

CANADA / JUDGMENT

Thomas v. Rio Tinto Alcan Inc.

2013 BCSC 2303

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2303 Thomas v. Rio Tinto Alcan Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thomas v. Rio Tinto Alcan Inc.,

2013 BCSC 2303

Date: 20131213

Docket: S116524

Registry: Vancouver

Between:

Jackie Thomas on her own behalf and on behalf of all members of the SAIK'UZ FIRST NATION,
and Reginald Louis on his own behalf and on behalf of all members of the STELLAT'EN FIRST
NATION

Plaintiffs

And

Rio Tinto Alcan Inc.

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the plaintiffs:

G.J. McDade, Q.C.

M.J. Skeels

Counsel for the defendant:

D.R. Bennett

R.D.W. Dalziel

S. Boucher

Place and Date of Hearing:

Vancouver, B.C.

June 10 - 14, 2013

Place and Date of Judgment:

Vancouver, B.C.

December 13, 2013

I. INTRODUCTION

- [1] Rio Tinto Alcan Inc. ("Alcan"), the defendant to an action, brings this application seeking summary judgment in its favour as well as an order striking the whole or specific parts of the plaintiffs' pleadings.
- [2] In the action, the plaintiffs, Aboriginal First Nations and their elected Chiefs, allege that since the construction of the Kenney Dam in 1952 by the defendant Alcan, which dams one of the upper reaches of the Nechako River ("Nechako"), and continuing to the present time, Alcan has diverted and altered the water flowing to the Nechako with significant adverse impacts on its waters, and that these water impacts have in turn had significant adverse impacts on the fisheries resources of the Nechako and its tributaries.
- [3] Alcan asserts that the plaintiffs' claims arise from water diversion and storage activities that Alcan says it undertakes with the express authorization of the Province of British Columbia ("the Province").

II. THE PLAINTIFFS' CLAIM

- [4] The plaintiff Saik'uz First Nation is an Aboriginal First Nation, as well as a "band" as defined by the Indian Act, R.S.C. 1985, c. I-5. Jackie Thomas is a member and the elected Chief and is an Aboriginal person within the meaning of s. 35(2) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, and an Indian within the meaning of s. 91(24) of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

- [5] The plaintiff Stelat'en First Nation is an Aboriginal First Nation, as well as a "band" as defined by the Indian Act. Reginald Louis is a member and the elected Chief and an Aboriginal person within the meaning of s. 35(2) of the Constitution Act, 1982, and an Indian within the meaning of s. 91(24) of the Constitution Act, 1867.
- [6] In their Notice of Civil Claim (the "Notice"), the plaintiffs claim that they were neighbouring First Nations of Central Carrier ancestry with ownership and use of territory along the Nechako at and prior to the time of contact with Europeans and at the date on which British Sovereignty ("Sovereignty") was asserted in 1846. Each existed as an organized traditional Aboriginal society, with their own villages and with a common history and distinctive features including language, laws, customs, and traditions. The plaintiffs say that at Sovereignty they used and exclusively occupied portions of the Central Carrier territory, which included the Nechako and the lands along its banks, and its lakes and tributaries. The present day members of the plaintiff First Nations are the descendants of and legal successors to their ancestors and claim present ownership of Aboriginal title and rights and beneficial ownership of their reserves. They also say that the lands along the Nechako, the banks thereof, and the bed of the river are subject to their Aboriginal title and rights.
- [7] The plaintiffs assert further that, based on the nature of the use and occupation of the said lands, and specific sites for fishing purposes and on the interests held by them in their reserves, they hold proprietary interests in the lands, waters, and resources, including fisheries, and that the use and enjoyment of the waters and fisheries within and adjacent to the said lands has always been an important and valuable component of their proprietary interests.
- [8] The plaintiffs allege that the impacts of the diversion and alteration of the water flowing to the Nechako is an unreasonable interference with the plaintiffs' proprietary rights and have been severe, causing harm to their proprietary interests. They also allege that the impacts are actionable by them as a private nuisance, or in the alternative, to the extent that these are a public nuisance, they say that they have suffered special and particular damage. The plaintiffs assert that by reason of the nuisance caused by Alcan, they have suffered and continue to suffer loss and damage.
- [9] The plaintiffs seek an interim injunction restraining Alcan from the continuance or repetitions of the alleged nuisance and restraining Alcan from the continuance or repetitions of interference with the plaintiffs' riparian rights and a permanent injunction restraining Alcan from conducting its operations at the Kenney Dam in such a manner as to cause like nuisances to the plaintiffs.

III. ALCAN'S APPLICATION

- [10] Alcan states that its application is a "hybrid" one that is based on both R. 9-5 (striking pleadings) and R. 9-6 (summary judgment) of the Supreme Court Civil Rules. Alcan sets out in its application that there are two branches to the relief it seeks, each of which is independent of the other.
- [11] First, Alcan raises the defence of statutory authorization as being a full defence to the plaintiffs' claim, and as being appropriately the subject of an order for summary judgment.
- [12] Second, Alcan contends that the plaintiffs' claim discloses no reasonable cause of action, assuming the facts alleged in the Notice to be true. Alcan says that the plaintiffs' claim is purportedly in nuisance and for breach of riparian rights, based on diminished river flows that allegedly interfere with asserted but unproven Aboriginal interests in land (including both Aboriginal title and Aboriginal rights to a fishery), and with interests in lands reserved for the plaintiffs' bands under the Indian Act. Alcan says that such claims are unknown to or unsupported by the law.
- [13] Alcan argues that when Aboriginal land rights are claimed but not proven, the interests in land alleged are not recognized within and, indeed, are at odds with provincial land regimes. As long as this is so, says Alcan, Aboriginal peoples claiming rights have no cause of action against private parties for interference with those claimed rights. Such causes of action, asserts Alcan, are the exclusive preserve of those who are recognized at law as the possessors of the relevant interests in the lands in question.
- [14] Alcan also argues that because the plaintiffs' reserves include no property in or rights of use in connection with the Nechako, the reserves provide no basis for the plaintiffs' claims.

IV. BACKGROUND TO ALCAN'S ACTIVITIES ON THE NECHAKO

- [15] Mr. Paul Henning, Alcan's Vice-President, Strategic Projects Western Canada, in his affidavit sworn March 21, 2013, set out the background to and details of Alcan's activities on the Nechako.
- [16] On August 5, 1997, Alcan and the Province entered into the BC/Alcan 1997 Agreement ("the Agreement") that settled litigation commenced by Alcan against the Province. In performance of a clause in the Agreement, the Province issued The Final Water Licence No. 102324 ("the Licence") to Alcan on August 5, 1997. The Licence provides, inter alia, that Alcan is authorized to store, divert, and use water and to construct, maintain, and operate works: the sources of water supply are the Nechako above Grand Canyon and all the streams and lakes tributary thereto; the points of storage, diversion and use, and the extent of the Nechako Reservoir are approximately as shown on the plan attached; the date from which the Licence shall have precedence is August 3, 1949; the maximum quantity of water which may be stored is 23,850 cubic-hectometres, of which 7100 cubic-hectometres are live storage; the maximum rate of diversion and use for power purpose is 170 cubic-metres per

second; the works may be operated to divert water for power purpose throughout the whole year; the works may be operated to collect water into storage throughout the whole year; the Licence is appurtenant to the land required for the powerhouse.

- [17] Mr. Henning deposes that from 1950 to 1954, Alcan constructed extensive facilities in northwestern British Columbia, all of which it continues to operate to the present time. The primary purpose of Alcan's facilities is the production of aluminum at its smelter in Kitimat, British Columbia. Alcan's facilities have at all times included works for the generation of hydroelectric power, among them the Kenney Dam which dams one of the upper reaches of the Nechako and, with a number of smaller saddle dams, creates the Nechako Reservoir.
- [18] Mr. Henning deposes that all of Alcan's water storage and diversion operations are carried out in accordance with the terms of the Licence.

V. RELEVANT PLEADINGS

- [19] The plaintiffs' claims in the action are set out in the Notice, in part, as follows:
14. The lands along the Nechako River and the banks thereof, and the bed of the river are subject to the aboriginal title and rights of the Nechako Nations.

The Nechako Fisheries and the Tributary Fisheries

15. Further, and in the alternative, in accordance with their laws, customs and traditions, the Nechako Nations at Sovereignty used and exclusively occupied specific sites for fishing purposes and owned those fisheries along the Nechako River within their territories (the "Nechako Fisheries") and the watershed and tributaries of the Nechako River, including the Stellaquo River, Nautley River, Stoney Creek, Fraser Lake, Tachick Lake and Nulki Lake and [sic] (the "Tributary Fisheries"). The Plaintiffs claim that their exclusive use and occupation of the specific locations of the fisheries, and of the riverbanks and beds adjacent to them, gave them proprietary rights to these Fisheries.
16. The Nechako Nations' use and occupation of the Nechako Lands, the Nechako Fisheries and the Tributary Fisheries was governed by their indigenous legal system, the Clan/Bahlats complex, which vested in the Nechako Nations control over and specific responsibilities regarding these lands, waters and resources, including fisheries. In accordance with the Clan/Bahlats complex, the Nechako Nations used, occupied and governed in respect of the Nechako Lands, the Nechako Fisheries and the Tributary Fisheries.
17. Prior to and since Contact, the Nechako Nations have occupied, used and maintained a substantial connection to the lands and waters including and surrounding the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries, and the Reserve lands where members, among other activities, harvest resources, and carry out cultural and spiritual practices.

19. The Plaintiffs, as aboriginal communities, have an interest in the Reserves pursuant to the Indian Act and the laws of Canada relating to aboriginal peoples which constitutes a sui generis interest in lands that is recognized and protected by the common law, and by the Constitution of Canada.
20. Legal title to their Reserves is held by the Queen in Right of Canada, on behalf of the Nechako First Nations for the use and benefit of the members of the Nechako First Nations. The Nechako First Nations are the beneficial owners and lawful occupiers of the Reserves.
21. The Plaintiffs claim that the Reserves along the Nechako River and its Tributaries include the riparian rights associated at common law with ownership of lands adjacent to rivers and lakes, including the right to the natural flow of water undiminished in quality and quantity within the Nechako River and its Tributaries.

The Plaintiffs' Proprietary Interests

22. Based on the nature of the use and occupation by the Nechako First Nations of the Nechako Lands, the Nechako Fisheries and the Tributary Fisheries, and on the interest held by the Nechako First Nations in the Reserves, the Plaintiffs hold proprietary interests in the lands, waters, and resources, including fisheries, of the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves (the "Proprietary Interests").
23. The use and enjoyment of the waters and fisheries within and adjacent to the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves, has always been an important and valuable component of the Plaintiffs' Proprietary interests. The quantity, nature and quality of the Nechako River flows are significant factor [sic] impacting upon these waters and fisheries.

IMPACTS OF THE NECHAKO DIVERSION

Water Impacts and Fisheries Impacts

24. Since the construction of the Kenney Dam in or about 1952, and continuing to today, Alcan has diverted and altered the water flowing to the Nechako River (the "Diversion"), with significant adverse impacts on the Nechako River waters ("Water Impacts"), including:
 - a. A significant reduction in the amount of water flowing to and in the Nechako River;
 - b. Alterations to the natural course of the water flowing to and in the Nechako River;
 - c. Alterations in the timing and quantities of the water flowing to and in the Nechako River;
 - d. Qualitative impacts on the water flowing to and in the Nechako River including on water temperature;
 - e. Erosion of the banks of the Nechako River and its Tributaries;
 - f. Unnatural sedimentation in the bed of the Nechako River;

- g. Unnatural flooding and high water flows at some times of the year
 - h. Interference with the ecology of the Nechako River and its Tributaries, impacting the natural vegetation and wildlife; and
 - i. Other adverse hydrological changes to the natural state of the Nechako River and its Tributaries and ecology.
25. The Water impacts have in turn had significant adverse impacts on the fisheries resources of the Nechako River and its Tributaries, including the Nechako Fisheries, and the Tributary Fisheries ("Fisheries Impacts"), including:
- a. Reductions in available fisheries resources, including salmon, trout and sturgeon;
 - b. Alterations to fisheries health and demographics, including age distribution and regeneration of fisheries populations;
 - c. The gradual progress toward extinction of the Nechako River Sturgeon as a species;
 - d. Loss of spawning habitat; and
 - e. Adverse impacts from changed temperature and flow interfering with the ability of fish populations to survive and thrive.
26. The unnatural interference with flows on the Nechako River and its Tributaries have caused adverse impacts on the Plaintiffs and their ability to use their lands and waters for the practice of their distinctive culture, including:
- a. Damage to habitat which supply the resources on which the Plaintiffs rely;
 - b. Reduction of the resources on which the Plaintiffs rely;
 - c. Loss of abundant fish populations and the ability of the Plaintiffs to harvest fish in excess of conservation requirements;
 - d. Loss of wildlife, including beaver and muskrat, resulting from interference with water levels and loss of habitat;
 - e. Damage to resource harvesting locations; and
 - f. Interference with the use of the Nechako River and Tributaries for navigation and cultural uses.

Nuisance and Interference with Riparian Rights

27. The impacts of Alcan's Diversion, including the Water Impacts and Fisheries Impacts, are an unreasonable interference with the Plaintiffs' Proprietary Interests, including their rights to use and enjoyment of those interests, and as such constitute nuisance.

28. The impacts of the Diversion have been severe, causing harm to the Plaintiffs' Proprietary Interests and to the Plaintiffs.
29. The impacts of Alcan's Diversion, including the Water Impacts and Fisheries Impacts, are actionable by the Plaintiffs as private nuisance, but in the alternative, or to the extent that these are a public nuisance, the Plaintiffs claim that they have suffered special and particular damage.
30. Further, and in the alternative, the impacts of Alcan's Diversion, including the Water Impacts and Fisheries Impacts, constitute a wrongful, unreasonable and substantial interference with the Plaintiffs' riparian rights arising from their Proprietary Interests.

Damage resulting from Nuisance and Interference with Riparian Rights

31. By reason of the nuisance caused by the Defendant Alcan, the Plaintiffs have suffered, and continue to suffer, loss and damage, particulars of which are as follows:
 - a. Loss of use and enjoyment of the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves;
 - b. Interference with the Plaintiffs' ability to exploit fisheries resources within and adjacent to the Nechako Lands and the Reserves, and within the Nechako Fisheries and the Tributary Fisheries;
 - c. Loss of value of the Nechako and Tributary Fisheries;
 - d. Erosion and loss of value of the riverbanks and adjacent Nechako Lands;
 - e. Loss of value of Reserve lands; and
 - f. Negative cultural impacts associated with the above.
32. By reason of the interference with the Plaintiffs' riparian rights by the Defendant Alcan, the Plaintiffs have suffered loss and damage, particulars of which are as follows:
 - a. Interference with the Plaintiffs' natural use of the riparian lands and waters within and adjacent to the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves;
 - b. Loss of enjoyment of the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves;
 - c. Loss of ability to properly exercise their fishing practices and resource gathering activities within and in waters adjacent to the Nechako Lands, the Nechako Fisheries, the Tributary Fisheries and the Reserves;
 - d. Loss of value of the Fisheries;
 - e. Loss of value of the riverbanks and adjacent Nechako Lands;

- f. Loss of value of Reserve lands;
 - g. Reduced waterflows and habitat alterations on the Tributary rivers and lakes;
 - h. Cultural impacts associated with the above.
33. The Plaintiffs have made their concerns regarding the Diversion and the impacts of the Diversion known to the Defendant Alcan and Alcan has failed or refused to adequately abate the nuisance and interference with the Plaintiffs' Proprietary Interests.
34. The Defendant Alcan intends, unless restrained from doing so, to continue the nuisance and interference with the Proprietary Interests of the Plaintiffs.
35. The impacts of the Defendants Alcan's actions upon the Plaintiffs' Proprietary Interests, or some of or the degree of said impacts, are avoidable or could have been avoided, and the Defendant Alcan had or continues to have the ability to remedy the Impacts or operate in a different manner in order to avoid the Impacts.
- [20] Paragraph 57 of the Notice provides as follows:
57. The licences and agreements under which the Defendant Alcan purports to operate and govern the Diversion, are of no legal force or effect against the Plaintiffs in relation to the Plaintiffs' Proprietary Interests.
- [21] In its Response to Civil Claim, Alcan pleads the following facts (which the plaintiffs address specifically in their Reply):

Part 1, Division 2

2. Alcan has no knowledge of the aboriginal title, fishing rights, and reserve interests alleged by the plaintiffs. Even if the plaintiffs' allegations are true, Alcan's statutory authority to divert Nechako River water is a complete answer to all of their claims. The validity of Alcan's authorization to divert water has been previously challenged in this Court, and upheld.
5. In the years that followed the end of the Second World War, the Government of British Columbia decided that the prosperity of the Province depended on harnessing the economic power of its natural resources for industrial development and population growth. To this end, in 1949 the Legislature enacted a special purpose statute called the Industrial Development Act, S.B.C. 1949, c. 31 (the "IDA"). The IDA empowered the Lieutenant Governor in Council to, among other things, enter into an agreement (the "1950 Agreement") with Alcan.
7. Reliable power supply is essential to an aluminum smelting operation. Accordingly, the 1950 Agreement contemplated that Alcan would be entitled to divert water for hydroelectric power production.

8. The 1950 Agreement conferred, in clause 1, "the right, and a licence or licences and a permit or permits under the 'Water Act', to store and to use by diversion and otherwise, those unrecorded waters called the Eutsuk and Tahtsa water power". The "Eutsuk and Tahtsa water power" refers to headwaters of the Nechako River watershed.
13. Alcan is authorized to store, divert and use Nechako River water by Alcan's Final Water Licence No. 102324 (the "Final Water Licence"), issued by the Minister of Education, Skills and Training and Minister responsible for the Industrial Development Act (the "Minister") on August 5, 1997. The Final Water Licence was issued pursuant to the BC/Alcan 1997 Agreement Order-in-Council No. 0977 (the "1997 OiC") made August 4, 1997, pursuant to the IDA. The Final Water Licence:
 - (a) supercedes and replaces water licences previously issued to Alcan;
 - (b) specifies the amount of water that may be stored by Alcan, and the geographic area in which that storage may take place;
 - (c) specifies the amount of water that may be diverted and used by Alcan; and
 - (d) authorizes releases of water in accordance with the 1987 Settlement Agreement among Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of the Province of British Columbia, and Alcan (the "1987 Settlement Agreement").

Part 1, Division 3

17. In 1997, the Province and Alcan settled the [Kemano Completion Project] litigation and a settlement agreement was executed (the "1997 Settlement Agreement"). As part of the 1997 Settlement Agreement, the Province agreed to make the 1997 OiC, under which the Final Water Licence was issued.
- [22] Paragraphs 1-5 of the plaintiffs' Reply state as follows:
1. In reply to Part 1 Division 2 paragraphs 2, 5, 7, 8 and 13 and Division 3 paragraph 17, the plaintiffs plead that the statutory authorization pled by the defendant is constitutionally inapplicable against the plaintiffs' aboriginal or proprietary rights based on the constitutional protection of existing aboriginal rights under s. 35 of the Constitution Act, 1982, c. 11 (U.K.), Schedule B and the doctrine of interjurisdictional immunity pursuant to s. 91(24) of the Constitution Act, 1867, 30 & 31 Victoria, c. 3.
 2. In particular the plaintiffs plead:
 - a. The plaintiffs' proprietary rights are based upon aboriginal title, or interest in a "reserve" pursuant to the Indian Act, R.S.C. 1985 c. I-5 or aboriginal rights akin to or being a private fishery or profit a prendre, or some or all of these.

- b. In so far as the laws and instruments pled by the defendant (the "Impugned Laws and Instruments") purport to interfere with or extinguish the plaintiffs' proprietary rights appurtenant to an aboriginal title or reserve interest, they purport to be in respect of "lands reserved for Indians" contrary to s. 91(24). They are therefore constitutionally inapplicable as against the plaintiffs' aboriginal or proprietary rights. Further or in the alternative, the Instruments issued pursuant to the Laws are of no force or effect to the extent that they purport to take away, diminish or extinguish the plaintiffs' aboriginal or proprietary rights.
 - c. In so far as the Impugned Laws and Instruments purport to otherwise interfere with or extinguish the plaintiffs' aboriginal or proprietary rights, they purport to intrude upon the "core" of Indianness contrary to s. 91(24). They are therefore constitutionally inapplicable against the plaintiffs' aboriginal or proprietary rights. Further or in the alternative, the Instruments issued pursuant to the Laws are of no force or effect to the extent that they purport to take away, diminish or extinguish the plaintiffs' aboriginal or proprietary rights.
 - d. In so far as the Impugned Laws and Instruments purport to infringe upon or extinguish the existing aboriginal or proprietary rights of the plaintiffs, they purport to do so contrary to s. 35 of the Constitution Act, 1982. They are therefore constitutionally inapplicable against the plaintiffs' aboriginal or proprietary rights. Further or in the alternative, the Instruments issued pursuant to the Laws are of no force or effect to the extent that they purport to take away, diminish or extinguish the plaintiffs' aboriginal or proprietary rights.
3. The agreements pled by the defendant do not provide a constitutionally valid defence to an action brought to enforce the plaintiffs' aboriginal or proprietary rights. At all relevant times, neither the Government of British Columbia or the Government of Canada had the constitutional power, by contract or statute, to enter into agreements with a third party, being the defendant, and to which the plaintiffs were not party, which could have the effect of taking away, diminishing or extinguishing the plaintiffs' aboriginal or proprietary rights, including:
- a. The 1950 Agreement, contrary to s. 91(24) of the Constitution Act, 1867;
 - b. The 1987 Settlement Agreement, contrary to s. 91(24) of the Constitution Act, 1867, and s. 35 of the Constitution Act, 1982;
 - c. The 1997 Settlement Agreement, contrary to s. 91(24) of the Constitution Act, 1867, and s. 35 of the Constitution Act, 1982, (collectively, the "Agreements");

and insofar as those Agreements purport to provide a defence to the defendant of statutory authority or otherwise, they are constitutionally inapplicable to the plaintiffs' aboriginal or proprietary rights and to this action.

4. Further, the plaintiffs deny that the Agreements had such effect, and put the defendant to the strict proof thereof, and the onus of proof is on the defendant to establish that the Governments of British Columbia or Canada had the lawful power to, and intended to or did exercise it in a manner that would, allow the Agreements to lawfully apply against the plaintiffs.
5. Further, at all relevant times the Government of British Columbia did not have the constitutional power to take away, diminish or extinguish the plaintiffs' aboriginal or proprietary rights by Licence issued to a third party, being the defendant. In particular, the Province did not have the constitutional power to issue the Final Water Licence contrary to s. 91(24) of the Constitution Act, 1867, and s. 35 of the Constitution Act, 1982 so as to take away, diminish or extinguish the plaintiffs' aboriginal or proprietary rights, and the plaintiffs plead that the Licence did not have such effect.

VI. ISSUES

[23] The first issue to be decided in Alcan's application is whether Alcan is entitled to summary judgment on the basis of the defence of statutory authorization. The sub-issues that comprise this first issue include:

- (1) Is the statutory authorization defence suitable for resolution by way of summary judgment under R. 9-6?
- (2) Has Alcan established the defence of summary judgment?

[24] The second issue to be decided in Alcan's application is whether Alcan is entitled to an order dismissing the plaintiffs' notice on the ground that it discloses no reasonable claim. The sub-issues that comprise this second issue include:

- (1) Do holders of unproven Aboriginal title and rights have a cause of action against private persons in private or public nuisance or for breach of riparian rights for interference with the claimed rights?
- (2) Is there any basis in law for the plaintiffs' claims to private nuisance or for breach of riparian rights incidental to their reserve interests?

VII. IS ALCAN ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF THE DEFENCE OF STATUTORY AUTHORIZATION?

[25] Alcan's application for summary judgment is brought pursuant to R. 9-6(4) and (5) of the Rules, which read as follows:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
 - (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[26] Generally speaking, summary judgment acts as a filter for unmeritorious claims. As stated in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 10 [Lameman]:

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage.

[27] Conversely, Lameman states at para. 10:

[I]t is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[28] At para. 11, the Court set out the analysis for dealing with summary judgment applications:

[T]he bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial" If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts

[29] A summary judgment application will be decided on the basis of pleadings and evidence actually before the Court. It is not sufficient to rely merely on evidence that might be adduced in the future. As stated in *Lameman* at para. 19:

A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[30] Rule 9-6 is the successor to R. 18 of the Rules. Unlike its predecessor, R. 9-6 provides limited scope to decide issues of law on a summary judgment application. Rule 9-6(5)(c) states that a court, "if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly."

[31] In *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2011 BCSC 628 [L.D.], Mr. Justice Sewell cautioned against interpreting subrule (5)(c) too broadly and concluded, at para. 20, that a Court should decide an issue of law only if there is no real dispute about material facts and the issue of law is well settled:

I think I should also be cautious about deciding issues of law on this application. I am of the view that I should decide an issue of law only if I am satisfied that there is no real dispute about the material facts and that the issue of law is well settled by authoritative jurisprudence. It seems to me that Rule 9-7 is better suited for deciding novel points of law because on a summary trial the court will have a more complete record framing the question of law. I also note that Rules 9-3 and 9-4 are available for determining points of law on an agreed record.

[32] Although the decision in *L.D.* was subsequently overturned, the British Columbia Court of Appeal nonetheless endorsed Sewell J.'s comments quoted above: 2012 BCCA 491, at para. 19.

[33] Finally, Mr. Justice Savage addressed a further limitation on R. 9-6(5)(c) in *Haghdust v. British Columbia Lottery Corporation*, 2011 BCSC 1627, at para. 17:

Rule 9-6(5)(c) limits determinations of questions of law to certain circumstances. That is, the court may only make determinations on questions of law where it would allow the court "to pronounce judgment accordingly". In the context of Rule 9-6(4), where the application is to dismiss "all or part of the claim", this means that determination of the question of law must allow the court to pronounce judgment on at least part of the claim.

[34] Turning to the defence of statutory authorization, the leading Canadian case is *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 [Ryan]. The motorcyclist plaintiff in *Ryan* was injured while attempting to cross railway tracks in Victoria, and brought an action in public nuisance against the city and the railway companies that owned and operated the tracks. The motorcyclist was thrown from his vehicle when his front tire became trapped in the "flangeway", i.e. the gap running alongside the inner edge of the tracks. The defendants argued that the tracks, which had a flangeway width of between 3.75 and 3.94 inches, were authorized by regulations that prescribed a minimum flangeway width of 2.5 inches and maximum width of 4.75 inches.

[35] Mr. Justice Major affirmed in *Ryan* the "traditional" view of the defence of statutory authority centered on the doctrine of "inevitable result". His Lordship stated at para. 54:

Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority.

- [36] Among the cases cited by Major J. in support of the traditional view is *Manchester (City) v. Farnworth*, [1930] A.C. 171 (H.L.), which contains the classic statement of Viscount Dunedin, at p. 183, on which the defence of statutory authority in Canada is based:

When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

- [37] Prior to *Ryan*, there was some uncertainty whether the traditional view of statutory authority had persevered following the decision of the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 [*Tock*]. This case was about a sewer blockage that caused flooding in the Tocks' basement. The defendant board had a general statutory power to construct and operate a city sewerage system, but the statute said nothing about the design or operation of the system.
- [38] While there was no majority opinion in *Tock* on the correct legal approach to the defence, the court was unanimously of the view that the defence should fail on the facts before it. In three concurring judgments, the Court had divided in *Tock* on the correct test to apply for the defence of statutory authority. Mr. Justice Sopinka had advocated for adherence to the traditional view based on the doctrine of inevitable result, while Wilson J. and La Forest J. each offered alternate approaches.
- [39] As Major J. observed in *Ryan*, the attempts to depart from the traditional view in *Tock* were unsuccessful and neither of the alternate approaches received majority support. After making clear that the traditional view persists, Major J. went on to cite favourably, at para. 55, from the comments of Sopinka J. in *Tock* at para. 94:

The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

- [40] Turning to the case before him, Major J. defined the issue in *Ryan* as whether the hazard created by the gap in the street was an "inevitable result" of exercising statutory authority or, to phrase the test differently, whether it was "practically impossible" for the railway companies to avoid the nuisance (para. 56). His Lordship concluded that it was not for two reasons.

- [41] First, the railway companies made the decision to exceed the minimum width by more than one inch, and that decision was discretionary; it was not the "inevitable result" or "inseparable consequence" of complying with the regulations (Ryan at para. 56). Second, the railway companies also made the decision not to install flange fillers, a rubber-type material inserted into the flangeway to create an even road surface for traffic. This failure to employ methods and technologies available at the time of the accident that would have avoided the nuisance was similarly a matter of discretion, not regulatory compliance. To use the language of Sopinka J. in *Tock* at para. 94, the defendants were unable to establish that there were no alternate methods and that their method was the only one that was "practically feasible".
- [42] The burden of proof in establishing the defence of statutory authorization rests on the defendant. First, the defendant must establish that the act causing the nuisance is expressly or implicitly authorized by statute; and second, that the nuisance is the "inevitable result" of the statutorily authorized action: *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, at paras. 79-80 [Heyes].
- [43] In *Heyes*, the Court held that the defendants had successfully demonstrated that the nuisance attributable to the use of the "cut and cover" method of construction of the Canada Line was "inevitable" in the sense that, due to cost, no alternative method of construction was viable (para. 146). Crucially, no statute authorized the use of cut and cover construction itself and the plaintiff asserted that "bored tunnel" construction would have been much less disruptive; however, the court ruled that cut and cover construction had been the only practically feasible option.
- [44] The case of *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416 [Sutherland] concerned the noise that resulted from the addition of a third runway at Vancouver International Airport. Because the order-in-council and airport certificate relied upon by the airport authority had authorized not only the construction of a third runway, but the specific location and operation of the runway, the court concluded that any noise caused was not actionable in nuisance. Noise was the "inevitable result" of operating a runway in that location (para. 117).

Is the statutory authorization defence suitable for resolution by way of summary judgment under Rule 9-6?

- [45] The plaintiffs in the case at bar argue that the defence of statutory authority raised by Alcan is not an appropriate issue to address on an application for summary judgment. The plaintiffs note that the defence of statutory authority is always a question of mixed fact and law and is therefore rarely suitable for determination as a preliminary matter. The plaintiffs refer to the decision of Mr. Justice Carrothers in *Torino Motors (1975) Ltd. v. British Columbia* (1988), 63 D.L.R. (4th) 168 (B.C.C.A.), which states at p. 171 that "[d]etermination of issues of statutory authority turns on the particular facts of each case thus rendering such determination generally unsuitable for summary judgment proceedings."

- [46] The plaintiffs point out that Alcan has failed to provide any authority where a court has determined the question of statutory authorization on a preliminary motion. The only case relied upon by Alcan that was dealt with on a pre-trial basis is *Allen v. Gulf Oil Refining*, [1981] A.C. 1001 (H.L.) [Allen]. That case involved an attempt by the plaintiff to strike the defence under English rules, and thus the plaintiffs in this case submit that Allen has little relevance to an application for summary judgment against a plaintiff under R. 9-6.
- [47] The plaintiffs do note that in the case *Hill v. Vernon (City)*, [1989] B.C.J. No. 144 (S.C.) [Hill], summary dismissal was found to apply to a defence of statutory authority raised against an alleged nuisance. However, the decision was later overturned by the British Columbia Court of Appeal because the defendant had not conceded the accuracy of the allegations in the statement of claim and the trial judge improperly gave judgment on assumed facts rather than facts as found: [1991] B.C.J. No. 911 (C.A.).
- [48] The plaintiffs say that, as in *Hill*, Alcan has not admitted the facts alleged by the plaintiffs. While Alcan admits in its Response to Civil Claim that the diversion of water from the Kenney Dam affects the amount and timing of water flowing into the Nechako, Alcan specifically denies that the quality of water flowing into the Nechako has been diminished or that the plaintiffs' property has been adversely impacted and suffered unreasonable damage.
- [49] Finally, the plaintiffs say that other authorities have also held that summary judgment is not suitable for cases where the court would need to proceed on assumed facts that are not admitted by the defendant, particularly in the context of complex issues of constitutional law and novel legal claims.

Discussion and decision

- [50] I agree with the plaintiffs that the defence of statutory authority generally involves a fact-specific inquiry. However, as I cannot conclude that it is inappropriate in all cases to deal with the issue summarily, the suitability of summary judgment in this case can only be determined by comparing the scope of the statutory authority invoked by Alcan to the particular types of harm alleged by the plaintiffs. I therefore turn to consider whether the defence of statutory authority has been established by Alcan.

Has Alcan established the defence of statutory authorization?

- [51] Alcan argues that it is clear on the record that all of its water storage and diversion operations are authorized by the Licence. It says that Mr. Henning's uncontradicted evidence is that all such operations are carried out in accordance with the terms of the Licence and that, as a result, there is no question of conduct that is not specifically authorized.

- [52] Alcan submits that the applicable authorities on this issue and the evidence before the Court establishes that (1) the only authorization that need be considered is the Licence; (2) the Licence and the order-in-council that issued it are capable in law of giving rise to the defence of statutory authorization; (3) that Alcan, though not a public body, may rely upon the authority conferred by the legislature directly or by subordinate legislation such as the order-in-council; (4) the defence answers with equal force both causes of action relied upon by the plaintiffs; (5) that the conduct that is the subject of the plaintiffs' claims is confined to the storage and diversion of the Nechako waters by Alcan; (6) all of Alcan's conduct in question comes within the protection of the Licence.
- [53] Alcan claims that all of the above being so, what is left for the Court's consideration is the narrow question of whether the Licence conferred statutory authority for Alcan's storage and diversion of the Nechako waters such that Alcan's conduct is not actionable. Alcan argues that it is entitled to summary judgment because the defence of statutory authorization is, according to Alcan, established, and thus there is no genuine issue of material fact requiring a trial.
- [54] In Alcan's submission, the ultimate inquiry in the defence of statutory authorization is whether "the necessary causal connection exists between the work authorized and the nuisance". Alcan argues that, while the practical feasibility inquiry was dispositive in *Ryan*, it is not an inquiry that needs to be undertaken in all cases. This assertion emerges from a review of Sopinka J.'s reasons in *Tock*, particularly at para. 93:

The criticism of the present state of the law which is the springboard for the desire to change it is largely based on the fact that the term "inevitable consequences" is too vague and uncertain. That term is the expression of the factual conclusion that the necessary causal connection exists between the work authorized and the nuisance. If the necessary connection exists, then it follows that the legislature authorized that which is the inevitable consequence of the work described in the statute.

[55] And at para. 92:

A work is authorized by statute whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute. The distinction between mandatory and permissive, which Wilson J. makes to eliminate, in the latter case, the defence of statutory authority, has not been accepted in Canada or, apparently, in England. (See *Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.), and *Tate & Lyle Industries Ltd. v. Greater London Council*, [1983] 1 All E.R. 1159 (H.L.))

- [56] Alcan submits that the approach taken by Major J. in *Ryan* is one means of testing whether the "necessary causal connection" exists, on a given set of facts. In other cases, the nexus between the authorization and the alleged nuisance may be so close that the "inevitable result" test can be resolved on the face of the authorization alone. Alcan applies two notable House of Lords decisions, both cited and discussed in *Tock* to illustrate the point.

- [57] In *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193 (H.L.) [*Metropolitan Asylum District*], a hospital board was found liable for a nuisance caused by one of its hospitals to adjoining residents. The sites of the hospitals were left to the discretion of the board under its statutory power. Since the board could have chosen, but did not choose, a site more distant from residential areas, the board failed to establish that the nuisance was the inevitable result of the authorization to establish hospitals.
- [58] By contrast, in *Allen*, the defendant oil company had obtained authority through a private act to acquire certain lands and construct an oil refinery on those lands. Their Lordships held that the act must be taken to immunize the oil company from an action in nuisance because the smell, noise and vibration that affected the surrounding residents would be the inevitable result of erecting a refinery upon that site.
- [59] Alcan contends that *Heyes* and *Sutherland* reflect a similar dichotomy. Alcan submits that *Heyes* is similar to *Metropolitan Asylum District* and *Tock*, in that all three cases involved a power set up by a legislative regime that, taken on its own, was too general to shield the defendants. The cases were about statutory powers to construct a rail line underneath Cambie Street by some method; to establish hospitals somewhere; and to create a sewer system of some kind.
- [60] Alcan submits that the factual twist that distinguishes *Heyes* is that, although cut and cover construction was not directly and specifically authorized in that case, for cost reasons, it was the only feasible method and thus the inevitable result of the decision to construct the Canada Line. If, as in *Heyes*, the defendants in *Metropolitan Asylum District* and *Tock* had shown that the only feasible place or way to construct the hospital and sewer system, respectively, was as they had each done, then, says Alcan, the "inevitable result" doctrine would have provided the "necessary causal connection" between the authorizations and the alleged nuisances and those defendants too would have been entitled to rely upon statutory authorization.
- [61] Alcan contends that *Sutherland* is a case that, like *Allen*, shows the other side of the coin: because the specific location and operation of the third runway in *Sutherland* was specifically authorized, noise was an "inevitable result" of the construction of that runway and thus not actionable in nuisance.
- [62] Alcan asserts that in the instant case the Licence expressly and specifically authorizes the time, place, and amounts of Alcan's water storage and diversion operations. It is those very same water storage and diversion operations, in those same times and in those same places, that are said by the plaintiffs to create a nuisance (and a breach of riparian rights). The Kenney Dam is specifically authorized and so is the diversion of the Nechako.
- [63] Alcan insists that this is a clear case in which the "necessary causal connection" exists between the authorization and the nuisance alleged, in that the legislature (through the Lieutenant Governor in Council) specifically authorized all of the work that Alcan performs in operating the dam, and it is that work that creates (and indeed is specifically alleged to

create) the water impacts alleged by the plaintiffs. The authority to operate the dam throughout the year in its specific location, says Alcan, inevitably means that water flows in the Nechako system are disturbed. Since it is that very disturbance that is the subject of the present claim, the "inevitable result" test is satisfied here.

- [64] Alcan submits that, like Allen and Sutherland, in the instant case the Licence must be taken to immunize Alcan because it specifically describes and authorizes the operation and location of the Kenney Dam and because diminished water flows are the inevitable result of a licence to store and divert water.
- [65] Finally, Alcan submits that the plaintiffs' statement in their Reply that the statutory authorization is "constitutionally inapplicable" against the plaintiffs' Aboriginal or proprietary rights constitutes a "collateral attack" on the Licence and amounts to an abuse of the process of the court under R. 9-5(1)(d).
- [66] The plaintiffs submit that even if this were a suitable case for an application for summary judgment, such an application is premature as the parties have not had the opportunity to develop evidence through the discovery process on issues raised in the pleadings. Furthermore, even if the Licence was capable of providing a full defence, Alcan has not met its burden in establishing the defence of statutory authorization and cannot do so without a full examination of the evidence at a trial.
- [67] The plaintiffs assert, referring to Tock, Ryan, and Heyes, that the defence of statutory authorization requires a factual inquiry to be made as to whether the nuisance was the "inevitable result" of the authorized action, or if there was an alternative option that would cause less harm. The plaintiffs specifically note the words of Sopinka J. in Tock, who said at para. 94:

The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance.

- [68] The plaintiffs say that in the instant case the evidence simply establishes the Licence and falls far short of addressing alternative methods that could avoid the many impacts alleged by the plaintiffs. They quote from Heyes at para. 80 where the court adopted the following excerpt from *Schenk v. Ontario* (1981), 34 O.R. (2d) 595 (Ont. H.C.J.), at para. 32:

In determining whether an authorized activity is to be relieved of ordinary tort liability, the statute authorizing the activity must be given a strict construction. The Legislature is not to be deemed to have taken away the legal remedies of private persons and their right to compensation for injury to their legally recognized interests unless a contrary intention is clearly manifested by the legislation.

- [69] The plaintiffs contend that in order to determine this issue the Court may be required to review and test evidence in respect of whether the impacts complained of were known or contemplated by the statutory authority at the time of granting the Licence; whether Alcan

misled or failed to disclose such prospective impacts, and whether Alcan and/or the statutory authority anticipated that further protection measures would be implemented. For example, the Licence affords Alcan significant discretion with respect to the timing, amount, quality and location of water released back into the Nechako system. The Licence may have contemplated or permitted construction of measures such as a cold water release facility which would have altered temperature and flow impacts.

[70] Finally, the plaintiffs say that Alcan's allegation of "collateral attack" on the Licence is based on a misconception of the claim disclosed in the pleadings. The plaintiffs state that they seek no relief in this action in relation to the Licence. Their claim is in private law.

Discussion and decision

[71] According to the court in Heyes, at para. 79, the defence of statutory authority raises a two-part inquiry:

- 1) whether the act causing the nuisance was expressly or implicitly authorized by statute; and,
- 2) if so, whether the nuisance was the inevitable result of the statutorily authorized action.

[72] The burden of proof rests on Alcan, and the legislation at issue must be strictly construed in accordance with the presumption against interference with individual rights. For that reason, it is commonly stated in the authorities that the defence is difficult to establish: e.g. Heyes at para. 80; Tock at para. 94.

[73] In taking the position that the practical feasibility standard applied in Ryan is only one means of testing whether the "necessary causal connection" exists, in effect, Alcan is arguing that the second branch of the statutory authority inquiry - the inevitable result test - is automatically met where the act authorized and the nuisance claimed are one and the same. Alcan says the instant case is one where the nexus between the authorization and the alleged nuisance are so close that the "inevitable result" test can be resolved on the face of the authorization alone, rendering it unnecessary to consider practically feasible alternatives.

[74] I agree that, as a matter of logic and general common sense, there will be little analysis to undertake at the inevitable result stage where the Licence expressly authorizes the nuisance. If the nuisance is the same as the act authorized, then it logically follows that success on the first branch of the statutory authority inquiry will necessarily lead to success on the second branch. In such a case, it would theoretically be possible to resolve the issue of statutory authority entirely on the face of the Licence, as Alcan proposes. However, I do not agree that the instant case falls into that narrow category.

- [75] Alcan states that the Licence expressly authorizes the time, place, and amounts of Alcan's water storage and diversion operations and that it is those very same water storage and diversion operations that are said by the plaintiffs to create a nuisance. As a result, Alcan concludes that the present case is one in which the "necessary causal connection" exists between the authorization and the nuisance alleged.
- [76] I do not accept that argument for a number of reasons. Alcan's argument incorrectly focuses on the source of the nuisance (i.e. the acts authorized), rather than the actual nuisance claimed by the plaintiffs.
- [77] According to the Notice, the plaintiffs allege a number of specific adverse impacts on the Nechako waters, including increased water temperature and erosion of the river banks, as well as adverse impacts on the fisheries resources, including loss of fish spawning habitat and the eventual extinction of the Nechako sturgeon. The plaintiffs say that these adverse impacts have been created by the diversion of water by the Kenney Dam.
- [78] The harm alleged by the plaintiffs is not, as Alcan suggests, the mere storage and diversion of water. The plaintiffs do not contest the fact that the Licence authorizes Alcan to store and divert water generally. Rather, the plaintiffs allege an interference with their rights on the basis of storage and diversion of water in a manner that results in very particular types of harm. The issue is not whether Alcan is authorized to store and divert water generally, but whether Alcan is authorized to store and divert water in a manner that results in the particular harms alleged.
- [79] The question is whether the disturbance of the water, in a manner that results in the particular types of harm alleged by the plaintiffs, is inevitable from the operation of the dam. That question involves an examination of the various options available to Alcan in operating the dam. If there are alternative options that are "practically feasible" and would avoid the alleged harms, then the harms cannot be said to be the inevitable result of Alcan's operation of the dam pursuant to the Licence. Many of the impacts (e.g. fish decline) alleged by the plaintiffs would likely not have been apparent at the time of the original construction of the Kenney Dam and thus it cannot be said that such impacts were contemplated and authorized when Alcan was issued the Licence. Accordingly, the defence of statutory authorization would not be available.
- [80] Simply because the impacts alleged by the plaintiffs are the result of acts authorized by the Licence does not make them one and the same, nor does it establish the "necessary causal connection" as claimed by Alcan. To treat the impacts in that way would render the inevitable result test largely redundant.
- [81] The question under the second branch of the statutory authority inquiry is whether the impacts were the inevitable result of the diversion of water authorized by the Licence. That involves a factual inquiry to determine if there are practically feasible alternatives that would avoid the impacts.

- [82] For example, as noted by the plaintiffs, it may have been practically feasible for Alcan to construct a cold water release facility. Evidence will be required for the Court to weigh this possible alternative.
- [83] To illustrate the importance of distinguishing between the authorized act alleged to cause the nuisance and the actual nuisance itself, it is helpful to examine the decision in *Sutherland* in greater detail, a case which Alcan says involves "materially identical facts" to the case at bar. In my view, *Sutherland* is not only distinguishable from the present case, but offers an excellent example of why Alcan cannot establish the defence of statutory authority on the face of the Licence alone and side-step the practically feasible inquiry.
- [84] In reaching its decision in *Sutherland* the Court did not address the practical feasibility of alternatives (or at least not in such terms). However, that is not because the inevitable result test was satisfied on the face of the authorization alone. Rather, it is because no alternatives were available for consideration as a matter of law, and on the facts as found by the trial judge.
- [85] In response to the defence of statutory authority, the plaintiffs in *Sutherland* advanced three alternatives for consideration, arguing that the defendants should have: 1) selected a different location for the runway; 2) expropriated the property affected by the nuisance; or 3) provided compensation to the plaintiffs affected by the nuisance. The Court rejected all three alternatives as not properly considered. The location was clearly authorized by the statutory scheme, which stipulated the precise location and configuration of the runway, and was therefore not a justiciable issue. Expropriation and compensation were also not valid considerations in part because the Minister did not have the requisite authority to expropriate land for such purposes and there was evidence that the federal government considered and rejected a proposal for compensation to individuals who would be affected by noise from the runway.
- [86] Despite the Court's finding that the location and operation of the runway were authorized by statute, the analysis did not end there. The Court then considered whether the noise constituting the nuisance was the inevitable result of the runway's operation at the specified location. The Court, at para. 102, referred to the trial judge's finding of fact, at para. 294, that the nuisance was impossible to avoid when the runway was operating at capacity:

The defendant Authority called a good deal of evidence to the effect that, given the location of the north runway, it is not possible to operate it to capacity and avoid the noise nuisance of which the plaintiffs complain. The evidence supports that view. Once the runway is placed the die is cast on how aircraft must approach and depart the runway over the plaintiffs' properties.

- [87] In the view of the Court, the finding of the trial judge was effectively a ruling that the operation of the runway at capacity, as located, inevitably resulted in the noise constituting a nuisance.

- [88] As the reasoning of the Court makes clear, the inevitable result test was met because there were no alternatives available that would have avoided the noise, not because the authorized act was the same as the nuisance. The location and operation of the runway, which were specifically authorized by statute, were treated by the Court as distinct from the noise resulting from the operation of the runway. However, the Vancouver International Airport was able to establish that there were no "practically feasible" alternatives.
- [89] The plaintiffs in the case at bar allege a number of adverse impacts on the environment that result from the dam's diversion of water. As with the noise in Sutherland, the impacts alleged by the plaintiffs are not the same as the acts authorized by statute. The question then becomes whether the dam can be operated pursuant to the Licence in a manner that avoids the alleged impacts. All of Alcan's evidence is directed toward establishing the existence of the Licence and the operation of the dam pursuant to the Licence. Alcan has provided no evidence whatsoever to prove that there are no practically feasible alternatives.
- [90] In the result, I am not satisfied that there is no genuine issue for trial with respect to the plaintiffs' claim against Alcan. In my opinion, Alcan has failed to establish the defence of statutory authorization and therefore I dismiss Alcan's application for summary judgment based upon this ground.
- [91] Further, I cannot find that the plaintiffs' claim amounts to a "collateral attack" on the Licence. I agree with the plaintiffs that their claim is a private law claim for injunctive relief and damages. It is Alcan that raised the Licence as a defence to that claim. I therefore dismiss Alcan's application under R. 9-5(1)(d) that the plaintiffs' Reply amounts to an abuse of the process of the Court and should be struck on that basis.

VIII. IS ALCAN ENTITLED TO AN ORDER DISMISSING THE PLAINTIFFS' NOTICE ON THE GROUND THAT IT DISCLOSES NO REASONABLE CLAIM?

[92] Rule 9-5(1)(a) provides:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be[.]

[93] The question for the court under this rule is whether, in the context of the law and the litigation process, the claim has no reasonable chance of succeeding: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 25 [*Imperial Tobacco*].

[94] The Supreme Court of Canada recently discussed and applied the predecessor to R. 9-5 in *Imperial Tobacco* in which the Court struck certain third-party claims made by the defendant tobacco companies against Canada. The defendant tobacco companies had alleged that Canada was a "manufacturer" or "supplier" of tobacco and thus liable for harms due to tobacco products.

[95] The Court set out the test for applications to strike pleadings at para. 17 as follows:

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial ... [Citations omitted].

[96] The Court elaborated on the purpose of the test by setting out the following principles:

- The power to strike out claims that have no reasonable prospect of success is essential to effective and fair litigation. It promotes efficiency by uncluttering proceedings and ensuring that those claims that do have some chance of success go on to trial (paras. 19-20);
- The test operates on the assumption that the claim will proceed through the court system in the usual way. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding; not whether a mathematical chance exists of a thing happening based on abstract speculation (para. 25).

[97] A motion to strike a claim under R. 9-5(1)(a) proceeds on the basis that the facts pleaded are presumed to be true, unless they are manifestly incapable of being proven (*Imperial Tobacco* at para. 22; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 29 [Hunt]; *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at paras. 7-8; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15).

[98] The claimant in a motion to strike must clearly plead the facts upon which it relies in making its claim. The claimant may not be in a position to prove the facts pleaded at the time of the motion; however, whether the evidence substantiates the pleaded facts is irrelevant to the motion to strike. The claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses (*Imperial Tobacco* at paras. 22-23).

[99] The approach to the test set out in *Imperial Tobacco* must err on the side of permitting a novel but arguable claim to proceed to trial. As stated by Chief Justice McLachlin at para. 21:

[O]n a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[100] Neither the length nor the complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case: *Hunt* at para. 33.

- [101] These principles have been firmly endorsed by the British Columbia Court of Appeal in *Bow Valley Resource Services v. Kansa General Insurance Co.* (1991), 56 B.C.L.R. (2d) 337, at para. 9, and *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24, at para. 27.
- [102] There is also authority to suggest that novel actions in matters involving constitutional principles and Aboriginal rights and interests should not be dismissed or rejected without a full factual record before the courts: *Stoney Creek Indian Band v. Alcan Aluminum Limited*, 1999 BCCA 527, at para. 37; *Davis v. Canada (Attorney General)*, 2004 NLSCD 153, at paras. 10-11; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, at para. 40 [Osoyoos].
- [103] The law regarding Aboriginal title and other Aboriginal rights in Canada is a special and highly distinctive body of constitutionally-protected principles. A brief review of the law in this area is necessary in order to address the issues raised in the case at bar.
- [104] The leading case on the nature of Aboriginal title is *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. In that case, the Gitksan and Wet'suwet'en First Nations claimed Aboriginal title to 58,000 sq. kilometres of territory in British Columbia. The Court, without deciding the issue at bar, set out the following principles relating to Aboriginal title:
- (a) Aboriginal title is a collective right to land held by all members of an Aboriginal nation. It cannot be held by individual Aboriginal persons (para. 115);
 - (b) Aboriginal title is inalienable - it cannot be transferred, sold, or surrendered except to the Crown (para. 113);
 - (c) Aboriginal title encompasses the right to exclusive use and occupation of the land for a variety of purposes. Permissible uses are not restricted to uses which were elements of traditional practices (para. 117);
 - (d) Aboriginal title is meant to protect Aboriginal peoples' relationship with their land. Aboriginal title lands cannot be put to uses which are irreconcilable with the claimants' attachment to the land, in the past, present day, or future (paras. 125-128);
 - (e) The reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty requires that the Aboriginal perspective and the common law be given equal weight (para. 148);
 - (f) Aboriginal title is a sui generis interest in land, a right to the land itself, but it is not an absolute right. Aboriginal title may be infringed by the Crown where the test for justification can be met (paras. 125, 159, 160);
 - (g) The Crown's ability to infringe flows from the court's finding that the purpose of s. 35(1) of the Constitution Act, 1982 was aimed at recognition of the prior occupation of North America by distinctive Aboriginal societies and reconciliation of Aboriginal prior occupation with the assertion of Crown sovereignty (para. 161).

- (h) The two-stage test of justification is as follows:
- (i) The infringement must be in furtherance of a legislative objective that is compelling and substantial (para. 161); and
- (ii) The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples (para. 162).

[105] Aboriginal rights and Aboriginal title are related concepts. Aboriginal title is a sub-category of Aboriginal rights which deals solely with claims of rights to land: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 74 [Van der Peet]. Aboriginal title, like all Aboriginal rights, arises from the prior occupation of land, but other Aboriginal rights may also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land.

[106] Aboriginal rights are recognized rather than created by the common law: *William v. British Columbia*, 2012 BCCA 285, at para. 167 [William]. In considering whether a claim to an Aboriginal right has been made out, courts must apply the test set out in *Van der Peet* in order to look at both the relationship of an Aboriginal claimant to the land and the practices, customs, and traditions arising from the claimant's distinctive culture and society. To establish Aboriginal title, claimants must prove occupation of the land by their ancestors prior to, and exclusive occupation at the time of, sovereignty (*Delgamuukw* at para. 143). The recognition of Aboriginal rights in a common law system is complex, and the solution to this complexity has been described as representing a reconciliation of Aboriginal rights with Crown sovereignty: *William* at para. 169.

[107] The Crown has a duty to consult with and accommodate the interests of Aboriginal peoples who have asserted, but not yet proven claims to Aboriginal rights: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida].

[108] In *Haida*, the provincial government had issued forestry licences to private companies which permitted logging in certain areas of Haida Gwaii, despite the fact that the Haida people had claimed (but not yet proven or established) Aboriginal title to those lands. The Haida challenged the transfer of the licences and asked that they be set aside, arguing legal encumbrance, equitable encumbrance, and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

[109] The Court found that the provincial government had legal title to the land (*Haida* at para. 6). While the Crown had a duty to act in good faith pending the resolution of the Haida claims, the assertion of those claims, without yet being proven, were insufficient to ground an action for breach of fiduciary duty (*Haida* at paras. 18, 41, 42). However, the honour of the Crown was still invoked.

[110] The Crown's duty to consult and accommodate stems from the honour of the Crown and its importance in the ongoing process of reconciliation. The need for protection of potential rights triggers the Crown's duty before these rights are proven. As stated in *Haida* at paras. 25, 27:

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

27 The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution.

[111] The Court found that third parties do not owe Aboriginal peoples a duty to consult or accommodate, as they are separate from the special relationship between the Crown and Aboriginal peoples (para. 53):

[T]he duty to consult and accommodate flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.

[112] Aboriginal reserves are created under the Indian Act. The statute defines a "reserve" in s. 2(1) as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".

[113] The leading Supreme Court of Canada authority on the principles behind reserve creation in British Columbia is *Wewaykum Indian Band v. Canada*, 2002 SCC 79 [Wewaykum]. Mr. Justice Binnie, for a unanimous court, concluded that the federal Crown cannot attach any rights to reserve land until those lands are conveyed to it from the Province.

[114] The Court in *Wewaykum* described the process of reserve creation in British Columbia as follows:

- (a) After British Columbia joined confederation, cooperation between the federal government and the provinces was required in the reserve creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the Constitution Act, 1867, the province retained control and ownership of the Crown land required to form Aboriginal reserves (para. 15).
- (b) Any unilateral attempt by either the provinces or the federal government to establish a reserve on provincial land would be invalid (para. 15).
- (c) After confederation, a number of issues relating to reserve creation persisted between the provincial and federal governments, until these issues were ultimately resolved by federal-provincial agreement and the transfer in 1938 of administration and control to the federal Crown of provincial land on which the reserves were to be established. Until this point, nothing with respect to reserve land in British Columbia had been accomplished in any effective legal sense (para. 18).

[115] The legal requirements for the creation of a reserve include an act by the Crown to set apart Crown land for use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown and practical steps by the Crown and the Indian band to realize that intent (Wewaykum at para. 13).

[116] The 1938 transfer of administration and control to the federal Crown of provincial land described in Wewaykum was effected through Order-in-Council No. 1036. The clear intention of the transfer, expressed in the Order-in-Council, was that the lands conveyed be set apart pursuant to the Indian Act to create reserves for the benefit of Aboriginal bands in British Columbia (Wewaykum at para. 19).

[117] Order-in-Council No. 1036 expressly lists the lands on the banks of the Nechako and its tributaries as set aside to create the reserves of the plaintiff Saik'uz and Stellat'en bands, along with many others.

[118] In Osoyoos, the Supreme Court of Canada described the nature of the Aboriginal interest in reserve land in British Columbia. First, the Court stated that Aboriginal title and an Aboriginal interest in reserve land are "fundamentally similar" (Osoyoos at para. 41). Both interests are inalienable except to the Crown, both are rights of use and occupation, both are held communally, and both are sui generis interests in the land that are distinct from traditional common law proprietary interests (Osoyoos at para. 42).

[119] Second, the court articulated three "implications" of the nature of the Aboriginal interest in reserves that were relevant to the case:

43 First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land[.]

45 Second, it follows from the sui generis nature of the aboriginal interest in reserve land and the definition of "reserve" in the Indian Act that an Indian band cannot unilaterally add to or replace reserve lands. The intervention of the Crown is required.

46 Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.

47 Land may be removed from a reserve with the participation of the Crown, which owes a fiduciary duty to the band ...

[120] With respect to riparian rights, the common law concept of riparian rights has been extinguished by legislation in British Columbia, including the historic Water Privileges Act, S.B.C. 1892, c. 47, and Water Act Amendment Act, S.B.C. 1925, c. 61, and the current Water Act, R.S.B.C. 1996, c. 483. The Water Act states that:

2(1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

[121] Previously, the common law doctrine of riparian rights provided the owner of land on the banks of a watercourse with the right to the ordinary use of the water which adjoined his land, as a natural incident of the ownership of the land itself: *Lack v. Alberta (Sustainable Resource Development)*, 2011 ABQB 379, at para. 60.

[122] The case of *Cook v. Vancouver (City)*, [1914] A.C. 1077 (P.C.), at p. 1081-82, settled the question of the effect of legislation such as that in British Columbia, ruling that the Water Privileges Act, which vested water rights in the Province, had the effect of extinguishing riparian rights. Later, the Province enacted the Water Act Amendment Act, which further increased Crown rights over watercourses.

[123] The doctrine of riparian rights has still been raised from time to time in novel actions in British Columbia. For example, in *Pasco v. C.N.R.* (1985), 69 B.C.L.R. 76 (S.C.) [Pasco], the Oregon Jack Creek Indian Band submitted that it was the beneficial owner of a reserve adjoining the Thompson River and, as such, had property rights to the centre line of the river as well as riparian rights. Without deciding the issue of property rights, the court held that the question of riparian rights arising from a reserve interest represented a serious issue to be tried for the purposes of securing an interim injunction pending a final resolution at trial.

[124] The statutory incursions into riparian rights in British Columbia were recently summarized and discussed by this court in *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945, at paras. 497-503, rev'd on other grounds, 2012 BCCA 472.

[125] I turn next to the law of nuisance.

[126] The essence of this area of law is that it addresses interference with a plaintiff's rights in property: Gregory S. Pun & Margaret I. Hall, *The Law of Nuisance in Canada* (Markham, ON: LexisNexis Canada Inc., 2010) at p. 4.

[127] The court in *Ryan* described the doctrine of public nuisance at para. 52:

A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience ... Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference" [Citations omitted].

[128] An action in public nuisance may be asserted by a private person, provided the harm alleged would inflict "special" damage upon him: *Ryan* at para. 52.

[129] The tort of private nuisance arises where a person suffers unreasonable damage to or interference with that person's interest in land. In *Royal Anne Hotel Co. Ltd. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756, at para. 10 [*Royal Anne*], the British Columbia Court of Appeal cited the following definition of private nuisance:

A person then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable. [Emphasis in original].

[130] In the recent decision of the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Transportation)* [2013] SCC 13, Cromwell J. for the Court said:

18. The Court of Appeal concluded that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable: paras. 79-80. In my view, this conclusion is correct.
19. The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 77; see also *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, at pp. 914-15, quoting with approval *H. Street, The Law of Torts* (6th ed. 1976), at p. 219; *Susan Heyes Inc. v. Vancouver (City)*, 2011 BCCA 77, 329 D.L.R. (4th) 92, at para. 75, leave to appeal refused [2011] 3 S.C.R. xi; *City of Campbellton v. Gray's Velvet Ice Cream Ltd.* (1981), 127 D.L.R. (3d) 436, at p. 441 (N.B.C.A.); *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756

(B.C.C.A.), at p. 760; Fleming's *The Law of Torts* (10th ed. 2011), at s. 21.80; Street on Torts (13th ed. 2012), at p. 443; L.N. Klar, *Tort Law* (5th ed. 2012), at p. 759.

[131] Thus, private nuisance is a tort committed against the land itself rather than against any person; the common law requirement is that a plaintiff must have a proprietary interest (legal or equitable) in the affected land in order to have standing to maintain an action for private nuisance: *Pun & Hall*, at pp. 86-87. Canadian law has diverged from this strict requirement in a small number of cases; most notably the Alberta appellate decision in *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 [Motherwell]. In that case, the defendant made a series of harassing phone calls to the home where her brother and his wife lived. The brother alone held legal title to the home and the question was raised as to whether his wife had standing to make a claim in nuisance.

[132] The Court, relying on the earlier decision in *Foster v. Warblington (Urban District Council)*, [1906] 1 K.B. 648, stated at para. 33:

Here we have a wife harassed in the matrimonial home. She has a status, a right to live there with her husband and children. I find it absurd to say that her occupancy of the matrimonial home is insufficient to found an action in nuisance. In my opinion she is entitled to the same relief as is her husband, the Brother.

[133] Thus, the wife's "occupancy of a substantial nature" (*Motherwell* at para. 32) was sufficient to ground a claim in private nuisance.

[134] However, the decision in *Motherwell* was later criticized by the House of Lords in *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 [Hunter], where Lord Goff of Chieveley expressed concern at p. 693 that:

[E]xtension of the tort [of private nuisance] in this way [(i.e., such that people who have a 'substantial link' with the land, including those who occupied the premises 'as a home')] would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is, in my opinion, not an acceptable way in which to develop the law.

[135] Based on his review of the authorities, His Lordship concluded at p. 692:

[A]n action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far as his reversionary interest is affected. But a mere licensee on the land has no right to sue.

[136] Mr. Justice Holmes considered both lines of reasoning in *Sutherland v. Canada* (Attorney General), 2001 BCSC 1024 [*Sutherland v. Canada*], rev'd on other grounds. In *Sutherland*, in determining whether two children, aged 10 and 8, of nearby homeowners had standing to make a claim in nuisance for noise created by the addition of the north runway at Vancouver International Airport, His Lordship stated at para. 233:

I prefer the reasoning of the majority of the House of Lords in *Hunter v. Canary Wharf Ltd.*, supra, as being consistent with the nature and the origin of claims in nuisance and providing cogent reason against extension of those claims. I conclude the infant [plaintiffs] Brett and Laura Livingstone do not have a valid claim in private nuisance.

[137] Thus, the current jurisprudence in this jurisdiction indicates that people who occupy premises as a home, without ownership or other interest in the property, do not have standing for an action in private nuisance.

[138] A small number of cases address the intersection of Aboriginal rights and the law of nuisance, suggesting that the rights to fish or trap wild animals might be sufficient to grant standing to Aboriginal plaintiffs in making a claim of private nuisance. In *Islands Protection Society v. British Columbia* (1979), 98 D.L.R. (3d) 504 (B.C.S.C.) [*Islands Protection Society*], Murray J. relied on the decision in *Motherwell* in granting standing to two Aboriginal individuals who were members of the Haida Indian Band. The Aboriginal plaintiffs had used and occupied the land in question for trapping animals, harvesting seafood, and fishing and sought declaratory relief against the provincial Minister of Forests in determining the issuance of tree farm licences. The reserve interest of the Haida Indian Band was not discussed.

[139] In *Bolton v. Forest Pest Management Institute* (1985), 21 D.L.R. (4th) 242 (B.C.C.A. Chambers) [*Bolton*], Macfarlane J.A. stated that the plaintiffs' interests constituted a common law proprietary interest (namely, a *profit à prendre*) and thus might support a claim in nuisance. The Aboriginal plaintiffs, members of the Kitsumkalum Band, had registered trap lines and Indian fish food permits on the land in question and they opposed the defendants' proposed herbicide research program in the areas upon which they were reliant for food. Macfarlane J.A. stated at para. 19:

A trap line can be registered in the name of one person only. While it does not give the holder of the trap line any proprietary rights in wildlife, or restrict other persons from capturing wildlife, it nevertheless is a right to take animals *ferae naturae* (wild game) from the lands over which the registered trap line is given.

[140] However, a similar approach failed in a claim of nuisance against a private company in *Palmer v. Nova Scotia Forest Industries*, [1983] N.S.J. No. 534 (N.S.S.C.) [*Palmer*], because the Aboriginal plaintiffs were unable to establish the rights to hunt and fish on the land in question.

[141] In *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24 [Tolko], the Band's recognized right to harvest timber (which had previously been acknowledged by the Crown) was sufficient to ground the action in trespass. Importantly, the Court also stated at para. 43 that until the Band established their title to the area, the Court must presume that it was Crown land.

[142] Among the four cases cited above (*Islands Protection Society*, *Bolton*, *Palmer*, and *Tolko*), only *Palmer* includes a specific consideration of whether an Aboriginal reserve interest could ground a claim in private nuisance. Although *Palmer* is a decision of the Nova Scotia Supreme Court (Trial Division) and thus not binding on me, I find it useful to review its discussion.

[143] Mr. Justice Nunn draws a distinction in *Palmer* between Aboriginal rights asserted on reserves and off reserves. His Lordship states:

494 In the *Isaac* case, *supra*, Macdonald, J.A., at pp. 498 and 499, makes these observations:

"With deference to those who may hold a contrary view, I think that a real distinction exists in law between the status of an Indian hunting on reserve ground [and] an Indian or non-Indian hunting on non-reserve lands.

[T]he one right that was never taken away from [Indians] by treaty or otherwise, was the right to hunt or fish on reserve land. Although such right could be taken away by amendments to the Indian Act or by regulations made thereunder, this has not been done.

What I am saying is that historically, reserves were created for the use of Indians: not only as their place of residence but also as their hunting and fishing grounds. Thus, hunting and fishing on reserves are so inextricably bound up with land and land use as to constitute a usufructuary right - a legal right that has never been taken away."

495 This reasoning goes further than the comments of Chief Justice MacKeigan and, while obiter with regard to non-reserve lands, I find it compelling.

[144] Based on the facts in *Palmer*, Nunn J. concluded that the case was concerned only with lands outside the reserve and that the Aboriginal plaintiffs had not established their rights in those areas. However, His Lordship commented in obiter (para. 509):

[T]his denial relates only to that part of the Indian claim relating to aboriginal rights and the right of the bands involved arising out of reserve lands stands on the same footing as other privately owned property of other plaintiffs.

[145] He also notes at para. 504:

In my opinion the situation as to aboriginal rights may very well differ from province to province so that a finding of particular aboriginal rights in one province is of little help in making a determination in this province. Further, such rights might exist in one province and not in another.

[146] The statement by Nunn J. in *Palmer* that an Aboriginal reserve right "stands on the same footing as other privately owned property of other plaintiffs" (para. 509), might suggest that a reserve interest could ground a claim in private nuisance in Nova Scotia. However, as Nunn J. notes, the situation might differ between provinces. I turn now to consider each of the two sub-issues that arise in determining whether the Notice should be struck on the basis that it discloses no reasonable claim. For the purposes of this analysis, the plaintiffs' claim is considered first in light of their asserted but unproven Aboriginal title and rights and then in relation to their reserve interest.

Do holders of unproven Aboriginal title and rights have a cause of action against private persons in private or public nuisance or for breach of riparian rights for interference with the claimed rights?

[147] Alcan argues that even if the facts alleged in the Notice are accepted as true, they disclose no reasonable cause of action against it in nuisance or for breach of riparian rights. The premise which underpins this part of Alcan's submissions is that asserted but unproven Aboriginal rights and title are no basis for a claim having as its gravamen interference with property, against a private party such as Alcan.

[148] Alcan submits that, as a third party, it has no obligation to consult with or accommodate the Aboriginal plaintiffs on the basis of their unproven claim to Aboriginal title and rights on the land surrounding the Nechako. For the plaintiffs' claim to succeed, says Alcan, would be to "shortcut" all aspects of the reconciliation process, including negotiation, consultation, and accommodation. The Crown would be unable to fulfill its duties to consult and accommodate because it would be excluded from the proceedings. Further, the Crown, who would not be a party to the proceedings, would not be bound by any order made therein. Alcan argues that the plaintiffs' claim is an attempt to skip the process of reconciliation and move straight to enforcement of their, as yet, unproven rights.

[149] Alcan also submits that the jurisprudence on Aboriginal rights and title demonstrates that the establishment of rights is a necessary precondition to the enforcement of such rights. Without a court's declaration, or the acknowledgment of the Crown, the plaintiffs' claims have no reasonable prospect of success because the Court is unable to determine the scope of alleged rights, which therefore precludes a finding that Alcan's actions interfere with them.

[150] For these reasons, Alcan insists that there can be no cause of action against it in nuisance or for breach of riparian rights arising from interference with unproven and unrecognized Aboriginal title and rights.

[151] The plaintiffs' argument is that they have the proprietary rights necessary to bring this action based on their claims of Aboriginal title and rights. The plaintiffs contend that, in principle, their claim is no different from any other claim in property-based tort. It would be "absurd", they argue, to suggest that this application to strike, which must proceed on the basis that the facts pleaded are true, should succeed because the property rights pleaded as

the basis of the plaintiffs' claim have not yet been proven. The plaintiffs assert that they can succeed in their claim once they prove the property rights (i.e. Aboriginal title and rights) sufficient to ground their claim.

- [152] The plaintiffs submit that their claim does not engage the duty to consult and accommodate, nor does it implicate or affect the framework for reconciliation that has been established in Canada. The plaintiffs claim against Alcan in tort law on the basis of property rights, including Aboriginal property rights. It is not a claim based on the duty to consult. The plaintiffs note that the duty to consult is a procedural right that is only enforceable against the Crown, while, once proven, Aboriginal rights are enforceable against the world.
- [153] The plaintiffs submit that the question of whether the federal or provincial Crowns ought to be a party to the proceedings does not arise at this stage. Both Crowns have notice of these proceedings and the claims made by the plaintiffs, but neither has sought to be added as a party or otherwise involved, nor has the defendant made such an application.

Discussion and decision

- [154] The plaintiffs in the case at bar attempt to claim in nuisance on the basis of an, as yet, unproven interest in the land in question. To the extent that similar actions have been attempted in the past, earlier decisions of this and other courts suggest that the plaintiffs' claim has no reasonable prospect of succeeding. While Aboriginal plaintiffs in British Columbia have been successful in asserting claims based on rights to trap animals and fish (Bolton) and to harvest timber (Tolko), these rights were registered or otherwise acknowledged by the Crown before the action began. The actions were not grounded in unproven or unrecognized rights. Palmer, a similar case in Nova Scotia, failed because the Aboriginal plaintiffs could not establish their claimed rights to hunt and fish.
- [155] Perhaps the strongest authority for the plaintiffs' claim is Islands Protection Society, which relied on Motherwell in granting standing to Aboriginal plaintiffs who did not have recognized rights. However, the line of reasoning in Motherwell has since been rejected by this Court in Sutherland v. Canada.
- [156] Thus, the law of private nuisance as it currently stands in this jurisdiction would not appear to recognize a plaintiff who has claimed, but not yet established, an interest in land.
- [157] The plaintiffs have indicated that they intend to prove their claims to Aboriginal title and Aboriginal rights (and thus establish sufficient grounds to bring a claim in nuisance) in the course of trial; i.e. while establishing the required elements for an action in private or public nuisance (or breach of riparian rights).
- [158] In my view, the key problem with this submission is that the plaintiffs assert their claim, not against the Crown, but against a third party defendant, Alcan.

- [159] The assertion and resolution of claims to Aboriginal title and Aboriginal rights is inherently intertwined with the ongoing process of reconciliation of Aboriginal rights with Crown sovereignty. While, ordinarily, a claim in nuisance would not engage the duty to consult or accommodate or the broader framework for reconciliation in Canada, the Aboriginal plaintiffs in this case must still establish either the Aboriginal title or the Aboriginal rights that they say ground their claim.
- [160] Thus, the Crown is a key party in this action as it attempts to establish and delineate the scope of Aboriginal title or rights. Indeed, as held in *Tolko* at para. 43 and *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at para. 978, until there is a finding of Aboriginal title, there must be a presumption that lands not held privately are Crown lands.
- [161] This Court has already expressed misgivings about conducting tort litigation as a vehicle for asserting claims to Aboriginal title or rights: *Tolko* at para. 49. Consultation, accommodation, and negotiation are without doubt the preferred routes to reconciliation of Aboriginal rights with the assertion of Crown sovereignty: See *William* at para. 143; *Haida* at paras. 14, 38. Until an assertion of Aboriginal title and/or rights is proven, it is the honour of the Crown that protects the pending claim. There is no similar obligation on third parties at this stage.
- [162] Finally, while not of itself a bar to allowing this action to proceed to trial, it is worth noting that such a trial would be dominated by issues and evidentiary procedures that private parties, such as *Alcan*, are not well-positioned to contest. The recognition of Aboriginal rights is a complex legal process. The plaintiffs intend to prove occupation of the land by their ancestors prior to, and exclusive occupation at the time of Sovereignty (per the test for Aboriginal title set out in *Delgamuukw* at para. 143), that the pre-Sovereignty activity of fishing was an element of a practice, custom, or tradition integral to the distinctive culture of the *Saik'uz* and *Stellat'en* societies (per the test for Aboriginal rights set out in *Van der Peet* at para. 46), and that this practice translates to a modern legal right capable of grounding a claim in nuisance. The Crown is the only party who can properly fulfill the role of adversary in such an action.
- [163] Accordingly, I am persuaded by *Alcan's* argument to conclude that, considered in the context of the law and the litigation process, a claim in private or public nuisance (or for breach of riparian rights) against it, based on asserted but unproven claims to Aboriginal title and Aboriginal rights, has no reasonable chance of succeeding.
- [164] In reaching this conclusion, I have given due consideration to the principle articulated in *Hunt* that neither the novelty of the cause of action, nor the complexity of the issues, should prevent a plaintiff from proceeding with a case. I also note the authority cited above that suggests that novel actions in matters involving Aboriginal rights and interests, in particular, should not be dismissed or rejected without a full factual record before the courts. However, in applying the principles of the law of Aboriginal rights and title as they currently stand, and in light of the law of private and public nuisance, I am satisfied that

there is no reasonable prospect of success for this action.

Is there any basis in law for the plaintiffs' claims to private nuisance or for breach of riparian rights incidental to their reserve interests?

[165] Alcan contends that there is no reasonable prospect of success to the plaintiffs' claim that they have common law riparian rights to the waters adjoining their reserves because such rights were extinguished by the Province before these reserves were created.

[166] Alcan further submits that the fact that the existence of the reserves may provide evidence of occupation is not relevant to the case at bar.

[167] The plaintiffs argue that their interest in the lands reserved for them is sufficient to ground a claim in private nuisance. The plaintiffs cite *Joe v. Findlay* (1978), 87 D.L.R. (3d) 239 (B.C.S.C.) for the proposition that an Indian band for whom reserve lands are set aside has legal possession to those lands.

[168] Similarly, the plaintiffs argue that legal possession is sufficient to ground a claim for breach of riparian rights. Like a land owner, the plaintiffs contend, their interest in the lands reserved for them is sufficient to give rise to riparian rights; that is, the right to water from adjacent watercourses in a natural state in both quantity and quality. The plaintiffs rely on *Chasemore v. Richards* (1859), 11 E.R. 140 (H.L.), regarding the common law of riparian rights.

Discussion and decision

[169] The extent to which an Aboriginal reserve interest is sufficient to ground claims in tort, such as private nuisance has yet to be determined by the courts, and in that sense, constitutes a novel claim. An Aboriginal reserve interest has never been successfully used to ground a claim in private nuisance, but neither has this possibility been ruled out by the courts.

[170] The Aboriginal plaintiffs in *Islands Protection Society, Bolton, Tolko, and Palmer* based their claims in rights other than those arising from reserve interests. To the extent that there is any uncertainty as to whether the law recognizes the plaintiffs' claim, that novelty favours permitting the plaintiffs' claim to proceed to trial (*Imperial Tobacco*). In particular, I note again that novel actions in matters involving the rights and interests of Aboriginal peoples may often be addressed best on the basis of a full factual record before the courts.

[171] In assessing whether, per the test set out in *Imperial Tobacco*, a claim of private nuisance asserted on the basis of an Aboriginal reserve interest has a reasonable chance of succeeding, I consider the following.

- [172] First, the Supreme Court of Canada has described an Aboriginal interest in reserve land as a right of use and occupation (Osoyoos at para. 42). The law of nuisance, as it currently stands in this jurisdiction, does not extend standing to individuals who occupy property as a home without ownership or other interest in it (Sutherland v. Canada).
- [173] The question which arises, then, is whether the plaintiffs' right of "use" of reserve land could be a sufficient interest in which to ground a claim of private nuisance.
- [174] The only tenuous support of a reserve interest providing sufficient standing for a claim of nuisance is found in the remarks in obiter by Nunn J. in Palmer that a right arising out of reserve lands "stands on the same footing" as other privately owned property (para. 509).
- [175] Bolton provides authority for the proposition that registered trap lines and Indian fish food permits can constitute the common law proprietary interest known as a profit à prendre. However, the interest recognized in Bolton was established independently through the licensing system that regulated activity on lands external to the reserve, not as a right occurring incidental to the reserve interest.
- [176] Compared to either Palmer or Bolton, the circumstances in the case at bar more closely resemble those in Pasco, where the band that occupied a reserve adjoining a river asserted riparian rights over the use of the river.
- [177] I accept the argument of Alcan that there is no reasonable prospect of success to the plaintiffs' claim that, on the basis of their reserve rights, they have common law riparian rights to the adjoining waters. As Alcan points out, by no later than 1925, all riparian rights in respect of any stream were vested in the Province by means of legislation. The plaintiffs' reserves were not created until 1938. As a result of the principles articulated in Wewaykum, the federal Crown could not attach any rights to reserve property until that property was conveyed to it by the Province. It was therefore impossible for the federal Governor in Council to have conferred riparian rights on the plaintiffs' bands, as the federal Crown never had such rights to give.
- [178] Therefore, I conclude and find that a claim in private nuisance, or for breach of riparian rights, based on an Aboriginal reserve interest has no reasonable chance of succeeding.
- [179] In the result, notwithstanding my finding that Alcan's defence of statutory authorization must fail, I find that Alcan is entitled to an order striking the whole of the Notice. I have concluded that the foundation of the plaintiffs' claim against Alcan is fatally flawed for the reasons given above.

IX. CONCLUSION

- [180] Alcan's application for summary judgment is dismissed. Alcan's application for an order striking out the whole of the Notice is granted.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen

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