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Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan, 2015 BCCA 154

The Supreme Court of Canada has denied Rio Tinto Alcan leave to appeal from the BC Court of Appeal decision in this action: [2015] SCCA No 235. It is an important victory for First Nations as the Supreme Court effectively confirmed that asserted Aboriginal title can give rise to claims in private and public nuisance, and common law riparian rights.

Saik'uz and Stellat'en First Nations (the "Nechako Nations") claimed against Rio Tinto Alcan in public and private nuisance and breach of riparian rights due to operations of the Kenney Dam, a dam on the Nechako River which provides electricity for Alcan's aluminum smelter in Kitimat. The Nechako Nations alleged that the dam interfered with their right to fish and with their cultural practices relating to the river. They sought interlocutory and permanent injunctions or damages in the alternative.

Alcan brought an application for summary judgment on the basis that the complete defense of statutory authority applied. Alcan also sought to strike the Notice of Civil Claim in its entirety for disclosing no reasonable cause of action. The Chambers judge refused to grant summary judgment; however, he struck the Notice of Civil Claim. The Nations appealed from the striking of the claim, while Alcan cross-appealed from the refusal to grant summary judgment.

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Nacho Nyak Dun v. Yukon

Last week, the Yukon Court of Appeal released its decision in First Nation of *Nacho Nyak Dun v. Yukon* (2015 YKCA 18). Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin First Nations and the Yukon Government had previously entered into Final Agreements which among other things, set out a consultative and collaborative process for the development of land use plans. The process provided Final Agreement First Nations the powers to participate in the management of public resources. Specifically, rules regarding consultation and a detailed approval process for land use plans were set out in the Final Agreements – which are treaties with rights protected under section 35 of Canada's Constitution.

The planning process for the Peel Watershed began in 2009. A commission was created to develop a draft plan and, after input was received, the Commission provided a Recommended Final Plan ("RFP"), to the Yukon Government. The RFP took a precautionary approach which preserved significant options for conservation of the Peel River watershed. After consultations, the Yukon government rejected the plan and proposed 5 general and ill-defined modifications. Negotiations broke down after Yukon changed the plan over the objections of the First Nations, who took the position that Yukon did not have the authority under the Final Agreements to make the changes it had made.

Justice Veale of the Supreme Court of Yukon, agreed with the First Nations that theYukon Government had breached the Final Agreements and had not fulfilled its treaty obligations. In the Court of Appeal, Chief Justice Bauman held that since Final Agreements are treaties under section 35 of the Constitution, they must be interpreted in the context of reconciliation and so as to maintain the honour of the Crown; Yukon failed to honour the letter and spirit of its treaty obligations.

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UPCOMING EVENTS:

Dec. 1-2, 2015: Drew Mildon is speaking at the Canadian Institute's Building Aboriginal Partnerships in BC at the Vancouver Marriott Downtown on the topic*: After the Tsilhqot'in Decision: A Look at its Impact on the Legal Landscape in B.C.*

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The B.C. Court of Appeal allowed the Nechako Nations' appeal in part and dismissed Alcan's cross-appeal. They held that the Chambers judge had not erred in determining that there was a genuine issue for trial with respect to the defense of statutory authority, as the precise location, construction, and the operating procedures of the dam were not prescribed by statute. The Court of Appeal determined that the fact that Aboriginal title and rights were as yet unproven did not preclude the Nechako Nations' claims, writing: "Setting a separate standard for Aboriginal peoples before they can sue other parties to enforce their rights... could be inconsistent with the principle of equality under the Charter of Rights and Freedoms."

The Court explained that if the Nechako Nations were able to prove rights and title, this would entitle them to possessory rights, which are sufficient to ground both public and private nuisance claims. The Court likened the Aboriginal right to fish to a profit *à prendre*, capable of founding an action in private nuisance, and the claims for breach of riparian rights were upheld in part. Although the Chambers judge had decided that the Nechako Nations' "only proper adversary" was the Crown, not a private party, the Court of Appeal disagreed: "Whether the Crown is a party to the action should not be determinative of the issue of whether the pleadings disclose a reasonable cause of action." The Supreme Court of Canada dismissed Alcan's appeal of this decision. ❖

Changes to BC's approach to PST for First Nation Limited Partnerships

Limited Partnerships ("LPs") have been fairly common corporate structures, and are used where First Nations aim to take advantage of the tax exemption for a "public body performing a function of government" under paras. 149(1)(c) or (d.5) of the *Income Tax Act* ("ITA"). In BC, a LP is registered under the *Partnership Act* and must have a general partner and at least one limited partner. LPs are a variation of general partnerships in that the general partner carries on the management of the business, and the limited partner is simply a silent investor and cannot participate in the business. The general partner is fully liable for the debts and obligations of the partnership, and the limited partners' liability is limited to the amount of capital they contribute to the partnership. LPs have been advantageous because they provide liability protection while removing *income* tax liabilities for qualifying First Nations and Indian bands. Recent changes to the provincial sales tax ("PST") policy may affect the way limited partnerships ("LPs") are charged PST on transactions. Previously, the PST in a transaction was effectively divided in proportion to a partner's ownership interest in the LP, which meant that a band or First Nation that owned 99% or more of an interest in a LP as limited partner would bear that much of the tax, which would mean that effectively the LP was exempt. PST Bulletin 319, issued in 2013 and revised in early 2014, followed on the heels of two court cases that held that a general partner holds the entire ownership interest in assets acquired for the LP. PST Bulletin 319 states that because general partners conduct the business of a LP, they are also considered to own the assets of a limited partnership and are thus liable to pay PST on purchases unless otherwise *provincially* tax exempt. In essence, now PST may be charged to the general partner without apportioning based on the share of ownership of the LP, depending on the circumstances, and on the terms and nature of the partnership agreement.

PST Bulletin 319 considers examples of limited partnerships very similar to the kinds that many First Nations and Indian Bands use in BC, and specifically states:

> "In this case, assets purchased on First Nation land by the limited partnership would be subject to PST. The general partner is the purchaser of the assets and a band-owned corporation does not qualify as a First Nation individual or band, and, therefore, is not eligible for exemption from PST."

There are options available to First Nations who are involved with LPs as limited partners or as general partners through their development corporations, which may involve converting an LP to an LLP, or using a trustee arrangement. However, the best path forward will depend on the circumstances of each partnership, the location and nature of business, and the terms of the partnership agreement. ❖

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Justice Bauman held that at an earlier stage in consultation on the draft plan, Yukon Government failed to reveal its extensive plan modifications, and failed to provide the requisite details or reasons in support of its general comments. This undermined the dialogue and left the Commission ill-equipped to advance the process. At a later stage, Yukon proposed a new plan disconnected from its earlier comments. This effectively denied the Commission performance of its treaty role to develop a land use plan for the Peel watershed. The appropriate remedy for Yukon's failure to honour the treaty process was to return the parties to the point at which the failure began and where Yukon derailed the dialogue essential to reconciliation as envisioned in the Final Agreements. ❖