Cassels

No Open Floodgates: BCCA Upholds the Defence of Statutory Authorization for Impacts to Aboriginal Rights by Third Parties

Sandra Gogal, Aaron Cressman, David How, Shermaine Chua

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On February 26, 2024, the British Columbia Court of Appeal (the BCCA) issued its decision in *Thomas v. Rio Tinto Alcan Inc*.[1] *Thomas* concerned an appeal of a decision by the British Columbia Supreme Court (the BCSC), which had dismissed a claim in nuisance against Rio Tinto Alcan Inc. (Rio Tinto) by the Saik'uz First Nation and Stellat'en First Nation (collectively, the First Nations).[2]

The BCCA largely upheld the BCSC's decision, affirming that:

- an Aboriginal right protected under section 35 of the *Constitution Act, 1982* (Section 35) can ground a common law private claim in nuisance in appropriate circumstances;[3]
- a nuisance claim arising from interference with an Aboriginal right is subject to the defence of statutory authority;[4]
- the defence of statutory authority is available where the work or activity which caused the nuisance is authorized by statute and the nuisance is the "inevitable result" of carrying out the work as is expressly or implicitly authorized by the statute or regulatory regime;[5]
- an authorizing statute's infringement of an Aboriginal right does not render the defence of statutory authority constitutionally inapplicable or unavailable to private parties;[6] and
- an Indigenous group must seek remedies for infringement of an Aboriginal right resulting from ongoing Crown authorizations against the Crown, not against the private parties relying on those Crown authorizations.[7]

The BCCA also upheld the BCSC's decision that it could not make a finding of fact as to the First Nations' Aboriginal title to certain lands due to an insufficient evidentiary record and corresponding prejudice to overlapping title claims.[8]

However, the BCCA found that the BCSC had erred in declaring that British Columbia and Canada have "an "obligation" to protect the [First Nations'] Aboriginal right to fish for food, social and ceremonial purposes."[9] The BCCA found the BCSC had "taken an unduly narrow approach to the scope of declaratory relief" such that the declaration, "because of it is generalized nature, is of no real practical utility" to the First Nations.[10] Accordingly, the BCCA allowed the appeal in part and varied the declaration to include more specific terms reflecting British Columbia and Canada's fiduciary duty to protect the First Nations Aboriginal

rights by managing the Nechako River (the river relied on by the First Nations) flow regime and annual water allocation.[11]

An Aboriginal Right can Ground a Private Nuisance Claim, However the Defence of Statutory Authority Remains Available Even if the Authorizing Statute Infringes on Aboriginal Rights

The BCCA agreed with the BCSC's decision that a private nuisance claim was available to the First Nations against Rio Tinto.[12] The Court also upheld the BCSC's findings on the applicable framework for assessing causation and fresh damage necessary for a finding of continuing nuisance, unbarred by the applicable statutory limitation period.[13] However, the BCCA held that, as with all private nuisance claims, a claim arising from the interference of an Aboriginal right is still subject to any available defences. Relying on the decision in *Sutherland,*[14] the BCCA agreed that Rio Tinto was entitled to rely on the defence of statutory authority because:

- the statutory authority unambiguously and specifically authorized Rio Tinto's activities;[15]
- it specifically authorized the work, activity or conduct complained of in the place where that work, activity or conduct took place;
- the applicable regulatory framework specifically contemplated that the nuisance might arise from the authorized activities and was later modified to respond to the nuisance;[16]
- the regulatory authorities set out a structured regime with which Rio Tinto is obligated to comply;[17] and
- an Aboriginal group may not rely on their constitutionally-protected Aboriginal rights to render a common law defence to a private law claim in nuisance inapplicable.[18]

The BCCA specified that, while the defence of statutory authority was available to Rio Tinto to defeat the claims against it by the First Nations, it did not operate to extinguish the claims against British Columbia and Canada.[19]

The BCSC Erred in Providing an Overly Generalized Declaration That Did not Reflect the Crowns' Fiduciary Duty in Managing the Nechako River's Flow and Water Allocation

The Court found that the First Nations' Aboriginal right to fish in the Nechako River imposes a positive, fiduciary obligation on British Columbia and Canada to protect that right when managing the Nechako River's flow regime and annual water allocation.[20] The BCCA held that this obligation includes both a duty to

consult with the First Nations when contemplating actions or decisions that may cause a novel adverse impact to their Aboriginal right to fish, as well as a duty to manage the Nechako River's flow regime and water allocation in a manner that is substantively consistent with the Crown's obligations to Indigenous peoples.[21] By actively participating in the management of the Nechako River's flow regime and water allocation, the Court found that British Columbia and Canada had assumed discretionary control over a subject matter impacting the First Nations' established Aboriginal rights such that they have a "strong" fiduciary duty to "act with reference to the [First Nations'] best interest."[22]

The BCCA found that the BCSC committed a material error by taking an unduly narrow approach to the type of declaratory relief it could order.[23] Although the BCSC correctly found a clear connection between British Columbia and Canada's ongoing regulation of the Nechako River, the declaratory relief ordered reflected an erroneous position where the BCSC "considered [itself] without the authority to craft a declaration that particularized any specific duties borne by government."[24] Such a bare declaration served "little purpose" and failed to "translate into substantive change."[25]

Accordingly, the BCCA varied the BCSC's declaration to include more specific terms that reflect British Columbia and Canada's fiduciary duties to appropriately manage the Nechako River's flow regime and water allocation and to consult with the First Nations where its action or conduct in managing the annual water allocation and flow regime for the Nechako River raises the potential for a novel adverse impact on the right.[26]

Takeaways

The BCCA confirmed that private parties may rely on the defense of statutory authorization for the impacts of their activities on established Aboriginal rights.

The ability to rely on the defense is a question of mixed fact and law and is highly dependent upon the degree of discretion allowed under the governing legislative and regulatory framework. While Rio Tinto had limited operational flexibility in terms of water storage and diversion within its authorizations, it had no real discretion regarding water flow.

The BCCA did not interfere with the trial judge's conclusion that Section 35 Aboriginal rights are sufficient to ground a claim in nuisance, of and by itself, without any connection to the land, but in so doing, remarked that the trial judge did, in fact, find that there was a connection between the Aboriginal right to fish and the reserve land and water beds in question.

The BCCA also acknowledged that it is trite law that "a remedy against the Crown may affect third parties."[27] While proponents may be able to rely on the defence of statutory authority to shield themselves from direct liability, they may yet experience knock-on effects of remedies against the Crown.[28] Thus, a

remedy against the Crown may still impact proponents and any activities that depend on Crown authorizations, permits, or approvals.

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[1] *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [*Thomas*].

[2] See *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15; for an overview of the BCSC's decision, please see our earlier update.

[3] *Constitution Act, 1982*, s. 35, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11; *Thomas*, at paras. 54, 77—79, and 283.

[4] *Thomas,* at paras. 82—83, 154.

[5] *Thomas,* at paras. 185 and 190.

[6] *Thomas,* at paras. 290—291.

[7] *Thomas,* at paras. 281, 284, 287, and 291.

[8] *Thomas,* at paras. 320 and 334.

[9] *Thomas,* at para. 337.

[10] *Thomas,* at para. 392.

[11] *Thomas,* at para. 462.

[12] *Thomas,* at para. 154.

[13] *Thomas,* at paras. 123—124, 137, 139, and 151—154.

[14] *Thomas* at para. 156 citing *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416, leave to appeal ref'd, 29391 (8 May 2003).

[15] *Thomas,* at para. 232.

[16] *Thomas,* at paras. 232 and 235.

[17] *Thomas,* at para. 232.

[18] *Thomas,* at para. 263, 283—284, and 287—291.

[19] *Thomas,* at paras. 286—291 and 394—395.

[20] *Thomas,* at para. 417.

[21] *Thomas,* at paras. 418 and 420—421.

[22] *Thomas,* at paras. 427—429, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 18 and *Southwind v. Canada*, 2021 SCC 28 at para. 62.

[23] *Thomas,* at para. 392.

[24] *Thomas,* at para. 404.

[25] *Thomas,* at para. 405.

[26] *Thomas,* at para. 462.

[27] *Thomas*, at para. 267.

[28] *Thomas,* at para. 268.
