Cassels

BCSC Finds Companies Can Be Liable in Tort for Impacts to Aboriginal Rights, but Defences Exist

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On January 7, 2022, the Supreme Court of British Columbia (Court) released its decision in *Thomas and Saik'uz First Nation v. Rio Tinto*[1] (*Saik'uz First Nation*). The decision addressed the plaintiff First Nations' (First Nations) claims of nuisance against Rio Tinto Alcan Inc. (RTA) for impacts to their Aboriginal rights and title as a result of RTA's construction and operation of the Kenney Dam (Dam). The decision is expansive, resulting from 189 days of trial, and it is relevant for companies that may impact Aboriginal rights and title through their operations.

Facts

In the 1950s, British Columbia authorized a predecessor to RTA to construct the Dam to generate hydropower for smelting aluminum.[2] At the time of the authorization, Department of Fisheries and Oceans had considered the impacts that the Dam would have on fish in the Nechako watershed.[3]

Over 70 years later, the construction and operation of the Dam was found by the Court to have negative effects on the abundance and health of the fish population in the watershed.[4]

The First Nations have reserves downstream of the Dam and assert Aboriginal rights and title over areas within the Nechako watershed. They claim that the Dam has impacted these rights, including through reduced waterflow which has adversely impacted fish health.

In seeking to establish that RTA had acted tortiously against their Aboriginal rights, the First Nations asked the Court to find that they held Aboriginal rights to fish in the affected waterways. The First Nations also asked for the Court to find that they held Aboriginal title to their reserve lands, the bed of the Stellako River and Nechako River, and certain fishing sites.[5]

The Court found that the First Nations had established an Aboriginal right to fish, and it noted in *obiter dicta* that they had satisfied the requirement to establish Aboriginal title to their reserve lands (but without prejudice to other Indigenous communities which may have overlapping claims).[6]

Issues

In its decision, the Court identified two key principles of law that are relevant for proponents:

1. Proponents may be liable in tort where they impact Aboriginal rights; and
2. Proponents may rely on valid government authorizations as a defence to a finding of tortious liability.

Proponents Can Be Liable for Impacts to Aboriginal Rights

In the trial, RTA had argued that Aboriginal rights are only actionable against the Crown and are not actionable against a private entity under Canadian law.[7] Arguments were also made suggesting that the right to fish was not sufficient to ground the tort claim, since the right was not to ownership of the fish themselves.[8]

The Court disagreed. Impacts to Aboriginal title or other rights, such as a right to fish *are a legally sufficient foundation for an action in private nuisance*.[9] For Aboriginal title, the foundations of this claim are more straightforward. However, in the case of Aboriginal rights, such as fishing, the nature and context of the right may require consideration and may provide a foundation for an action "in the appropriate circumstances."[10] This liability extends to corporate entities, such as RTA, as well as to individuals.[11]

The Court found that RTA could be exposed to liability where the installation and operation of the Dam resulted in "substantial and unreasonable" interference with Aboriginal interests, such as ownership and occupation of land, or fishery rights associated with such land.[12] "Such liability can exist even where RTA has complied with all contractual obligations and licensing requirements imposed by the Crown."[13] Based on the evidence presented, the Court found that RTA would be liable for such impacts unless it could be immunized by a defence to the tort claim.[14]

Defence Exists Where Impacts Are Authorized by Statutory Authority

The Court noted that where an act is authorized by statute, or where it is the inevitable result of exercising statutory power, then *the act cannot be tortious*.[15] In order to rely on this defence, the statute must authorize the work, conduct, or activity complained of, either expressly or by necessary implication.[16] In understanding the full scope of permitted activities, consideration must be given to subordinate legislation, regulations, and even contracts.[17]

The defence of statutory authority may not arise where the activity could have been done in another manner that would avoid the infringement of private rights,[18] however this restriction does not appear to apply where the behaviour itself has been expressly authorized (such as storing and using water for hydroelectric production).[19]

The Court ultimately concluded that RTA had received express authorization to construct the Dam and to divert the waters as they had. “If RTA had in some way exceeded the authorizations, then the plaintiffs’ claim in nuisance could have succeeded.”[20] However, in the circumstances, RTA had strictly complied with its authorization and could rely on the defence of statutory authority.

Implications: Understand Your Authorizations

The decision in *Saik’uz First Nation* highlights in greater detail that proponents can be liable for impacts to Aboriginal rights. Proponents may be able to defend such actions where the alleged impact was authorized by statute or was necessarily incidental to a valid authorization, but this defence may be limited.

The defence of statutory authority requires that the tortious conduct be expressly authorized or required by necessary implication. Without satisfying this requirement, a proponent could find themselves liable for impacts to Aboriginal rights even if they were fully in compliance with government regulations.

Proponents seeking to avoid liability should consider whether their activities could adversely impact Aboriginal rights. Aboriginal rights such as hunting, trapping, harvesting and title may be easy to identify, but other types of Aboriginal rights may also be asserted. Where there is a risk of adverse impact to these rights, proponents should consider whether their activities have been authorized by statute, expressly or by implication (rather than simply being permissible at law).

Implications: Anticipate More Litigation

The decision in *Saik’uz First Nation* is likely to support further litigation in the context of Aboriginal law. While litigation has historically focused on the relationship between the Crown and Canada’s Indigenous peoples, *Saik’uz First Nation* opens the door for greater litigation between Indigenous peoples and proponents.

The decision highlights that instances of non-compliance with permits and other authorizations create risk beyond liability found under the statutory regime. Additionally, the decision may create additional uncertainty for those businesses that rely on disturbances to land, air or water and the Crown permits and authorizations relating thereto. Like so many other areas of Aboriginal law, it seems that the Crown or governments continue to have a key role to play in ensuring that their regulatory and authorization schemes and processes consider Indigenous rights and interests and properly authorize desired proponent activities where they might otherwise result in a claim at common law.

The Supreme Court of Canada has written much about the preference of negotiation to litigation in advancing reconciliation in Canada.[21] While *Saik’uz First Nation* may open a new door in Aboriginal law

litigation, the pathway forward towards reconciliation between Indigenous peoples and proponents may be found through the types of discussions and negotiations that have been promoted by the Supreme Court of Canada for nearly two decades.

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[1] *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.,* 2022 BCSC 15 [*Saik'uz First Nation*].

[2] *Ibid* at para 3.

[3] *Ibid* at para 81.

[4] *Ibid* at para 661.

[5] *Ibid* at paras 267 and 268.

[6] *Ibid* at para 661.

[7] *Ibid* at para 350.

[8] *Ibid* at para 372.

[9] *Ibid* at para 377.

[10] *Ibid* at paras 383 and 519.

[11] *Ibid* at para 355.

[12] *Ibid* at para 491.

[13] *Ibid.*

[14] *Ibid* at para 493.

[15] *Ibid* at para 525.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid* at para 541.

[20] *Ibid* at para 602.

[21] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14.
