Update

April 29, 2015

B.C. Court of Appeal Allows Environmental Claim Based on Unproven Aboriginal Title to Proceed

On April 15, 2015, the British Columbia Court of Appeal (BCCA) concluded that a lower court erred in dismissing a First Nation's environmental action against Rio Tinto Alcan Inc. (Alcan) as disclosing no reasonable cause of action on the basis that Aboriginal rights or title had to be proven in court or acknowledged by the Crown before bringing such a claim. In doing so, the BCCA allowed the Saik'uz and Stellat'en First Nations (the Nechako Nations) to proceed with their civil claim against Alcan relating to the Kenney Dam and its alleged effects on the Nechako River system and its fisheries.

BACKGROUND

In September 2011, the Nechako Nations, an Aboriginal First Nation and an *Indian Act* "band," commenced a claim alleging that Alcan's construction of the Kenney Dam had diverted and altered the water flowing to the Nechako River system causing significant adverse impacts on the fisheries since the Dam's construction in 1952. The Kenney Dam was built in connection with an agreement between Alcan and the Province of British Columbia (B.C. or the Province) made in 1950 pursuant to the *Industrial Development Act* (the Act). The Act allowed B.C. to enter into agreements and make arrangements with persons proposing to establish an aluminum industry in the province, and in Alcan's case, allowed for the necessary licences to operate and construct the Kenney Dam in 1950 and a smelter in nearby Kitimat in 1953.

In their claim, the Nechako Nations asserted that the lands and the bed of the Nechako River are subject to Aboriginal title and rights on the basis of pre-sovereignty exclusive use and occupation of the Central Carrier territory, including specific sites along the Nechako River for fishing purposes and other cultural and spiritual practices. The Nechako Nations also claimed that they have reserves on the bank of the Nechako River system now governed by the *Indian Act*, which give them riparian rights at common law. The claim sought to restrain Alcan from operating the Kenney Dam by way of interlocutory and permanent injunctions (or damages in the alternative) on the basis of public and private nuisance and breach of riparian rights.

Alcan, in response, brought an application for summary judgment on the basis that it had a full defence of statutory authority pursuant to its agreement with the Province under the Act, or, in the alternative, an order striking the claim on the basis that it did not disclose a reasonable cause of action because Aboriginal title or rights had not yet been proven in court or acknowledged by the Crown and therefore could not form the basis of a claim. Alcan also sought orders striking out certain portions of the Nechako Nations' court materials as being impermissible collateral attacks on Alcan's licences (and therefore, collateral attacks on its full defence of statutory authority).

Chambers Judge Decision (2013 BCSC 2303)

In his decision, the Chambers Judge dismissed Alcan's application for summary judgment on the basis that Alcan had failed to establish its defence of statutory authority on the evidence. He also rejected Alcan's argument that the Nechako Nations' constitutional argument regarding the defence of statutory authority amounted to a collateral attack on the Alcan licences.

However, the Chambers Judge concluded that because the Nechako Nations' claims – in nuisance (both public and private) and breach of riparian rights – were predicated on asserted but unproven claims to Aboriginal title and rights, the claim had no reasonable chance of success. The Chambers Judge also dismissed the claim based on common law riparian rights on the basis that all water rights had vested in the Province prior to the creation of the reserves by the federal Crown, therefore those rights could not have attached to the reserve land (and, in any event, common law riparian rights had been extinguished by statute in B.C. under the *Water Act*).

Appeal (2015 BCCA 154)

The BCCA dismissed Alcan's cross-appeal on its summary judgment application, agreeing with the Chambers Judge that: (i) there was a genuine issue for trial on the defence of statutory authority (specifically, whether the impacts of the Kenney Dam were "inevitable"); and (ii) the claim of the Nechako Nations did not amount to a collateral attack on the Alcan licences.

The BCCA also granted the appeal of the Nechako Nations and overturned the Chambers Judge's dismissal of their action as disclosing no reasonable cause of action, thus allowing the Nechako Nations' action to proceed. The Court applied the well-known legal test on such a motion to strike – that the Court must assume that the facts as pleaded in the statement of claim are true. Applying that test, the BCCA concluded that "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" (para. 60).

Nuisance

Specifically, on the subject of private nuisance, the BCCA explained that the facts, as pleaded, could ground a claim in nuisance:

> [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.

The Court also observed that "the Nechako Nations plead facts that support a claim for an Aboriginal right to harvest fish," and concluded that this also could found an action in private nuisance.

On the subject of public nuisance, the Court reasoned:

> ... 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 Nations do not have a reasonable cause of action in public nuisance.

Riparian Rights

On the claim for breach of riparian rights, the Court concluded that it also could be founded on the asserted Aboriginal title to lands adjacent to the Nechako River. Dealing with Alcan's argument that the B.C. *Water Act* vests all fresh water rights in the Province, the Court concluded that it was arguable – as asserted by the Nechako Nations in their notice of constitutional question – that this legislation is constitutionally inapplicable to the extent it purports to extinguish riparian rights held by them prior to its enactment. Thus, it was not plain and obvious a claim for breach of riparian rights could not succeed.

Claim Permitted to Proceed Without Proof or "Recognition" of Aboriginal Rights

Having found that the Nechako Nations' claim in nuisance and riparian rights was tenable at law, the BCCA turned to what it considered to be "the real issue" on the appeal: "whether the Aboriginal rights have to be first 'recognized' before the claim can be advanced."

The BCCA rejected the notion that a First Nation must, prior to commencing a tortious civil claim against a non-governmental party, prove Aboriginal title as against the Crown, stating:

> [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.

Applying Supreme Court of Canada precedent in *Van der Peet*, *Delgamuukw* and *Tsilhqot'in Nation*, the Court concluded that "whatever Aboriginal rights the Nechako Nations may have are already in existence." As a result, there was no reason in principle to require them to first obtain a court declaration in an action against the Province before they could maintain an action against a non-governmental party seeking relief in reliance on their Aboriginal rights. The BCCA even went on to suggest that to find otherwise might violate the equality provisions of the *Charter of Rights and Freedoms*.

DISCUSSION

This decision does not diminish the significant challenges faced by First Nations in establishing Aboriginal rights or title and, on its face, does not assist First Nations seeking claims where title issues have been resolved. The Court has applied the applicable general law to assertions of Aboriginal rights with respect to a claimant asserting rights in tortious claims. In this context the decision is not surprising. However, if followed, the decision could undermine the ability of industry to obtain a speedy preliminary ruling in such actions where Aboriginal rights or title have not been previously proven or recognized. This could result in industry becoming embroiled in Aboriginal rights and title litigation better suited to involving only the Crown, with no summary escape valve.

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