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Indigenous Rights and Private Party Liability

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Matter Commented On: *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 (CanLII)

To what extent can private parties be held liable in tort law, specifically nuisance, for damage done to Indigenous rights? This was the issue in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 (CanLII) [*Thomas*]. In 1952, the Aluminum Company of Canada (now Rio Tinto Alcan Inc., or RTA) completed construction of a dam on the Nechako River in west-central British Columbia to generate electricity for its aluminum smelting operations. Construction of the dam had been authorized by agreements with and a licence from British Columbia pursuant to a provincial statute, the *Industrial Development Act*, SBC 1949, c 31, which had been enacted to facilitate construction of the hydroelectric dam (*Thomas*, paras 66-69). The company has abided by all the conditions of the agreements and the licence.

The Nechako watershed is within traditional territory where the Saik'uz First Nation and the Stellat'en First Nation (the plaintiffs) claim Aboriginal title and other Aboriginal rights, including fishing rights. They were not consulted and did not consent to construction of the dam, which has substantially altered the flow of the Nechako River and significantly impacted the sturgeon and salmon fisheries upon which they depend for food, and which are an important part of their culture (see *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), involving the same dam). The plaintiffs commenced this action against the company in nuisance and for impairment of their riparian rights, caused by construction of the dam and alteration of the flow of the river. As they were challenging the constitutional applicability of the *Industrial Development Act* and aspects of another provincial statute, the *Water Users' Communities Act*, RSCB 1996, c 483, constitutional question notice was given to the federal and provincial attorneys general, who joined the litigation.

Justice Nigel Kent wrote a lengthy judgment dealing with numerous issues, but not providing any remedy against the defendant company. The plaintiffs were seeking "a mandatory injunction requiring RTA to take all necessary steps to abate the nuisance and damage caused by the construction and operation of the dams, as well as damages" (para 136). The damages claim was not pursued and was regarded by Justice Kent as having been abandoned (paras 606, 609-10, 640). However, he did suggest that damages could be a viable alternative to injunctive relief (paras 639-41). No damage claim was made against the Crown (paras 490, 589, 592).

While noting that the plaintiffs were not challenging Crown sovereignty *per se*, Justice Kent commented that the case did raise the question of "[w]hether Aboriginal rights trump contractual rights and proprietary interests historically acquired from the Crown by third parties and eliminate

defences otherwise available to those third parties in the law of tort, [which] is a question that certainly seems to be a challenge to Crown sovereignty" (paras 199-200). In a remarkable discussion (at paras 179-204) of the legitimacy of Crown sovereignty– a topic judges generally prefer to avoid – he said this: "Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada" (para 198). Nonetheless, he felt bound to accept the reality of Crown sovereignty and the Supreme Court of Canada's view that the Crown had acquired sovereignty in BC in 1846, despite that Court's reliance in earlier cases on the discredited doctrine of discovery (paras 187-204).

Justice Kent also discussed the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) and the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, which affirmed the application of the Declaration in BC. On the basis of articles 26 to 29 in particular, he observed that "*UNDRIP* states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories" (para 208). He continued: "It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights" (para 212). He used *UNDRIP* to support his conclusions at various points in the judgment (paras 192, 280, 367, 371-72, 490; see Arend JA Hoekstra, Grace Wu, & Thomas Isaac, "BCSC Decision Suggests Implications for UNDRIP Legislation in Canada" (18 January 2022)).

On the Aboriginal title claim, Justice Kent held that the plaintiff First Nations are the proper rights-holders (paras 225-36). The plaintiffs emphasized that "they are not seeking any formal declaration of Aboriginal title in this case but only a 'finding' of Aboriginal title to limited areas of land/riverbed as defined below, so as to 'support' their nuisance claim and/or the breach of riparian rights claim" (para 267, Kent J's emphasis). Their assertion of title was limited to their reserves and portions of the riverbed and banks where they fished regularly. Justice Kent found that, apart from their reserves, there was not enough evidence to support the title claim on the test articulated and applied in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII). Their riverbed claims in particular lacked sufficient proof of exclusive occupation at the time of Crown assertion of sovereignty. Given the exclusivity of Aboriginal title, Justice Kent also noted the possible incompatibility of title to the riverbed with the public right of navigation (paras 331, 342; see *Chippewas of Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181 (CanLII), discussed in *Thomas*, paras 323-29). Given insufficient evidentiary support, he was not prepared to extend the law on Aboriginal title to submerged lands. However, he made clear "that I am not dismissing the plaintiffs' alternative claim for waterbed title on the merits. I am simply deferring determination of that issue to a case where the question can be decided on a more complete evidentiary record" (para 334).

As mentioned, Justice Kent did decide there was sufficient evidence of exclusive occupation for the plaintiffs to have Aboriginal title to their Indian reserves. However, he declined to find that they have Aboriginal title to their reserves because other First Nations have overlapping claims to the lands claimed by the plaintiffs, including their reserves, and those First Nations had not been

made parties, nor was their evidence heard (para 276). The plaintiffs suggested the judge's order could expressly provide that the title findings bind only the parties and are "without prejudice to any claims by non-parties with respect to any interest they may have in the land" (para 272), as in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494 (CanLII), a commercial fishing rights case, but Justice Kent was nonetheless concerned about exclusivity, both as a requirement for proof of Aboriginal title and a feature of title once established. He also raised the possibility of other First Nations having joint title with the plaintiffs, as envisaged in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at para 158. As there was "no full evidentiary basis to properly determine exclusivity between overlapping claimants and it is possible that a 'finding of title' in favour of the plaintiffs would irrevocably and unfairly disentitle another Indigenous group that may have a stronger claim" (para 276), he declined to make an Aboriginal title finding on "procedural grounds, namely, the absence of the overlapping title claimants either as parties or witnesses" (para 278).

With respect, I think Justice Kent's reasons for refusing to make a finding of Aboriginal title are questionable. Findings of title by courts are relative, not absolute. In a dispute over title between two parties, all a court can decide is which of them has a *better* title. A ruling in favour of one does not bind potential non-party claimants. A classic case, *Perry v Clissold*, [1907] AC 73, decided by the Privy Council, illustrates this. The plaintiff had been in adverse possession of land for less than the statutory limitation period when the Crown expropriated the land. The Crown refused to pay compensation because he was not the "owner." The Privy Council decided that, as against the Crown, the plaintiff's possession gave him title and so compensation for the value of the land had to be paid to him. The person dispossessed by the plaintiff was not known, but because he was not a party his claim to title as against the plaintiff would have remained valid until the limitation period expired. Likewise, in *Thomas* a finding of Aboriginal title would have bound the provincial Crown as a party and supported the nuisance, and possibly the riparian rights, claim against RTA, but could not have affected possible rights of persons who were not parties, including First Nations.

The plaintiffs pleaded private nuisance, alleging public nuisance as a fallback. A private nuisance claim lies when a person's enjoyment of possession and use of land is substantially and unreasonably interfered with by another landholder. RTA's astounding argument that the Aboriginal rights recognized and affirmed by section 35 of the *Constitution Act, 1982* do not support any rights of action against third parties was rightly rejected by Justice Kent. He pointed out that, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 56, Chief Justice Beverley McLachlin stated that "[t]he fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable" (quoted in *Thomas*, para 357). Justice Kent had no difficulty concluding that the plaintiffs' possession of their reserves was sufficient to support nuisance claims. Moreover, their *sui generis* Aboriginal fishing rights, whether or not amounting to a *profit à prendre* or some other property right, are also a basis for nuisance because they are intimately related to the plaintiffs' connection with the land (paras 375-83). After extensive examination of the evidence, Justice Kent concluded that construction of the dam and alteration of the flow of the Nechako River have caused substantial decline in the sturgeon and salmon populations, which has "had, and continues to have, a substantial impact upon the plaintiffs as an Indigenous community,

one that is hugely disproportionate to the burden imposed on the non-Aboriginal population of the region"; consequently, "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" (para 493).

Before dealing with those defences, Justice Kent discussed the riparian rights claim. These are common law rights that possessors of land bordering a waterway have, including rights to flow, access to, and limited use of the water. He decided that any such rights the plaintiffs might have had were extinguished by the *Water Privileges Act*, SBC 1892, c 47. As these would be common law rather than Aboriginal rights, they were not protected against provincial extinguishment (para 517). A claim to Aboriginal rights similar to common law riparian rights had not been established by evidence, but if it had been it could be countered by the defence of statutory authority (paras 518-22).

As mentioned earlier, authority to build the dam was provided by provincial licences and agreements authorized by provincial legislation. RTA argued that this statutory authority was a complete defence against the plaintiffs' claims. The plaintiffs argued that "constitutional inapplicability" prevented RTA from relying on this defence (paras 527-28). Justice Kent agreed with RTA and rejected the plaintiffs' constitutional argument. Among other things, he relied on the Supreme Court's *dicta* in *Tsilhqot'in Nation* that, where section 35 Aboriginal rights are concerned, constitutional protection is provided by the *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 justifiable infringement test rather than division-of-powers interjurisdictional immunity (paras 554, 571). However, in my opinion this wrongly assumes that the Supreme Court's rejection of the application of interjurisdictional immunity applies to claims arising from events before section 35 was enacted in 1982 (see Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation" (2015) 71 *Supreme Court Law Review* (2d) 67 at 79-80, n64. As construction of the dam preceded section 35 by thirty years, Justice Kent should have considered whether Parliament's exclusive jurisdiction over "Indians, and Lands reserved for the Indians" (*Constitution Act, 1867*, section 91(24)) prevented the province from authorizing it, given the substantial impact on Aboriginal title and fishing rights, as well as on *Indian Act*, RSC 1985, c I-5 reserve lands (to which the doctrine of interjurisdictional immunity appears still to apply, despite *Tsilhqot'in Nation*: see Nigel Bankes & Jennifer Koshan, "The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands").

In case he was mistaken about statutory authority being a complete defence, Justice Kent went on to consider whether the post-1982 impact of the dam on the plaintiffs' Aboriginal fishing rights was justifiable under the *Sparrow* test. On the existence of an infringement, he said that "any legislation or license issued pursuant to such legislation which enables the extirpation of or reduction in the fish population and thereby reduces an Aboriginal harvest clearly qualifies as such an 'infringement'" (para 580). Consequently, the dam's continuing presence and operation infringes the Aboriginal fishing right. Building the dam for the purposes of generating electricity and creating jobs was a valid legislative objective, but the Crown did not consult with the plaintiffs before construction, nor has it been consulting with them since over the reduced river flow. The plaintiffs were not asking for the dam to be removed or the smelter shut down; rather, they wanted the damage to the fishery to be mitigated by altering the flow. Justice Kent concluded: "If I was compelled to decide 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. I would first emphasize, however, that a good-faith process of consultation and accommodation with the plaintiffs about their concerns might well lead to a resolution acceptable to all parties" (para 601).

Turning briefly to the defences of limitations and laches, Justice Kent decided that, if the plaintiffs were claiming damages against RTA, a claim for damage covered by the 12-year limitation period might be barred by the *Limitation Act*, RSBC 1996, c 266. In opining that the claim might have been "extinguished" by the statute (para 609), he did not mention the potential constitutional problems with such a conclusion (provincial limitations statutes cannot apply to extinguish Aboriginal rights and can only infringe them post-1982 if the infringement can be justified on the *Sparrow* test: see Kent McNeil, "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" 2 December 2021, soon to be posted on Osgoode Digital Commons). Nonetheless, he rejected RTA's argument that there was no fresh damage (para 611). The altered flow in the river continued to impact the fish, which are living animals with new generations being born every year: "Hence, while the cause may be much the same from year to year (i.e., the regulated flow of the river), the resulting damage (death of fertilized eggs or live fish) occurs anew each and every year. Precise quantification of that damage is challenging, but I am satisfied that in the past 12 years it is sufficiently substantial to sustain the claim in tort" (para 612). Each time fresh damage occurred, the limitation clock would begin running anew. He also rejected the application of the equitable doctrine of laches because "it is completely unrealistic to suggest the plaintiff First Nations have 'acquiesced' to RTA's regulation of the river" (para 613).

Because he accepted the defence of statutory authority, Justice Kent did not grant any remedies against RTA. He stated that "[i]f actions authorized by government (whether through unconstitutional legislation, licences, or agreements, or a combination of all of these) result in harm to the plaintiffs' rights, only government must answer for that" (para 572). No damages were claimed against the Crown in right of Canada or BC, as they only joined the action when given notice of the constitutional question. Justice Kent decided nonetheless that the federal and provincial Crown both have a constitutional obligation to protect Aboriginal rights, in this case "by taking all appropriate steps to protect the fish and to act honourably in doing so" (para 646), and he issued a declaration to that effect (para 653). However, given that he lacked expertise on river flow and fisheries, he provided no guidance on how this obligation should be met, nor was he willing to retain supervisory jurisdiction over implementation of a new river flow regime.

Regrettably, the *Thomas* decision is another example of a string of cases, including *Delgamuukw*, where judges pay lip-service to more expansive interpretations of Indigenous rights and constitutional protections, and then fail to grant effective remedies. It is hoped that more judges will bite the bullet and carry through by providing Indigenous claimants with substantial relief, as Justice Emily Burke recently did in *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII), when she decided that the province could no longer continue to authorize industrial development that infringed treaty rights by taking up lands to such an extent that there were no longer sufficient lands left for the Blueberry River First Nations to meaningfully exercise their hunting rights (see Robert Hamilton & Nick Ettinger, "Blueberry River First Nation and the Piecemeal Infringement of Treaty 8"). However, by making factual findings on many issues without reaching legal conclusions, Justice Kent did provide an appeal court with an opportunity to decide the legal issues

on the basis of those findings without sending the matter back to trial. This is in fact what happened in the *Tsilhqot'in Nation* case, in which the Supreme Court of Canada relied on Justice David Vickers' extensive factual findings at trial to finally make a declaration of Aboriginal title.

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