First Nations Not Barred From Bringing Claims Against Private Parties Based On Harm To Unproven Aboriginal Rights, Title and Treaty Rights

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The Supreme Court of Canada will not hear appeals of British Columbia and Quebec Court of Appeal decisions allowing First Nations to proceed in lawsuits against private companies based on impacts to asserted Aboriginal rights, title or treaty rights.

On October 15, 2015, the Supreme Court of Canada dismissed Rio Tinto Alcan Inc.'s ("Rio Tinto") application for leave to appeal the British Columbia Court of Appeal ("BCCA") decision in *Saik'uz First Nation v Rio Tinto Alcan Inc.* ("*Saik'uz*").[1] On the same day, the Supreme Court of Canada also dismissed Iron Ore Canada's ("IOC") application for leave to appeal the Quebec Court of Appeal ("QCCA") decision in *Innus of Uashat Mak Mani-Utenam v. Iron Ore Co. of Canada (Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Cie minière IOC inc.).*[2] Both cases involve First Nations lawsuits against private companies for impacts to asserted (but as yet unproven) Aboriginal rights, title or treaty rights. In both instances, companies were unsuccessful in moving to dismiss lawsuits brought by First Nations at an early stage on the basis that they disclosed no reasonable cause of action.

Although the lawsuits have been allowed to proceed, the First Nations in both instances will still have to prove that the impacted right or rights exist during the course of a lawsuit, in addition to all of the other elements of a cause of action. However, these new Supreme Court of Canada leave to appeal dismissals support the idea that First Nations can take action directly against private parties for harms to rights, title and treaty rights.

Neither of these decisions speculate on the possible success of the First Nations in either of the main actions.

Saik'uz First Nation v Rio Tinto Alcan Inc.

The Saik'uz and Stellat'en First Nations (the "First Nations") brought claims against Rio Tinto in private nuisance, public nuisance, and breach of riparian rights based on interference with Aboriginal title, Aboriginal rights and proprietary interest in reserve lands. The dispute is about alleged downstream impacts from a dam constructed and operated by Rio Tinto. We previously provided a summary and analysis of the *Saik'uz* decision here: http://www.willmsshier.com/docs/default-source/articles/article---saik-uz-bc-court-of-appeal-allows-tort-claim-against-a-private-party-for-harm-to-asserted-aboriginal-rights.pdf?sfvrsn=4

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1 *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154.

2 *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Cie minière IOC inc.*, 2015 QCCA 2.

The BCCA allowed the First Nations to proceed with public and private nuisance claims based on impacts on asserted Aboriginal rights and title. The BCCA held that tort claims based on harm to asserted (but unproven) Aboriginal rights and title should not be struck out as disclosing no reasonable cause of action. The BCCA stated in its reasons that to require Aboriginal people to prove asserted Aboriginal rights and title prior to enforcing their rights would be inconsistent with the principle of equality guaranteed by the *Charter of Rights and Freedoms*.

Innus of Uashat Mak Mani-Utenam v Iron Ore Co. of Canada

In March, 2013, the Innu First Nations of Uashat Mak Mani-Utenam and Matimekush-Lac John (the "Innu First Nations") commenced legal proceedings against Iron Ore Company of Canada ("IOC"), a subsidiary of Rio Tinto, before the Quebec Superior Court ("QSC"). IOC was unsuccessful in a motion to dismiss the lawsuit and appealed the decision to the Quebec Court of Appeal. Similar to the case in *Saik'uz,* the question before the Quebec Court of Appeal in this dispute is whether a claim against a private actor on the basis of harm to treaty rights as well as unproven Aboriginal rights and title should be dismissed outright as disclosing no cause of action.

In their lawsuit, the Innu First Nations seek damages in the amount of $900 million against IOC for violations to their Aboriginal title, Aboriginal rights, and treaty rights. The Innu First Nations also seek an injunction against IOC to cease its activities in the Nitassinan territory, the Innu First Nations' traditional territory on the Quebec-Labrador Peninsula. IOC operates a mining megaproject in the Nitassinan territory. The project includes several active and abandoned iron mines, processing and port facilities, a railway and 3 hydroelectric dams.

IOC attempted to deflect its liability in its motion to dismiss the claim by arguing that the Innu First Nations should have sued the Crown, and not the company. IOC argued that the Aboriginal rights and title asserted by the Innu First Nations do not impose any obligations or responsibilities on IOC. IOC argued that the identification of Aboriginal rights falls within the scope of the process of reconciliation and should take place between the Innu First Nations and the Crown.

The QSC denied the motion. The QSC held that the identification of Aboriginal rights as part of reconciliation between the Crown and First Nations should not preclude a First Nations from accessing a judicial process that has a chance of success.

IOC appealed the Superior Court's decision to the QCCA. The QCCA followed the lower court's decision, dismissing IOC's appeal, and allowing the Innu First Nations' proceedings. The lawsuit will now revert to the QSC for trial.

Implications

Advancing claims in tort based on harm to Aboriginal rights and title is somewhat novel in Canadian law.

As we noted in May 2015, this case does not resolve the issue of the significant costs that Aboriginal communities face in proving their rights in court. In *British Columbia (Minister of Forests) v Okanangan Indian Band*, the Band's counsel estimated that the cost of a full trial came in at $814,010 in 2003.[3] Most Aboriginal communities do not have access to these resources, and so do not have a means of establishing their rights through litigation. Aboriginal communities will also hold the onus of the burden of proof if they seek to establish their rights through civil litigation.

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[3] [2003] 3 SCR 371 at para 5. Many Aboriginal rights cases are subsequently appealed, although no estimate of an appeal was provided.

However, this decision represents a shift by giving more options to First Nations, and bringing the actions of private parties into the spotlight. More than ever, this decision emphasizes the necessity of private parties and First Nations to work together to build agreements where a company's actions could adversely affect First Nations.

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