THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

First Nations

Action in tort against third party new legal tool for First Nations

By **Anita Boscariol**

Anita Boscariol

(August 9, 2019, 8:40 AM EDT) -- In 2011, the Saik'uz and Stellat'en First Nations (the First Nations) commenced an action in tort against Rio Tinto Alcan (Alcan) for nuisance caused by the Kenney dam to the Nechako River system, to their adjacent reserves and to lands to which they assert Aboriginal title. The First Nations claim was unique to the extent that it was a claim for damages against a private defendant for alleged harm to proprietary interests based on a claim of asserted, but unproven, Aboriginal rights and title.

In 2013, Justice Bruce Cohen struck their Notice of Civil Claim and in his reasons for judgment, determined that no claim for proprietary damages could be brought by the First Nations until their claim of Aboriginal rights and title was first proven (*Thomas v. Rio Tinto Alcan Inc.* 2013 BCSC 2303).

The B.C. Court of Appeal overturned, in large part, the B.C. Supreme Court ruling in *Saik'uz and Stellat'en First Nation v. Rio Tinto Alcan Inc.* 2015 BCCA 154. The Court of Appeal determined that the First Nations had properly brought their action against Alcan. The court employed the test: assuming the facts alleged are true, has a reasonable cause of action in tort been made out? The court then felt the First Nations had established a reasonable cause of action in tort and held that, like any other litigant, should be afforded the opportunity to prove the rights required in order to succeed in their claim against Alcan.

The First Nations' Notice of Civil Claim was reinstituted to their extent of the claim for proprietary damages to their asserted Aboriginal title and rights, including riparian rights, as well as to their right to exclusive possession of their reserve lands. However, the portion of the Notice of Civil Claim to riparian rights tied to their reserve interests was struck by the Court of Appeal. Water rights were vested in the province of British Columbia in 1925, which predated the creation of reserves in 1938. Hence, these riparian rights could not be tied to their reserve lands.

The Court of Appeal dispensed with the notion that claimed Aboriginal rights and title would need to be proven *before* an action in tort could be brought against a third party. The First Nations were provided with the opportunity to prove their Aboriginal rights within their claim against Alcan. The Court of Appeal did not direct how or against whom the rights were to be proven.

In July 2016, Alcan applied to have both the federal and provincial Crown added as defendants in the action. The First Nations opposed the addition of the Crown because they were not seeking a formal declaration of Aboriginal title; they were purely bringing an action in tort. Nonetheless, Justice Nigel Kent in his reasons for judgment in *Thomas v. Rio Tinto Alcan Inc.* 2016 BCSC 1474, concluded that it was appropriate for the federal and provincial Crown to be added as defendants to the Claim for the following reasons:

- This is a major and complex case in which the intersection between Aboriginal rights and common law tort stand to be defined.

- The First Nations had already formally invited the Crown to participate through issuance of a Notice of Constitutional Question, challenging various laws and legal agreement issued or made by the Crown as inapplicable based upon alleged Aboriginal title and rights held by the First Nations; pursuant to s. 8 of the *Constitutional Questions Act*, both Crowns have the right to become a party and contest the existence and extent of the title and rights forming the basis of the constitutional challenge.
- Pursuant to the *Water Act*, the province owns the water that forms the subject matter of the dispute, subject to the Aboriginal rights and title the First Nations may have, and therefore, is entitled to participate in litigation involving its property.
- The First Nations allege, and will be required to establish, that they have Aboriginal rights and title to the lands and waters affected by the operation of the Kenney Dam.
- Though the Court of Appeal had confirmed the action in which Aboriginal rights and title were claimed could proceed despite the fact that the Crown was not yet a party to the litigation, it is still an important factor that litigation involving claims of Aboriginal rights and title is of general public importance, and a private litigant may not adequately represent all of the public interests at stake.
- A finding regarding Aboriginal rights and title of the First Nations involves evidence of exclusive occupation on the date of British sovereignty over British Columbia and culturally distinctive practices carried out prior to European contact, matters of which Rio Tinto says they have no knowledge; only the Crown would be able to meaningfully respond to the First Nations' claims.
- Despite the fact that adding the Crown as defendants will add complexity, time and expense to the proceedings, *an assertion of Aboriginal title and rights as the basis for common law rights leads almost inevitably to the need to add the Crown as defendants* (emphasis added).

As such, the First Nations were ordered to amend their claim, adding the Crown, federal and provincial, as defendants.

The First Nations filed their Amended Notice of Civil Claim in October 2016. It included allegations of duties and defaults on the part of the Crown defendants, including that the Crown failed to act on their fiduciary duty and other obligations to the First Nations to sufficiently control the water flows from the dam so as to preserve the fish and fishery in the Nechako River system.

Alcan and the Crown opposed certain amendments and sought declaratory relief because they believed the allegations to be vague and thus difficult, if not impossible, to enforce.

In reasons for judgment in *Thomas v. Rio Tinto Alcan Inc.* 2019 BCSC 107 issued in January 2019, the B.C. Supreme Court pointed out a number of obstacles it sees the First Nations having to overcome in order to establish that the relief they seek under their amended notice is appropriate. However, given that a full trial will be held to determine whether the relief proposed by the First Nations is available as a matter of law the court felt, it was not clear prior to a full trial that the relief sought by the First Nations is bound to fail. Ultimately, the court left all to be decided at trial.

Where we are now

We know that a First Nation can bring an action in tort against a third party for harm done to their reserve lands, and to proven or recognized Aboriginal rights and title lands. The Thomas (Saik'uz and Stellat'en) case against Rio Tinto Alcan Inc. presented an opportunity for a new development in the law in two ways; firstly, it was an action brought by First Nations solely in tort against a private defendant for alleged harm to proprietary interests based on a claim of asserted Aboriginal rights and title. Secondly, the issue of how Aboriginal rights and title, which are claims against the Crown, could be proven in such an action, without the Crown being made a party, remained an open question, following the Court of Appeal decision in 2015.

This latter issue was ultimately resolved in the case of these First Nations through adding the Crowns (federal and provincial) as defendants in the action, by way of applications to the courts.

Further developments in the law defining and refining the intersection of Aboriginal rights law and private tort law can be expected in future.

Anita Boscariol is associate counsel at Watson Goepel LLP *in Vancouver. With over 10 years' experience as director general, treaties and Aboriginal government negotiations west, for the former federal Department of Indigenous & Northern Affairs, Anita continues to focus her practice on Indigenous law.*

Photo credit / ChrisGorgio ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Richard Skinulis at* Richard.Skinulis@lexisnexis.ca *or call 437-828-6772.*
