicability. The Court held that were it compelled to find on the matter, "I would likely determine that RTA's desire to operate at maximum capacity does not outweigh the resulting adverse effects on the plaintiffs' Aboriginal interests and that the latter infringement is no longer justified" (para. 601.) Indeed, it stated that, in light of the "new reality" set out in its reasons, including its findings on the Plaintiffs' Aboriginal rights, it is necessary for the Crown to "reassess its prior conduct". Justice Kent pointed out that BC and Canada currently have various tools at their disposal to increase water flows in the Nechako (paras. 589-590).

The Court also considered arguments by RTA that the Plaintiffs brought their claims too late, either under the *Limitation Act*[2], or because they "acquiesced" to the dam's operation (called the doctrine of laches). Justice Kent rejected RTA's *Limitation Act* argument, finding that the damage to fish is continuously occurring (paras. 611-612). He did not consider it necessary to decide the issue of laches but remarked that it was "completely unrealistic" to suggest that the Plaintiffs acquiesced to the installation and operation of the dam (para. 613).

10. Should an injunction be ordered requiring RTA to release more water into the Nechako River to protect and benefit the health and abundance of fish?

No. Because the Court found that the defence of statutory authority was available to RTA, it did not have to decide on what the appropriate remedy would have been (para. 626).

However, Justice Kent nevertheless concluded that, if RTA had been liable to the Plaintiffs, he "would have favoured an injunction increasing water flows into the Nechako River", though he would have asked for further submissions from the parties on remedy, including potentially sending the parties to negotiate and attempt to come to an agreement (para. 642).

11. Do the governments of BC and Canada have an obligation to take action to protect the Plaintiffs' Aboriginal rights to fish?

Yes. Justice Kent made several findings and declarations on the responsibility of the Crown defendants to protect the Plaintiffs' rights. He stated:

> An Aboriginal right to fish may not bestow upon the plaintiff First Nations a property interest in the fish themselves, but without the fish, there can be no Aboriginal right to exercise.
>
> It follows that the Crown, both provincial and federal, has an obligation to protect the plaintiffs' Aboriginal right to fish by taking all appropriate steps to protect the fish and to act honourably in doing so. (paras. 645-646).

And:

> The Crown suggests it will not ignore any finding this Court may make respecting the plaintiffs' Aboriginal rights. It does not, however, suggest what it might do as a consequence in that regard, and one perhaps cannot fault the plaintiffs for a certain degree of skepticism on the matter, given their exclusion from critical decision-making in the past, the Crown's refusal

[2] *Limitation Act*, R.S.B.C. 1996, c. 266.

> to formally admit their Aboriginal rights in this litigation, the unexplained delay in implementing *SARA* to address the White Sturgeon crisis, and the limited accomplishments of initiatives such as the [Nechako Environmental Enhancement Fund]. (para. 652).

Having not issued the injunction sought against RTA, the Court said it could not make the declaration sought by the Plaintiffs requiring the Crowns to implement the injunction, but then went on to say:

> … given the "new reality" articulated in these reasons, there may be considerable benefit for the plaintiffs in making a declaration that:
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> 1. The plaintiffs have an Aboriginal right, as claimed, to fish for food, social, and ceremonial purposes in the Nechako watershed; and,
> 2. As an incident to the honour of the Crown, both the provincial and federal governments have an obligation to protect that Aboriginal right.
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> I therefore make such a declaration at this time. (para. 653).

12. Should the Court maintain "supervisory jurisdiction" to ensure the parties move forward appropriately following the decision?

No. While the Court did not have to decide on this issue, it noted it lacks the requisite fisheries management expertise and would have considered it otherwise inappropriate to have maintained supervisory jurisdiction in this case (paras. 654-660).

Conclusion

In sum, the Court made several key findings of fact and law in favour of the plaintiff First Nations, including:

- that both Nations have Aboriginal fishing rights in the Nechako watershed,
- that RTA's operation of the Kenney Dam has harmed both sturgeon and sockeye salmon,
- that this harm is an interference with those rights and is actionable in private nuisance,
- that the infringement of the Plaintiffs' Aboriginal fishing rights is likely no longer justified, and
- that both Crown governments have positive obligations to protect the Plaintiffs' Aboriginal fishing rights.

This was the first time a Court has made a finding in tort on the basis of interference with an Aboriginal right.

The Court refused to grant injunctive relief against RTA directly on the basis of the defence of statutory authorization. In reaching this conclusion the Court rejected the Plaintiffs' argument that the authorizations on which RTA relied were constitutionally incapable of authorizing an unjustified interference with their section 35 rights. However, the Court made strong declarations against the two Crown defendants, emphasizing BC and Canada's responsibility to act to protect the Plaintiffs' Aboriginal rights. The decision explicitly recognizes that the honour of the Crown includes a responsibility to reassess Crown conduct when Aboriginal rights are declared, and to take steps to protect those rights from ongoing interference—even where the interference in question was authorized and began many years ago.