Rio Tinto Subs Fail to block Aboriginal Title Damage

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With a one-two punch delivered by the Supreme Court of Canada on October 15, 2015 two Rio Tinto subsidiaries, Rio Tinto Alcan and Iron Ore Company of Canada, have failed to block two lawsuits brought by Indigenous groups. The Court refused to grant the two companies leave to appeal decisions of the British Columbia Court of Appeal and the Quebec Court of Appeal that keep the door open for two Indigenous groups to bring damage claims against the resource developers.

Thomas (Saik'uz) v. Rio Tinto Alcan Inc.

In *Thomas* representatives of the Saik'uz and Stellat'en First Nations brought an action for alleged damages arising out of the construction and operation of a hydroelectric dam, authorized by the Government of British Columbia, by Rio Tinto Alcan and its predecessors on the Nechako River since the early 1950s. They sought damages for nuisance and interference with the First Nations' riparian rights (i.e., water rights attaching to land). They also sought an injunction to restrain Rio Tinto Alcan from continuing the interference.

The company made an application for summary judgment, seeking to dismiss the claim at the outset or, in the alternative, to strike out portions of the claim. It argued that it had statutory authority to build and operate the dam, that the First Nations must first prove any Aboriginal Title as against the Crown and that the action was just a backdoor attack on the Crown's approval of the dam. Although the hearing judge did not grant the summary judgment application, he struck out the claims as disclosing no cause of action against the company.

The BC Court of Appeal did not agree. It applied a high threshold for striking the claim, holding that it had to be shown, assuming the facts alleged by the First Nations to be true, that it was plain and obvious that the claim disclosed no reasonable cause of action. The Court decided that there was enough to send the issue of nuisance and interference with riparian rights based on Aboriginal Title to trial, along with the company's defence of statutory authority. The Court also held that it was not necessary for the First Nations to have their claims proven and recognized by the Crown before proceeding with their action.

The Court did note that any ultimate decision in the case could not be binding on the Crown, as it is not a party. It also found in favour of the company on an element of the riparian rights claim associated with Reserve lands, determining that those water rights had been extinguished by legislation.

Iron Ore Company of Canada v. The Uashaunnuat

The Innu of Uashat, Mani-Uteman and Matimekush-Lac John in Northern Quebec brought a $900 Million law suit against the Iron Ore Company of Canada and the Quebec North Shore and Labrador Railway, claiming infringements of Aboriginal rights and treaty rights as a result of the companies' mining, port and railway activities. They also asked for a permanent injunction closing those operations.

The companies applied to the Superior Court to dismiss the claims. They said that the Innu ought to have named the Crown as a party. They claimed that the aboriginal rights that were not yet recognized or established could not create civil liability on the part of third parties. They further claimed that the action would create an impediment to reconciliation with the Crown.

The Court did not agree. As with the Rio Tinto Alcan decision, the judge had to assume that the facts being alleged to support the claim were true. The judge concluded that, based on those facts, he could not be certain that the Innu would be unable to prove legal fault on the part of the companies and the damages arising from it. He found there to be a fair issue to be tried. The judge also pointed out that the Crown had been given notice of the claim and that it, through its representatives, considered itself to be a full party to the dispute.

A judge of the Quebec Court of Appeal refused to grant leave to appeal this interim decision of the lower court. She found that allowing the action to proceed would not cause irreparable harm to the companies and that the issues should therefore be decided at a trial. The cost of the proceedings alone was not a sufficient reason to allow a review of the lower court's decision against dismissing the action.

The Supreme Court of Canada

The companies applied to the Supreme Court for leave (effectively, permission) to appeal the Court of Appeal decisions to that court. The Supreme Court denied the leave applications. As is customary, the Court did not give reasons for the denials.

This leaves the defendant corporations as parties to litigation that will certainly take years (if not decades) to make its way through the court system. It also leaves the plaintiffs with the burden of leading voluminous evidence in order to prove, at least on a balance of probabilities, the factual basis to support their claims, including proof of Aboriginal Title, associated rights and interest, and the damages allegedly suffered. Once the factual foundation is presented and tested at trial, the court will then have to wrestle with the complex legal issues raised by the claims.

The cases open the door for claims based on impacts to Aboriginal Title and treaty rights against private parties, without first having proved these rights as against the Crown. Time will tell as to whether and when those claims and others like them are proven, settled or otherwise determined.

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