IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15

Date: 20220107
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., Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Place and Date of Trial:	Vancouver, B.C. November 25-28, 2019 December 2-6, 9-13, 2019 January 20-24, 27-31, 2020 February 3-7, 18-21, 24-25, 27-28, 2020 March 2-5, 2020 June 9-12, 15-19, 22-26, 2020 July 6-10, 13-17, 20-24, 27-31, 2020 August 24-27, 31, 2020 September 1-3, 8-11, 21-25, 28-30, 2020 October 1-2, 19-23, 26-30, 2020 November 2-4, 16-20, 23-27, 30, 2020 December 1-2, 7-9, 2020 January 11-15, 18-19, 2021 May 10-14, 17-21, 25-28, 31, 2021 June 1-4,7-11, 14-18, 28-30, 2021 July 2, 5-9, 2021
Place and Date of Judgment:	Vancouver, B.C. January 7, 2022

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I. INTRODUCTION AND OVERVIEW

[1] The Nechako River is located in the interior plateau of British Columbia and is one of the largest tributaries to the Fraser River. Before the construction of the Kenney Dam, which is the subject matter of this litigation, the headwaters of the Nechako arose out of the high eastern slopes of the Kitimat Range of the Coast Mountains, and flowed through a chain of lakes and rivers from west to east, out of Natalkuz Lake and a further 320 km downstream before meeting the Fraser River at the city of Prince George.

[2] The Nechako drains some 47,200 km² representing 21 percent of the Fraser River's drainage area. Its watershed includes various First Nations' reserves, communities, and traditional territories as well as a number of cities and towns such as Prince George, Vanderhoof, Burns Lake, Fraser Lake, and Fort St. James. As noted by the Chief Justice of Canada in 2010 in related litigation, these First Nations have used the Nechako River for fishing and sustenance "since time immemorial" (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, para. 1 [*Rio Tinto* 2010]).

[3] In the 1950s, the government of British Columbia authorized the Aluminum Company of Canada (now Rio Tinto Alcan Inc. and hereinafter referred as "RTA") to build the Kenney Dam (also referred to as the "Dam") to facilitate the production of hydropower for the smelting of aluminum. The resulting reservoir is 233 km long, with a water surface of 910 km². Water from the reservoir is released in two places:

- The majority of the water is discharged to the west, through a 16 km tunnel which drops 792 m to the Kemano Hydroelectric Power Generating Station and thereafter into the Kemano River before flowing into the Pacific Ocean.

- The remainder of the water is released in an eastward direction by way of the Skins Lake Spillway located approximately 80 km west of the Kenney Dam, into Skins Lake, the Cheslatta River, Cheslatta Lake, and Murray Lake, over the Cheslatta Falls, and into the Nechako River approximately eight to nine km downstream from the Kenney Dam. From that

point, the river flows approximately 277 km east from Cheslatta Falls to Prince George.

[4] Attached as Appendix A these reasons is a map of the region marked as an exhibit at trial. It depicts both the RTA infrastructure and the location of the plaintiff's reserves.

[5] The effect of the Dam and related reservoir on the Nechako River has been dramatic. The water diverted to Kemano in the west never reaches the Nechako watershed. The nine km stretch of river bed between the Dam and just above Cheslatta Falls has been dewatered since 1952. The hydrograph, or the flow of water, from Cheslatta Falls to Vanderhoof and beyond has been substantially changed both in terms of volume and timing.

[6] The two plaintiff First Nations are distinct Dakelh (Carrier) "sub-tribes" recognized as such in historic and ethnographic accounts dating back to their first contact with colonial intruders. They have both been recognized and treated as distinct "bands" under the *Indian Act*, R.S.C. 1985, c. I-5, by the federal and provincial governments for well over a century.

[7] The main residential community of the Saik'uz First Nation is at Stoney Creek, but they also have a reserve on the Nechako itself at a location described by Reserve Commissioner O'Reilly in 1892 as "the only salmon fishery owned" by them (Noonla). The Saik'uz also claim several other traditional fishing locations further downriver.

[8] The Stellat'en First Nation have a reserve located at the mouth of the Stellako River at the west end of Fraser Lake, part of the Nechako watershed. They have always maintained a fishery, primarily for salmon that migrate into the Stellako through the Nechako and the Nautley River tributary system, but also for other species of fish, including the Nechako White Sturgeon that also migrate into Fraser Lake.

[9] Both plaintiffs claim an Aboriginal right to fish in the Nechako watershed. They also assert Aboriginal title to the lands from and the beds of the lake or rivers in which they have traditionally fished. They invoke these Aboriginal rights as the basis for bringing common law tort claims against RTA in nuisance and for breach of riparian rights. Their current claims are the latest in a series of attempts to legally challenge the Dam and diversion of water from the Nechako River.

[10] The plaintiffs claim that the construction of the Dam and the subsequent regulation of the Nechako hydrograph by RTA has not only profoundly affected the Nechako River itself but also the fish and related fishery within the Nechako watershed resulting, in particular, in the imminent extirpation of the Nechako White Sturgeon and a substantial reduction in the population of salmon, both sockeye and chinook. They claim that the Nechako is no longer a healthy river, and they seek injunctive relief compelling RTA and both levels of government to restore a more natural hydrograph, to prevent further damage to the fishery and ultimately to restore the historic abundance of both Nechako White Sturgeon and salmon.

[11] For its part, RTA denies liability and contests virtually every aspect of the plaintiffs' claims. It denies that private, non-governmental parties such as RTA can be found liable in nuisance or for breach of riparian rights on the basis of any Aboriginal rights, whether fishing or title. It says that Aboriginal rights, where proven and not extinguished by the federal Crown, can only be asserted against the Crown.

[12] RTA points out that the construction of the Dam and operation of the reservoir were explicitly and validly authorized by the government and that such statutory authority immunizes them against any liability for the inevitable consequences to the river or any fishery within it. In any event, RTA denies that regulation of the river has actually diminished fish stocks in any material way and says the plaintiffs' claim to the contrary is simply not proven on the evidence and is nothing more than speculation. Finally, RTA invokes other substantive defences based on limitation legislation and the common-law doctrine of laches (unreasonable delay in making a claim).

[13] The government defendants deny they have any fiduciary duty to order RTA to change the Nechako hydrograph or to institute any regime of "adaptive management" of the Nechako River in the manner that the plaintiffs seek. They say there is no plenary duty of the sort alleged by the plaintiffs in the absence of an identified specific Indigenous interest over which the Crown has assumed a discretionary control. They deny the plaintiffs' claim that the instruments which are the basis of RTA's "statutory authority" defence are somehow "constitutionally inapplicable".

[14] By the end of the trial, the government defendants acknowledged the plaintiffs have an Aboriginal right to fish for food, social, and ceremonial purposes but continued to deny such a right can ground any nuisance claim in law. They urge that remedies available in a tort action and in a constitutional challenge are distinct and should not be conflated. Lastly, the Crown points to the overlapping territorial claims of other First Nations and argues the plaintiffs have failed to prove sufficient exclusive use and occupation over the lands to which Aboriginal title is claimed.

[15] There are many complicated issues of fact and law in this case. The trial lasted 189 days spanning one and a half years. The evidentiary record is voluminous. Some 600 legal authorities were cited to the Court. The final written arguments amounted to approximately 3,000 pages, and the final oral arguments lasted six weeks.

[16] The findings of the Court are summarized in detail in the last four pages of these reasons for judgment. More briefly stated, they are as follows:

- The plaintiffs do have a constitutionally recognized Aboriginal right to fish for food, social, and ceremonial purposes in the Nechako watershed, a right which has been significantly impaired by the regulation of the Nechako River and the resulting decline in fish population.
- RTA's installation and operation of the Kenney Dam and related reservoir has strictly complied with all regulatory requirements imposed upon it by the government. The damage

to the fishery is the inevitable result of those authorizations, and RTA cannot be held liable to the plaintiffs on that account.

- In the circumstances of this case, any legal remedy for the plaintiffs' loss, if one is even available, can only be against the government, which has a duty to protect the plaintiffs' Aboriginal right to fish. However, no claim for damages has been made against the government in this case and therefore none can be awarded. A declaration respecting the Crown's duty to the plaintiffs will have to suffice.

II. PROCEDURAL HISTORY

[17] The pleadings in this case are lengthy and complicated. Since they form the foundation for the case at trial, they must be described in some detail.

A. The "Original" Pleadings

[18] This action was initiated by way of a Notice of Civil Claim filed on September 29, 2011. The pleading was amended in October 2016 following my August 12, 2016 order adding the two Crown defendants. The amendments related primarily to the claims against the Crown, which were then further amended in February 2019, as described below.

[19] The Notice of Civil Claim identifies each plaintiff as an "Aboriginal First Nation as well as an Indian Band as defined by the *Indian Act*". The plaintiffs describe themselves as "neighbouring First Nations of Central Carrier ancestry with ownership and use of territory along the Nechako River at and prior to the time of contact with Europeans and at the date at which British Sovereignty was asserted over British Columbia in 1846". They qualify this assertion by pleading "some of their lands and fisheries was shared between them and other neighbouring Carrier First Nations, but exclusively possessed by them against all others".

[20] Paragraphs 14 and 15 of the Notice of Civil Claim describe the plaintiffs' "Aboriginal title lands" in general and inclusive terms. For the Stellat'en, that includes the land contiguous to and west of the Nechako River from the Kenney Dam downstream to the confluence of the Nautley River, as well as Fraser Lake and the Stellaquo. For the Saik'uz, the description includes the lands along and east of the Nechako River from the Kenney Dam downstream to just southeast of Fort Fraser, and thereafter further downstream on both sides of the Nechako River to the confluence of the Chilako River.

[21] Paragraph 16 of the pleading makes it clear that not only are the plaintiffs claiming Aboriginal title to the lands bordering the Nechako River, they are also claiming that "the banks . . . and the bed of the river, or portions thereof, are subject to [their] Aboriginal title and rights".

[22] The Notice of Civil Claim defines certain "fisheries" in which the plaintiffs claim "proprietary interests". These include exclusive use and occupation of specific sites for fishing purposes and

ownership of the related fishery within their respective territories along the Nechako River, including its tributary watershed, i.e., the Stellaquo River, the Nautley River, Fraser Lake, Stoney Creek, Tachick Lake, and Nulki Lake, among others. Such fisheries are said to be “governed by their Indigenous legal system . . . which vested in [the plaintiffs] control over and specific responsibilities regarding these lands, waters and resources” (paras.17-18 of the most recent Amended Notice of Civil Claim).

[23] In their original Notice of Civil Claim, the plaintiffs provided particulars of their respective reserve lands and claimed to be the “beneficial owners and lawful occupiers” of those reserves. The original pleading claimed common law riparian rights derived from those reserve lands, but that claim was later deleted following the Court of Appeal decision referred to below.

[24] The Notice of Civil Claim particularizes numerous adverse impacts of the Kenney Dam on both the river watershed and the fisheries within these waters. The latter includes a reduction in available fish resources, including salmon and sturgeon, the imminent extirpation of the Nechako River White Sturgeon as a species, loss of spawning habitat, and, more generally, “adverse impacts from changed temperature and flow interfering with the ability of fish populations to survive and thrive”.

[25] The cause of action against RTA is framed as private nuisance, public nuisance, and wrongful interference with riparian rights. The damage alleged to have been suffered by reason of such nuisance and interference with riparian rights is particularized as:

- loss of use and enjoyment of the lands, waters and fisheries;
- loss of ability to exploit the fishery resources;
- loss of value of the fisheries;
- loss of value to both the title lands and reserve lands;
- reduced water flows and habitat alterations; and,
- negative cultural impacts associated with all the above.

[26] The remedy sought in the original Notice of Civil Claim included:

- interim and permanent injunctions restraining RTA from “continuance or repetitions of” the nuisance and interference with riparian rights; and,
- a mandatory injunction requiring RTA to release waters into the Nechako in such a manner that would abate the harm suffered and ensure the plaintiffs’ interests are no longer unreasonably interfered with.

[27] The most recent Amended Notice of Civil Claim seeks a mandatory injunction requiring RTA to “reinstate the functional flows that make up the natural flow regime of the Nechako River”.

[28] RTA filed its Response to Civil Claim on November 30, 2011, asserting various defences including statutory authority as a “complete answer to all claims”, based on various agreements with and water licences issued by the federal and provincial governments, including:

- A “1950 Agreement” made between British Columbia and RTA pursuant to the “special-purpose” *Industrial Development Act*, S.B.C. 1949, c. 31, which assured storage, diversion and use of “the quantity of water . . . required for the full utilization of . . . installed generating equipment”;
- A “1987 Settlement Agreement” made between RTA and both levels of government specifying the amount of water to be released into the Nechako; and,
- A “1997 Settlement Agreement” between RTA and British Columbia pursuant to which was issued a Final Water Licence FWL No.102324 issued by the Province on August 5, 1997.

[29] RTA pleads, among other things, that:

- no cause of action exists against private persons such as RTA for “interference with Aboriginal title” unless and until a declaration of such title is first secured from a Superior Court;
- in any event, “the plaintiffs' Aboriginal title is shared with other Aboriginal groups and cannot be unilaterally asserted by the plaintiffs”;
- the facts alleged by the plaintiffs, if accepted, only establish a right to engage in the practice of fishing, a right which is not interfered with by RTA's activities;
- whatever “proprietary right” the plaintiffs may have to a fishery in the Nechako watershed “is not a property interest in land or in the Nechako riverbed or its waters” sufficient at law to support a claim in nuisance or for interference with riparian rights;
- in any event, any reserve interests held by the plaintiffs do not include riparian rights;
- neither the Final Water Licence nor RTA's activities unreasonably interfere with any of the plaintiffs’ rights and, in any event, any such interference is justified by “valid governmental objectives”;
- RTA's activities are reasonable and therefore do not amount to any nuisance or interference with riparian rights;
- the plaintiffs’ cause of action in nuisance and interference with riparian rights, if it exists at all, arose in the 1950s and the present litigation is therefore “statute-barred and extinguished” by the provisions of the *Limitation Act*, R.S.B.C. 1996 c. 266 and barred by the doctrine of laches; and,
- injunctive relief is equitable and discretionary, and the unique circumstances of this case militate against such relief being granted.

[30] The plaintiffs filed a Reply to RTA's defence pleading on September 10, 2012, joining issue with each defence raised. Among other things, the Reply pleads:

- the statutory authorization pleaded by RTA is “constitutionally inapplicable against the plaintiffs’ Aboriginal or proprietary rights” based on (1) the constitutional protection of such rights under s. 35 of the *Constitution Act*, *1982,* being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, and (2) the doctrine of the interjurisdictional immunity;
- the plaintiffs' proprietary rights are based upon Aboriginal title, or interest in a reserve, or “Aboriginal rights akin to or being a private fishery or *profit à prendre*”;
- the government of British Columbia did not have the constitutional power to diminish or extinguish the plaintiffs' Aboriginal or proprietary rights by any licence issued to a third party;
- the statutory authority defence cannot succeed because it was possible for RTA to exercise its authority without damaging the plaintiffs' rights and such damage was therefore not inevitable;
- justification for the public good is “no valid defence of law” to a claim in nuisance or breach of riparian rights, however “if the defendants' actions are a public good and are justified, then the plaintiffs seek damages and compensation for the losses and damage they have suffered and continue to suffer”; and,
- the limitation and laches defences do not apply because the nuisance and breach of riparian rights are continuing and the plaintiffs have never acquiesced to the defendants' conduct.

[31] On September 10, 2012, the plaintiffs also issued to the Attorneys General of Canada and BC a Notice of Constitutional Question pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8. In that Notice, the plaintiffs advised they would be challenging the “constitutional applicability” of the *Industrial Development Act*, R.S.B.C. 1996, c. 220, s. 1(1)(a) and the *Water Act,* R.S.B.C. 1996, c. 483, ss. 2 and 14, along with the 1950, 1987, and 1997 Agreements between RTA and the governments, the British Columbia Order in Council 977 made August 4, 1997, and the Final Water Licence No. 102324. The particulars of the constitutional challenge essentially mirrored the matters pleaded in the Reply filed on the same date.

[32] In oral argument, the plaintiffs conceded that certain aspects of their “constitutionally inapplicable” position have been overtaken by subsequent case law, particularly *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44. As well, the 1996 *Water Act* referred to in the September 2012 Notice of Constitutional Question has since been replaced by the *Water Sustainability Act*, S.B.C. 2014, c. 15, s. 5. The effect of these events will be addressed later in these reasons for judgment.

B. Subsequent Applications and Pleadings

[33] In 2013, RTA applied for summary judgment under Rule 9-6 of the *Supreme Court Civil Rules*, dismissing the action on the basis that statutory authority was a full defence to the claim. In

the alternative, RTA sought an order under Rule 9-5(1)(a) striking out the whole Notice of Civil Claim on the basis that it did not disclose a reasonable cause of action.

[34] Judgment was issued by Mr. Justice Cohen of this Court on December 13, 2013 in reasons indexed at 2013 BCSC 2303. He found a genuine issue for trial existed with respect to the defence of statutory authority, and the application for summary judgment was accordingly dismissed. However, he struck out the Notice of Civil Claim in its entirety and dismissed the action against RTA on the basis that Aboriginal title and Aboriginal rights must first be proved in litigation involving the Crown (or otherwise conceded by the Crown) before any claim for nuisance or breach of riparian rights can be asserted, and absent such condition being met the plaintiffs' lawsuit had no reasonable chance of success.

[35] The ruling was appealed and eventually overturned by the Court of Appeal on April 15, 2015 in a decision indexed as *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc*., 2015 BCCA 154 (the "2015 Appeal Decision"). Speaking for the Court, Mr. Justice Tysoe held:

- There is no reason in principle to require First Nations to first obtain a court declaration in an action against the Crown before they can maintain an action against another party seeking relief in reliance on their Aboriginal rights.
- Like any other litigant, First Nations should be permitted to prove in an action against another party the rights that are required to be proved in order to succeed in the claim against that other party.
- Whether the Crown is party to the action should not be determinative of the issue of whether the pleadings disclose a reasonable cause of action.
- It is thus not plain and obvious, assuming the facts pleaded in the present case to be true, that the Notice of Civil Claim discloses no reasonable cause of action in respect of private nuisance, public nuisance, and interference with riparian rights, to the extent they are based on Aboriginal title and other Aboriginal rights.
- However, while possession of reserve lands may be sufficient to support a claim in private nuisance, as a matter of law when the reserve lands were transferred by the Province to the federal Crown in 1938, the Province had already abolished riparian rights for land owners and hence riparian rights could not and did not accompany the transfer. Thus any claim for riparian rights based on the plaintiffs' interest in reserve lands must necessarily fail, and the Notice of Civil Claim does not disclose a reasonable cause of action in that regard.
- The order striking out the whole of the Notice of Civil Claim must be set aside except, however, the plaintiffs' claim for interference with riparian rights to the extent they are alleged to arise from an interest in their reserves must be struck.

[36] From a practical perspective, the effect of the 2015 Appeal Decision was to restore the

Notice of Civil Claim as originally filed, albeit with the deletion of paragraph 21 related to the claim for riparian rights based on the plaintiffs' interest in reserve lands.

[37] Leave to appeal the Court of Appeal's decision was refused by the Supreme Court of Canada: [2015] S.C.C.A. No. 235.

[38] In 2016, RTA applied to add both the federal and provincial Crown as defendants in this litigation. Both governments consented to the application, albeit on certain terms. The plaintiffs, on the other hand, opposed the application, arguing that they were not seeking any formal declaration of Aboriginal title in the proceeding and thus it was neither necessary nor just and convenient for the Crown to be involved.

[39] RTA's application was granted: 2016 BCSC 1474. The plaintiffs were directed to amend their Notice of Civil Claim to reflect the addition of the Crown defendants. This resulted in the amended Notice of Civil Claim filed October 11, 2016, in which, among other things, the plaintiffs claimed against the Crown:

- Canada had and continues to have an obligation or duty to protect the plaintiffs' fishery rights and proprietary interests from damage within its control or resulting from its own acts or authorizations;
- Canada assumed discretionary control over the plaintiffs' interests when it entered into the 1987 Settlement Agreement purporting to regulate the specific water flows in the Nechako River;
- Canada has failed to ensure the water flows were effective in protecting the plaintiffs' interests and to alter those flows as required;
- BC has failed to act in good faith to reduce the impacts of the water diversion as evidence has become available that the water flows have been "inadequate to their purpose"; and more generally,
- Canada and BC "have failed, in exercising discretionary control over the water flows resulting from the Diversion, to act on their fiduciary and other obligations to the plaintiffs as Aboriginal peoples".

[40] The Amended Notice of Civil Claim did not claim any specific relief against the Crown defendants. However, in early 2019 the plaintiffs applied for and were granted an order permitting the filing of a Second Amended Notice of Civil Claim containing the following additional relief and allegation related to the Crown defendants:

> 46.1 A declaration that Canada and British Columbia, or one of them, have a fiduciary duty to require [RTA] to do one or more of the following:
>
> a. cease operating the Diversion in a manner that continues to cause nuisance to the Plaintiffs or that breaches the Plaintiffs' riparian rights:
>
> b. release waters into the Nechako River from such location in such manner in

> such quantities and at such times as would have the effect of ensuring that the Proprietary Interests of the Plaintiffs are not unreasonably interfered with: and
>
> c. reinstate the functional flows that make up the natural flow regime of the Nechako River.
>
> . . .
>
> **Liability of the Crown Defendants**
>
> 64.1 Canada and BC or one of them has a fiduciary obligation arising out of:
>
> a. their discretionary control over the Plaintiffs' Proprietary Interests: and
>
> b. section 35(1) of the *Constitution Act*, *1982*.
>
> to protect the Plaintiffs' Proprietary Interests as described in paragraphs 49-52 of this Second Amended Notice of Civil Claim including through positive actions that would require [RTA] to operate the Diversion in a manner that does not unlawfully or unconstitutionally interfere with the Plaintiffs' Proprietary Interests.

[41] In their Response to Notice of Civil Claim, as ultimately amended and filed February 20, 2019, British Columbia:

- points out that the traditional territories asserted by the plaintiffs “overlap with the asserted traditional territorial boundaries of a number of Aboriginal peoples”, and puts the plaintiffs to the proof of the precise “location of lands and waters claimed by the plaintiffs to be subject to Aboriginal title or proprietary rights”;

- declines to formally admit that the plaintiffs have any Aboriginal rights to fish and “puts [them] to the proof thereof”;

- also puts the plaintiffs to the proof that “the plaintiffs’ ancestors” were politically organized as an Aboriginal collective that existed at or before the time of contact with persons of European ancestry (1806), and/or “the time that the British Crown assumes sovereignty over the lands and waters at issue” (1846);

- asserts that the plaintiffs’ claim to proprietary rights in the Nechako fishery “are inconsistent with provincial rights in respect of inland fisheries” and “do not include any exclusive or proprietary rights to possession of river beds or fisheries”;

- claims that beds of lakes, rivers, streams or other bodies of water in British Columbia are held by the Province and thus so too are proprietary rights in the fisheries therein;

- claims that the property in and the right to the use and flow of all water in the Province is vested in the Province by the *Water Sustainability Act* and its predecessors “except only insofar as private rights have been established under licences or use approvals”;

- claims that riparian rights in British Columbia were extinguished by the *Water Privileges Act*, 1892, S.B.C. 1892, c. 47, and subsequent legislation;

- denies the existence of any fiduciary duty of the plaintiffs with respect to water flows; and,
- asks the Court, in any event, to decline the declarations of such duty on numerous grounds including lack of necessity, impermissible vagueness, and the doctrine of laches.

[42] Canada's Response to Notice of Civil Claim, as ultimately amended and filed March 8, 2019, is twice as long as the pleading filed by the Province and raises many additional matters. Among other things, Canada:

- admits that the plaintiffs are "Aboriginal groups of Carrier ancestry" and that their ancestors "existed as organized traditional Aboriginal societies with their own villages and with a common history and distinctive features, including language, laws, customs, and traditions";
- admits that the plaintiffs' ancestors and other Carrier Aboriginal groups used territory and specific sites along the Nechako River and its watershed for fishing purposes at and before contact with Europeans and the assertion of British Sovereignty;
- denies that any fisheries associated with the use and occupation of specific sites gave rise to ownership of or proprietary rights to the fishery resources;
- admits that the diversion and alteration of water flow as a result of the Kenney Dam "has had impacts on the Nechako River water flow and fisheries resources" but says "those impacts have been managed";
- claims that Crown Sovereignty over and underlying title to central British Columbia including the territory claimed by the plaintiffs, was "conclusively established" in 1846 and that when the colony of British Columbia became part of the dominion of Canada in 1871, the relevant constitutional legislation "vested in the Province of British Columbia" virtually all land and public property in the former colony;
- notes there have been "long-standing separate parcels of fee-simple lands in private ownership" within the territories claimed by the plaintiffs and numerous overlapping claims (and filed title litigation) by other First Nations, all of whom must be provided notice before any finding of Aboriginal title is made or injunctive relief granted;
- denies that Canada has failed to fulfill any fiduciary duty obligations it may owe to the plaintiffs; and,
- denies that the plaintiffs "have the necessary proprietary interest to give rise to claims in nuisance or breach of riparian rights".

[43] The plaintiffs also filed a Reply to the Crown pleadings in February 2017 which they did not further amend in response to the Crown's later amended Responses. In that Reply, among other

things, the plaintiffs say:

- whether the “proper legal holder” of Aboriginal rights and title is a larger or smaller collective than that of the plaintiff First Nations, the members of the latter are “descendants or lawful successors and present-day members” of such other collectives and hence “have the right or standing to bring this action in nuisance, riparian rights or other equivalent torts”; and,
- plead that they “do not seek any declaration of Aboriginal title in this action that would displace any holders of fee-simple lands”.

III. CONDUCT OF THE TRIAL

[44] The trial commenced on October 21, 2019, and the evidentiary portion of the proceeding concluded on January 19, 2021, following 151 sitting days and an interruption from April to mid-June 2020 due to the COVID-19 pandemic. Most of the evidence was heard in Vancouver, however the Court sat for four days in Prince George during the week of November 18, 2019, to facilitate the testimony of certain elders and other community witnesses presented by the plaintiffs.

[45] At the conclusion of the four days of evidence in Prince George, the Court, along with representative counsel from each party, was taken for a helicopter viewing of the Nechako River, Kenney Dam, the Skins Lake Spillway, and the Murray-Cheslatta system.

[46] The trial was conducted in electronic form. All exhibits were tendered and admitted into evidence electronically, mostly as PDF documents. The courtroom was equipped with display monitors for the Court, the witness, and each counsel table. A court technician provided by a private court reporting firm retained by the parties attended Court each day to manage the electronic exhibits. The court clerk managed the electronic documents used by the Court.

[47] Following the COVID-19 adjournment, counsel continued to attend the trial in person. The courtroom was modified to provide physical distancing and limits were placed on the number of counsel who could attend. Most witnesses also attended in person, but some out-of-town witnesses appeared through an internet-based video-conferencing platform established by the private reporting firm. These witnesses appeared on a large screen in the courtroom and, since all the documentary evidence was electronic, exhibits were shared with these witnesses remotely through the video-conferencing platform.

A. Agreed Statement of Facts

[48] At the urging of the Court, the parties prepared an extensive Agreed Statement of Facts (“ASOF”). The Court is extremely grateful for the hard work and professionalism displayed in the creation of this document.

[49] The ASOF was entered at trial as Exhibit 3. The body of the document is 95 pages long and includes three schedules. A copy of the table of contents of the ASOF is attached to these reasons

for judgment as Appendix B. The document itself is too lengthy to be attached in full. However, while the Court repeats many of the stated facts in this judgment, the Court also wishes to make it clear that it accepts and finds as a fact all of the matters agreed in the ASOF. Additional findings of fact are of course also made throughout these reasons for judgment.

[50] Schedule 1 and 2 of the ASOF contain hydrographs which set out the flows in the Nechako River at Cheslatta Falls from 1980 to 2019 and at Vanderhoof from 1949-2019. During the trial, the ASOF was supplemented to include hydrographs for the balance of 2019 and up to October 2020 (Exhibit 3A). Schedule 3 of the ASOF provides a list of "decision records" of the Nechako Fisheries Conservation Program ("NFCP") Steering and Technical Committees.

[51] Attached as Appendix C to these reasons is a glossary of various terms and acronyms used in the judgment.

B. Document Agreement

[52] The parties initially planned to tender at the outset of trial a compilation of documents governed by a "Common Book Document Agreement". Some 2650 documents were subject to the Common Book Agreement but only a small portion of these were ultimately put into evidence. The total number of exhibits at the trial was 772, although many were voluminous.

[53] The overwhelming majority of the documents admitted into evidence pursuant to the Common Book Agreement were not admitted for the truth of their contents but rather only for proof of their existence and authenticity.

C. The Plaintiffs' Witnesses

[54] The Plaintiffs called twelve lay witnesses and seven expert witnesses.

[55] Of the twelve lay witnesses, eight were from the two plaintiff First Nation communities. Their evidence primarily related to: their experiences fishing for salmon and sturgeon in the Nechako River, Fraser Lake, and Stellako River; the cultural importance of those fish and of the Nechako River generally to the plaintiff First Nations; the impacts of colonization on their communities; how the decline of the salmon and sturgeon fisheries has impacted them and their communities; and, their knowledge of the Dakelh *keyoh*/*kayah* systems of land use and governance. These witnesses included:

- ***Miss Jackie Thomas***: Ms. Thomas is a member and Councillor of the Saik'uz First Nation. She served as the elected Chief of the First Nation from 1997-1999, 2009-2013, and 2017-2019. She gave evidence about historical cultural practices, including fishing methods. In her testimony, she noted several fishing locations on the Nechako utilized by her family, including Noonla, Finmore, Wedgewood, Hulatt, and Chunlac (or Chinlac). On cross-examination, she provided oral evidence and annotations indicating overlapping claims of

other Nations over the asserted traditional territory of the Saik'uz and Stellat'en.

- ***Ms. Betsy William***: Ms. William is a member and retired elder of the Saik'uz First Nation. She testified that has fished on the Nechako River over the years with family members at Noonla, Finmore, and Wedgewood.

- ***Ms. Hazel Alexis***: Ms. Alexis is a member of the Saik'uz First Nation. Her husband, also a member of the Saik'uz First Nation, had a fishing camp at Finmore. The couple would go there every fishing season. Ms. Alexis provided evidence with regard to the catching, cleaning, and preserving of salmon and sturgeon.

- ***Mr. Vladimer Mole*:** Mr. Mole is a member of Saik'uz First Nation who works in forestry. He gave evidence regarding the use of Finmore and Wedgewood as primary fishing camps. This evidence included his own experiences as a child during summers with his grandparents at Finmore and later at Wedgewood. He also testified to cultural practices related to fishing at those locations.

- ***Ms. Gladys Michell***: Ms. Michell was born a member of Saik'uz First Nation She transferred to Stellat'en First Nation, to which her husband belongs, in 2019. Her paternal grandfather was a hereditary chief, and her maternal grandmother Mary was a holder of traditional knowledge. Ms. Michell testified that Wedgewood is an area that has been in her family for over 100 years on her grandmother's side.

- ***Ms. Mary Nooski***: Ms. Nooski is a member of the Stellat'en First Nation. Ms. Nooski learned to fish from her paternal aunt and her grandfather, and testified that they would fish on the west end of Fraser Lake at Stellaquo.

- ***Ms. Tannis Reynolds***: Tannis Reynolds is a member of the Stellat'en First Nation who lives on Stellaquo Indian Reserve #1. Her maternal grandmother was a traditional knowledge holder. She testified that she learned to fish at a very young age, with fishing primarily occurring at the mouth of the Stellako River on Fraser Lake.

- ***Mr. David Luggi***: Mr. Luggi is a member of the Stellat'en First Nation. He is a former elected Chief of the Stellat'en First Nation and of the Carrier Sekani Tribal Council (CSTC). David Luggi spoke to his experiences as an elected Chief and to the plaintiffs' continued efforts to address concerns related to the Kenney Dam and diversion. Evidence of these efforts included the CSTC challenge to the 1987 Settlement Agreement and the CSTC's engagement in the treaty process. He also discussed the financial circumstances of the plaintiff First Nations and his experiences in the BC Treaty Commission.

[56] In addition to testifying about these matters, Miss Thomas, Ms. Michell, and Ms. Reynolds also gave oral history evidence, referred to later in these reasons.

[57] The Plaintiffs also called four non-Indigenous lay witnesses. They included:

- ***Mr. Rod Bell-Irving*:** Mr. Bell-Irving worked for the Department of Fisheries and Oceans ("DFO") from 1974 to 1996 and chaired the DFO's Kemano Completion task force. His testimony highlighted conflict within the DFO regarding what flow regime should be sought for the Nechako in the course of DFO's 1980s litigation with RTA. He testified that, in particular, conflict existed between the scientists and habitat managers at DFO regarding the flows necessary to sustain fish populations in the Nechako.

- ***Mr. Ken Ashley***: Mr. Ashley is a former BC government employee who testified regarding his work with the Kenney Dam Working Group in the 1990s designing the Kenney Dam Release Facility. He also testified regarding the possibility of a more natural hydrograph in the Nechako River. He testified that he had objected at the time to RTA's unwillingness to entertain the idea of different flows.

- ***Mr. Henry Klassen***: Mr. Klassen is a long-time resident of Vanderhoof who served as the chair of the Nechako Watershed Council ("NWC"), which was to advise the Nechako Environmental Enhancement Fund ("NEEF") Management Committee, from 1997 to 2012. Mr. Klassen spoke to the events leading to the NWC's formation, as well as his involvement in the sturgeon recovery process as an NWC representative. He testified that the NWC consistently sought, from the late 1990s onward, to have a water release facility built at the Kenney Dam.

- ***Mr. Brian Toth***: Mr. Toth is a fisheries biologist who has been a member of the Nechako White Sturgeon Recovery Initiative ("NWSRI") since its inception in 2000. He has also worked for the CSTC since 2000. His testimony primarily dealt with the steps taken by the NWSRI to aid the Nechako White Sturgeon population and the failure (perceived or actual) of those actions.

[58] The plaintiffs called seven expert witnesses, five in chief and two in reply:

- ***Professor Brett Eaton***: Professor Eaton is a fluvial geomorphologist who is currently a tenured professor in the Department of Geography at UBC, where he serves as Assistant Dean of Graduate Studies. Professor Eaton gave evidence about the physical and geomorphological impacts of the Kenney Dam and diversion on the Nechako River and recommended certain base flows on the basis of those impacts.

- ***Dr. Richard Hauer***: Dr. Hauer is a professor emeritus at the University of Montana who has conducted prominent research in river and stream ecology. He has particular expertise in gravel-bed rivers and their floodplains. Dr. Hauer authored two expert reports for this litigation, one on the effects of the Kenney Dam and diversion on the ecology of the Nechako, and another in reply to the report of RTA's witness Dr. Zimmermann. He opines that modifications to the Nechako's natural flow regime have had a cascade of negative

effects on the ecology of the Nechako River. In particular, he opines that the altered timing and decrease to flow volumes have reduced river dynamism, harming the "shifting habitat mosaic" of the Nechako's floodplain, degrading habitat diversity, and harming food webs.

- ***Mr. Richard Inglis***: Mr. Inglis is an anthropologist who gave evidence regarding the culture, social, and political organization, economy (particularly fishing), land use, laws, and other matters in respect of the plaintiff First Nations dating from pre-contact times through to the early 20th century. He states that the Saik'uz and Stellat'en and their predecessors have occupied the relevant lands along the Nechako River since first contact with Europeans, and that this occupation and related fishing and hunting activities were exclusive to those predecessors.

- ***Dr. Marvin Rosenau*****:** Dr. Rosenau has been an instructor in BCIT's Fish Wildlife and Recreation Program since 2006. He was qualified as an expert in the field of fisheries and aquatic biology and entitled to express opinions respecting freshwater habitats and fish behaviour. He authored an expert report in which he opines that changes to the flow regime caused by the Kenney Dam are the dominant cause of Nechako White Sturgeon recruitment failure, which he believes originally occurred between 1971 and 1976.

- ***Mr. Al Cass***: Mr. Cass is a biologist with expertise in salmon who used to work with the DFO. He gave evidence regarding the impact of the Kenney Dam and diversion on Chinook and sockeye salmon in the Nechako. In particular, Mr. Cass connects the loss of a spring freshet from river regulation to a reduction in optimal Chinook rearing habitat.

- ***Ms. Robyn Allan***: Ms. Allan is an economist who gave reply evidence regarding the economic impact of reduced production at the Kitimat smelter and on the availability and economics of obtaining an alternative power supply for the smelter.

- ***Ms. Tamsin Lyle***: Ms. Lyle is a hydrotechnical engineer who gave reply evidence responding to expert evidence tendered by RTA regarding flood mapping at Vanderhoof. Ms. Lyle gave evidence that structural flooding would start to occur at flows of 693 m^3/s at Vanderhoof.

D. RTA's Witnesses

[59] RTA called fifteen witnesses, including ten expert witnesses. Four of those experts also testified as lay witnesses and an additional five lay witnesses were called by RTA.

[60] The five witnesses who exclusively gave lay evidence included:

- ***Mr. Justus Benckhuysen***: Mr. Benckhuysen is a long-time employee of RTA who currently serves as RTA's Nechako Coordinator. Mr. Benckhuysen testified about his involvement with the NWSRI, the NWC, and the NEEF Management Committee, as well

as about reservoir management and planning as it relates to impacts of spillway releases on the Cheslatta burial grounds and Vanderhoof.

- ***Mr. Jacobus Smith***: Mr. Smith has been Plant Director and Operational Readiness senior manager on site at the Kitimat smelter since January 2020. He was involved in the planning of the new smelter starting in 2010 as part of the Kitimat smelter modernization project and serves as the liaison between the LNG project and RTA. He was called to respond to the plaintiffs' economist, who raised questions about the smelter's production in 2019 and 2020.
- ***Mr. Patrick Tobin***: Mr. Tobin was appointed Vice President of Business/Corporate Development by RTA in 2009 and continues to hold that position. RTA called Mr. Tobin to provide evidence on investigations into the feasibility of constructing a water release facility at the Kenney Dam that began in 2018. He gave evidence about discussions with BC Hydro and interested First Nations regarding the project and stated that such a project, if it were to go forward, would not be completed before about 2025.
- ***Mr. Paul Choudhury***: Mr. Choudhury is an engineer working for BC Hydro as Director of Transmission and Distribution Systems Operations. He spoke to RTA's role in BC Hydro's provision of service and discussed the potential impact of certain proposed remedies on third parties. Mr. Choudhury testified to the role power produced by RTA plays in supporting the BC Hydro power grid, and discussed the power needs of the smelter should the Kemano facility no longer be available to produce power.
- ***Mr. Sebastien Bellerose***: Mr. Bellerose is RTA's Finance Business Partner for BC Works. He testified about RTA's financial circumstances and operations, and how they would be impacted by reduced power generation at the Kemano facility.

[61] RTA called ten expert witnesses, four of whom (Mr. Mercier, Mr. Long, Mr. Mitchell, and Mr. Rublee) also gave lay evidence. RTA's expert witnesses included:

- ***Mr. Michael Long***: Mr. Long is an engineer who has worked for RTA in a number of capacities since 1984, including Manager of Power Operations for the Kitimat smelter (which involved meeting fisheries obligations) and Manager of Watershed Projects, directing releases into the Nechako River. He has also served on the NFCP Steering Committee. RTA called Mr. Long to assess the impact of lost water resulting from the implementation of Professor Eaton's recommended flows on RTA's operations. Mr. Long also gave lay evidence about the operation of the Nechako Reservoir, the Kemano powerhouse, the Kitimat smelter, and the Kitimat Modernization Project, as well as his participation as RTA's representative on the NFCP Steering Committee and the NEEF Management Committee.
- ***Mr. Clyde Mitchell***: Mr. Mitchell is an engineer who gave expert evidence regarding the

operation of the Summer Temperature Management Program ("STMP"), including the timing and amount of discharge. In particular, his evidence focussed on the impacts of a cold water release facility at the Kenney Dam on water temperature and volumes. Mr. Mitchell testified that the water in the Nechako has been subject to warming over recent decades due to climate change and stated that the STMP has been effective. Mr. Mitchell also gave lay evidence about the Kemano Completion Project, the Kemano Working Group and 1987 Settlement Agreement, the NFCP, and NEEF's consideration of a water release facility at the Kenney Dam.

- ***Mr. William Rublee***: Mr. Rublee is a biologist and vice president of Triton Environmental Consultants. He gave evidence about the impacts of the Kenney Dam and diversion on Chinook salmon in response to the expert evidence of plaintiffs' expert Mr. Cass. With regard to Chinook salmon, Mr. Rublee opined that the Nechako provides good quality spawning habitat and contested Professor Eaton's suggestion that re-watering the Nechako Canyon would provide viable Chinook-rearing habitat. Mr. Rublee also gave lay evidence regarding the NFCP, including the operation of the NFCP Technical Committee and its data and technical programs.
- ***Mr. Alec Mercier***: Mr. Mercier is a hydrologist who works for RTA. He gave expert evidence on the operation and management of the Nechako Reservoir from a hydrologic modelling perspective, using modelling to project impacts of the base flows proposed by Dr. Eaton on Kemano powerhouse operations. His model indicates that if Dr. Eaton's flows were to be implemented, the Kitimat smelter would be forced to operate at 25 percent of its current capacity. Mr. Mercier also gave lay evidence respecting RTA's data collection processes and reservoir operating model.
- ***Dr. Steven Cooke***: Dr. Cooke is a professor at Carleton University in the Institute of Environmental Sciences and Department of Biology. He has worked with BC Hydro on adaptive management. His research focusses on the migration biology of Pacific salmon, in particular sockeye. Dr. Cooke's report for the defendants discusses thermal impacts on sockeye salmon that spawn in the Stuart and Nechako watersheds. He criticized the report of plaintiffs' expert Mr. Cass for relying on inferences based on different sockeye populations and insufficient pre-dam data.
- ***Mr. Egbert Scherman*:** Mr. Scherman works as a civil and structural engineer. He oversees most of Knight Piésold's hydropower projects as design manager, civil lead, and engineer of record. Mr. Scherman provided an expert report explaining why it was reasonable from an engineering perspective not to install a low-level outlet in the Kenney Dam when it was constructed in the 1950s.
- ***Dr. Josh Korman***: Dr. Korman is a fisheries biologist with expertise in statistical modelling.

He serves as an adjunct professor at the UBC Institute of Oceans and Fisheries and as president of Ecometric Research. Dr. Korman gave expert evidence on population modelling of Nechako Chinook salmon and Nechako White Sturgeon as well as adaptive management programs for rivers. Relying on his use of fin-ray and age-length methods of determining the age of Nechako White Sturgeon, Dr. Korman opines that their recruitment declined from roughly the mid-1960s to mid-1970s and has remained persistently low since. He states that his model shows only a very weak relationship between flow and Nechako White Sturgeon recruitment.

- ***Mr. Rodrigo Freire de Macedo***: Mr. Freire de Macedo is employed by SNC-Lavalin as an engineer specializing in hydraulic engineering and structural engineering. He authored an expert report on flood inundation at Vanderhoof. He was qualified as an engineer to provide opinion evidence regarding impacts and numerical modelling of flood scenarios in the Nechako watershed. His model created flood maps based on four different flows at Vanderhoof – 400, 500, 600, and 700 m^3/s.
- ***Dr. Andre Zimmermann***: Dr. Zimmermann is a geomorphologist who is an adjunct professor in UBC's Department of Geography. He gave expert evidence on the geomorphological impacts of the Kenney Dam and diversion on the Nechako River in response to the evidence of plaintiffs' experts Professor Eaton, Dr. Hauer, and Dr. Rosenau. In particular, Dr. Zimmermann opines that Dr. Hauer and Professor Eaton fail to account for the distinct range of channel-bed conditions along the Nechako or the existing data on sediment quality in the river when coming to their conclusions regarding the benefits of spring freshet flows.
- ***Mr. Charles Scott***: Mr. Scott is an economist who teaches at the University of Northern British Columbia's School of Business and operates a private consulting firm. He gave expert evidence on potential economic impacts to the Kitimat smelter and the BC economy that could flow from reduced production at the smelter. His model estimates that every 25 percent reduction in smelter productivity would have a "ripple effect" of reducing total economic activity in British Columbia by approximately $100 million CAD.

E. BC's Witnesses

[62] BC called two witnesses who exclusively gave lay evidence. Those witnesses included:

- ***Mr. Ted White***: Mr. White is BC's Comptroller of Water Resources. He gave evidence about the development of the *Water Sustainability Act* and about his department's role with respect to RTA's operations and the Nechako River. Mr. White raised concerns that Professor Eaton's proposed base flows: (1) might not meet the appropriate summer temperature targets for the Nechako; and, (2) would increase the risk of flooding in the Murray-Cheslatta system and at Vanderhoof.

- ***Mr. James Jacklin***: Mr. Jacklin testified about the organization, mandate and operations of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, including how environmental stewardship work is funded and his Ministry's participation in the Watershed Engagement Initiative.

[63] The Province called two expert witnesses, one of whom (Dr. McAdam) also gave lay evidence:

- ***Mr. John Dewhirst***: Mr. Dewhirst is a cultural anthropologist and archaeologist. He provided evidence in response to Mr. Inglis' evidence about ethno-historical methodologies, Central Dakelh ethnography, social and political organization, economy, land use, and Indigenous legal structures dating from pre-contact times through to the mid-20th century. Mr. Dewhirst was in agreement with Mr. Inglis that the *keyoh*/*sadeku* system of land use and governance was the basic legal structure governing land and resource ownership among the Central Dakelh at Crown assertion of sovereignty, but stated that he had no information about how this structure governed ownership of riverbeds. His testimony is tendered by the province as supporting a right of access to the sites of traditional fishing weirs rather than a right of ownership to those sites.
- ***Dr. Steve McAdam***: Dr. McAdam is a fisheries biologist who currently works for the BC Ministry of the Environment. His expertise is in the ecology and conservation of sturgeon. Dr. McAdam was called by the Provincial Crown to provide lay witness evidence regarding the activities of the NWSRI. He was also qualified as an expert to give evidence regarding the recruitment failure of the Nechako White Sturgeon in response to the expert evidence of Dr. Rosenau. Dr. McAdam contested Dr. Rosenau's conclusion that altering the Nechako's flow regime is warranted for the good of the Nechako White Sturgeon, stating that he has not found sufficient support for such a change.

F. Canada's Witnesses

[64] Canada called two lay witnesses, both current or former DFO employees:

- ***Jason Hwang***: Mr. Hwang is a habitat biologist who worked for the DFO as area and regional manager responsible for the Nechako between 1994 and 2019. Mr. Hwang testified to the work he did during this period, including his involvement in the NFCP, the early Nechako White Sturgeon recovery initiatives, NEEF, and the NWC. His key evidence involved the research of Dr. Steven MacDonald, who did not testify. Mr. Hwang testified that Dr. McDonald's research found that either reducing STMP flows or implementing a cold water release facility could be detrimental to Nechako sockeye populations.

- ***Byron Nutton***: Mr. Nutton is a habitat biologist who works as section head of DFO's Fish and Fish Habitat Preservation Program. Mr. Nutton testified about his work regarding the Nechako River, including his involvement in the NFCP Technical Committee, NEEF, NWC, and sturgeon recovery initiatives. He stated that while the NFCP had done some research into the relationship between spring flows and Nechako Chinook escapement, those analyses suffered from a lack of data and were outside NFCP's mandate.

[65] Canada served two expert reports, one by an anthropologist responding to Mr. Inglis' report and another by a biologist with expertise in sockeye salmon. However, neither was tendered as evidence and neither expert was called to testify.

IV. CONSTRUCTION OF THE DAM AND SUBSEQUENT WATER FLOW REGULATION

A. The 1940's-1980 (the Conditional Water Licence Period)

[66] In the early 1940s, the Province of British Columbia envisioned large-scale hydro-electric developments as a means of establishing permanent industry and settlement in sparsely populated areas of the Province. The Government of Canada was also involved, and the protection of fisheries was an issue during subsequent project considerations.

[67] Government enthusiasm to promote hydro-electric developments was reflected in RTA's internal correspondence, including a letter exchanged between executives dated November 4, 1941, as follows:

> As you have already been informed, the Prime Minister of British Columbia (sic) called on 3rd November to attempt to interest the management of the Aluminum Company of Canada Ltd. in the underdeveloped water powers in his Province.
>
> He plainly indicated that the Provincial Government would do almost anything to get the Company to establish itself there.

[68] The enticement continued later in that decade with suggested legislation to ensure such projects "might be economically pursued to…mutual advantage". In a letter to the President of RTA dated June 16, 1948, from Mr. E. T. Kenney, British Columbia's Minister of Lands and Forests, the Province expressed "the desire of the Government of the Province of British Columbia to promote the establishment of the industry within our Province" and continued:

> In order to enable you to carry on in engineering studies to determine the feasibility of such a project from your Company's point of view, may I offer you the following assurances for your further guidance:
>
> > (1) We will place a departmental reserve in favour of such extensive investigations to be carried out on the following watersheds . . . together with the necessary Crown lands in the vicinities of such possible power sites.
> >
> > (2) Should you decide to proceed with your proposed project, we shall be glad to issue to you water licences on such of those powers as you may select as being suitable for your requirements.
> >
> > (3) If . . . your engineering studies demonstrate that our existing laws would not

> economically permit further development, I shall be glad to discuss ways and means with my colleagues, having in mind the amendment of such laws whereby such a project might be economically pursued to the mutual advantage of our Government and your Company.

[69] The suggested legislative reform began the next year with the enactment by the legislature of British Columbia of the 1949 *Industrial Development Act*. Fully titled *An Act to promote the Industrial Development of the Province*, the statute included a preamble explaining its rationale and purpose:

> Whereas the prosperity of the Province depends on the development of its water-power sites and other natural resources, the expansion of its industry, and the establishment of new centres of population within its boundaries:
>
> And whereas it is consequently in the best interest of the Province that the establishment of new industries and the expansion of existing industries that require the development of water power sites be encouraged to the fullest possible extent:
>
> And whereas the establishment in presently undeveloped sections of the Province of any permanent industry and in particular of an aluminum industry, which requires for its operations substantial quantities of electric power, involves extensive and costly preliminary investigations and engineering studies and the expenditure on the construction of hydro-electric works and industrial plants and facilities of very large sums of money over an extended period of years:
>
> And whereas, in order to facilitate the establishment or expansion in the Province of such permanent industries, it is advisable that the Lieutenant-Governor in Council be empowered to make agreements respecting the use of natural resources.

[70] This preamble is stripped out in subsequent revisions of the statute but it is still effective as a statement of its purpose and intent. The operative provisions of the *Industrial Development Act* are short and are set out here in full:

> 1. This Act may be cited as the "*Industrial Development Act*."
>
> 2. "Minister" means the Minister of Lands and Forests or such other Minister as may be designated from time to time by Order in Council.
>
> 3. (1) Notwithstanding any law to the contrary, the Lieutenant-Governor in Council may do any of the following things:—
>
> > (a) Sell or lease on such terms and for such price or rental as he deems advisable to any person who proposes to establish or expand an aluminum industry in the Province any Crown land or interest therein, and also on such terms and for such price or rental as he deems advisable grant a licence to any such person to store or use any unrecorded water in the Province:
> >
> > (b) Make such other arrangements regarding the future operations of such industry as he may deem to be in the best interest of the Province:
> >
> > (c) Make with such person such arrangements as he may deem advisable regarding any future taking by any public authority of the hydro-electric development and works and facilities made and constructed by such person, including arrangements as to the manner and extent of such taking, the determination of the compensation payable in connection therewith, and the conditions governing the future supply of electric power from the development so taken:
> >
> > (d) Authorize the Minister to execute any Agreement for the above purposes.

> (2) Subsection (1) shall not be construed so as to authorize the Lieutenant-Governor in Council to grant to any such person financial assistance by way of loans, subsidies, or in any other manner.
>
> (3) Any Agreement entered into pursuant to the authority conferred by this Act shall provide for such protection as may be considered advisable by the Lieutenant-Governor in Council of any fisheries that would be injuriously affected.
>
> 4. Any Agreement made pursuant to this Act may from time to time be amended or extended if deemed advisable by the Lieutenant-Governor in Council: Provided that the subject matter of such amendment or extension could lawfully have been incorporated in the original agreement at the time it was made.

[71] The *Industrial Development Act* was and is a unique statute. It essentially empowered the Government to sell Crown land, grant licences to store or use water, and make whatever other arrangements that might be considered advisable for the establishment and operation of aluminum industry in the Province "notwithstanding any law to the contrary". It also authorized the Government to execute formal contracts to accomplish these purposes.

[72] Section 3(3) of the *Industrial Development Act* expressly contemplated that the establishment and operation of an aluminum industry in the Province might "injuriously affect" fisheries and made it mandatory for any formal agreement made by the Government to provide protection to such fisheries "as may be considered advisable".

[73] While it was likely unnecessary, given the wording of the *Industrial Development Act*, the Province nonetheless required RTA to make an application for water licences and a formal hearing on those applications was chaired by the Province's Water Comptroller in October 1949. Dr. A.L. Pritchard, Director of Fish Culture Development, with the Federal Department of Fisheries, made extensive submissions on behalf of his department. Among other things, he noted:

> The diversion of all of the water by a dam in the Nechako River, below Natalkuz Lake would reduce the river flow from below the proposed dam to Fort Fraser by about 95%. From Fort Fraser to the confluence of the Stuart around Vanderhoof, the Nechako River flow will be reduced by about 80%. The combined flows of the Stuart and Nechako Rivers from their confluence to Prince George will be reduced by about 55%.
>
> Sockeye and spring salmon and steelhead trout would be directly involved by such flow restrictions. These species could experience transportation difficulties brought about by such reduced flows, as the river channels could be completely altered from their present stable character. Erosion of the bed of the channel could cause points of a difficult passage, such as rapids. The water could spread out so as to create shallow areas with insufficient depths for fish to swim through. Another possibility is that there could be areas of percolation . . . which are not uncommon, apparently, in that area . . . which might produce localized channels of critical low flows. The spring salmon and steelhead which spawned in the main river channels might, under reduced flows, be adversely affected by the immediate destruction of their spawning grounds due to stream bed erosion. Such losses would continue until the river channel became stable again. Reductions in the size of the salmon and steelhead runs in this area could be caused by losses of available spawning grounds due to the shrinkage of the wetted channel areas. Deposited spawn could be lost by unfavourable temperatures of freezing conditions due to a lack of winter flow protection.
>
> . . .
>
> To briefly present the available figures on the present size of the populations of fish which are

> being discussed here, we are attaching a graphic presentation of the cyclic years of the spawning stocks of the sockeye since 1938. The information at hand indicated that there is a spawning population of 10,000 or more spring salmon between Fort Fraser and the dam site. There is no index available, as far as I know, at this time showing the size of the present population of steelhead trout.

[74] On December 29, 1950, the Province and RTA entered into a formal agreement (the "1950 Agreement"), the execution of which by the Province was authorized by Order in Council 2883/1950. On that same date, the Comptroller of Water Rights, on behalf of the Province, issued RTA a "Conditional Water Licence" No. 19847 ("1950 Conditional Water Licence"), and the Provincial Minister of Lands and Forests issued RTA a "permit under the *Water Act* 1939, authorizing the occupation of Crown land".

[75] Both the 1950 Conditional Water Licence and the associated occupation permit incorporated the terms and conditions of the 1950 Agreement with respect to the use and storage of water on the lands. Neither the 1950 Agreement nor the 1950 Conditional Water Licence contained any provision for specific flows to be released into the Nechako River for any purpose, fisheries or otherwise.

[76] The 1950 Agreement provided that:

- If RTA commenced construction before June 1, 1958, and installed generating equipment having the capacity of not less than 400,000 horsepower before January 1, 1963, then the applicable water licences/permits would not be reduced for another 20 years, i.e., not before January 1, 1983; and,

- If by January 1, 1983, the installed generating equipment had a capacity of 750,000 horsepower or more, then RTA's Water Rights would not be reduced before December 31, 1999, at which time a "final licence" would be issued to RTA based on the generating capacity then installed.

[77] The 1950 Agreement guaranteed RTA a supply of water that would enable full utilization of its generators:

> At no time will the said licence or licences and permit or permits be cancelled or the quantity of water that [RTA] is authorized to store, divert and use or the area of Crown Lands [RTA] is authorized to occupy be reduced below the quantity and area required for the full utilization of the then installed generating equipment except in case of default by [RTA] as aforesaid.

[78] The protected nature of the licences is also reflected in the following provision:

> Any provision of this Agreement or of said licence or licences and permit or permits that is in conflict with any present or future statute of general application shall not be invalidated by reason of such conflict.

[79] The Conditional Water Licence "licenced and authorized" RTA to "store, divert and use

water” to specified maximums; the maximum quantity of storage was 35 million acre-feet (43,172 cubic hectometers) and the maximum rate of diversion was set at 9500 cubic feet per second (269 cubic metres per second).

[80] Clause (j) of the Conditional Water Licence required RTA to simultaneously provide to the Department of Fisheries of the Government of Canada, the Game Commission of the Government of British Columbia, and the latter’s Comptroller of Water Rights “copies of the plans and specifications of all works proposed to be constructed and shall not commence the construction of any works until the plans and specifications thereof have been approved by the said Comptroller”. The licence also prohibited any storage, diversion, or use of water until the said construction plans had been approved by the Water Comptroller.

[81] The Federal Department of Fisheries continued to voice concerns about the impact of the proposed Dam on fish in the Nechako watershed. In August and December 1950, representatives from DFO, the International Pacific Salmon Fisheries Commission (“IPSFC”), and RTA met to discuss fishery concerns. It was agreed that fishery engineers and biologists would compile a special interim report on these concerns. IPSFC asked RTA to consider increasing water spillage into either the Cheslatta system or a diversion tunnel during Dam construction.

[82] In January 1951, DFO released a report entitled “The Fisheries Problems Created by the Development of Power in the Nechako-Kemano-Nanika River Systems”, prepared by its own personnel and that of IPSFC and the Fisheries Research Board of Canada. Recommendations included installation of an outlet at the proposed dam on the Nechako to release cold water from the main reservoir, to address transportation concerns and protect Chinook salmon eggs in the winter.

[83] The same concerns were raised by the Federal Minister of Fisheries directly with RTA’s senior executives in early 1952. RTA remained opposed to the passage of water through or under the dam, primarily on account of dam safety concerns, but indicated a preparedness to release water from the main reservoir into the Cheslatta system via the proposed spillway at Skins Lake. Eventually, an informal arrangement was reached that:

- RTA would release flows from the Skins Lake Spillway as requested by Canada up to a rate of 100 cubic feet per second;
- Canada would not request releases at any higher amounts; and,
- Canada would inform British Columbia’s Water Comptroller of its approval of RTA’s construction plans and urge him to approve them without delay.

[84] The Province formally approved the dam-reservoir design in July 1952. The design did not include any type of water release facility at the Dam itself. The Nechako River was closed at the dam construction site in October 1952, and the reservoir was thereafter filled until January 1957.

[85] The townsite of Kitimat was founded in 1950, and for the next four years, RTA constructed the major infrastructure associated with the establishment of the reservoir, the hydroelectric generation facility, and the aluminum smelter facility.

[86] The Kenney Dam is named after the provincial Minister of Lands and Forests who signed the 1950 Agreement with RTA. It is a rock-filled dam approximately 315 feet high, 1,500 feet long, and 40 feet wide at the crest. Nine saddle dams, which do not release water, were constructed at low spots around the reservoir to complete the proposed water impoundment.

[87] At the time of construction, the top of the waterproof core of the Kenney Dam was at the 2,820-foot contour. Over time, due to the settling of the dam material, this level has dropped, and the top of the waterproof core of the Dam is currently estimated to be at the 2,816-foot contour.

[88] The Nechako Reservoir enables hydroelectric power generation by means of a 16 km tunnel located at Tahtsa Lake at the westernmost point of the reservoir. That tunnel is frequently referred to as “T1”, and a second tunnel (“T2”) is currently under construction at the same location and is scheduled to become operational in the near future.

[89] The intake to T1 can operate safely with reservoir levels as low as 2,768.4 feet. T1 branches into two thick steel pipes that channel water at a 48° angle down a 2600 foot elevation drop to an underground powerhouse at Kemano. The water passes through turbines that drive generators and thus produce electricity. Thereafter, the water drops from the turbines into the tailrace and is diverted into the Kemano River.

[90] Discharges to Kemano began in 1954, while the reservoir was still filling. Aluminum production at the Kitimat smelting facility began the same year.

[91] The maximum flow for T1 is operationally restricted to about 144 m^3/s, a flow that results in power generation at Kemano of about 894 megawatts (“MW”).

[92] Until 2015, the power required to maintain full operations at RTA's Kitimat smelter, as originally constructed in the 1950s with upgrades over time, was 640 MW including transmission and transformation losses and auxiliary power to Kemano.

[93] The original smelter was replaced in 2015. The new smelter requires 710 MW at full production including auxiliary power and losses.

[94] To generate 640 MW of power at Kemano when the reservoir is full, RTA had to divert water at a rate of approximately 103 m^3/s from the Nechako Reservoir to Kemano. To generate 710 MW of power, the required diversion rate is approximately 115 m^3/s.

[95] The original smelter had seven “potlines”, rows of electrolytic reduction pots, with a total of 900 pots used to smelt aluminum. The new smelter has a single potline with 384 pots.

[96] At full load, the total annual metal production for the old smelter was 283,000 tonnes, while the new smelter can produce 420,600 tonnes. The new smelter uses less electricity to make a tonne of aluminum. Specifically, the new smelter requires approximately 13 MW hours per tonne while the old smelter required approximately 18 MW hours per tonne.

[97] The highest point of the reservoir bottom is at Tahtsa Narrows located near the western end of the reservoir close to the intake for the tunnel to Kemano. Tahtsa Narrows thus creates a hydraulic restriction that limits the ability of water stored on the east side of the reservoir to travel to the west side and thereafter be used for power generation.

[98] The Skins Lake Spillway was constructed to permit the discharge of water from the reservoir to the Nechako River. The discharges flow through Skins Lake, Cheslatta River, Cheslatta Lake, and Murray Lake, entering the Nechako at Cheslatta Falls. There is no infrastructure at Skins Lake Spillway to generate electricity from water releases.

[99] The sill of the Skins Lake Spillway gates is at 2,765 feet above sea level. Water levels in the reservoir must therefore exceed 2,765 feet in order to be discharged into the Cheslatta-Murray system.

[100] Discharges at the Skins Lake Spillway commenced in June 1955.

[101] During periods of low reservoir level due to dry conditions, the water level in Tahtsa Lake (at the western edge of the reservoir) drops at a faster rate than the rest of the reservoir east of Tahtsa Narrows, as water is discharged to Kemano. Due to the Tahtsa Narrows restriction referred to above, RTA projects that when the water level at the Tahtsa intake reaches 2,768.4 feet, the water level is estimated to be 2,786 feet at Skins Lake Spillway.

[102] Records of reservoir elevation have been kept since the reservoir was filled in the 1950s. For dam safety reasons, the normal maximum operating level for the reservoir is restricted to the 2,800-foot contour. RTA is required to notify the provincial Water Comptroller of any surcharges above this level.

[103] As noted above, RTA is currently completing the construction of a second tunnel (T2) from Tahtsa Lake. Once T2 is operating and the requisite water levels exist in the reservoir, it will be possible for RTA to manage the flow of the discharge down both tunnels to deliver the total maximum flow that can be accommodated by the eight generators installed at the Kemano Power Plant. Those generators can accommodate total flows as high as 157 m^3/s.

[104] The 1950 Agreement expressly contemplated that RTA might produce electricity in amounts exceeding its smelter requirements. Article 9 of that Agreement expressly authorized RTA to sell such surplus electric energy to third persons without being deemed a public utility within the meaning of the *Public Utilities Act*, R.S.B.C. 1948, c. 277. However, the terms of any sales to

persons other than RTA's own subsidiaries, employees and tenants, were made subject to the jurisdiction of the Public Utilities Commission. Article 11 of the 1950 Agreement expressly affirmed RTA's expectation for “continuing use of a large quantity of low-cost electric energy” and expressly provided that RTA would not be required or compelled to supply power “to the Government or anyone else”, except as provided in Article 9.

[105] Currently, all electricity produced by RTA above the smelter requirements is sold to BC Hydro pursuant to a certain 2007 Electricity Purchase Agreement. RTA derives a significant amount of income from the sales.

[106] From 1950 to the end of the 1970s, RTA held the same authorization to store and divert water provided in the 1950 Conditional Water Licence. Whatever arrangements were made between RTA and Canada regarding flows from Skins Lake, the terms of the authorization remained the same until matters changed in 1980.

B. The 1980s Litigation, Settlement Agreement, and Amended Water Licence

[107] RTA's first power sales to BC Hydro began in the early 1960s and led to various agreements imposing power supply obligations starting with 35 MW in 1966 and increasing to 125 MW for the period of 1973-77.

[108] By 1968, BC Hydro had constructed transmission lines from Kitimat to Terrace and from Terrace to Kitsault and Prince Rupert. Starting in December 1978, RTA's power facilities became interconnected with the BC Hydro grid, and BC Hydro purchased RTA’s entire power generation surplus. The significant increase in power sales to BC Hydro and the resulting decrease in discharges from the Skins Lake Spillway also coincided with the onset of the driest years on record in the late 1970s and early 1980s.

[109] By November 1, 1979, the outflow from the Skins Lake Spillway decreased from 1200 cubic feet per second (“cfs”) (34 m^3/s) to 800 cfs (22.7 m^3/s) and later that same month further decreased to 500 cfs (14.2 m^3/s). Upon learning of this development, DFO invoked s. 20(10) of the *Fisheries Act*, R.S.C. 1970, c. F-14, to request RTA to increase the discharge from Skins Lake Spillway to 800 cfs (22.7 m^3/s) by December 20, 1979. On this latter date, RTA declined the request and pointed out that the provincial Water Comptroller was the recognized authority in British Columbia for regulating such matters.

[110] Section 20(10) of the *Fisheries Act* provides as follows:

> The owner or occupier of any slide, dam or other obstruction shall permit to escape into the riverbed below the said slide, dam or other obstruction such quantity of water, at all times, as will in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon.

[111] On June 16, 1980, the DFO Minister issued a “flow opinion” under s. 20(10) of the *Fisheries Act* directing RTA to provide a release of water from the Nechako Reservoir which would ensure a sustained minimum flow of 1000 cfs (28.3 m^3/s) at all times in the Nechako River bed below Cheslatta Falls and to provide such additional flow as may be required to ensure the safety of fish during spawning migration.

[112] On July 25, 1980, shortly after receiving correspondence from Mr. George Manuel, president of the Union of BC Indian Chiefs, expressing concern about the flow of water in the Nechako, the Minister issued a further flow opinion under s. 20(10) of the *Fisheries Act* revising the earlier directive. The flow opinion required:

- immediate release of flows from the Skins Lake Spillway sufficient to provide 8000 cfs (226.4 m^3/s) below Cheslatta Falls and maintenance of this discharge until August 20, 1980, or until such earlier date as water temperatures permit (“this additional flow is required for cooling because temperatures in the Nechako River have risen sharply in recent days and are approaching the critical level for the safety of migrating and resident salmon”);
- commencing August 21, 1980, reduction of flows to provide 1100 cfs (31.1 m^3/s) below Cheslatta Falls by September 1, 1980, and maintenance of this discharge until March 31, 1981 (“this discharge level is necessary for successful spawning and incubation of chinook salmon”); and,
- commencing April 1, 1981, increased flow to provide 2000 cfs (56.6 m^3/s) by April 10, 1981, and maintenance of this discharge below Cheslatta Falls until June 30, 1981 (“this discharge level is necessary to provide adequate habitat for the rearing of juvenile chinook salmon”).

[113] RTA informed the DFO Minister that it would not comply with either flow opinion on the basis that “the British Columbia Comptroller of Water Rights has always claimed and exercised jurisdiction over certain facets of our operations, including the volume of water to be released from time to time from the Nechako Reservoir”. It also expressed the opinion that s. 20(10) of the *Fisheries Act* was *ultra vires* the constitutional authority of Parliament.

[114] On July 30, 1980, Canada filed an action in this Court against RTA seeking a declaration that the company was in breach of the flow opinions and claiming interlocutory and permanent injunctive relief. On August 5, 1980, Justice Berger of this Court granted Canada's motion for an interlocutory mandatory injunction and ordered RTA to comply with the flow releases set out in the Minister's July 25, 1980 Direction: *Canada (Attorney General) v. Aluminum Company of Canada Ltd*, (1980) 115 D.L.R. (3d) 495 (B.C.S.C.) (the “1980 Action”). Justice Berger's decision is short but insightful. It includes observations that still apply today, albeit in a somewhat different context:

> [2] This is a classic case of conflict over resource management in a federal system. Alcan has been given the right to impound the waters of the Nechako River by the Province. It has built one powerhouse, and intends to build another since the water licence granted to it in 1952 allows it to divert 9,500 cfs and the present generating facility at Kemano requires only 4,700

> cfs. Alcan therefore opposes any limitation on its right to impound and divert water under the licence granted to it 30 years ago. The Minister, on the other hand, has reached the conclusion that Alcan is not releasing enough water, having in mind the welfare of the salmon migrating through the Fraser system into the Nechako to spawn. Salmon have already been observed in the Nechako. The majority of the salmon are still in the Fraser River system but are working their way swiftly into the Nechako. The Minister says that the salmon will be at risk unless flows are increased. Alcan says they are not at risk. Alcan has been discharging water at a rate of 600 cfs. The Minister's order requires 8,000 cfs.
>
> [3] The Attorney-General has filed affidavit evidence setting out the advice the Minister has received from his scientific advisers. Alcan has filed affidavit evidence setting out the quite different advice of its own scientists.

[115] A relatively detailed chronology of events related to the 1980 Action, including the 1987 settlement of that litigation, is set out in paras. 300 to 402 of the ASOF, and I will not repeat all of it here. There are, however, some significant events which must be described for the present context.

[116] British Columbia was added as a defendant to the 1980 Action by way of a consent order granted on December 31, 1982. The main constitutional question in the litigation was whether s. 20(10) of the *Fisheries Act* was *ultra vires* or, alternatively, whether the Minister had exceeded its jurisdiction in directing the release of the quantity of water beyond what was actually necessary for the safety of fish and for the flooding of spawning grounds.

[117] In January 1984, RTA submitted an application to BC's Minister of Energy, Mines and Petroleum Resources for an Energy Project Certificate under s. 18 of the *Utilities Commission Act* to allow RTA to construct additional infrastructure and to increase diversion of water. The project was called the Kemano Completion Project ("KCP") and included diverting water from the Nanika watershed into the Nechako Reservoir, dredging Tahtsa Narrows, adding generators at Kemano, and constructing a cold water release facility at the Kenney Dam with a capacity of 130 m^3/s. Planning, environmental studies and document reviews were undertaken in preparation of anticipated public hearings, but matters were dropped when RTA later requested that further review be postponed.

[118] The mandatory injunction granted by Justice Berger in August 1980 was continued by consent each year the litigation continued. In mid-1985, however, RTA indicated that it was no longer interested in "rolling over the 1980 injunction" and that it wished to proceed to trial. Canada was thus compelled to finalize both its expert evidence and also its pleadings insofar as particularizing necessary and desirable flows for the protection of fish was concerned.

[119] In November 1985, DFO held a workshop to facilitate its technical position on fishery flows in the Nechako. The workshop was attended by officials from DFO, IPSFC, the Department of Justice, and BC's Fisheries Branch.

[120] Differences of opinion emerged at this workshop between the research scientists, who were primarily interested in the flows necessary to sustain fish populations, and "operations staff" (habitat

managers), who were primarily interested in how to make the most of the “remaining water” after a certain amount had been allocated to RTA.

[121] Memoranda and email were exchanged internally at DFO and the disagreements within DFO intensified. Three DFO scientists in particular, Drs. Cole Shirvell, Harold Mundie, and Don Alderdice, expressed strong objections with the direction being taken by DFO, arguing that the flow regime proposed for Canada's pleading in the litigation was not supportable on scientific grounds and would be inadequate to protect and sustain the various Nechako fisheries.

[122] DFO prepared a memorandum entitled “Technical Position of the DFO on Flow Requirement for Fish and Fish Habitat in the Nechako River”. It was prepared for the purposes of briefing the Minister of Fisheries as part of the process for finalizing the government's pleadings. It set out in table form what are described as “composite base flows” and “preferred protection flows” for different stages of fish development (spawning/rearing, overwintering/incubation, rearing, and migration).

[123] The “composite base flow” discharge was considered to be “sufficient to maintain the existing populations but it is unknown whether the flows will meet [DFO’s] objective of rebuilding in the Nechako fish stocks”. The “preferred protection flows” were said to be a flow regime that would maximize spawning and rearing habitat and optimize egg to fry survival.

[124] The table noted that the protection of migrating sockeye spawners required a flow that would maintain river temperature below 20° in the reaches of the Nechako above the Stuart River. It also noted that increased flows might be necessary some years “for flushing purposes”.

[125] The Minister of Fisheries was briefed in February 1986. He expressed annoyance. He wanted to focus on maintaining current salmon runs and not pre-regulation populations. Other demands on the water besides fish had to be considered. He was concerned about the relative economic benefits of enhancing salmon runs to the detriment of RTA's economic contribution, including the proposed KCP. He expressed dissatisfaction with the draft pleading under discussion and stated that it should be “more reasonable”.

[126] The “preferred flows”, which were two to three times higher than the suggested “base flows”, were subsequently removed from the draft pleading and were not pursued by Canada in the litigation or, indeed, at any time since.

[127] Canada filed its Amended pleading in March 1986, particularizing its position on the specific flows in the Nechako that were “sufficient for the safety of fish and deposited ova”. They were the same “base flows” set out in the DFO technical paper, as follows:

- for the month of September, a flow of 56.6 m^3/s (2000 cfs);
- for the months of October through March, a flow of at least 31.1 m^3/s (1100 cfs);

- for the months of April through September, a flow of at least 56.6 m^3/s (2000 cfs); and,
- during the period of sockeye migration in the river, from approximately July 20 to August 15, a constant flow of 226.6 m^3/s (8000 cfs) necessary to minimize incidence of mean daily temperatures above 20°C in the Nechako River, just upstream from its confluence with the Stuart River.

[128] Canada's amended pleading has played a critical role. It had the effect of converting a proposed minimum flow regime (thought by DFO to be sufficient to maintain fish populations, a position DFO's own scientists disputed) into a maximum flow regime for the purposes of not just the court order sought in the 1980 Action, but also for the purposes of negotiating any settlement of that litigation. It also essentially ignored the concerns expressed by DFO's own scientists, including Drs. Mundie and Alderdice, that the specified flow levels were wholly inadequate and that the 20° water temperature would not in fact be protective of the sockeye salmon during the spawning migration.

[129] In July 1986, Dr. Mundie published a report entitled “Case Histories of Regulated Streamflow and its Effects on Salmonid Populations”. It provided an extensive review of 81 case histories of regulated rivers and concluded that flow regulation had a poor record of success in preserving natural salmonid stocks. Based on the research, the report recommended a guideline that the monthly flows in regulated rivers should not be reduced below 30 percent of the natural regime. In the context of the proposed KCP, the report specifically raised the negative impact of reduced flows on habitat, sedimentation and gravel quality, fluctuation in water temperature, pollution, and gas supersaturation.

[130] It should be noted that while reference was made to the Mundie 1986 report in the ASOF, the report itself was not admitted into evidence and does not form part of the expert opinion evidence in this trial.

[131] Dr. Mundie also provided an expert report dated July 18, 1986, for use by Canada in the 1980 Action. While this report was marked as an exhibit at trial, its admission into evidence was not for the truth of its contents or the correctness of the opinions expressed.

[132] Dr. Mundie's expert report referred in detail to the “case histories” publication set out above and repeated many of the observations made in that regard. His opinion was succinctly summarized:

> [N]either set of proposals [the flow proposals of DFO and RTA respectively for the Nechako River] will give protection to the chinook salmon nor to the migrant sockeye salmon . . . [F]lows that would afford protection is water abstraction amounting to no more than 30% of the pre-[dam] flows for each month of the year.

[133] Canada did not serve Dr. Mundie's expert report upon the other parties to the litigation and also did not disclose Dr. Mundie's expert opinion to the plaintiff First Nations who had, by that point

in time, been added as parties to the 1980 Action.

[134] On July 17, 1986, Mr. Justice Cumming of this Court granted a motion by Chief Edward John (Tribal Chief of the Carrier Sekani Tribal Council) and 12 “Indian Bands” (including the Stellat’en, Saik'uz, and Cheslatta) to be added as parties to the 1980 Action: [1987] 1 C.N.L.R. 10, 1 A.C.W.S. (3d) 257 (B.C.S.C.). At a subsequent hearing, the Court directed that these parties be joined as plaintiffs.

[135] The 12 First Nations' Statement of Claim was filed in September 1986. The claims made bear a remarkable resemblance to the plaintiffs' pleading in the present litigation. Among other things, the Statement of Claim pleads:

- recognition and protection of Aboriginal rights and title pursuant to the *Constitution Act*, *1982*;
- lack of consultation with and consent from the First Nations regarding the installation and operation of the Dam and related reservoir;
- interference with the Nechako hydrograph leading to damage to resources, flooding, erosion and pollution;
- continuing trespass;
- continuing public and private nuisance;
- the inadequacy of the flow regimes proposed by both [RTA] and Canada to abate the nuisance/damage; and,
- that the *Industrial Development Act* and the 1950 Agreement are *ultra vires* and of no force and effect.

[136] The relief sought in the action by the First Nations plaintiffs included a mandatory injunction requiring RTA to take all necessary steps to abate the nuisance and damage caused by the construction and operation of the dams, as well as damages.

[137] RTA and the Province appealed the decision to add the First Nations to the 1980 Action. The Court of Appeal allowed the appeal: 115 D.L.R. (3d) 495 (B.C.C.A.). As a result, the First Nations were no longer parties to the action and did not participate in the tripartite negotiations ultimately leading to the 1987 Settlement Agreement.

[138] Even though they were no longer a party to the litigation, an informational meeting occurred between DFO officials and the First Nations representatives so that the latter might be informed of settlement negotiations underway. Following that meeting, on June 26, 1987, Chief John wrote to the Minister of DFO expressing alarm at some of the proposed terms, i.e., construction of a cold water outlet at the Kenney Dam, a maximum of 1100 cfs of cold water being released into the river, and granting DFO a water licence to a portion of the water in the reservoir. Among other things, Mr.

John stated:

> This deal will prove to be a disaster to our people who depend on the Nechako River and its Tributaries. The already low level of water in the Nechako River will be further reduced . . . [Y]ou must see the area for yourself before you understand what we are talking about . . . [T]he "proposal" your department has negotiated with [RTA] will be very detrimental to our people who live along and depend upon the river and its Tributaries.

[139] Chief John requested an in-person meeting between the Minister and the CSTC Tribal Chiefs to discuss matters further. No such meeting occurred.

[140] In August 1987, UBC President Dr. David Strangway was retained to facilitate a meeting of technical experts from RTA, DFO, and the Province to develop a program for the “conservation and protection of the chinook fisheries resource of the Nechako River” based on “a mean annual flow of 26.4 cms including Cheslatta basin runoff”. On August 24, 1987, Dr. Strangway transmitted a “Summary Report of the Nechako River Working Group” to RTA and DFO, a report that subsequently became a Schedule to the tripartite 1987 Settlement Agreement.

[141] The 1987 Settlement Agreement established the flow regime for the Nechako River that is in force today. The documents evidencing the Agreement include:

- a 23-page formal Settlement Agreement dated September 14, 1987, with five schedules attached;
- an Amendment Agreement dated December 29, 1987, between RTA and the Province amending the 1950 Agreement;
- an Amended Conditional Water Licence dated December 29, 1987, issued by the Province to RTA;
- a Conditional Water Licence dated December 29, 1987, issued by the Province to Canada; and,
- the “Kenney Dam and Skins Lake Spillway Orders Regulations”, SOR 1987/992, limiting the Minister's ability to issue certain orders under the *Fisheries Act* regarding the operation of the Kenney Dam and Skins Lake Spillway.

[142] On April 9, 1987, the DFO Minister issued another flow opinion pursuant to section 20(10) of the *Fisheries Act*. The specified flows were the same “base flows” set out in the DFO technical paper and also Canada's amended pleading in the 1980 Action.

[143] As part of the 1987 Settlement Agreement, the Minister issued a revised flow opinion based on (unidentified) “additional information received” reducing the required flows “to the level identified in s. 2.1A(b) of the [1987 Settlement] Agreement . . . provided that the program identified in s. 3 [of that Agreement] is also implemented”. This revised flow opinion, which is still in force today, became Schedule “A” to the 1987 Settlement Agreement.

[144] The 1987 Settlement Agreement contemplated, but did not expressly require, that RTA would construct a “Kenney Dam Release Facility” (“KDRF”). The Agreement specified RTA's obligations to release water, whether from the Skins Lake Spillway, the KDRF, or in the combination of the two.

[145] Section 2.1 of the 1987 Settlement Agreement prescribed what was labelled a “Short-Term Water Allocation”, more particularly specified in Schedule “C” to the Agreement, as well as a “Long-Term Water Allocation” specified in Schedule “D” to the Agreement. The latter was intended to apply once the KDRF became operational, something that has never occurred. In the result, the Short-Term Water Allocation has governed RTA's water release obligations in the 34 years since the 1987 Settlement Agreement.

[146] As noted, Schedule “C” to the Agreement specifies the quantity of water to be released from the reservoir for each month of the year:

SCHEDULE "C"

SCHEDULE OF SHORT TERM WATER RELEASES FOR NECHAKO RESERVOIR

	Column I Reservoir Release (mean monthly)	Column II Approximate Nechako River Flow below Cheslatta Falls measured at hydro-metric station no. 08JA017 (mean monthly)
	m^3/s cfs	m^3/s cfs
Jan	29.2 (1031)	31.1 (1098)
Feb	29.3 (1035)	31.1 (1098)
Mar	29.4 (1038)	31.1 (1098)
Apr	54.6 (1928)	56.6 (2000)
May	47.2 (1667)	56.6 (2000)
Jun	40.9 (1444)	56.6 (2000)
Jul	45.6 (1610) *	56.6 (2000) *
Aug	50.4 (1780) *	56.6 (2000) *
Sep	27.6 (975)	31.1 (1098)
Oct	28.6 (1010)	31.1 (1098)
Nov	28.8 (1017)	31.1 (1098)
Dec	29.1 (1028)	31.1 (1098)
Annual Mean	36.8 (1300)	41.7 (1472)

* plus additional flows as are determined to be required for cooling purposes.

Exhibit 55, tab 9

[147] Technically speaking, Column I of Schedule “C” is actually a default mechanism: s. 2.1A(b) of the Agreement imposes upon RTA a “mean annual water flow [obligation] measured at Skins

Lake Spillway of at least 36.8 m^3/s plus such additional flows as are determined to be required for cooling purposes by [certain defined computer modelling]". However, s. 2.1A(c) contemplates that a certain "Technical Committee" will manage the annual water allocation "with the object of achieving flows set out in Column II" (or as they otherwise determine), and will "direct [RTA] accordingly". Failing any such directions, RTA is required to release the water in accordance with Column I of Schedule "C".

[148] Section 2.1A of the Agreement also provides that,

> [RTA] will be responsible for and have complete control over the operation of the [Kenney Dam, Nechako Reservoir, and Skins Lake Spillway]; and,
>
> . . .
>
> [RTA] will continue to maintain and operate the Computer Models and Protocol necessary to maintain temperature control . . . in the Nechako River.

[149] The 1987 Settlement Agreement provided for what has come to be called the Nechako Fisheries Conservation Program implemented by a "Technical Committee" and subject to oversight by a "Steering Committee". The structure was initially suggested in the Strangway Report. The Steering Committee consists of three members appointed separately by each of the parties to the 1987 Settlement Agreement. Decisions of that committee are to be unanimous, failing which disagreements may be determined by arbitration.

[150] The Technical Committee comprises four members, one appointed by each party to the 1987 Settlement Agreement and a fourth member, selected by them, to be an "independent expert selected for technical expertise".

[151] As noted above, the Technical Committee was (and still is) charged with directing the flows to be released by RTA from the reservoir through the Skins Lake Spillway.

[152] The Technical Committee is also responsible for the implementation and ongoing administration of a program of remedial measures. These measures were outlined in the Strangway report for the purposes of achieving a "conservation goal", defined as a "sustainable target population of the Nechako River Chinook salmon". The wording of that target in the Strangway report is actually somewhat ambiguous, but has been interpreted by the 1987 Settlement Agreement parties and the two NFCP Committees to mean an average escapement of 3,100 spawning chinook.

[153] As part of the 1987 Settlement Agreement, amendments were made to both the 1950 Agreement between the Province and RTA and the Conditional Water Licence issued by the former to the latter. The purpose of these amendments was said to be "the protection of the sockeye and chinook salmon in the Nechako and Nanika Rivers". Essentially, RTA relinquished all rights previously granted with respect to the Nanika River watershed and the Conditional Water Licence was amended to:

- reduce maximum storage from 43,172 cubic hectometres to 23,850 cubic hectometres, with live storage of 7100 cubic hectometres and a maximum diversion to the power facilities of 269 m^3/s;
- permit further construction of works in accordance with the 1987 Settlement Agreement; and,
- "in order to provide flows necessary for the protection of sockeye and chinook salmon, … [authorize RTA] to make releases into the natural channel of the Nechako River in accordance with the [1987] Settlement Agreement".

C. Kemano Completion Project and the 1997 Settlement Agreement

[154] In 1988, RTA started construction of the Kemano Completion Project which was designed to expand RTA's power generation capability. The project included a cold water release facility at the Kenney Dam that would allow for water releases of up to 170 m^3/s. Other components included,

- dredging of Tahtsa Narrows;
- construction of a second tunnel and a second powerhouse that would include four new generators; and,
- twinning the transmission line from Kemano to Kitimat.

[155] The project became mired in controversy and litigation between RTA and the government defendants, which is described in the ASOF and need not be repeated here.

[156] In January 1995, the Province announced the cancellation of KCP. The ensuing lawsuit by RTA against the Province was ultimately settled by way of the 1997 Settlement Agreement pursuant to which, among other things:

- the Province issued RTA its Final Water Licence;
- the Nechako Environmental Enhancement Fund (NEEF) was created; and,
- the Nechako Watershed Council was created to advise the NEEF Management Committee on the uses and priorities of the NEEF fund.

[157] The only significant change in the Final Water Licence was a reduction in the maximum rate of diversion for power purposes from 269 m^3/s to 170 m^3/s. The Final Water Licence included the same provision as the 1987 Amended Water Licence respecting RTA's obligation to release into the Nechako River the "Short-Term Annual Water Allocation" specified in the 1987 Settlement Agreement.

D. The 2012 Amendments

[158] In 2008, Alcan was amalgamated with Rio Tinto Canada Holdings Inc. and was renamed Rio Tinto Alcan Inc. Thereafter, RTA applied under the *Industrial Development Act* to:

- authorize construction to complete the partially completed second Kemano tunnel (T2) and intake and connect it to the existing tunnel (T1) and the Kemano powerhouse; and,
- further amend the 1950 Agreement to include the completed construction as Works authorized under an Amended Final Water Licence.

[159] The Province approved the project, and on July 19, 2012, the parties executed a further formal amendment to the 1950 Agreement. An Amended Final Water Licence was also issued on July 19, 2012. The authorized maximum water storage and rate of diversion for power purposes remained the same, as did the provision requiring RTA to release water into the Nechako River in accordance with the 1987 Settlement Agreement.

E. Actual Flows into the Nechako River

[160] Until approximately March 1989, the Technical Committee followed the target Skins Lake Spillway release rates set out in Schedule “C” of the 1987 Settlement Agreement. After the Technical Committee conducted hydrological monitoring of the natural snowmelt runoff in the Cheslatta watershed, however, it concluded the optimal Schedule “C” flow rate in the Nechako would not be achieved if the Column I, Schedule “C” target release rates were followed. Accordingly, the Technical Committee developed its own set of decision criteria to regulate the release regimen from the Nechako Reservoir to the Nechako.

[161] From 1988 to present, the Technical Committee has made a number of decisions directing RTA with respect to the management and release of the AWA from the Skin Lake Spillway, which it divides into three categories:

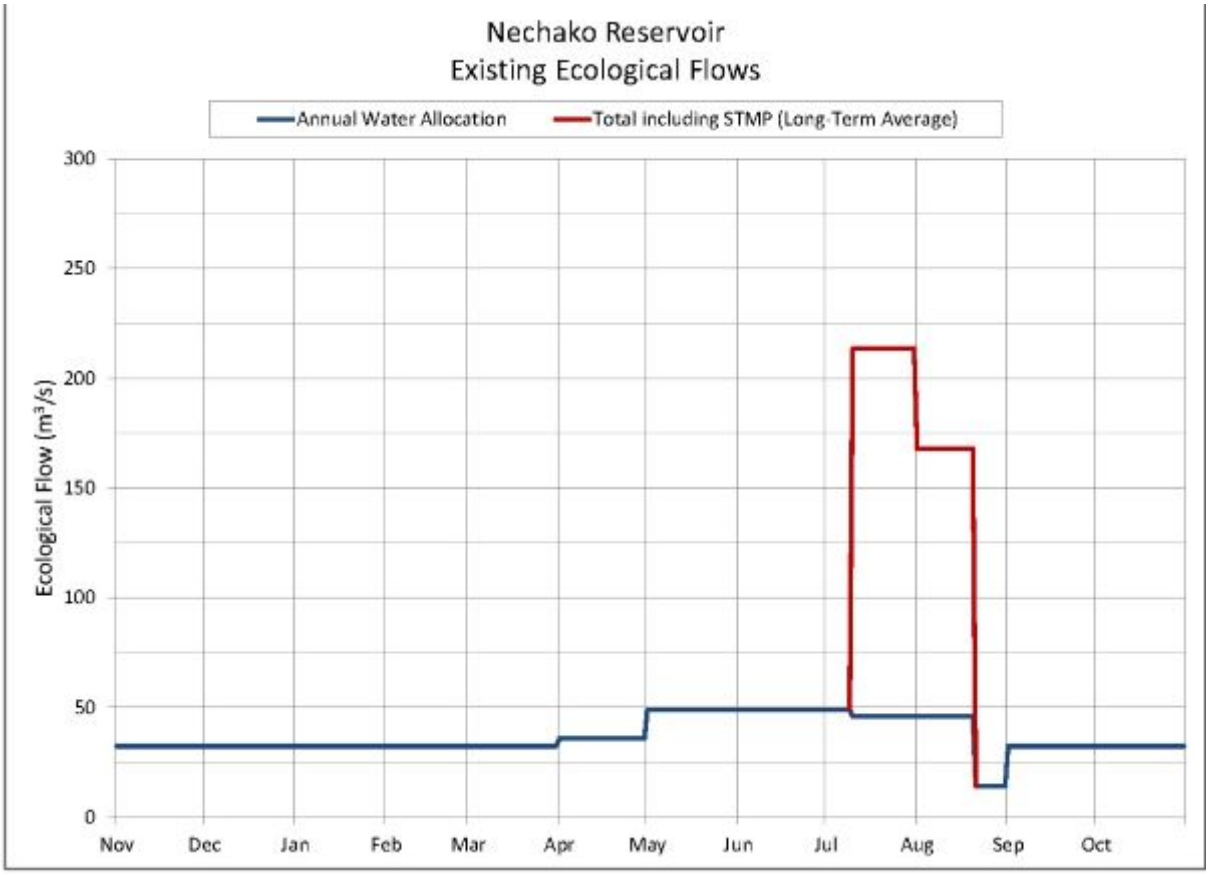
a. spring releases (April, May and June);

b. fall/winter releases; and,

c. exceptions related to dam safety, flood protection maintenance, etc.

[162] The 1987 Settlement Agreement does not expressly specify the volume of water to be released from the Nechako reservoir for the Summer Temperature Management Program (STMP). The stated objective of the program is to prevent mean daily water temperatures from exceeding 20°C in the Nechako above the Stuart River (Finmore) during spawning sockeye migration in July and August. The flow regime is determined through computerized modelling programs run by an RTA consultant, Triton Environmental Consultants Ltd.

[163] In his expert report, one of RTA's hydrologists, Mr. Alec Mercier, prepared a table illustrating the current basic flow regime based on the Technical Committee's directions. For the purposes of interpreting the table, the lower (blue) line across the table is the Annual Water Allocation, and the vertical (red) lines forming a rectangular shape illustrate the Total including STMP.



Essentially, the regime is:

- mid-April to July 10: spring release flow of 49 m^3/s;
- mid-July to mid-August: variable STMP flows ranging up to 283 m^3/s and not less than 49 m^3/s;
- mid-August to end of August: 14.5 m^3/s (for the purpose of the Chinook spawning period); and, September to mid-April: flows averaging not less than 29.5 m^3/s but not falling below 29 m^3/s at any time.

[164] In some years, snowpack conditions or rain events can result in a higher than normal flow into the reservoir, requiring RTA to spill water through the Skins Lake Spillway to avoid exceeding the reservoir's maximum allowed capacity. In such high flow years, the discharges through the Spillway can significantly exceed the base flows specified in Schedule “C” of the 1987 Settlement Agreement.

V. ISSUES TO BE DECIDED IN THIS CASE

[165] Very broadly stated, this case requires the Court to decide whether the regulated flow regime of the Nechako River has caused a decline in fish population that is actionable by the plaintiff First Nations and, if so, what legal remedy is appropriate.

[166] The broad issues can be broken down into a great many sub-issues, both legal and factual.

[167] The first question is whether a decline in the Nechako fish population has actually occurred and if so, when and to what extent. Then a determination must be made whether any such decline was caused by the regulated hydrograph. This is not just a determination of fact but also involves legal principles informing the doctrine of causation in the law of tort and, in particular, whether and to what extent liability can be imposed when there may be multiple contributory causes of the loss, only some of which are tortious in nature.

[168] Even if causation is proved, a further question remains whether the loss of the fishery is actionable by the plaintiff First Nations. They invoke common law causes of action, namely the tort nuisance and breach of riparian rights. The foundations for these causes of action are claimed Aboriginal rights to fish and/or Aboriginal title to land, including the riverbeds and lake beds where fishing has traditionally occurred.

[169] Because it is the very foundation of their claim, I will start my analysis with the question of Aboriginal rights and title. I will then address whether as a matter of law such rights, including title, can ground a claim for the tort of nuisance or for breach of riparian rights. Thereafter, I will determine whether such a nuisance or breach has been proved on the evidence in this case and whether RTA has any valid defences which might exclude or reduce any liability on their part. Lastly, I will consider the question of remedies against all three defendants.

[170] This is a case that will almost certainly be appealed. Aboriginal rights litigation can, and occasionally does, result in the appellate courts remitting the case back to the Superior Court for retrial many years later and after tens of millions of dollars have already been spent. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 was such a case. In an attempt to avoid that result in this case, I have addressed issues and made findings of fact on matters that are not necessary to the outcome; this may enable the appellate courts to make a final determination of the issue in dispute should my conclusions be overturned.

VI. BACKGROUND TO ABORIGINAL RIGHTS JURISPRUDENCE IN CANADA

A. An Abbreviated Chronology of Displacement

[171] Context is important, especially when the Court is being asked to determine whether Aboriginal rights can or should support a private right of action in tort against a third party, albeit a corporation, other than the government. Hence an abbreviated chronology of colonial confiscation and Aboriginal displacement in this case is an appropriate first step.

[172] The ASOF makes no mention of most of the matters set out in the chronology below. They are, however, notorious historical or legislative facts of which the Court can and does take judicial notice, and in any event, many are recited in *Calder v. Attorney-General of British Columbia,* [1973] S.C.R. 313. This chronology of displacement helps inform whether any incremental extension of common-law might be warranted insofar as Aboriginal rights supporting a private right of action are

concerned.

1493: Pope Alexander VI issued *Inter Caetera* papal bull granting the present and future kings of Castile and Leon (Spain/Portugal) all “rights and jurisdictions” respecting certain delineated lands of non-Christian peoples (including the Americas).

1496: King Henry VII issued Letters Patent to John Cabot and sons authorizing the conquest and claiming of lands in the name of the English Crown from “heathens and infidels in whatsoever part of the world placed which before this time were unknown to all Christians”.

1497: Cabot claimed what is now Newfoundland and all contiguous lands for the English Crown.

1534: Jacques Cartier claimed New France in the name of the French Crown.

1670: King Charles II granted Hudson's Bay Charter respecting “Rupert's Land” (drainage basin of Hudson's Bay) thereby creating the Hudson's Bay Company (“HBC”) with Prince Rupert as First Governor.

1755: “Indian Department” created as a branch of the British military.

1763: Treaty of Paris signed renouncing French claims to New France following defeat by Britain in the Seven Years' War.

1763: Royal Proclamation by King George III “strictly forbids” dispossession of Indians from unceded lands, ultimately triggering subsequent treaty-making processes in Canada (first Crown recognition of Aboriginal rights to lands traditionally occupied by them).

1774: Spanish Navigator Juan Perez exchanged goods with the Haida of Langara Island (first recorded West Coast encounter by Europeans).

1778: Capt. James Cook sailed into Nootka Sound and acquired pelts from the local Indigenous population, triggering a West Coast maritime fur trade.

1779: North West Company founded, later establishing a network of trading posts in BC's interior (“New Caledonia”).

1790-5: Concession (relinquishment) by Spain to Britain of claims to territory in BC (resulting in what are now known as the Three Nootka Conventions); Spanish settlement at Fort San Miguel was the first colony in BC.

1791-2: Captain George Vancouver commanded a two-ship expedition (including HMS Discovery) charged on behalf of the British Crown with exploring and surveying the west coast of what is today BC, including Georgia Strait, Howe Sound, and Burrard Inlet, and returned in 1793 to explore and survey points further north.

1806-7: Simon Fraser of North West Company established Fort George (now Prince George, at the confluence of Fraser and Nechako Rivers), Fort St. James (on Stuart Lake), and Fort Fraser (near Fraser Lake) trading posts, all part of the trading district of New Caledonia.

1821: HBC and North West Company merged, with the enterprise continuing as HBC.

1843: HBC established a trading post on Vancouver Island and constructed Fort Victoria.

1846: Oregon Boundary Treaty (Great Britain/USA) established 49th parallel border (excepting Vancouver Island); this later became the date of the "assertion of sovereignty" in BC for Aboriginal title claim purposes.

1849: Crown Colony of Vancouver Island established by British Colonial office (granted by Charter to HBC, merged with BC in 1866).

1853: Crown Colony of the Queen Charlotte Islands established (amalgamated into the colony of British Columbia in 1863).

1857-58: Fraser Canyon gold rush prompted a massive influx of non-Aboriginal intruders.

1858: Crown Colony of British Columbia established (November 19, 1858, is the date English common law was formally received in BC).

1859: Colonial Crown proclaimed that "all the lands in British Columbia and all the Mines and Minerals therein belong to the Crown in fee".

1863: First residential schools established in Mission and Chilliwack, BC.

1862: Smallpox, a disease imported by early settlers, erupted in Victoria and within two years, killed one-third of the Indigenous peoples in what is now BC.

1867: *British North America Act* (later renamed *Constitution Act*, *1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5) established Confederation of Canada including division of legislative powers between the federal and provincial governments.

1871: BC joined Confederation, and Terms of Union made provisions of BNA *Act*, 1867, applicable to BC. Article 13 provides: "The charge of the Indians, and trusteeship and management of the lands reserved their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union".

1873: Father Jean Marie Lejacq (Oblate missionary) founded a mission at Fort St. James.

1876: *Indian Act* consolidated legislation such as *Gradual Civilization Act*, 1857, and laid foundation for future administration of Indian affairs by the federal government.

1884: *Indian Act* criminalized potlaches and other Indigenous cultural ceremonies, prohibited the sale of intoxicants to Indians, and formally authorized residential schools.

1892: *Water Privileges Act* granted BC all user rights in non-navigable waters and prohibited diversion without a permit.

1892: Reserve Commissioner O'Reilly set aside "reserves" for plaintiff First Nations on Fraser Lake and Nechako River.

1910: Deputy Superintendent General of Indian Affairs described residential schools as the "final solution of our Indian problem" (Department of Indian Affairs Superintendent Duncan Campbell Scott to BC Indian Agent-General Major D. McKay, DIA Archives, RG 1-Series 12 April 1910).

1911: Weir/barricade fishing by plaintiffs prohibited by Crown.

1920: *Indian Act* amended to make residential school attendance compulsory and authorized Indian agents to remove children for that purpose.

1922: Lejac Residential School established on Fraser Lake (closed 1976).

1925: *Water Act*, R.S.B.C. 1924, c. 271, amended to provide that "property in . . . all water is vested for all purposes in the Crown".

1925: BC imposed universal mandatory trapline registration.

1927: *Indian Act* criminalized fundraising for the prosecution of claims by Indians (until 1951) and also banned the formation of Indian political organizations.

1938: Formal creation of plaintiffs' reserves by land transfers from BC to Canada.

1949: BC passed the *Industrial Development Act* authorizing the establishment of hydropower/aluminum industry "notwithstanding any law to the contrary".

1950: Formal agreement between BC and RTA authorizing construction of Kenney Dam and creation of Nechako Reservoir (no consultation with plaintiffs or any other First Nations).

[173] Canadian courts have tended to employ rather tepid language in describing the inhumane treatment of Indigenous peoples by both church and government. One early understatement, repeated in *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1103, simply says, "We cannot recount with much pride the treatment accorded to the native people of this country".

[174] Some more recent observations of the Supreme Court have been a little more pointed.

[175] In a 2015 speech, then Chief Justice of Canada Beverley McLachlin observed that the historic treatment of Indigenous peoples in Canada reflected an "ethos of exclusion and cultural annihilation", before continuing:

> Early laws forbade treaty Indians from leaving allocated reservations. Starvation and disease were rampant. Indians were denied the right to vote. Religious and social traditions, like the Potlatch and the Sun Dance, were outlawed. Children were taken from their parents and sent away to residential schools, where they were forbidden to speak their native languages, forced to wear white-man's clothing, forced to observe Christian religious practices, and not infrequently subjected to sexual abuse. The objective was to "take the Indian out of the child", and thus to solve what John A. Macdonald referred to as the 'Indian problem'. 'Indianness' was not to be tolerated; rather it must be eliminated. In the buzz-word of the day, *assimilation*; in the language of the 21st century, *cultural genocide*.
>
> ("Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance", Toronto, Ontario, May 28, 2015)

[176] In *R. v. Desautel*, 2021 SCC 17, the Court noted at para. 33 that the "displacement of Aboriginal peoples as a result of colonization is well acknowledged", reciting the *Report of the Royal Commission of Aboriginal Peoples*, 1996, Vol.1 at 139-40:

> Aboriginal peoples were displaced physically—they were denied access to their traditional territories and in many cases actually forced to move to a new location selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools—which undermined their ability to pass on traditional values to their children, and imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America, they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

[177] The legacy of 150 years of systemic discrimination and attempted assimilation is bleak and intractable. It has resulted in cultural erosion and alienation, relentless intergenerational trauma, and socio-economic marginalization. While representing only five percent of Canada's population, Indigenous people endure massively disproportionate rates of poverty, interpersonal violence and family breakdown, addiction and substance abuse, youth suicide, lower levels of education, and higher unemployment. Many reserves lack basic human needs such as decent housing and clean water to drink. And mostly as a cumulative result of the foregoing, Indigenous people are hugely overrepresented in both the child welfare and the criminal justice systems of this country.

[178] Given these tragic realities, I have no hesitation whatever in making incremental extensions of the common law that might advance some small redress for Indigenous peoples, including, of course, the plaintiffs in this case.

B. Legitimacy of Crown Assertion of Sovereignty

[179] It is common in Aboriginal law jurisprudence for the court to acknowledge the occupation by Indigenous peoples of their traditional lands "since time immemorial". Indeed, such an observation, albeit in the context of fishing, has been made by the Supreme Court of Canada in regards to the Dakelh (Carrier) and the Nechako River (see paragraph 2 in these reasons for judgment).

[180] In *Calder*, Judson J. stated:

> [T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.

Desautel recites numerous similar statements in subsequent Supreme Court of Canada cases, and I will not repeat them all here.

[181] The *Calder* case is an early example of the contest between Crown sovereignty on the one hand and Aboriginal title on the other. The claimants were all members of the Nisga'a First Nation who were described by Judson J. as "descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed". The plaintiffs

were seeking a declaration that their Aboriginal title to this territory “[had] never been lawfully extinguished”.

[182] The trial judge and the BC Court of Appeal both ruled that the claimed Aboriginal title had indeed been extinguished.

[183] The Supreme Court of Canada dismissed the Nisga’a appeal for procedural reasons. Specifically, permission had not been obtained to sue the Crown. Three separate judgments were written. The first, authored by Judson J., with Martland and Ritchie JJ. concurring, concluded that the Nisga’a Aboriginal right had been extinguished by the “legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to ‘aboriginal title’”, as evidenced by various Crown proclamations and ordinances between 1858 and 1870. Judson J. also expressed agreement with the decision of Pigeon J. which simply dismissed the suit as “barred by sovereign immunity from suit without a fiat”.

[184] The other judgment in the case was written by Hall J. and concurred in by Spence and Laskin JJ. The judgment reviewed in detail both the Commission and the Instructions issued to the Governor of the Colony of British Columbia and concluded that “any attempt . . . to extinguish [Aboriginal] title . . . was beyond the power of the Governor or of the Council . . . and [any attempt to do so was] therefore, *ultra vires*”. In the result, Hall J. and his two concurring colleagues declared that:

> [T]he appellants' right to possession of the lands delineated . . . and their right to enjoy the fruits of the soil, of the forest, and of the rivers and streams within the boundaries of said lands have not been extinguished by the province of British Columbia or by its predecessor, the Colony of British Columbia, or by the Governors of that Colony.

[185] Both of the substantive judgments referred to the evidence and writings of an expert witness, Dr. Wilson Duff, a professor of anthropology at the University of British Columbia. Dr. Duff was acknowledged by all levels of the court as being a renowned scholar. Before joining UBC, he was the Curator of Anthropology at the BC Provincial Museum and was working on a proposed multi-volume handbook called “The Indian History of British Columbia”. The first and, as it turned out, only volume in the proposed series was entitled *The Impact of the White Man*, published in 1964. The text displayed rigorous scholarship, linking historical and ethnographic data long before the practice became academically fashionable, and is considered a classic work of British Columbia anthropology, albeit one with some terminology that is now dated.

[186] Both of the substantive judgments in *Calder* recited the following passage from Duff's work, one that likely resonates with the plaintiffs in this case:

> It is not correct to say that the Indians did not “own” the land but only roamed over the face of it and “used” it. The patterns of ownership and utilization that they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land,

> they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food gathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the province was formerly within the owned and recognized territory of one or other of the Indian tribes.

[187] Both substantive judgments also made extensive reference to the Royal Proclamation of 1763 and to the doctrine of "discovery" articulated in two early judgments of Chief Justice Marshall in the United States Supreme Court in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), and applied, albeit without express reference to the US cases, by the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen*, (1888), 14 A.C. 46. The doctrine of "discovery" combines with the related concept of "*terra nullius"* to bestow upon European settlers title to and sovereignty over the "empty lands" which they "discovered". As recited in *Calder*, Chief Justice Marshall in *Johnson v. M'Intosh* stated:

> The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.
>
> The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

[188] The Court in *Johnson v. M'Intosh* acknowledged how "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear", but nonetheless rationalized the consequences as follows:

> [I]f the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.

[189] Not surprisingly, this rationale for Crown sovereignty over land formerly owned and occupied by Indigenous peoples has in recent decades come under scathing academic, political, and legal criticism. See for example:

> Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1980s" (1999) 38:1 J West 68;
>
> John Borrows, "The Durability of Terra Nullius*: Tsilhqot'in Nation v British Columbia*" (2015)

48:3 UBC L Rev 701 [Borrows 2015];

Karen Drake, “The Impact of St Catharine's Milling”, in Law Society of Upper Canada, ed, *Special Lectures 2017: Canada at 150: The* Charter *and the Constitution* (Toronto: Irwin Law and the Law Society of Upper Canada, 2017);

Tracy Lindberg, “The Doctrine of Discovery in Canada” in Robert J. Miller et al., eds, “*Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*” (Oxford: Oxford University Press, 2010) 89 at 120-21; and,

Chase Blair, “Indigenous Sacred Sites & Lands: Pursuing Preservation through Colonial Constitutional Frameworks” (2020) 25 Appeal: Rev Current L & L Reform 73.

[190] In *Tsilhqot’in*, Chief Justice McLachlin stated in para. 69 of the unanimous judgment:

> The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763.

[191] The Truth and Reconciliation Commission of Canada released its summary report and findings in June 2015, after six years of hearings and testimony from more than 6,000 residential school survivors and their families. The report included 94 Calls to Action to redress the horrific legacy of residential schools and advance the process of reconciliation. Calls to Action 45, 46, and 47 all urge the repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples including the doctrines of discovery and *terra nullius*.

[192] And most recently on June 21, 2021, the federal government passed into law the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“*UNDRIPA*”), which includes in the preamble the statement that “the doctrines of discovery and terra nullius are racist, scientifically false, legally invalid, morally condemnable and socially unjust”.

[193] Contrary to these recent developments, Canadian jurisprudence has a long history of endorsing these doctrines. *Johnson v. M’Intosh* and the doctrine of discovery has been cited at length not only in *Calder*, but also in a series of subsequent Supreme Court of Canada decisions including *Guerin v. The Queen*, [1984] 2 S.C.R. 335, per Dickson J.; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, paras. 35-36, 49, per Lamer J.; *Mitchell v. M.N.R.*, 2001 SCC 33 at paras. 112-13, Binnie J., minority opinion; and also note *Sparrow* at 1103, holding that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown”, citing *Johnson v. M’Intosh* as support.

[194] If the doctrines of discovery and *terra nullius* are indeed “legally invalid” or simply inapplicable in Canadian law, what then is the legal justification validating the assertion of Crown sovereignty over Indigenous peoples and Indigenous lands?

[195] In the very same paragraph in which the Supreme Court of Canada in *Tsilhqot’in* denied application of the doctrine of *terra nullius* in Canada, the Court simply restated:

> At the time of assertion of European sovereignty, the Crown acquired radical or underlying

> title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival . . . The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[196] This construct has become a fundamental part of the framework animating Aboriginal law jurisprudence following 1982, when s. 35 of the *Constitution Act*, *1982* formally recognized and affirmed the existing Aboriginal rights of the Indigenous peoples in Canada. But, one may rightly ask, if the land and its resources were owned by Indigenous peoples before the arrival of Europeans, how, as a matter of law, does the mere assertion of European sovereignty result in the Crown acquiring radical or underlying title? How and why does pre-existing Indigenous title somehow become subordinate?

[197] Rather remarkably, the Supreme Court of Canada has never directly answered this question even though the Court itself noted in *Delgamuukw* at para. 145, “it does not make sense to speak of a burden on the underlying title before that title existed”.

[198] True, in the same paragraph, the Supreme Court suggests that Aboriginal title “crystallized” at the same time sovereignty was asserted, hence presumably permitting the layering/burdening of radical title, but the logic of this is perplexing. Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada: see Borrows 2015, above at para. 182, and John Borrows, “Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 Osgoode Hall Law Journal 537.

[199] I raise these questions because the paramountcy of title, i.e. “ownership” of land and its resources, including water and the fishery within, lies at the heart of this case. While the plaintiffs say they are not challenging Crown sovereignty *per se*, they are nonetheless challenging the efficacy of legislation, licences, and contracts issued or made by the Crown in a tort lawsuit against a non-government entity. They say these instruments are “constitutionally inapplicable” as any defence to their claim.

[200] Whether Aboriginal rights trump contractual rights and proprietary interests historically acquired from the Crown by third parties and eliminate defences otherwise available to those third parties in the law of tort is a question that certainly seems to be a challenge to Crown sovereignty. It is similar to another long outstanding issue of fundamental importance to everyone in this country, namely, the impact of Aboriginal rights, including title, on lands that are “privately-owned” (an express exception to the *Tsilhqot’in* ruling and a claim also expressly excepted by the plaintiffs in the pleadings filed in this case).

[201] Still, regardless of any legal frailties underlying the Crown's assertion of sovereignty over British Columbia in 1846, the plaintiffs’ claims confront certain harsh realities, unpalatable though

they may be to many.

[202] First and foremost is the fact that the system of law and government imported by settlers into British Columbia and superimposed upon Indigenous peoples has become firmly and intractably entrenched. It is the foundation for Canadian society as it exists today. The laws relating to ownership of land are the basis for this country's wealth and the very foundation for its economy. It is these same laws which provide legitimacy to this Court.

[203] As the Court noted in *Delgamuukw*, "we are all here to stay", and while the legal justification for Crown sovereignty may well be debatable, its existence is undeniable and its continuation is certain. The task of the Court is therefore to somehow reconcile continued settler occupation and Crown sovereignty with the acknowledged pre-existence of Aboriginal societies. In my view, such reconciliation will not likely entail wholesale evisceration of common-law concepts such as private ownership of land or the enforceability of contractual obligations.

[204] The second harsh reality, closely related to the first, is that this Court is bound by the doctrine of precedent, which requires it to apply the law enunciated by the Supreme Court of Canada. If that construct or analytical framework attracts academic or political criticism, no matter how justified, this Court is nevertheless bound to apply it, subject only to incremental changes not prohibited by precedent or legislative change, a subject to which I now turn.

C. *United Nations Declaration on the Rights of Indigenous Peoples*

[205] In November 2019, British Columbia became the first jurisdiction in Canada to pass legislation affirming the application of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess., Annex, UN Doc A/Res/61/295 (2007) ("*UNDRIP*") to the laws of British Columbia. The legislation was entitled *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 ("*DRIPA*"). It required the government of British Columbia to "prepare and implement an action plan to achieve the objectives of the Declaration".

[206] In June 2021, the federal government followed suit with its own legislation, *UNDRIPA*. The stated purpose of the *Act* was to "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and to provide a framework for the federal government's implementation of the declaration. Unlike the British Columbia legislation, *UNDRIPA* contains an extensive preamble referencing the Calls to Action and Calls for Justice made by the Truth and Reconciliation Commission of Canada and the National Inquiry into Missing and Murdered Indigenous Women and Girls respectively. The preamble expressly recognizes that "Indigenous peoples have suffered historic injustices as a result of, among other things, colonization and dispossession of their lands, territories and resources" and expressly states that "the Declaration is affirmed as a source for the interpretation of Canadian law".

[207] What then are the Indigenous rights which apply to, and which are also affirmed as a source

for the interpretation of, British Columbia and Canadian law? For present purposes, reference might be made to the following articles of *UNDRIP*:

> **Article 26**
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States [i.e. Canada and British Columbia] shall give legal recognition and protection to these lands, territories and resources.
>
> **Article 27**
>
> States shall . . . [give] due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.
>
> **Article 28**
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
>
> **Article 29**
>
> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

[208] In essence, then, *UNDRIP* states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories. It is not difficult to see how such principles might readily apply to the plaintiffs' claims in this case.

[209] Both the provincial and federal legislation was passed after the start of the trial in this case. It is therefore not surprising that the legislation does not appear in the pleadings. It did, however, feature in the parties' final submissions at the end of the trial.

[210] The plaintiffs say that the extent to which *UNDRIP* creates substantive rights is not an issue that needs to be resolved in this case. However, they also say that *UNDRIP* can and should be used as an interpretive tool in support of robust recognition and accommodation of Aboriginal rights enjoying recognition under s. 35(1) of the *Constitution Act*, *1982*. They emphasize that s. 1(4) of *DRIPA* expressly states that "Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia".

[211] The defendants say that *UNDRIP* is merely an international declaration of a sort that has never been implemented as law in Canada. They point out that, on the other hand, international treaties and conventions can obtain the force of law in Canada but only when they are expressly implemented by statute. They say the recent *UNDRIP* legislation has no immediate impact on existing law and is simply “a forward-looking” statement of intent that contemplates an “action plan” yet to be prepared and implemented by either level of government.

[212] It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, *UNDRIP* legislation has on the common law.

[213] I now turn to a review of the anthropological evidence presented to the Court and the parties’ submission on the proper rightsholders.

VII. ANTHROPOLOGICAL INFORMATION CONCERNING THE PLAINTIFFS AND THEIR STANDING

[214] Aboriginal rights cases often demand a unique approach to the treatment of evidence. There are obvious obstacles to the production of conclusive evidence from pre-contact times about the practices, customs, and traditions of Indigenous communities and establishing present-day continuity of such matters, albeit in a more modern form. Many Indigenous societies did not keep written records at the time of contact or the Crown’s assertion of sovereignty. There is no one alive who can testify to early historical events and circumstances based on personal participation or observation.

[215] Courts will therefore admit evidence from experts in anthropology, history, archaeology and the like who express opinions and conclusions based on historical documents, ethnographic literature, and the work of other scholars. A certain degree of flexibility is applied to the laws of evidence in order to accommodate hearsay or other evidence that might otherwise be inadmissible including oral histories transmitted through numerous generations of Aboriginal society. As noted in *Van der Peet* at para. 68:

> The courts must not undervalue the evidence presented by [A]boriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in [other contexts], for example, a private law torts case.

[216] In the present case, the Court received evidence by way of expert reports from anthropologists, oral testimony from members of the two plaintiff First Nations, including respected elders (regarding both personal experiences and information passed down through generations),

and in some instances, oral histories provided by deceased persons subsequently reduced to writing.

[217] Expert anthropological evidence was provided by Richard Inglis and John Dewhirst at the behest of the plaintiffs and the defendant province respectively. An expert evidence report was also served by Canada, however that particular anthropologist was not called as a witness and her report was not put into evidence at trial. The expert evidence goes to genealogy, the organization and governance of the plaintiffs' historical communities, occupation of specific areas of land including fishing sites, fishing methods, and plaintiffs' reliance on fish for food, among other things.

[218] After careful review of the evidence in its totality, I make the following findings of fact regarding the historical socio-political organization of the Dakelh, including the two plaintiff First Nations.

[219] The Dakelh (Carrier) are an Athapaskan (Dene-speaking) people that anthropologists classify in three divisions, each of which has three levels of social organization. The three divisions are Southern, Central (which include the plaintiffs) and Babine. The levels include sub-tribe, extended family (*sadeku*), and clan. Sub-tribe unity was based on common dialect, marriage, kinship ties, and pressure to share resources. Sub-tribes could and did include several *sadekus*.

[220] Anthropologists identified 14 Dakelh sub-tribes in the late 19th century including the Saik'uz and Stellat'en. At that time, Saik'uz comprised two subgroups, the *Nulki-Whut'en* and the *Tachick-Whut'en,* but survivors of two other communities, Tatuk and Chinlac, also became part of the Saik'uz (also referred to in some records as Stoney Creek). The Saik'uz, albeit spelled differently, were noted in the early records of the North West Company traders and on one of the earliest maps of the area produced in 1824 by the Arrowsmith firm of London, England, based on information provided by HBC.

[221] The Stellat'en were also referred to in the early trading post records, and their village on the west end of Fraser Lake was also identified on the 1824 Arrowsmith map ("Stilla"). They were referred to in some subsequent records as part of the Fraser Lake or Nadleh sub-tribes, but certainly by 1916 had come to be divided into two "bands" by the Royal Commission of Indian Affairs for the province of BC. However, it is very clear, and I find as a fact, that the Stellat'en plaintiffs before the Court today and who occupy the Stellaquo Indian Reserve at the west end of Fraser Lake are the direct descendants of the Indigenous peoples who occupied the village of Stella in the same location before and after contact with European traders in the first decade of the 19th century.

[222] The traditional and ancestral territories of the Dakelh sub-tribes were governed by a patrilineal *keyoh/sadeku* system of land ownership. The *sadeku* was comprised of a leader (the *köyohodachum)*, his close male relatives, and their families. The *keyoh* is the ancestral territory of the *sadeku* with well-defined boundaries within which the family had exclusive rights to fishing,

hunting, trapping, and gathering. Use of the *keyoh* by others required permission of the leader of the *sadeku*. The sub-tribe's territory was the sum of the *keyohs* held by the *sadekus* forming the sub-tribe, in this case the Saik'uz and the Stellat'en.

[223] Alongside the patrilineal *keyoh/sadeku* system of governance was a parallel matrilineal clan/potlatch system integral to social organization. That system bound families and villages together in ties of marriage, trade, and exchange. Leadership paralleled that of the family units and mediated disputes (including territorial rights), provided cooperative use of resources including fishing weirs, and organized ceremonial distribution of accumulated resources and wealth. The matrilineal clan system continues today.

[224] Mr. Inglis opines, and I find as a fact, that the traditional system of land ownership and management among the Dakelh, including the two plaintiff First Nations, changed significantly as a result of colonization. He says, and I accept as a fact, that:

> Alienation of large tracts of land to settlers, resource and infrastructure developments and the creation of Indian Reserves all restricted First Nation control and access to their *keyohs*. The role of chiefs (*detsah*) in managing and scheduling activities on their *keyohs* was further eroded by the end of weir (barricade) fishing in 1911, and the provision of fish nets to individual families. Working for wages as packers, making railroad ties, farming and other activities also eroded the authority of the *detsah* and the role of the extended family. The provincial system of trapline registration resulted in loss of some hunting territories owned by the [plaintiffs] to settlers. Depopulation from various disease outbreaks further weakened the traditional system of land and resource management.

A. The Proper Rightsholders

[225] Mr. Inglis and Mr. Dewhirst essentially agree on many aspects of both the pre-and post-contact organization of Dakelh society. Mr. Dewhirst, however, disagrees with some of Mr. Inglis' conclusions respecting land ownership and, in particular, the appropriate modern Indigenous collectivity who "owns" the land.

[226] Mr. Dewhirst's preferred approach is to identify current family-owned resource areas ("*keyohs*"), the ancestral territory of an extended family or "*sadeku*", and to trace back through time the male head of the *sadeku* (called the "*köyohodachum*", also spelled *keyohwhuduchun*) through whom ownership of the land passed. Mr. Dewhirst acknowledges this can be a challenging task but insists it can be done with appropriate scholarship and diligence and argues that this is the only proper way to trace "ownership" (exclusive use and occupation) of any particular tract of land within the Dakelh territory. He has not undertaken the task himself in this case, presumably because he was commissioned only to provide a critique of the Inglis report.

[227] Under cross-examination, Mr. Dewhirst acknowledged several times that his own "thinking had changed" over the years on these matters.

[228] Mr. Dewhirst's methodology, presented and endorsed by the provincial Crown, would not

only require the plaintiffs to identify their present-day *sadekus*, *keyohs*, and *köyohodachum* and trace those “through space and time” back to 1846, but would also require the same to be done for any other Indigenous group whose territorial assertions overlap with the plaintiffs’ claim. I have already found as a fact that the effects of colonialization have made such a task extraordinarily difficult and to the point of impossibility in many cases.

[229] The issue is complicated by practical limitations on information and historical developments. Extended families (*sadekus*) of Dakelh peoples can and indeed did die out, whether due to diseases imported by colonialists or otherwise. Tracts of land/*keyohs* can be and have been subdivided, and affiliation with any sub-tribe can change. Sub-tribes themselves can merge or subdivide, as actually occurred in this case with respect to the Saik'uz (the former) and the Stellat'en (the latter).

[230] The plaintiffs correctly criticize Mr. Dewhirst's approach as wrongly assuming that the traditional land system that existed within the relevant Aboriginal groups at 1846 has survived intact notwithstanding the impacts of colonization; i.e. it assumes that *köyohodachum* and *keyohs* continue to persist and remain in place for the plaintiffs. They point to the evidence of Ms. Thomas, who is very knowledgeable about her own nation's traditions and territories, and who stated that people in Saik'uz today cannot say where the *keyohs* are located or which persons are properly associated with any specific *keyoh*. She says there are simply too many knowledge gaps and “sleeping names”. “Parents that went to residential school . . . did not learn that, they did not teach the children that”. I accept this evidence.

[231] The defendants argue that the plaintiffs could have produced more specific evidence regarding location and ownership of traditional *keyohs* but simply failed to do so and have therefore failed to prove their claim to Aboriginal rights or title. They say it is clear from the lay witness evidence there remains some present awareness within the community, that work is ongoing to try and revitalize the traditional *keyoh* system, and that with better effort “the plaintiffs could have established links to the historic titleholders had they wished to do so”. They point to Mr. Dewhirst's current methodology of “applied genealogical research”, which he has used to identify *keyohs* with other Dakelh First Nations, and essentially criticize Mr. Inglis “for failing to utilize a sufficiently rigorous methodology to reach the meaningful conclusions necessary to ascertain Aboriginal title”.

[232] I disagree with this criticism. I also disagree with Mr. Dewhirst's (and the defendants’) implication that Aboriginal rights and title can only be claimed at the *sadeku* level and not at the First Nation/“sub-tribe” level. I prefer and accept Mr. Inglis' approach, one which Mr. Dewhirst himself has used in the past, i.e., recognition that the Dakelh were made up of different social, political and economic groups, each of which had a close relationship to the land. Those groups included (1) regional “sub-tribes”, (2) matrilineal clans and phratries (a group of related clans) as well as (3) extended families (*sadekus)* owning specific *keyohs*.

[233] At the other end of the spectrum Canada raises, indeed expressly pleads, the litigation claiming title to the Nechako River and its tributaries on behalf of “all Carrier Indian People”. They invoke the same quote from the Supreme Court of Canada in *Rio Tinto* 2010, referred to at the beginning of these reasons for judgment and which affirms that it was the “CSTC First Nations” who have since time immemorial used the Nechako River for fishing and sustenance. However, when pressed by the Court during final submissions, Canada politely but firmly refused to identify who might be the proper Indigenous group claimant for the lands in question.

[234] For its part, the Province ultimately stated that, should Mr. Dewhirst's reverse genealogical tracing be frustrated by the absence of evidence, then the appropriate entity to claim Aboriginal title to the lands of the Nechako watershed would be the Dakelh as a whole and not individual sub-tribes such as the two plaintiffs in this case.

[235] The plaintiffs respond by pointing out that, whether title must be held at the *keyoh/sadeku* level or some broader collective of the Dakelh more generally, the members of their particular sub-tribe belong to both categories, and this should be sufficient standing to ground a claim in nuisance, particularly in the present circumstances where a formal declaration of title is not being sought. They expressly plead this point in their Reply filed in February 2017. I accept this aspect of their argument.

[236] I therefore find that the plaintiffs are the appropriate collectives to pursue this claim.

VIII. ABORIGINAL LAW AND THE CLAIM FOR AN ABORIGINAL RIGHT TO FISH

A. Analytical Framework

[237] In a series of cases spanning almost 40 years and which I do not intend to discuss in detail here, the Supreme Court of Canada developed the infrastructure of Aboriginal law to include the following general features:

- “Radical”/underlying title to land is vested in the Crown, albeit “burdened” with existing Aboriginal rights arising from previous occupation of the land by Indigenous peoples. Such rights operate as a limit on federal and provincial legislative powers.
- Aboriginal title to land is a distinct species of Aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end of the spectrum are practices, customs, and traditions where the use of the land is incidental to the activity, in the middle are site-specific activities intimately related to a particular piece of land, and at the other end is exclusive use and occupation of the land prior to sovereignty (in BC, 1846). The latter confers Aboriginal title to the land itself, i.e. ownership rights similar to those associated with fee simple.
- Aboriginal rights including title are unique in nature (“*sui generis”*). They do not necessarily

coincide with traditional common law rules respecting property. However, Aboriginal interests in land are quasi-proprietary in nature, and they are at the heart both of Aboriginal culture and identity and of the relationship between the Crown and Indigenous peoples. The Indigenous group claiming the Aboriginal right has the onus of proving its existence and content. The standard of required proof is the "balance of probabilities" standard.

- Before 1982, Aboriginal rights could be extinguished by surrender (e.g. by treaty), federal legislation, or constitutional amendment. Evidence of a clear and plain intention to extinguish is required and the onus of proof rests with the Crown. Following the *Constitution Act, 1982*, extinguishment by federal legislation is no longer possible, and it has always been impossible by provincial legislation.
- The Crown is otherwise entitled to regulate/infringe upon existing Aboriginal rights provided such intrusion is justified by compelling and substantial objectives related to the broader public good. The onus of proof respecting justification lies with the Crown.
- Justification also requires that the Crown has (1) discharged its procedural duty to consult and accommodate Aboriginal interests to the degree required by the circumstances; and, (2) otherwise satisfied its duty to act honourably, including compliance with any fiduciary duty arising from assumed discretionary control of specific Aboriginal interests.
- Justification requires that any infringement of Aboriginal interests be necessary and rationally connected to the objective, as minimally intrusive as possible, and also properly proportionate in the sense that the perceived benefits are not outweighed by adverse effects on the Aboriginal interest.
- With respect specifically to fishing rights, after valid conservation measures, Aboriginal rights holders have priority in the fishery to fish for food, social and ceremonial ("FSC") purposes. Aboriginal fishing rights are not species-specific, but rather comprise a general right to fish all species.

Citations omitted for purpose of summary but see: *Guerin; Sparrow* at 1099, 1101; *Van der Peet* at para. 28; *Delgamuukw* at paras. 112, 125, 138, 179-181; *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 BCCA 237 at paras. 59-61; *Tsilhqot'in* at paras. 12, 50, 77-84, 87, 142; *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2021 BCCA 155 at paras. 170, 252; *Southwind v Canada,* 2021 SCC 28 at para. 77.

[238] I have outlined the above principles in the broadest of terms simply to provide further context for what follows. Each principle is subject to numerous refinements and qualifications found in the specific decisions. In that regard, I turn now to the specific claim asserted by the plaintiffs, namely, an Aboriginal right to fish.

[239] In *Desautel,* the Aboriginal right in issue was the right to hunt for food, social, and ceremonial purposes within the traditional territory of the Indigenous group. The Court described the required analysis as follows:

- first, characterize the right claimed in light of the pleadings and evidence;
- second, determine whether the claimant has proved that a relevant pre-contact practice, tradition, or custom existed and was integral to the distinctive culture of the pre-contact society; and,
- third, determine whether the claimed modern right is demonstrably connected to and reasonably regarded as a continuation of the pre-contact practice, tradition or custom.

[240] As described earlier, the plaintiffs' pleadings are complex. They claim “proprietary interests in the lands, waters and resources, including fisheries”, of the Nechako watershed. The claim of proprietary interest is based upon “exclusive use and occupation of specific sites for fishing purposes”. They assert “rights amounting to or akin to private fisheries or to a *profit à prendre* to fish” in the identified areas of the Nechako watershed. *Profit à prendre* is the “right to take something off the land of another person” (*Bolton v. Forest Pest Management Institute*, [1985] 21 D.L.R. (4th) 242 (B.C.C.A.). In *Chain Lakes Logging Corp. v. Abitibi-Prince Inc*., 2005 NLCA 13 at para. 16, Rowe J.A. (as he then was) held that *profit à prendre* “is an interest in land” and that “[t]he owner of a *profit à prendre* has rights of a possessory nature, and can bring an action for trespass at common law for their infringement”.

[241] In their final submissions, the plaintiffs say their “primary position” is that their “Aboriginal right to fish for food in the Nechako [watershed], being intrinsically linked to specific tracts of land, is appropriate and sufficient to ground a nuisance claim”.

[242] Although none of the defendants formally admitted in their pleadings that the plaintiffs had any Aboriginal right to fish, and indeed they expressly put the plaintiffs to the strict proof of such claim, all three defendants essentially yielded the point in the final argument.

[243] The province stated in its final argument that it “does not dispute the fact that the evidence establishes a non-species-specific right to fish for food in the Nechako River and its tributary system, including at Fraser Lake and the Stellako River” and that “the evidence from the Saik'uz and Stellat'en community members demonstrates that the modern-day exercise of the Aboriginal fishing right is reflective of what occurred historically”.

[244] In its final submissions, Canada “acknowledges that the plaintiffs' ancestors used territory along the Nechako River, including specific sites along the Nechako and its watershed and tributaries for fishing for FSC purposes at and before contact with Europeans”. Canada further states that “[t]he expert ethnohistorical and lay witness evidence presented at trial supports that the plaintiffs have an ongoing right to fish for FSC purposes, which is non-exclusive in that other Indigenous groups may also be licensed to fish for FSC purposes in those same areas”.

[245] In its final submissions, RTA does not directly dispute the plaintiffs' asserted Aboriginal right to fish for FSC purposes in the Nechako watershed. Rather, they submit that the plaintiffs have

“over-reached” on the content of their fishing rights. In particular, RTA says that Aboriginal fishing rights of the sort alleged do not include any proprietary interest in the land, the river, or the fish, even if the activity was site-specific in nature. They say Aboriginal fishing rights cannot ground a claim in nuisance, and in any event, they deny that regulation of the river has caused any damage to the sockeye salmon, by far the most significant component of the plaintiffs' right to fish. RTA goes so far as to suggest that “the reality is not necessarily as bleak as [the plaintiffs] portray” since a wide variety of other species has been and remains available, Chinook and Nechako White Sturgeon have not been a significant component of the traditional catch, and substantial returns of sockeye still occasionally occur.

B. Evidence and Findings of Fact

[246] The importance of salmon to Dakelh subsistence was first described by North West Company trader Daniel Harmon, whose journals were part of the historical record relied upon by the expert anthropologists in this case. He described what has come to be called the “seasonal round” of the Indigenous peoples encountered in the first decade of the 1800’s:

> The Carriers reside a part of the year in villages built at convenient places for taking and drying salmon, as they come up the rivers. These fish they take in abundance, with little labour; and they constitute their principal food during the whole year…
>
> Toward the middle of April, sometimes sooner, they leave their villages to go and pass about two months at the small lakes, from which, at that season, they take white fish, trout, carp, [etc.] in considerable numbers. But when these begin to fail, they return to their villages, and subsist on the small fish, which they dried when at the lakes, or on salmon, should they have been so provident as to have kept any until that late season; or they eat herbs, the inner bark or sap of the cypress tree, berries, [etc.]. At this season, few fish of any kind are to be taken out of the lakes or rivers of New Caledonia.
>
> In this manner the Natives barely subsist, until about the middle of August, when salmon again begin to make their appearance, in all the rivers of any considerable magnitude; and they have them at most of their villages in plenty, until the latter end of September, or the beginning of October.

[247] In another journal entry noted in the Inglis report, Harmon stated:

> Were it not for the Salmon that come up these Rivers every year more or less, the natives would be truly miserable, as they have little else that they can depend upon for subsistence.

[248] Similar observations are found in the correspondence and records of various priests seeking to introduce European religion to the Dakelh in the second half of the 19th century. One prominent such missionary, Father Morice, headed the Oblates' Stuart Lake Mission from 1885 to 1904 and wrote the following in reference to the prohibition of fishing weirs/barricades in the early 1900s:

> [The Dakelh] have practically no other alimentary resource than dried salmon. Without salmon they must starve, since that single article of diet is to them considerably more than are to us bread and meat combined . . . enormous quantities of this fish have to be dried and stored away every fall under pain of actual starvation should the supply of it fail . . . it is a matter of absolute necessity for the Indians to stake across the Northern stream to secure a quantity of fish at all commensurate with their needs as the use of nets yield scarcely more than they can consume daily during the fishing season. This would leave about 10 months of

> the year without any provisions for the native homes.

[249] The Saik'uz and Stellat'en witnesses described in their testimony the methods taught to them as children and which they have employed throughout their lives to catch salmon and Nechako White Sturgeon at various specific family-“owned” locations on the Nechako River, Fraser Lake and the Stellako River. They also testified about specific spiritual or ritual practices related to fishing and the role that activity played in the intergenerational transmission of culture. The evidence corroborated the exclusivity of fishing sites and the requirement of permission for fishing to occur at sites traditionally occupied by other families. All of this evidence was uncontroverted and I accept it without reservation.

[250] The plaintiffs submit:

> The connection to fish from the Nechako is central to the Plaintiffs’ culture and way of life. Processing and eating salmon and sturgeon are activities that span across untold generations of Central Dakelh People. Parents and grandparents teach the next generation how to catch fish and how to process it . . . [T]hey also teach them their stories, and pass down their cultural values and their spiritual practices.

[251] I agree this was and to some degree still is the case. It is consistent with both the expert anthropological evidence and testimony of the plaintiffs' witnesses.

C. Assessment and Determination

[252] The defendants now essentially acknowledge that the plaintiffs have an Aboriginal right to fish. I have referred to some of the evidence simply to illustrate the abundant proof that fishing for a diversity of species, and particularly for salmon, was not only fundamental to the plaintiffs' subsistence and way of life but was also a pre-contact practice, tradition, or custom integral to the distinctive culture of the plaintiffs' society. There is also no doubt that the modern right of the plaintiffs to fish for food, social, and ceremonial purposes is demonstrably connected to, and is reasonably regarded as, a continuation of the pre-contact activity, albeit now heavily regulated and indeed actually prohibited in some respects because of declines in the fish population.

[253] I have no hesitation in finding that the plaintiffs in this case have proven their Aboriginal right to fish in their respective areas of the Nechako watershed.

[254] The next question is whether, as a matter of law, the plaintiffs' Aboriginal right to fish can ground an action in nuisance. It is dealt with in a later section of these reasons for judgment but first I address another foundational issue, namely, Aboriginal title.

IX. THE CLAIM FOR ABORIGINAL TITLE

A. Analytical Framework and the Problem of Overlapping Claims

[255] *Tsilhqot’in* is now the leading case respecting the test for Aboriginal title. The unanimous

Court summarized the essential principles in para. 50 of the decision:

> The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

[256] *Tsilhqot'in* establishes, and the parties in any event agree, that the assertion of Crown sovereignty in British Columbia occurred in 1846. Hence, any Aboriginal title claimant must prove sufficiency and exclusivity of occupation of the land in question as of 1846.

[257] The quote set out above clearly states that regular use of tracts of land for hunting, fishing, or resource exploitation can be sufficient to ground Aboriginal title to that land, provided the Indigenous group also exercised "effective control" over the land, again as of 1846. Effective control is presumably much the same as "exclusive stewardship", a concept referred to in an earlier paragraph of the *Tsilhqot'in* judgment (at para. 38).

[258] I have already found that the plaintiffs are the appropriate collectives to pursue this claim. A further and more challenging consideration is the possibility, and in this case the actuality, of overlapping claims by other First Nations, and land interests held by third parties whether they be private individuals or entities, municipalities, or Crown corporations and public utilities.

[259] In *Delgamuukw*, Lamer C. J. commented in para. 185 of his judgment that:

- determinations of Aboriginal title for the plaintiffs in *Delgamuukw* would undoubtedly affect the interests of the many Aboriginal nations with territorial claims that overlap those of the plaintiffs; and,

- because Aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-Aboriginals and members of other Aboriginal nations, it may be advisable if those other Aboriginal nations intervened in any new litigation.

[260] Lamer C. J. also referred to the possibility of joint Aboriginal title involving "shared exclusivity", i.e., "two [or more] [A]boriginal nations [living] on a particular piece of land and [recognizing] each other's entitlement to that land but nobody else's": para. 158.

[261] In this case, the parties point to at least eight neighbouring First Nation's claims for rights and title that overlap with the Saik'uz asserted traditional territory, including claims by Nadleh

Whut'en, Nazko, Kluskus, Ulkatcho, Cheslatta, Nak'azdli, Lheidli T'enneh, and Skin Tyee. These overlapping claims cover almost the entirety of the Saik'uz asserted traditional territory; indeed, only approximately ten percent of the Saik'uz asserted traditional territory is not the subject of some overlapping claim. The overlaps include Noonla and the other sites on the Nechako River used by various Saik'uz families for fishing purposes.

[262] Canada gave evidence that, with respect to the Stellat'en, there are at least four neighbouring First Nations whose claim for Aboriginal rights and title overlap with the Stellat'en asserted traditional territory, namely, the Nadleh Whut'en, Cheslatta, Wet'suwet'en, and Yekooche. The overlap between the Stellat'en and the Nadleh Whut'en is particularly substantial and includes all of the traditional fishing sites claimed by the Stellat'en in this case and even the Stellaquo Indian Reserve #1 itself.

[263] As noted above, in the past, the First Nations who were members of the Carrier Sekani Tribal Council have issued lawsuits jointly asserting Aboriginal title to the lands of the Nechako watershed.

[264] First and perhaps foremost was the Statement of Claim issued in 1986 in the 1980 Action, which was set aside when the Court of Appeal disallowed the order adding the First Nations as parties. The 13 named plaintiffs in that pleading included Chief Edward John, who sued on behalf of the “Carrier People”, and the chiefs of 12 Indian Bands suing on their own behalf and on behalf of all other members of their respective bands. The Saik'uz and the Stellat'en were included as plaintiffs at the time (as the Stoney Creek and Stellaquo Indian Bands), along with the Cheslatta, Fraser Lake (Nadleh) and others. They sought a formal declaration that “the Carrier Indian People have Aboriginal title in and to” the Nechako watershed area affected by the Kenney Dam. They sought injunctive relief and damages against RTA in trespass, negligence and public/private nuisance. The claim also sought damages from British Columbia for “wrongfully purporting to grant to the defendant RTA rights, titles and interests which were at all material times the lawful rights, titles and interests of the Carrier Indian People” and the plaintiff Indian Bands.

[265] In December 2003, six First Nations sued both British Columbia and Canada seeking a declaration of Aboriginal title to a defined territory which they claimed to have “occupied exclusively or shared exclusively…including the lands covered by water and the resources thereon and therein” as illustrated on a map attached as a schedule to the Writ of Summons. The First Nations included Burns Lake, Nak'azdli, Saik'uz, Stellat'en, Tl'azt'en, and the Wet'suwet'en (neither the Nadleh Whut'en nor the Nazko were included). The claimed territory was extensive but included all of the watersheds that are the subject matter of the present litigation. The lawsuit was never discontinued and remains “on the books”.

[266] Similar lawsuits, which also have not been discontinued, were issued by the Yekooche and the Nadleh Whut’en in 2003 and 2004 respectively.

[267] The plaintiffs emphasize they are not seeking any formal declaration of Aboriginal title in this case but only a “finding” of Aboriginal title to limited areas of land/riverbed as defined below, so as to “support” their nuisance claim and/or the breach of riparian rights claim. For the Stellat'en, the “finding of title” is limited to the Stellaquo Indian Reserve #1, the bed of the Stellako River where it flows through the reserve, and the Stellat'en fishing sites at the western end of Fraser Lake.

[268] For the Saik'uz, the “finding of title” is with respect to “Crown land along and including the Nechako River at one or more of Wedgwood, Finmore, Keilor's Point, Chinlac, and all of Noonla Indian Reserve #6”. The boundaries of the area in respect of which a “finding of title” is sought are (1) the bed of the Nechako River from Noonla “to a point downstream of the Burrard Avenue bridge” in Vanderhoof, and (2) “an area along the banks of the River, going back 250 m and 1 km along the bank” for each of the sites.

[269] As noted above, all of the areas in respect of which a “finding of title” is sought, including the two Indian reserves, are subject to overlapping claims by one or more other First Nations.

[270] In their written submissions, the plaintiffs say that, as a matter of law, a “finding of title” to a single location such as Noonla or Stellaquo would be sufficient to ground a claim in either nuisance or breach of riparian rights and implicitly invite the Court to limit its findings accordingly. As well, they say that “for the purposes of this case only” the Stellat'en are not seeking any finding of Aboriginal title to the Nechako River itself because it is sufficient for their purposes that the diversion of water from the Nechako negatively affects the fish that would otherwise be harvested on the Stellako River and in Fraser Lake.

[271] The plaintiffs take the position that notice to and participation of “potentially interested third parties” in this case is not required. They point to preliminary trial court rulings to that effect in *Calder v. British Columbia*, 8 D.L.R. (3d) 59, *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2009 BCSC 1494, and the *Tsilhqot’in Nation v. British Columbia,* 2007 BCSC 1700. In *Calder* and *Tsilhqot’in*, the trial judges observed that adding so many potentially affected persons as parties would, for all practical purposes, put a halt to the proceedings, something that would not be in the interests of justice. In *Ahousaht*, the trial judge concluded the judgment (which related to Aboriginal fishing rights only and not Aboriginal title) would not have any binding effect upon “non-participants”.

[272] The plaintiffs suggest any order made in this case could also expressly provide that “findings of title” are binding only against the parties to this litigation and that they are “without prejudice to any claims by nonparties with respect to any interest they may have in the land”.

[273] Lastly, the plaintiffs point out they are expressly exempting from their claim any displacement of third-party interests, whether held privately or by any level of government between Cheslatta Falls and Prince George. Hence, so they say, any “finding of title” in their favour would not preclude some other Court from making a finding of joint title along with one or more other First Nations

should such a claim ever be pursued.

[274] The issue of overlapping claims directly affects exclusivity both as an incident of title and an element of its proof. It also muddies the water insofar as identifying the proper title claimant is concerned. It is a perfect illustration of the almost insurmountable obstacles placed in the path of Indigenous groups seeking to establish title even though they have occupied the land “since time immemorial”, and notwithstanding purported affirmation of *UNDRIP* by both levels of government.

[275] I am acutely aware of the dissatisfaction experienced by the parties when a major aspect of multi-million-dollar litigation is not decided by the court because of procedural concerns. I also agree with the plaintiffs that the mere existence of overlapping claims does not necessarily negate exclusive occupation by the Saik'uz and Stellat'en First Nations. Indeed, I make findings of fact in that regard in the next section of these reasons.

[276] Nevertheless, the simple fact of the matter is that the sites in respect of which the plaintiffs seek a “finding” of title are subject to overlapping claims by other First Nations who have not been made parties to this litigation and whose evidence has not been heard. No witnesses were called as representatives of the neighbouring title claimants, whether to substantiate their claim or to waive it in favour of the plaintiffs. There is thus no full evidentiary basis to properly determine exclusivity between overlapping claimants and it is possible that a “finding of title” in favour of the plaintiffs would irrevocably and unfairly disentitle another Indigenous group that may have a stronger claim.

[277] The two Crown defendants also point out, probably correctly, that as parties to this case, they would be bound by the findings of fact underlying title. They say it is unfair to make “findings of title” without considering the evidence of overlapping claimants. I am inclined to agree.

[278] The issue of overlapping claims and previous title litigation by broader Indigenous collectives is expressly raised in the pleadings in this case and has been known to all parties since the outset of the litigation. The plaintiffs, therefore, had ample opportunity to consult with neighbouring First Nations and strategize matters to facilitate their claim, whether through waivers or evidence supporting exclusive or joint title in the plaintiffs' names. This either did not occur or was simply unsuccessful. Either way, in the circumstances I find myself compelled to reject the requested “findings” of title on procedural grounds, namely, the absence of the overlapping title claimants either as parties or witnesses.

B. Evidence and Findings of Fact

[279] Lest my decision to decline “findings of title” based on procedural concerns be overturned on appeal, I will review the evidence and make findings of fact which may permit the determination of the issue by the appeal courts if they are so inclined. I am limiting that exercise to Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1. I do so because, as plaintiffs’ counsel observed

during submissions, title to the reserves should suffice to ground the tort claims and, in any event, they likely represent the most obvious cases in respect of title to land and riverbeds.

[280] I start by again noting the absurdity of the exercise. Both plaintiff First Nations are sub-tribes of the Dakelh who have occupied the Nechako watershed since time immemorial. Their status as Indigenous Peoples within the meaning of *UNDRIP* and as an appropriate Aboriginal collective for legal purposes is unquestionable. They are the persons who, according to *UNDRIP*, “have the right to own, use, develop and control the lands, territories and resources” they traditionally occupied long before any intrusion by intrepid adventurers motivated by self-interest or dubious proclamations of foreign potentates.

[281] Unlike the rest of Canada, there were very few treaties made with Indigenous peoples in what is now British Columbia. The vast majority of the province comprises territory that has never been ceded to the Crown. The colonial government hoped to resolve the question of Aboriginal interest in land by a policy of allotting reserves to Indigenous peoples. A “Joint Committee on Indian Reserves” was appointed in 1876 and thereafter laboured for some three decades to lay out reserves throughout the province. Mr. Peter O'Reilly was the single member of the Commission between 1880 and 1898. He was the individual who allotted reserve lands to the Stellat’en and Saik’uz in 1892, including the lands now comprising Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1.

[282] In British Columbia, most land allotted as reserves was already recognized as part of the traditional territory of the Indigenous groups to whom they were allotted. As stated earlier, when Noonla was allotted to the Saik’uz (then referred to as the “Stoney Creek Band”), Commissioner O’Reilly noted that it was “of great value . . . being the only salmon fishery owned by them”.

[283] Similarly, when Stellaquo was allocated to the Stellat’en (at that time Stellat’en and Nadleh Whut’en were described as a single band, the Fraser Lake Band), Commissioner O'Reilly noted “an abundant supply of fish to be had at all seasons”, and the early sketches/plans of the reserve depict both the village and a fishery at the mouth of the “Stellaquo” River.

[284] Both the Noonla and Stellaquo reserves were confirmed by the Royal Commission on Indian Affairs whose 1916 four-volume report was ultimately ratified by both governments in 1924. The Reserve lands themselves were formally conveyed to Canada by Order in Council No. 1036 in 1938. Hence, for at least the past 130 years, the Stellat’en and Saik’uz have been recognized by the Crown as the rightful occupants of the lands comprising Stellaquo Indian Reserve #1 and Noonla Indian Reserve #6. In all these circumstances, one might question, rightly in my opinion, why the Crown would not simply yield Aboriginal title to the reserve lands.

[285] But the Aboriginal law construct devised by our Court requires the two plaintiff First Nations to prove they had exclusive occupation and control of the lands within the reserve as of 1846 before any finding of Aboriginal title can be made. The defendants insist this be done regardless of

what *UNDRIP* might say.

[286] And so it is, absurd though it may seem to some, that the plaintiffs are obliged to present evidence from an expert anthropologist who scoured 200-year-old records of North West Company/HBC traders, handwritten correspondence and census records of Oblate missionaries, ethnographic and geographic maps, some containing controversial handwritten hieroglyphic annotations, and other scholarly works of anthropology to cobble together sufficient references demonstrating a connection between the present-day Stellat'en and Saik'uz and the occupants of Noonla and Stellaquo in 1846 or earlier.

[287] It is perhaps worth repeating the comments of Lamer C.J. in *Delgamuukw* where he described the task of producing "definitive and precise evidence of pre-contact [A]boriginal activities on the territory in question" as "next to impossible" and an "almost impossible burden to meet". Some would argue that the burden of proof imposed upon Indigenous title claimants, based as it is on the legitimacy and primacy of asserted colonial sovereignty, is just another insidious example of systemic discrimination.

1. Noonla

[288] The Inglis report describes the early records referring to Aboriginal use and occupation of both Noonla and Stellaquo. These include records of the North West Company traders and the records of the HBC traders following the amalgamation of the two entities in 1821. A trading post was located at the eastern end of Fraser Lake and resulted in numerous contacts with Aboriginal communities in the region.

[289] The journals of North West Company trader Harmon record visiting the Village of "Stilla" at various times between 1811 and 1815 to buy salmon. His HBC successor, MacDonnell, recorded visits to and from the "Indians of Sy-cuss" on various occasions in 1822 and 1823 to trade furs and fish.

[290] In 1824, the Arrowsmith firm in London, England, produced a map entitled "North America (Northwestern Portion)" which was based on information from the HBC. It depicts several villages including "Stilla" (20 men) on the west side of Fraser Lake, "Carrier Vil" (40 men) on the east side of Fraser Lake; four men at the confluence of an unnamed stream flowing into the Nechako River in the vicinity of Stoney Creek; and "Scyens Lake" (15 men) at the head of the Latter stream (which Mr. Inglis notes, was in the area of Noolki, Tatchick, or Sy-cuss).

[291] In 1827, the HBC journals noted "Yasscho" as a chief at "Noolaah" and in 1828, the "Noolaah" under chief Yasscho were recorded as trading at the Fraser Lake Post (Fort Fraser).

[292] Noonla is depicted on the AC Anderson map published in 1867, which was based on his observations in New Caledonia between 1831 and 1854, including three years at Fort Fraser

between 1836 and 1839.

[293] Part of the evidence at this trial was a document entitled “Saik’uz history”. It is actually a transcript of events related by Adanas Alexis to his daughter Cecile Patrick recorded in July 1977. The recording was translated and transcribed in June 1984 by Cecile Patrick and Mary John. It is described as Adanas Alexis' story “about the 10 Reserves which now make up the Stoney Creek Band” including Noonla.

[294] The transcript starts as follows:

> Now I am going to tell you a story, the old-timer way. When my grandfather told me the story he said he would tell me about long ago and how many villages got together and made one village, Stoney Creek. One by one, what I was told I will tell you whatever I remember . . . It will take a while to finish that story of what happened so long ago even my grandfather was told.

[295] One of the Saik’uz witnesses at trial was Ms. Betsy William, another daughter of Adanas Alexis. Because of frail health, she provided an affidavit dated February 14, 2020, to which she attached the transcript and in which she states:

> The Transcript is an account of the Story as my father learned it directly from his grandfather. Even if there are people in the community who have learned the Story from others (such as my more limited knowledge of it or potentially Mary John Jr.'s), there is no one alive who would have learned it directly from my great-grandfather as my father did.

[296] Adanas Alexis held a hereditary name that entitled him to a seat in the potlatch and he had a respected leadership role in the community as a Hereditary Chief. Ms. William did not know her great-grandfather although she can remember his son, her grandfather, Eugene “Captain” Alexis who passed away when she was about six years old. She learned the story related in the transcript from her father who spoke about various aspects on a number of occasions over the course of her lifetime. She says the content of the transcript is consistent with what she remembers her father telling her, although her recollection is not as vivid or as detailed as what is recorded.

[297] The Alexis oral history described Noonla as “quite a big settlement” with “quite a few people there”. He noted that:

> At the end of the island and in the river the water is not very deep. When the water goes down the horses can walk across and that is where they made a barricade across the river to the island. And where they made the barricade they put in their fish traps to get their salmon . . . There were a lot of people living in Noonla all along the riverbank.

[298] Adanas Alexis recounted a story of an ice jam flooding Noonla “just like a lake” which caused the death of all but two people at Noonla. He noted:

> Still people did their salmon fishing down there for a long time after that. So my family said to move down there again after that . . . So my dad moved down there when he and his brothers and sisters were just kids . . . We had a cabin just down there where the people were all drowned. Late in the fall we come back to Stoney Creek just when the ice starts freezing.

[299] It is not clear when the ice jam drowning incident occurred. It appears that after the incident people continued to fish salmon at Noonla “for a long time” and that, at the Alexis family urging, Adanas Alexis' father moved to Noonla when they were “just kids”.

[300] The 1876 census prepared by Jesuit Missionary Lejacq lists the birthdate of Adanas Alexis' father, “Captain Alexis”, as 1867. Hence the Alexis family “again moved down” to Noonla most likely in the 1870s.

[301] Captain Alexis operated a scow that ferried people across the Nechako, a vessel that is pictured in the Inglis Report. He also held the first Certificate of Possession for lands on the Noonla reserve which was later passed down to his granddaughter, Betsy William, and her remaining siblings.

[302] The defendants argue that the evidence adduced by the plaintiffs is insufficient to establish exclusive occupation by the Alexis family or any other members of the Saik’uz as of 1846. They say there is nothing in the evidence which links Chief Yasscho to the Saik’uz, and thus they have, as Canada puts it, “failed to establish their claim for title on the basis of persuasive evidence and, as such, have not demonstrated the validity of their claim on the balance of probabilities”.

[303] I disagree. The evidence establishes, and I find as a fact, that it was a cultural pattern of the Dakelh to locate villages at or near the sites of fishing weirs/barricades. I am satisfied there was a fishing weir at Noonla. Furthermore, as both expert anthropologists agreed, the fishery at Noonla would have been part of a *keyoh*, controlled by a *köyohodachum* and exclusively used and occupied by a *sadeku* in accordance with Dakelh legal traditions. It would have been in accordance with those legal traditions that the Alexis family was entitled to return to Noonla at some point in time after the decimation visited by the ice jam flood. It is only logical, and I find as a fact on the balance of probabilities, that a Saik’uz *sadeku* had occupied Noonla for regular fishing purposes, likely for generations, before that time. It is in accordance with those same Dakelh legal traditions that the Alexis family is considered to be the legitimate successor to that occupancy.

[304] I also conclude that the contemporary collective whose members have a demonstrable ancestral connection to the historic community of Noonla is the Saik’uz First Nation. As Mr. Dewhirst himself stated, “the ancestral territories (*keyoh*s) held by *sadekus* form the territory of the respective ‘sub-tribe’ such as Stellat’en and Saik’uz”. In its various decisions respecting Aboriginal rights and title, the Supreme Court has emphasized the concept of title rights held by the collective, indeed rights that are to be preserved for the benefit of future generations. This reinforces the appropriateness of vesting or “finding” title at the sub-tribe level rather than any specific family or *köyohodachum*, even assuming the latter can be identified.

[305] In the result, if I am wrong in concluding any findings of title should be precluded on procedural grounds, on the evidence before the Court in this case, I have no hesitation in finding that Aboriginal title to what is now Noonla Indian Reserve #6 should be and is vested in the Saik’uz

First Nation.

2. Stellaquo

[306] The determination of Aboriginal title to the Stellat'en traditional territory is less complicated. The only other Indigenous group whose claimed traditional territory includes what is now the Stellaquo Indian Reserve #1 is the Nadleh Whut’en.

[307] The Inglis report describes numerous references in historical records to the location of an Indigenous village at the west end of Fraser Lake and more particularly at the confluence of the lake with the Stellako River. As noted above, the earliest records of the North West Company traders referenced visits to the village of “Stilla” at least as early as 1811 to buy salmon. The village is depicted in the 1824 Arrowsmith map. And the later Anderson map depicts the same village with the added description “great salmon fishery”.

[308] In September 1876, George Dawson, leading the Geological Survey of Canada Expedition, commented on the two villages on Fraser Lake:

> Near Fort Fraser is the Indian village of Naul-Tey, and at the other end that of Stella: each inhabited by a few families, the remnants of a once more numerous tribe, who appeared to live in comparative comfort, and cultivate small garden patches.

Dawson described Stella as a “neat looking Indian village of four log houses, besides various outbuildings and shanties and a church”.

[309] The 1876 Lejacq census lists the “Natle” and Stella villages as part of the “Fraser Lake tribe”. The document refers to 63 people and 56 people living at Stella in two separate references.

[310] Two Stellat’en witnesses gave evidence about fishing at the Stellako River and the west end of Fraser Lake.

[311] Ms. Nooski, a Stellat’en elder born in 1940, who attended the Lejac residential school from 1950 to 1959, described the fishing spots used by her mother, paternal aunt and uncle, and paternal grandfather. She herself used to set net at the mouth of the Stellako River when she was growing up.

[312] Ms. Reynolds, a Stellat'en Councillor and clan leader with a hereditary name, testified about fishing with her grandmother near the mouth of the Stellako River. She described that particular location as one “where everybody used to fish”.

[313] As with the Saik’uz, Mr. Dewhirst has no doubt that the modern collective of the Stellat’en includes ancestors of the original group living at Stella at the time of contact and also in 1846. As with the Saik’uz, his criticism is methodological, i.e., he faults the failure to undertake reverse genealogical tracing of the individual *sadekus* and *köyohodachum* to verify the appropriate modern-day titleholder. I have rejected that approach as the basis for determining title for the Saik’uz and I

reject it as well for the same reasons insofar as the Stellat'en are concerned.

[314] Whether there were two distinct collectives or whether, as the early records would seem to suggest, the two villages at the opposite ends of Fraser Lake were occupied by members of the same sub-tribe, i.e. the "Fraser Lake tribe", is of no import. As the plaintiffs say in their submissions:

> There is no evidence that the people who occupied the village of Stella at 1846 . . . were usurped. The descendants continued to reside at Stellaquo Indian Reserve #1 today, while the descendants of the people at Nadleh in 1846 continued to reside at Nadleh. Whether one band or two, whether they shared some parts of that territory historically or whether they do so today, whether they share a clan system – none of this is determinative.

[315] Just like the Saik'uz, the Stellat'en and the Nadleh Whut'en historically comprised extended families (*sadekus*) who had exclusive use and occupation of, and controlled access to, tracts of land for hunting and fishing (*keyohs*). Whether they were historically one sub-tribe or two, the simple fact of the matter is that they became subdivided as two separate First Nations in the 20th century, and each is now the contemporary collective with a demonstrable ancestral connection to each of the two villages that existed in 1846 (and indeed upon contact) and that continue to exist today.

[316] It is true that the Nadleh Whut'en claim the Stellaquo Indian Reserve #1 as part of their traditional territory. I have heard no evidence from the Nadleh Whut'en which substantiates the nature and extent of their overlapping claim for title to Stellaquo. Based on the evidence that has been presented to me in this case, however, I am satisfied on the balance of probabilities and I find as a fact that the Stellat'en First Nation are the modern-day descendants of the Indigenous people who exclusively occupied the lands comprising the Stellaquo Indian Reserve #6 and who, in accordance with both their own legal traditions and the test in *Tsilhqot'in*, are their appropriate successors in Aboriginal title to those lands.

3. Riverbeds

[317] The plaintiff First Nations seek a finding of Aboriginal title to certain portions of the Nechako River, Stellaquo River, and Fraser Lake. Given my limited and alternative finding of title to Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1, I will only consider the plaintiffs' claim to portions of those bodies of water and/or their beds adjacent to and/or surrounded by those reserves.

[318] A potential finding of Aboriginal title to a navigable waterway or its submerged bed raises several unresolved questions of law, including:

1) whether such title can exist under Canadian law given the public right of navigation;

2) whether the test for Aboriginal title to dry land from *Tsilhqot'in* is applicable to (and

appropriate for) submerged land or bodies of water; and if so,

3) how sufficient, exclusive occupation should be evaluated in the context of a body of water or submerged land.

[319] The plaintiffs submit that Aboriginal title can and should be found to the relevant portions of the Nechako River, Stellako River, Fraser Lake, and/or their submerged beds. Their submissions apply the *Tsilhqot'in* test for Aboriginal title to those areas. In support of the possibility of title to the riverbed, the plaintiffs cite *Tsilhqot'in* for the principle that title to dry land can be proven based upon "fishing over tracts of water". From this principle, the plaintiffs assert that the law must contemplate Aboriginal title over submerged land where the evidence supports it. They also submit that while access to the relevant portions of the aforementioned waterways was generally allowed to those travelling through, access to resources derived from them was regulated and restricted by the local population. They argue that this amounts to precisely the kind of "intention and capacity to retain exclusive control" required by *Tsilhqot'in* at para. 47.

[320] With regard to the possibility of Aboriginal title to navigable waterways or their beds, RTA, the Federal Crown, and the Provincial Crown each note the conflict between (1) the "exclusive" nature of Aboriginal title as described in *Delgamuukw* at para. 117 and (2) the public right of navigation in respect of navigable waterways. Given the navigability of the Nechako River, Stellako River, and Fraser Lake, they say it is unclear how the primacy of this right of navigation, affirmed in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 54, can be reconciled with Aboriginal title to their beds. More generally, RTA submits it is unclear whether private ownership of navigable riverbeds even exists at all under Canada's common law. They say the common law principle of private riverbed ownership *ad medium filum aquae* has never been adopted in Canada.

[321] Should this Court acknowledge the possibility of Aboriginal title to the submerged lands beneath navigable waterways, as well as the applicability of the *Tsilhqot'in* test, RTA and the Federal and Provincial Crown submit that exclusive occupation and control has not been and cannot be proved to the areas claimed by the plaintiffs. In particular, they note the following:

- Mr. Dewhirst testified that the *sadeku*/*keyoh* system of familial ownership and control of land did not extend to ownership of submerged lands.

- Mr. Inglis apparently accepted Ms. Fiske's research indicating that *keyoh* ownership did not allow *sadekus* to command passage down adjacent waterways.

- These considerations combined with a lack of sufficiently reliable evidence to the contrary lead to the conclusion the plaintiffs did not have exclusive occupation of the relevant waterways or submerged lands in 1846.

- The status of the Nechako River, Stellaquo River, and Fraser Lake as navigable waterways to which the public right of navigation has applied for a significant period of time militates against any finding of exclusive occupation for the duration.

[322] RTA cites *R. v. Marshall; R. v. Bernard,* 2005 SCC 43, for the principle that the test for title should not be altered simply because it cannot be met.

[323] Several of these issues were addressed by the Ontario Superior Court of Justice in *Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al.*, 2021 ONSC 4181, a decision that came out following the conclusion of final arguments in this case. In *Chippewas of Saugeen*, the Saugeen Ojibway Nation ("SON") sought a declaration of Aboriginal title to a portion of Lake Huron's lakebed surrounding the Bruce Peninsula. Matheson J. characterized SON's claim as including the "right to exclude all other people from a large part of Lake Huron, including about half of Georgian Bay, right up to the international boundary": at para. 136.

[324] SON members have lived on the Bruce Peninsula for many years and the waters in question form their traditional fishing grounds. They previously established an Aboriginal right to fish in the area. SON claimed ownership of the contents of the water and the lakebed (e.g., fish and minerals) and sought to have the *Tsilhqot'in* test applied to their claim. They did not seek title to any adjacent portion of the Bruce Peninsula.

[325] In rendering her decision, Matheson J. made the following findings that are helpful to the evaluation of the plaintiffs' claim:

- The principle of *ad medium filum aquae* has not explicitly been incorporated into Canadian law, and the authorities indicate that the principle is inconsistent with the Canadian courts' (1) recognition of the primacy of the public right of navigation and (2) rejection of the tidal vs. non-tidal distinction that is central to the *ad medium* principle under British law in *Oldman River* at 53-55. Therefore, the plaintiffs in the instant case cannot use this principle as evidence of a private right of ownership to the beds of adjacent navigable waterways.

- Aboriginal title in relation to a body of water must be to the submerged land, as the common law does not recognize ownership of moving water: G.V. La Forest and Associates, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Regional Economic Expansion, 1973) at 223-224, 234.

- Because Aboriginal title imparts a right of exclusive occupation and control, a finding of title to a riverbed, like the principle of *ad medium filum aquae,* would be inconsistent with the primacy of the public right of navigation.

- Defining Aboriginal title to river or lakebeds as imparting something less than exclusive

occupation and control would be inconsistent with the common law's current understanding of Aboriginal title as set out in *Delgamuukw* and *Tsilhqot'in*.

[326] In spite of these findings, Matheson J. did explicitly recognize that, under the right circumstances, Aboriginal title to submerged land might exist. Her analysis in this regard suggests that for a historical practice to translate into a right of ownership, the claim to submerged land:

1) must be to a well-defined geographic area with boundaries rooted in historical use and occupation (rather than a spiritual or religious connection), and

2) must demonstrate a connection between the claimants and the submerged land that is central to the claimant's distinctive culture beyond use for fishing, travel, and ceremonial purposes.

[327] Neither of these criteria was deemed to be met in *Chippewas of Saugeen*. Rather than being based on historical use and occupation, Matheson J. determined that the boundaries of the region claimed by SON were based largely on modern agreements and the location of the Canada-U.S. border. Regarding the second criteria, Matheson J. described SON's ancestors as using the water primarily to fish, travel along the shore, and in ceremony. For these reasons, in conjunction with, first, the inconsistency identified by Matheson J. between Aboriginal title and the public right of navigation and secondly, national defence-related concerns associated with a finding of Aboriginal title in territorial waters, Matheson J. declined to make a finding of title to the claimed submerged lands.

[328] In the alternative, Matheson J. applied the *Tsilhqot'in* test (which she conceded had significant overlap with the above analysis) and declined to make a finding of title to the submerged lands due to a lack of sufficient occupation and exclusivity. While the SON's ancestors made some efforts to control use of fishery resources in the claimed area and made limited use of the water for transport, this was not sufficient. Matheson J. also noted a lack of evidence related to continuity.

[329] The Aboriginal title claim to submerged land in the instant case differs significantly from the claim in *Chippewas of Saugeen*. With regard to the relevant lakebed and riverbeds at Noonla and Stellaquo, boundaries can perhaps be defined in line with historical fishing sites. Furthermore, the submerged land, as opposed to simply the water above it, was fundamental to the plaintiffs' traditional methods of fishing which involved the construction of structures embedded in and along lake and riverbeds like weirs and fences. A lack of structures built on the submerged lands at issue was noted by Matheson J. as problematic for the SON claim. Thus, while fishing *generally* was not treated by Matheson J. as sufficient connection to the submerged land to succeed in a claim for title, the particular fishing method utilized by the plaintiffs in the instant case, for whom the salmon caught at those weirs comprised the bulk of their diet, might well survive her analysis.

[330] That said, any argument for occupation and control of the relevant submerged lands is

significantly weakened by a general lack of evidence that the plaintiffs' exercised exclusive control over the waters and the conflicting expert opinions with regard to *sadeku* ownership and control of rivers and riverbeds. This weakness is even more problematic if one applies the *Tsilhqot'in* requirements of sufficient, continuous, and exclusive occupation. It is also here that the evidence of overlapping title claimants would have been particularly helpful.

[331] Even if I were to find that the plaintiffs had met the criteria considered by Matheson J. or required by the *Tsilhqot'in* construct, the conflict between the exclusivity of Aboriginal title and the primacy of the public right of navigation might still provide a potentially insurmountable barrier to a finding of Aboriginal title in this case. In fact, on the face of it, this would appear to be the case for *any* Aboriginal title claim to the bed of a navigable waterway.

[332] As a best-case claim, one might imagine a land-locked lake, fully bounded by land to which Aboriginal title has been found, and to which access has been historically and exclusively controlled by the titleholders. In my opinion, it would be illogical to deny Aboriginal title to the lakebed, given the exclusive control of access to the lake belonging to the titleholders as an incident of Aboriginal title. In every meaningful way, the lake and access to it would be controlled by the titleholders. However, no such land-locked water is involved in the case before me. Rather, this case involves a large navigable river and lake bordering lands claimed by several different First Nations, all of whom may have navigated the waters since time immemorial.

[333] In the absence of any further direction from the appellate courts, the inclusion of exclusive control and occupation in the definition of Aboriginal title set out in *Delgamuukw* and *Tsilhqot'in* remains operative. Without some development in the law, there may be no path to Aboriginal title to submerged lands beneath navigable waterways. Altering the definition of Aboriginal title (perhaps by burdening it with the public right of navigation) in the context of claims to such submerged lands would constitute a significant development in the law that I decline to make in *obiter*, and particularly so when the evidence respecting the exclusive control of the waters is lacking.

[334] I wish to make it clear, however, that I am not dismissing the plaintiffs' alternative claim for waterbed title on the merits. I am simply deferring determination of that issue to a case where the question can be decided on a more complete evidentiary record.

C. Assessment and Determination

[335] There are many uncertainties in Aboriginal law but one thing is certain; when Crown sovereignty was asserted in British Columbia in 1846, the lands bordering the Nechako River, the Stellako River, and Fraser Lake were not *terra nullius*. They were owned, occupied and used by Indigenous peoples whom anthropologists have subsequently labelled as "Carrier Indians" (and who refer to themselves as Dakelh).

[336] Unlike the rest of Canada, there were very few treaties made with the Indigenous peoples in

what is now British Columbia, and the vast majority of the province comprises territory that has never been ceded to the Crown. However, according to the modern construct of Aboriginal law, groups claiming Aboriginal title to land, a right recognized and affirmed by the *Constitution Act*, *1982*, are required to prove both (1) sufficiency of and (2) exclusivity of occupation of defined territory as of 1846.

[337] In accordance with their own traditional social and legal organization, the Dakelh comprised extended families (*sadekus*) who had exclusive use and occupation of, and controlled access to, tracts of land (*keyohs*) for hunting, fishing and other resource exploitation. Such features can bestow Aboriginal title to land.

[338] The colonial provincial and federal governments created “Indian Reserves” allotted to “Indian Bands” which, in the present case, include the land now comprising Noonla Indian Reserve# 6 and Stellaquo Indian Reserve# 1.

[339] The Stellat’en and the Saik’uz, like many other First Nations in British Columbia, claim as their traditional territory lands far beyond the boundaries of small Indian reserves allotted to them by the government including rivers and lakes such as the Nechako, the Stellako, and Fraser Lake. Colonial constructs of land ownership, reinforced by the land claim agreements process in BC, have resulted in overlapping claims to the same land by different First Nations, a situation that complicates any determination of Aboriginal title. Such overlapping claims directly affect exclusivity both as an incident of title and an element of its proof. They also inject uncertainty about the identification of the proper title claim claimant group.

[340] In this case, I am asked to make “findings” of title limited to reserves and certain specific fishing sites, but the absence in these proceedings of overlapping title claimants either as parties or witnesses militates against any such findings at this time.

[341] Should my decision to decline “findings of title” be overturned on appeal, however, I have made findings of fact underlying Aboriginal title to the lands comprising Noonla Indian Reserve# 6, Stellaquo Indian Reserve# 1, and their adjacent riverbeds and lakebeds. On the evidence before the Court in this case, I have found that Aboriginal title to what is now Noonla Indian Reserve# 6 should be and is properly vested in the plaintiff Saik’uz First Nation. I have also found that Aboriginal title to those lands comprising Stellaquo Indian Reserve# 1 should be and is properly vested in the Stellat’en First Nation. Additionally, part of the import of these findings for the present claim is that, even if exclusivity cannot be conclusively proven, the plaintiffs have demonstrated sufficient and continuous occupation of these lands, an element of their nuisance claim discussed below.

[342] The claim for a finding of Aboriginal title to certain portions of the Nechako River, Stellako River, and Fraser Lake confronts some significant legal obstacles, particularly given the conflict between the exclusivity of such title and the primacy of the public right of navigation. Here, the

absence of evidence from overlapping title claimants is particularly acute, and since the outcome of the claim would represent a significant development in the law, I decline to make such finding of riverbed title in *obiter*.

[343] As requested by the plaintiffs, my “findings of title” in this case are without prejudice to any claims by non parties with respect to any interest that they have in the land, including, in particular, any claims for joint title by other First Nations.

X. CAN ABORIGINAL RIGHTS FOUND AN ACTION IN NUISANCE?

A. Components of the Cause of Action

[344] This lawsuit against RTA is based primarily on the tort of nuisance.

[345] The essence of any nuisance cause of action is interference with property rights. Unlike torts such as negligence which focus on the conduct of the tortfeasor, the tort of nuisance focuses on the harm suffered by the plaintiff rather than fault, negligence, or blameworthiness. As noted in *Royal Anne Hotel Co. v. Ashcroft*, [1979] 95 D.L.R. (3d) 756 (B.C.C.A.), at para. 9 (citations omitted):

> As has been said: “The essence of the tort of nuisance is interference with the enjoyment of land.” . . . That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree.

[346] As with the tort of negligence, the plaintiff must prove a causal link between the defendants' activity and the damage or harm alleged. There is no distinct test for causation in the law of nuisance and, as discussed later in these reasons for judgment, the same basic test for causation in negligence generally applies for the purposes of proving a cause of action in nuisance.

[347] In *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13, the Supreme Court of Canada reviewed the key components of private nuisance as follows:

- A nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable (at paras. 18-19).
- A substantial interference with property is one that is non-trivial. This is a low threshold test simply for screening out weak claims and one which confirms that not every interference, no matter how minor or transitory, gives rise to a claim in nuisance (at paras. 19, 21).
- The second part of the test is whether the interference with the plaintiff's use or enjoyment of land is “unreasonable in all of the circumstances” (at para.19).
- Traditionally, the courts assessed whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct, often referring to factors

such as the severity of the interference, the character of the lands, the sensitivity of the plaintiff, and the like (at para. 26).

- However, courts are neither bound to nor limited by any specific list of factors but instead "should consider the substance of the balancing exercise in light of the factors relevant in the particular case" (at para. 26).
- Generally, the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct is unreasonable* (at paras. 28, 44, emphasis in original).
- The focus of the reasonableness analysis is on the character and extent of the interference with the claimant's land. The burden is on the claimant to show that the interference is substantial and unreasonable, not to show that the defendant's use of its own land is unreasonable (at para. 28).
- The nature of the defendant's conduct is still a relevant consideration, and may even be a significant factor in the reasonableness analysis if, for example, it is either malicious or careless. However, even a finding of reasonable conduct will not necessarily preclude a finding of liability (at para. 29).
- When the case involves work by a public authority that may have significant utility, the balancing exercise in assessing reasonableness will generally distinguish between interferences that, on the other hand, constitute the "give-and-take" expected of everyone in society and, on the other, interferences that impose a disproportionate burden on individuals (at para. 39).

[348] The tort of public nuisance is pleaded by the plaintiffs as a claim in the alternative, i.e. a "fallback" claim in the event the claim for private nuisance fails. As noted in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 52, the doctrine of public nuisance is "a poorly understood area of the law". The nuisance consists of activities which unreasonably interfere with the health, safety, comfort, or convenience of the public generally, and the primary right to sue traditionally lay with the Attorney General.

[349] Private individuals have a right to sue for a public nuisance, but only if they suffered special damage over and above that suffered by the public generally: *Ryan,* at para. 52. In the present case, the plaintiffs rely on the unique nature of their Aboriginal rights and interests to support their right to sue for public nuisance.

B. The Defendants' Foundational Objections to the Plaintiffs' Nuisance Claims

[350] RTA argues that the plaintiffs' Aboriginal rights, albeit recognized and affirmed under s. 35 of the *Constitution Act*, *1982*, are only actionable against the Crown and "are not actionable against [a private entity such as] Alcan at Canadian common law". They say:

> That is so for a simple reason: private rights of action based on s. 35 are unknown to the common law, and that is as it should be.

RTA also challenges the plaintiff's position that Aboriginal rights bestow a proprietary interest in land sufficient to ground a claim in nuisance.

[351] The province does not address RTA's sweeping proposition above but joins them in arguing that the plaintiffs cannot succeed in their claims against RTA, whether for private nuisance or public nuisance. In particular, they argue:

- Aboriginal fishing rights lack the required degree of exclusive possession, are not akin to an actionable *profit à prendre*, and do not bestow any sort of title to a fishery; and,
- the plaintiffs also cannot sue for public nuisance because they have not demonstrated any particular and substantial damage beyond that suffered by any other users of the Nechako River.

[352] For its part, Canada simply and unhelpfully states “there is no nuisance claim against Canada and therefore Canada takes no position on [the legal issues respecting nuisance and riparian rights]”. Canada does, however, admonish that “the nuisance claim and the constitutional claims are governed by distinct legal tests that should not be conflated”.

[353] I will deal with the two challenges separately.

1. Are Aboriginal Rights Actionable Against Non-government Entities?

[354] I mean no disrespect when I say that the constitutional status of Aboriginal rights has little to do with the substance of the plaintiff's cause of action against RTA. For sure, the constitutional status of those rights imposes limitations upon and could trigger duties to consult and accommodate by the provincial and federal governments who, unlike RTA, also have obligations to the plaintiffs arising from the honour of the Crown and the law of fiduciary obligations.

[355] But this does not mean that third parties, whether corporate entities such as RTA or individuals, are somehow immunized from tort liability for claims founded on Aboriginal interests.

[356] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, stands for the proposition that third parties such as RTA do not have a duty to consult and accommodate First Nations with respect to matters affecting Aboriginal interests. The Court held that the ultimate legal responsibility for such consultation and accommodation rests with the Crown and that the honour of the Crown in that regard cannot be delegated (para. 53).

[357] However, the possibility of tort liability on the part of third parties based on the legal rights of Indigenous peoples was expressly affirmed by the Supreme Court of Canada in *Haida* at para. 56:

> The fact that third parties are under no duty to consult or accommodate Aboriginal concerns

> does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

[358] In the 2015 Appeal Decision in this case, Mr. Justice Tysoe stated that para. 56 in *Haida* stands for the following proposition:

> While third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate, that does not mean they can never be held liable for infringement of Aboriginal rights.

[359] RTA made similar arguments in the 2015 Appeal Decision. If the legal proposition they espouse is correct, the Court would have dismissed the plaintiff's action. The Court did not do so. To the contrary in fact, it expressly stated that Aboriginal title and even the Aboriginal right to fish might provide "sufficient occupancy to found an action in private nuisance" (paras. 54-56), and might involve "a type of interference protected by the tort of public nuisance" (para. 57). These are the very questions I am being asked to determine in this trial. Through the analysis below, I find that interference with Aboriginal rights can serve as a basis for a common law action against non-government entities.

2. Can *Sui Generis* Aboriginal Interests Found an Action in Nuisance?

[360] Lewis N. Klar et. al., *Remedies in Tort*, (Toronto: Thompson Reuters, 2021) (loose-leaf) Ch. 20, devotes an entire chapter to the tort of nuisance. The text addresses the various categories of property interest that provide standing for plaintiffs in such actions at s. 20:23:

> Actions in nuisance normally involve interference with the plaintiff's right to use and enjoyment of land, thus, the right to sue ordinarily arises from possession, rather than ownership. Those with the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession, can sue. . . A licensee with a right to possess land may sue, but a licensee with no right of possession cannot.
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> . . .
>
> A landlord or other reversioner can bring action for nuisances which permanently impair the usability of land and thereby damage his proprietary interest, but cannot bring an action for noise, fumes, or other temporary invasions, even if they drive away the tenants or reduce the rental value of the property.
>
> The holder of an easement or profit can maintain an action against any person, including the servient owner, who interferes with the use or enjoyment of that interest.
>
> . . .
>
> Aboriginal title, a beneficial interest in the land that gives a First Nation the right to possess it, manage it, use it, enjoy it and profit from its economic development, provides sufficient occupancy to found an action in private nuisance by a First Nation claiming exclusive occupation of those lands [citing the 2015 Appeal Decision and also *Bolton v. Forest Pest Management Institute*, [1985] 21 D.L.R. (4th) 242 (B.C.C.A.)].
>
> [Footnotes omitted.]

[361] To much of the same effect is Gregory S. Pun et. al., *The Law of Nuisance in Canada*, 2nd ed. (Toronto: LexisNexis, 2015) at 93-103 as follows:

> §3.56 Private nuisance, at its core, is a tort seen as being committed against the land itself rather than against any person. This premise forms the foundation for the common law requirement that a plaintiff must have a proprietary interest (legal or equitable) in the affected land to have standing to maintain an action for private nuisance.
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> . . .
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> §3.68 At the core of the traditional rule is that any plaintiff who demonstrated fee simple ownership over the land will have the standing to sue. But having said that, it must be clearly noted that ownership alone is generally insufficient to maintain an action. The correct statement is that the right to sue depends on legal possession, because the person in possession has the right of use and enjoyment of the land. “It is perfectly clear that anyone who has the right to occupy property has the right to sue for private nuisance and that ownership is not necessary”. Of course, an owner in possession can maintain an action in private nuisance but this is by virtue of legal possession rather than legal ownership.
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> . . .
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> §3.69 In this regard, “occupancy” is used in the legal sense, carrying a proprietary meaning: “[a]n occupier is one who takes possession; one who has the actual use or possession of a thing; one who holds possession and exercises control over a thing”. An occupier in this sense has a proprietary interest in the land that is enforceable against others.
>
> . . .
>
> §3.71 . . . [L]essees (tenants) have the right to possession and quiet enjoyment of the property and as such have the requisite proprietary interest to sue for private nuisance.
>
> . . .
>
> §3.73 Generally speaking, a mere licensee does not have any proprietary interest in property and will not be able to maintain an action in private nuisance.
>
> . . .
>
> §3.75 . . . [A] *profit à prendre* does not give an exclusive right to use or occupy the property. The holder of a *profit à prendre* does not have an interest in the land itself or exclusive occupation of the land; he has a legal right to use the land, and it is this right that grounds standing in nuisance.
>
> . . .
>
> §3.80 Aboriginal interests in reserve land and Aboriginal title are both very complex and continually evolving areas of law in Canada. What is clear, however, is that Aboriginal interests in reserve land and Aboriginal title are both distinct from normal common-law proprietary interests. There is authority that Aboriginal title and interest in Reserve land may, however, share some characteristics with common-law interests sufficient to justify a claim in nuisance. It has been held to be a possessory right, and may also be akin to a *profit à prendre* where it conveys certain rights to harvest resources from the land [citing the 2015 Appeal Decision].
>
> [Citations omitted.]

[362] As noted, the 2015 Appeal Decision endorsed three separate bases on which the nuisance claim in this case might be founded, namely, (1) the plaintiffs' interest in their reserves, (2) the plaintiffs' Aboriginal rights to fish, and (3) the plaintiffs' Aboriginal title (if established).

[363] The first, interest in reserve lands, appears to be the proverbial elephant in the room which has received scant attention by the parties in their submissions. In the 2015 Appeal Decision, Mr. Justice Tysoe observed:

> [88] In my opinion, it is not plain and obvious that the Nechako Nations do not qualify as claimants in private nuisance under the narrower view. The term "reserve" is defined in s. 2 of the *Indian Act* to mean "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". <u>This would seem to give the band the right to exclusive possession of the reserve lands, which is sufficient to found a claim in private nuisance.</u>
>
> [89] In *Joe v. Findlay* (1981), 122 D.L.R. (3d) 377, 26 B.C.L.R. 376 (C.A.), this Court upheld a finding of trespass on reserve lands. If the possession of reserve lands is sufficient to support a claim in trespass, it is not plain and obvious to me that it should not also be sufficient to support a claim in private nuisance. In my opinion, the chambers judge erred in striking the claim for private nuisance to the extent that it was based on the Nechako Nations having a right of possession to the reserve lands.
>
> [Emphasis added.]

[364] The plaintiffs refer to their reserve interests throughout their Second Amended Notice of Civil Claim filed February 7, 2019. They specifically allege nuisance caused by RTA which has resulted in "loss of use and enjoyment of . . . the Reserves" and also "interference with the plaintiffs' ability to exploit fisheries resources within and adjacent to the . . . Reserves".

[365] RTA actually concedes that the reserve interests can found a claim in nuisance. Their written submissions state:

> Alcan's first position with respect to the plaintiffs' proprietary rights is that *only* the plaintiffs' reserve interests are interests capable of giving rise to claims, and *only* for claims in nuisance, not for breach of riparian rights.
>
> [Emphasis in original.]

[366] I have no hesitation in concluding that, as a matter of law, the plaintiffs' interest in and occupancy of Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1 respectively is sufficient to found an action in private nuisance arising from any substantial and unreasonable interference with their use or enjoyment of the reserve lands.

[367] I reach the same conclusion with respect to Aboriginal title. As the Court noted in the 2015 Appeal Decision, Aboriginal title is a beneficial interest in the land which bestows upon the title claimant the right to possess it, manage it, use it, enjoy it, and profit from its development. When such "ownership" is accompanied by actual use or occupancy, it clearly meets the common-law standing requirements for a cause of action in nuisance. To suggest otherwise is absurd and, in my opinion, disrespectful of the rights of Indigenous peoples respecting their traditional territories whether embodied in *UNDRIP* or simply as a matter of reconciling the assertion of Crown sovereignty with the legitimate interests of this land's original occupants and their descendants.

[368] More controversial, however, is whether the Aboriginal right to fish, whether in waters

adjacent to reserve/title lands or elsewhere, bestows standing to sue in nuisance. This is the question that has been the primary focus of the parties' submissions except for Canada, of course, who has elected not to engage in the debate.

[369] It will be recalled that the reserves in this case were expressly identified by the reserve Commissioner as providing the Saik'uz and Stellat'en with an important fishery. For the Saik'uz, this meant fishing in the Nechako River at Noonla. For Stellat'en, it meant fishing both in the Stellako River and also in the west end of Fraser Lake.

[370] The plaintiffs argue that occupation of land that is either a reserve or subject to Aboriginal title (in this case both) bestows the right to harvest the resources associated with that land, including the fish in any adjacent river or lake. As such, they argue that any interference that causes harm to the fish that would otherwise be available for harvesting is an interference with the exclusive occupation of the reserve/title lands and hence must be actionable in nuisance.

[371] Similarly, where an Aboriginal right to fish is being exercised by a member of the Indigenous group at a traditional fishing site "owned" by them elsewhere in their traditional territory, whether standing on the shore or fixing nets in the water or to the river/lake bed, the same remedy should lie for the same type of interference, simply as a matter of principle (and one which also incidentally accords with *UNDRIP*).

[372] The defendants draw distinctions between access to the water and access to the fish. They emphasize that plaintiffs have no ownership or proprietary right in the fish themselves (an argument which conveniently ignores *UNDRIP*'s declaration otherwise). As RTA says in its submissions, the plaintiffs "do not own or have a legal interest in the fish that migrate past their fishing areas". They argue that treating the right to fish as a *profit à prendre* does not assist because it is simply a right to enter the land of another person for the purpose of taking some profit (in this case fish).

[373] The parties engaged in much academic debate about incorporeal hereditaments and a variety of intangible legal rights associated with different types of ownership, use, or occupation of real property. The Court was treated to a line of older cases starting with (1) *Fitzgerald v. Firbank* (1897), [1987] 2 Ch. 96 (CA), [1895-9] All E.R. 445 (Eng. C.A.), where a deed granting an exclusive right of fishing in a defined part of a privately owned river founded a claim in nuisance when the water was fouled and the fish injured by a nearby gravel pit operation, and (2) *New Brunswick Electric Power Commission v. Tobique Salmon Club Ltd*., [1966] N.B.J. No. 13 (S.C.(A.D.)), where the utility was held liable for building two hydroelectric energy dams which significantly reduced enjoyment of the fishery by the plaintiff fishing club, which owned and leased land adjacent to the affected rivers. In the latter case, the New Brunswick Court of Appeal characterized the club's fishing rights as a *profit à prendre* and an interest in land, stating, "[t]he owner of a fishery has the right to a free passage for fish to his fishery and a right to catch every fish finding its way there which he can take by art or industry" (at 30).

[374] These cases led to further debate about the necessity of exclusivity of the fishery interests and whether such exclusivity exists in respect of any Aboriginal right to fish for food.

[375] I am not inclined to enter the academic debate. *Sparrow* reminds us that Aboriginal fishing rights are not easily analogized to other rights:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of . . . the "*sui generis*" nature of [A]boriginal rights [at 1112].

Sparrow and many other cases since then also caution:

> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the [A]boriginal perspective itself on the meaning of the rights at stake [at 1112].

And further:

> [R]ecognition and affirmation requires sensitivity to and respect for the rights of [A]boriginal peoples on behalf of the government, courts and indeed all Canadians [at 1119].

[376] Plaintiff's counsel submits:

> Whether the conventional nomenclature of nuisance law (such as "proprietary interests") is technically descriptive of Aboriginal rights cannot dictate whether a claim in nuisance lies against a defendant whose use of land unreasonably interferes with those rights. As the SCC has emphasized, Aboriginal rights are *sui generis* and not to be compartmentalized by traditional common-law terms.
>
> . . .
>
> More fundamentally, though, and apart from any characterization of Aboriginal rights as "usufructuary" [a reference to *Tsilhqot'in*] or by comparison to a *profit à prendre*, the *sui generis* nature of Aboriginal rights, the important purpose they serve (reconciliation and provision of cultural security and continuity), <u>and the fact that they are intimately related to a particular piece of land means that a claim in nuisance must be sustainable in law when there is an unreasonable interference with the right itself or the land to which the right is intimately related.</u> If an extension of the common law is necessary to achieve that, this is the appropriate case in which to do so.
>
> [Emphasis added.]

[377] I agree with every word of this submission and I have no hesitation in concluding that the plaintiffs' Aboriginal right to fish is a legally sufficient foundation for an action in private nuisance. This is so regardless of whether that right is exercised in the waters within or adjacent to the lands now comprising Noonla Indian Reserve #6 and Stellaquo Indian Reserve #1 and whether or not they hold title to those lands and waterbeds.

[378] Both RTA and the provincial Crown protest that such a development in the law would create "indeterminate liability to anyone who potentially affects" the salmon returns or the sturgeon in the Nechako River and may even suppress further economic development within the province. I do not agree. Such a submission is simply hyperbole.

[379] First, as this case amply demonstrates, causation of harm to the fishery can be extremely difficult to prove and that alone, combined with the prospect of lengthy and expensive litigation, will deter frivolous or insignificant claims. Furthermore, as this case also amply demonstrates, powerful defences to nuisance claims can and do exist and will also deter unmeritorious claims.

[380] Second, any incremental extension of the common law made in this case (assuming there even is one), only applies to Aboriginal claimants. It is only their unique, *sui generis* rights that are being recognized and protected. And, to borrow a phrase from RTA, “that is as it should be”.

[381] I referred earlier in this judgment to the catastrophic effects colonization has had upon many of the Indigenous peoples in this country. Several of the First Nations witnesses in this case testified how the fish have disappeared, fishing for year-long sustenance is no longer possible, buying fish at the store is too expensive, and many of the children are no longer even being taught to fish. All of this is yet another invidious challenge to Indigenous cultural security and continuity that justifies any necessary extension of the common law.

[382] Insofar as future economic development is concerned, impacts upon Aboriginal fishing interests are already protected through the Aboriginal law construct of mandatory consultation, accommodation, and justification for proposed infringements. The prospect of nuisance actions as a deterrent for economic development pales in comparison.

[383] In the result, I conclude that the plaintiffs’ occupation of their reserve lands are sufficient to ground their nuisance claim, and that *sui generis* Aboriginal rights to fish can indeed found an action in nuisance in the appropriate circumstances.

XI. HAS REGULATION OF THE NECHAKO RIVER DAMAGED FISH HABITAT AND FISH POPULATION?

A. Legal Principles re: The Doctrine of Causation in Nuisance Claims

[384] It is axiomatic in nuisance cases, as with other torts such as negligence, that in order for the liability to be imposed, the defendant's conduct must cause the damage for which the plaintiff sues. In this case, the damage is the reduction of fish stocks that would otherwise be available to the plaintiffs, the cause of which is claimed to be the installation and operation of the Kenney Dam and the related reservoir.

[385] While the Court has heard evidence from numerous scientific experts in this case, the case law frequently notes that experts often require a high degree of certainty before drawing conclusions on causation. In tort litigation such as this case, however, the Court determines causation simply on a balance of probabilities. Indeed, the Court can even draw inferences of causation without any scientific proof.

[386] The basic legal principles respecting causation for the tort of nuisance parallel those for the tort of negligence, as set out in the seminal cases of *Athey v. Leonati*, [1996] 3 S.C.R. 458 and

Clements v. Clements, 2012 SCC 32, repeated many times since. These principles include:

1. The general, but not necessarily conclusive, test for causation is the “but for” test requiring the plaintiff to show the damage would not have occurred without the conduct of the defendant. This is a factual inquiry into what likely happened and one to be proved on the balance of probabilities standard of proof (*Clements,* at paras. 8, 14, 49);
2. This causation test must not be applied too rigidly. Causation need not be determined by scientific precision, as it is essentially a practical question of fact best answered by ordinary common sense, robustly and pragmatically applied. If evidence sufficiently connects the defendant's conduct to the damage, depending on the circumstances, the court may find as a fact, whether by inference or otherwise, that the conduct was a probable cause of the damage (*Clements,* at paras. 9-10);
3. It is not necessary for the damage to establish that the defendant's conduct was the <u>sole</u> cause of the damage before liability can be imposed. As long as the conduct is <u>part</u> of the cause, i.e., at least one contributory cause of the damage beyond a *de minimis* level, the defendant is liable regardless of whether other factors also contributed to cause the damage (*Athey,* at para. 17); and,
4. Apportionment does not lie between tortious causes and non-tortious causes of the damage. Absent contributory fault on the part of the plaintiffs, the law does not excuse or reduce the defendant's liability merely because causal factors for which he is not responsible also helped to produce the harm. Such factors may impact remedy but not liability (*Athey,* at paras. 12, 19, 23).

[387] This is a case where there are almost certainly multiple contributing causes to the reduction of the fishery within the waters of the plaintiffs’ traditional territories. However, as stated in *The Law of Nuisance in Canada* at §5.18, “[i]t is no defence that the defendant is only part of the problem or is only adding to an already existing problem”, citing *Walker v. McKinnon Industries Limited*, [1949] 4 D.L.R. 739 (Ont. H.Ct.J.), affirmed [1950] 3 D.L.R. 159 (C.A.) and [1951] 3 D.L.R. 577 (P.C.), and the well-known English case of *Lambton v. Mellish*, [1894] 3 Ch. 163.

[388] RTA does not dispute the legal principles respecting causation, but suggests that any contribution it may have made to the diminution of fish stocks is at best “relatively minor among other causes”, and this must be taken into account in any nuisance analysis particularly when it comes to the assessment of remedies. It notes as well that it cannot be faulted if the interference with the plaintiff's fishing rights “would have come to pass anyway” as a result of other causes. It says that in any event, the plaintiffs’ cause of action is time-barred and has been extinguished by limitations legislation.

[389] I will deal with RTA's arguments respecting reduction or extinguishment of liability in later sections of these reasons for judgment, but will first address the factual inquiry whether regulation

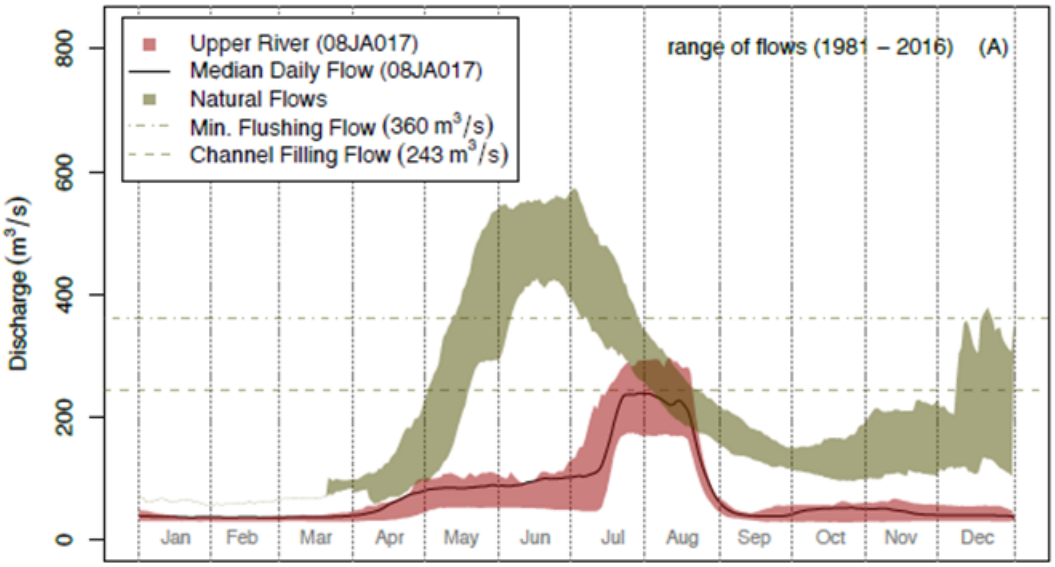
of the Nechako River has actually damaged fish habitat and fish population.

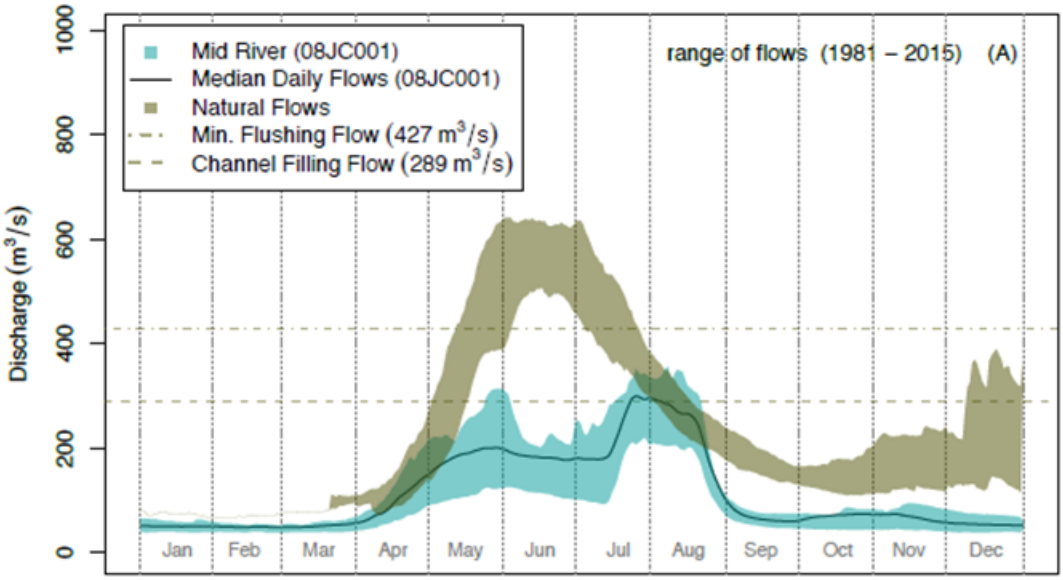
B. Effects of Regulation

1. Geomorphology and Habitat

[390] It is not disputed (and nor could it be) that the installation of and operation of the Kenney Dam and the related reservoir has fundamentally altered the natural hydrograph (flow pattern) of the Nechako River. This is graphically illustrated by the nine km of essentially dry riverbed below the Dam. The total volume of water that now flows into the Nechako River is 30 to 40 percent of the "natural" pre-dam flow in an average year between Cheslatta Falls and the confluence with the Nautley River (the "Upper River"), and only half the pre-dam natural flow between the Nautley River and the confluence of the Nautley River and Vanderhoof (the "Middle River").

[391] The following charts, extracted from the expert report of Professor Brett Eaton, a fluvial geomorphologist, depict the changes in the Upper River and Middle River hydrographs respectively following 1981 (the first year of the injunction flows):





[392] In these figures, the steeper olive green polygons represent the pre-dam flow regime and the shallower polygons represent the post-1981 Upper (red) and Middle (blue) river flow regimes respectively.

[393] The steep incline during the period April to June reflects inflow from snowmelt, commonly referred to as the “spring freshet”. The flows gradually decline following the freshet into the fall period but are subject to greater variability in November and December due to rain.

[394] Sixty percent of the Nechako River between Cheslatta Falls and Vanderhoof is gravel and cobble. It is a typical gravel-bed river of the sort frequently found in the Northwest. It is an “alluvial river” whose channel is self-formed in sediments transported and deposited over thousands of years. The natural flow regime, particularly the power of the spring freshet and the flooding of flood plains, changes the shape of the river over time and results in a complex and dynamic system of aquatic, semi-aquatic, and terrestrial habitats.

[395] The hydraulic power of the river combines with the process of flooding to trigger the movement of gravel and cobble along the bed of the river and also to flush out fine sediments that may accumulate within static gravel and cobble. This in turn results in a “shifting habitat” that supports biogeochemical recycling of nutrients, food-web productivity, and the physical habitat necessary for successful reproduction and the rearing of juvenile fish, particularly salmonids (anadromous or migratory salmon and resident trout).

[396] The plaintiffs contend, and their expert witnesses opine, that the changed hydrograph of the Nechako River has fundamentally altered the natural river process of riverbed flushing, erosion, and transport. They claim that significant parts of the river have become “essentially static”, thereby degrading ecological integrity, permitting the encroachment of vegetation into riparian habitat, and negatively affecting the spawning and rearing habitat for fish over time. Hence, the plaintiffs argue,

it is necessary to restore a more natural flow regime to halt the decline in fish population and to restore a healthy abundance of the Nechako White Sturgeon and particularly the salmon that have been integral to their sustenance and culture since time immemorial.

[397] The defendants acknowledge that the natural hydrograph of the Nechako River has been changed by the installation and operation of the Kenney Dam and related reservoir and that this has, in turn, resulted in geomorphological changes within the river including reduced channel migration and increased vegetation encroachment. They even acknowledge that “re-establishing these [natural] processes will require re-establishing something close to the full natural flow regime” of the Nechako River for many years and perhaps for several decades. They say, however, that any physical change to the river occurred decades ago, well outside the applicable limitation period for any nuisance lawsuit, and in any event, the plaintiffs have simply failed to establish on credible evidence that the geomorphological changes in the river has actually caused the declining fish populations claimed to constitute an unreasonable interference to their fishing rights.

[398] I accept Dr. Hauer’s testimony respecting the “basic concepts” fundamental to the ecological integrity and ecosystem sustainability of gravel-bed rivers throughout western North America. I accept his description of the physical processes of hydrology and geomorphological driving gravel-bed river ecological structure and function as well as a “shifting habitat mosaic”. I also accept that cut–and–fill alluviation of a gravel bed river maintains surface water and groundwater exchange, directly affects temperature regimes, and may play a critical role with respect to habitat most protective of salmon reproduction and the rearing of juvenile fish. I find as a fact that these basic concepts apply to the Nechako River.

[399] There is thus a powerful logic to the suggestion that the substantial alteration of the Nechako’s natural flow regime has led to significant changes in river condition and habitat which in turn has had negative effects on the abundance and health of the fish population in the Nechako watershed. However, I will now address this latter point with particular reference to each of the Nechako White Sturgeon, the Chinook salmon, and the sockeye salmon within that watershed.

2. Nechako White Sturgeon

[400] White Sturgeon is the largest, longest-lived freshwater fish in North America. In Canada, they reside primarily in the Fraser and Columbia River watersheds. The Nechako White Sturgeon are a distinct population with a relatively restricted home range within the Nechako watershed, including the Nechako River itself (particularly near Vanderhoof) as well as Fraser Lake and Stuart Lake.

[401] White Sturgeon can grow to over six meters in length and can live over 100 years. Their most distinguishing features include a long scaleless body covered with rows of large bony plates called scutes on the back and sides, a shark-like tail, and an elongated snout.

[402] White Sturgeon are slow-growing with a delayed onset of sexual maturity. Males tend to mature at a younger age and smaller size than females. Females and males generally spawn for the first time at 26 and 11 years of age respectively, but often it is later. At the present time, the only known spawning site of the Nechako White Sturgeon is a three-kilometre stretch of the Nechako River at Vanderhoof stretching westward from the vicinity of the Burrard Avenue bridge over the river.

[403] Spawning typically occurs in the late spring and early summer. Nechako White Sturgeon are “broadcast spawners”. The eggs and sperm are released into the water column and fall to the bottom of the river bed. Fertilized eggs have a sticky surface and will typically adhere to coarse, clean substrates devoid of fine material, including silt. Spaces between gravel and cobbles in the river bottom are critical for larval survival and growth. Hatching of larval fish typically occurs within one to three weeks of spawning depending on water temperature. The emerging larvae have a yolk sac for sustenance and typically remain hidden within the gravel riverbed.

[404] Once the yolk sac is exhausted, the larvae start exogenous feeding and eventually metamorphose into the features of the adult form. During the juvenile stage of development, the growing fish tend to become less susceptible to predation and after about one year are often observed in habitats that are similar to adult habitat types. However, for reasons that are not yet fully known, the Nechako White Sturgeon are suffering from a “chronic recruitment failure” wherein regular spawning occurs, but viable offspring do not “recruit” or transition to the juvenile stage in sufficient numbers to sustain the population. This recruitment failure is the primary cause of population declines and is occurring not only in the Nechako River but also in the regulated Columbia and Kootenay River systems.

[405] The chronic recruitment failure of Nechako White Sturgeon has been extensively studied, and various hypotheses for the failure have emerged. As this case demonstrates, significant information gaps remain, and the scientists do not necessarily agree on the precise cause or mechanics of the recruitment failure. Nevertheless, in the case of the Nechako White Sturgeon, all three sturgeon experts who testified at trial agreed that regulation of the Nechako River is the root cause.

[406] The Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”) is an independent advisory panel that assesses the status of wildlife species at risk of extinction. Members are wildlife biology experts from academia, government, nongovernmental organizations, and the private sector. They are responsible for designating wildlife species in danger of disappearing from Canada. In April 1990, COSEWIC designated White Sturgeon as a “vulnerable” species (one that may become a threatened or an endangered species).

[407] In 1994, the Fisheries Branch of the Ministry of Education, Lands and Parks (“MELP”) reduced the annual catch quota for White Sturgeon to zero, effectively terminating the harvest of

sturgeon. That same year the BC Conservation Data Centre red-listed White Sturgeon provincially and identified the Nechako sturgeon subpopulation as in danger of extinction.

[408] In 1995, MELP commissioned a study on the Nechako White Sturgeon ("RL&L Study") to gather and analyze data on growth, reproduction, age distribution, habitat use, movement patterns, and population size. The RL&L Study took five years to complete and was released in December 2000.

[409] As a result of the RL&L Study, the province established the NWSRI (Nechako White Sturgeon Recovery Initiative) with the mandate of implementing recovery planning efforts for the Nechako White Sturgeon population. The NWSRI remains in effect today and is composed of two committees called the Technical Working Group, and the Community Working Group. Participants in the NWSRI currently include:

- the Province;
- the federal government (represented by DFO);
- the District of Vanderhoof;
- the Carrier Sakani Tribal Council;
- the Lheidli T'enneh First Nation;
- RTA;
- the Fraser River Sturgeon Conservation Society; and,
- the Freshwater Fisheries Society of BC.

[410] In 2003, COSEWIC's listing of Nechako White Sturgeon changed from "vulnerable" to "endangered" (a species facing imminent extirpation or extinction).

[411] In 2004, the NWSRI released a "Recovery Plan for Nechako White Sturgeon" which summarized some of the evidence respecting the decline of the Nechako stock and outlined a course of action for recovery. It included a sturgeon hatchery program as a stopgap measure for rebuilding and maintaining the population of the Nechako White Sturgeon until the cause of the decline can be corrected.

[412] The *Species at Risk Act*, S.C. 2002, c. 29 ("*SARA*"), came into force in 2003. One of its purposes is to provide for the recovery of wildlife species that are extirpated (made locally extinct), endangered, or threatened as a result of human activity. Section 37 of *SARA* provides:

> 37 (1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister <u>must</u> prepare a strategy for its recovery.
>
> [Emphasis added.]

[413] The competent federal department for the Nechako White Sturgeon under *SARA* is DFO.

[414] In 2006, the Nechako White Sturgeon was listed on Schedule 1 of *SARA* as "endangered"

(at imminent risk of extirpation). The Regulatory Impact Analysis Statement (2006) C Gaz I, Vol. 140, No. 23, 1478, which accompanied the *Order Amending Schedules 1 to 3 to the Species at Risk Act*, P.C. 2006-768, (2006) C Gaz II, 1082, included the following paragraph:

> Many of these species are also valued by Aboriginal peoples for cultural, spiritual and subsistence purposes. White Sturgeon has traditionally been utilized for subsistence and cultural purposes by several British Columbia First Nations along the Fraser, Nechako, Columbia, and Kootenay Rivers. The recovery of the White Sturgeon would provide social and cultural value to First Nations.

[415] In 2014, four years later than the deadline required by *SARA*, the DFO published its final "Recovery Strategy for White Sturgeon in Canada". It promised basin-specific Action Plans would be developed by DFO within five years. That Action Plan is now more than two years overdue, and no explanation for the delay or inaction in that regard was offered at this trial. In their final argument, Canada acknowledges that the *SARA* deadlines were missed but simply says the missing of deadlines is "irrelevant to the claim".

[416] The expert evidence tendered at trial is unanimous that the regulation of the Nechako River is the root cause of the recruitment failure of Nechako White Sturgeon. The experts simply disagree on the direct mechanism of failure; Dr. Rosenau believes the low survival rates are directly related to the low flows in the river whereas Dr. McAdam attributes it primarily to geomorphological changes in the Vanderhoof reach of the Nechako River, leading to the deposit of fine sediment within the cobble and gravel of spawning grounds.

[417] At trial, Dr. Korman testified:

> Something about building a dam, the changes perhaps in flows, sediment, temperature, all sorts of things that happen when you build a dam, is a likely cause of that recruitment decline because we have seen it not just in the Nechako, we [have] seen it in the Columbia and in the Kootenay rivers as other examples . . . So I have no quarrel with the idea that the dam has in some way caused a decline in the survival rates of juvenile fish.

[418] Dr. McAdam expresses the opinion that "recruitment failure is ultimately a consequence of river regulation", and he even acknowledges the logic of the argument that "fully restoring the natural flow regime should restore recruitment".

[419] DFO's 2014 Recovery Strategy report issued pursuant to *SARA* ascribes the White Sturgeon's endangered status to river regulation:

> The life history of white sturgeon is closely linked to river hydrology. White sturgeon are endangered in the Columbia, Kootenay, and Nechako rivers where the flows are highly regulated; additionally the Nechako River is subject to substantial out of basin diversion. The precise mechanisms responsible for population decline and recruitment failure are still unproven, but river regulation is heavily implicated.

[420] The plaintiffs submit:

> With all three sturgeon experts agreeing that the Dam and Diversion is the cause of the

> recruitment failure, it is unnecessary for the plaintiffs to establish the exact mechanism of factors through which the Diversion is scientifically impeding sturgeon recruitment. As stated in *Clements v. Clements*, 2012 SCC 32, the law does not require "scientific evidence of the precise contribution" of the defendant's conduct.

[421] I agree with this submission. The evidence is overwhelming that the recruitment failure of the Nechako White Sturgeon is the result of river regulation, namely, the installation and operation of the Kenney Dam and the related reservoir, and I find as a fact that this is the case. This is sufficient to fix RTA with liability for the tort of nuisance, assuming, of course, that the other requirements for such liability are also present and the pleaded defences do not apply.

[422] In the circumstances, it is not necessary to resolve the various differences of expert opinion or to comprehensively review the extensive scientific investigations and recovery efforts undertaken by the NWSRI over the past 20 years. The simple fact of the matter is that the physical habitat restoration experiments undertaken by the NWSRI have not (at least, not yet) produced any meaningful solution for reversing the recruitment failure, and the hatchery program has yet to produce meaningful long-term results and is not intended as a permanent solution to the problem in any event. The Nechako White Sturgeon currently remains at substantial risk of local extinction and harvesting of sturgeon is still prohibited, as it has been for nigh on 30 years.

[423] I do recognize that resolving some of the scientific disputes might better inform both certain defences and the type of remedy, if any, that might be available, but I will address those matters later in these reasons for judgment.

3. Chinook Salmon

[424] Chinook salmon are one of the five species of Pacific salmon that spawn in the rivers of British Columbia. All five species share essentially the same life history.

[425] Adult Chinook salmon spawn in late summer through fall and fertilized eggs are deposited in gravel nests (redds) on the riverbed. Fry emerge from the redds in the spring and rear in freshwater for a few months before migrating to the ocean or alternatively, they remain in freshwater for an additional year as parr (also called fingerlings) and migrate to the ocean as smolts the following spring. The salmon then typically spend one to three years at sea and return to their natal stream to spawn. As with all salmon, the fish die after they have spawned.

[426] The Nechako Chinook spend their first summer and winter in freshwater before going to sea in their second year of life. The number of salmon returning to their spawning grounds is referred to as "escapement" because these fish have "escaped" fisheries during their return migration. The total "run size" is a figure that is basically reconstructed by adding the sum of escapement to the number of fish harvested in either the ocean or the rivers during migration.

[427] Five-year-olds are the dominant age class, followed by four-year-olds, although in some

years, four-year-olds will predominate. Small numbers of three-year-old, six-year-old, and seven-year-old fish also occur in the Nechako population.

[428] Stock assessment data can be aided by coded-wire tag programs carried out by fisheries agencies along the Pacific Coast. They help the analysis of ocean distribution patterns, fishery impacts, and survival rates of salmon. However, there has never been any coded wire tag program in respect of the Nechako Chinook.

[429] Canada's *Wild Salmon Policy* (DFO, 2005) allocates salmon populations to "conservation units" ("CUs") with abundance assigned coloured zone status (green, amber, and red indicating healthy, cautionary, and at risk of extirpation respectively). Two of the three CUs that represent Upper Fraser Chinook are classified Red, whereas the Nechako Chinook are within the third CU (CK–11), which is classified as Amber.

[430] Annual estimates of the number of spawning salmon (the spawning "escapement") are the most relevant data to assess the health or status of the stock. The quality of such data depends on the enumeration method utilized.

[431] Escapement records for the Nechako River exist from 1925 to the present. Before 1974, however, those estimates were simply based on fishery officer observations and the reliability of escapement estimates was questionable.

[432] It will be recalled that the Nechako Fisheries Conservation Program (NFCP) was established to implement the 1987 Settlement Agreement which was incorporated into RTA's Amended Water Licence that same year. The Technical Committee of the NFCP produced a report in 2016, "*Historical Review of the Nechako Fisheries Conservation Program: 1987-2015*" ("2016 *Historical Review*"), which included the following paragraph related to escapement data collected between the years 1951 and 1960:

> The Technical Data Review (NFCP 2005) compiled all of the Nechako River Chinook escapement data that has been collected since 1951 (Figure 6). Based on information in [a 1988 study], the largest chinook escapements to the mainstem of the Nechako River prior to the inception of the NFCP were recorded in 1951 (3,500) and 1952 (4,000) before the construction of the Kenney Dam and the regulation of the upper river. Escapements fell ten-fold with the closure of the dam (1952), but between 200 and 1,500 spawners were reported in the next four years (1953 to 1956) as the last progeny of the pre-dam era returned from sea to spawn. By the fifth year, 1957, no spawners were reported and none were observed in 1958 and 1959. Then in 1960, a total of 75 spawners were reported; escapement slowly increased thereafter. In recent years escapement has exceeded the recorded pre-dam escapements.

[433] Figure 6 in that report is a chart of Chinook escapements to the Nechako River between 1951 to 2015:

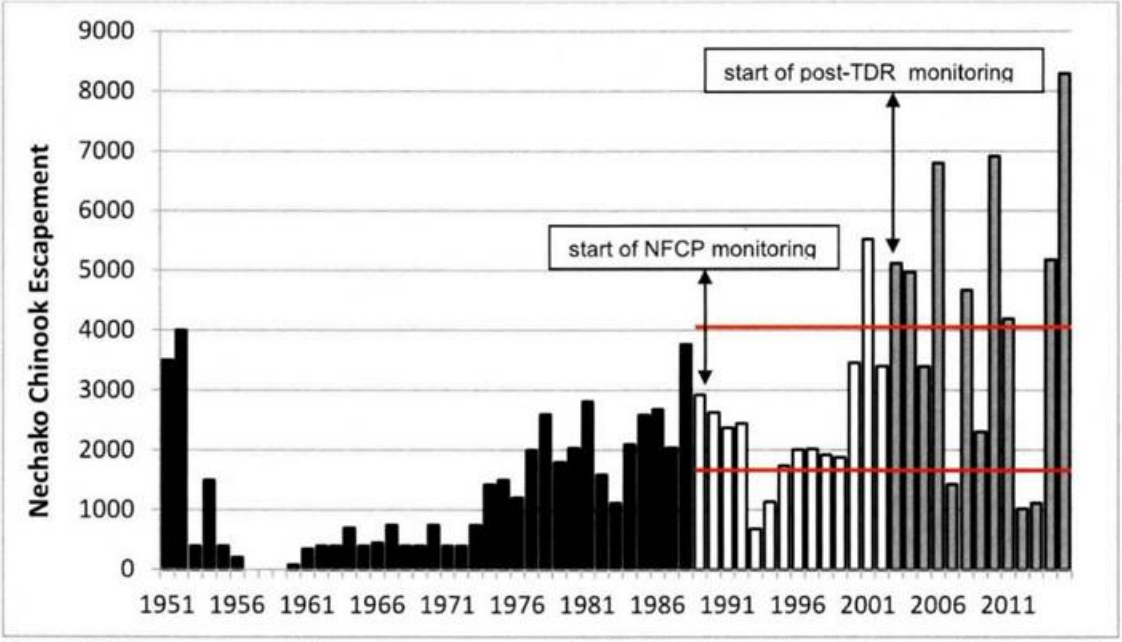


Figure 6. Time series of Chinook escapements to the Nechako River between 1951 - 2015. Black shaded bars indicate data from Jaremovic and Rowland (1988), white bars indicate NFCP monitoring results analysed in the TDR (NFCP 2005) and grey-shaded bars indicate NFCP monitoring results collected after the TDR evaluation (NFCP 2015). Horizontal red lines indicate the upper and lower limits of the Conservation Goal established following the 1987 Settlement Agreement.

[434] DFO refined its enumeration techniques in the mid-1970s and in the following decade adopted an “Area-Under-the-Curve” (“AUC”) methodology. The AUC method uses both periodic helicopter counts of spawning numbers during fall Chinook spawning and estimates of the time female spawners spend on the redd (nest) in the calculation of the spawner population size.

[435] The escapement numbers for the Nechako Chinook population in the years 1985- 2017, which are accepted by all parties as being generally accurate, are as follows:

Nechako Chinook Data

Escapement Year	Total Escapement	Escapement Year	Total Escapement	Escapement Year	Total Escapement
1985	2,591	**1996**	2,005	**2007**	1,428
1986	2,685	**1997**	2,021	**2008**	4,670
1987	2,042	**1998**	1,919	**2009**	2,310
1988	3,765	**1999**	1,876	**2010**	6,915
1989	2,928	**2000**	3,459	**2011**	4,200
1990	2,628	**2002**	3,397	**2012**	1,021
1991	2,371	**2001**	5,526	**2013**	1,117
1992	2,451	**2003**	5,121	**2014**	5,183
1993	685	**2004**	4,978	**2015**	8,291
1994	1,138	**2005**	3,393	**2016**	3,138
1995	1,736	**2006**	6,803	**2017**	588

[436] Figure 6 in the NFCP's 2016 *Historical Review* report referred to above illustrates a long-term upward trend in Nechako Chinook escapement since 1957 when, following the construction of the Dam, escapement was reduced to zero. All three expert witnesses, Mr. Cass, Dr. Korman, and Mr. Rublee, independently conducted a trend analysis comparing the escapement trends of Nechako Chinook with other Fraser River stocks. They all reached the same conclusion, namely, that since at least 2001, the escapement trend of the Nechako stock has actually outperformed the majority of other Fraser River Chinook stocks.

[437] The plaintiffs acknowledge the positive trend but argue this is not necessarily a sign of a sustained healthy population. They point to the 2017 escapement of 588 fish as the lowest on record since DFO started collecting reliable data, a sure indicator of the fragile state of the Nechako Chinook stock. They say, and their expert Mr. Cass opines, that regulation of the river and the elimination of the spring freshet serves to suppress production of the fish, thereby materially contributing to its threatened condition. They point to recent high flow years (e.g. 2007, 2011, 2012) which were followed by elevated returns three to four years later. They acknowledge the sample may be too small to provide scientific statistical conclusions but suggest the correlation is very compelling and is sufficient to meet the balance of probabilities standard of proof.

[438] It must be said that the evidentiary foundation for finding that regulation of the Nechako

River is continuing to suppress Chinook productivity is rather thin. As before, the theoretical logic is compelling; i.e., the natural flow, including the powerful spring freshet, expands and improves the diversity and productivity of fish habitat within the floodplain and therefore promotes a healthier fish population. However, Mr. Rublee, who has 40 years of experience conducting freshwater salmon studies, 20 years of which were related to the Chinook salmon in the Nechako River under the auspices of the NFCP, provided essentially uncontroverted evidence that the Nechako river habitat conditions have been stable and capable of sustaining a healthy Chinook population whose numbers are trending upwards as the years go by (albeit with a notable recent exception in the year of 2017).

[439] Perhaps not surprisingly, Mr. Rublee's testimony is confirmed by the NFCP 2016 *Historical Review* report referred to above and an earlier report published by the NFCP in 2015, "*Trends in Adult Chinook Salmon Escapements in the Nechako River: Results from 26 years of NFCP Monitoring*". The reports discussed the NFCP's various Chinook monitoring programs, including fry emergence and juvenile out-migration, and concluded that Chinook habitat conditions have remained stable and that "flow regulation has not induced a deterioration of habitat quality of the time".

[440] Clearly, there is a region-wide decline in Chinook productivity such that many conservation units are at risk of extirpation. The precise cause appears to be unknown and, although poor ocean conditions are frequently mentioned in that regard, there are many factors affecting the population dynamics of the Chinook that are poorly understood.

[441] On the whole of the evidence, I conclude and find as a fact that, while the installation and operation of the Kenney Dam and related reservoir initially had a devastating effect upon the Nechako Chinook traditionally spawning between Cheslatta Falls and the confluence of the Nechako and Nautley Rivers, the fish have proved to be remarkably resilient and their population has rebounded to pre-dam levels. I agree it is entirely possible that restoration of a somewhat more natural flow regime in the river, particularly a spring freshet, might improve the health of the Chinook population even more; however, I am not satisfied based on the evidence before me that such an outcome is more probable than not. The possibility may still be factored into the analysis of remedies in due course. At the same time, the escapement statistics may also be taken into account when limitation defences are considered.

4. Sockeye Salmon

[442] Like the Chinook, sockeye salmon also migrate between the Pacific Ocean and the rivers in which they were spawned. They return to the spawning grounds mainly at age four or five, after spending two to three years in the ocean. The timing of entry into the mouth of the Fraser River varies by population.

[443] Various runs of sockeye salmon use the Nechako River downstream of the Nautley River as

a migration corridor on their way to spawning grounds in the Stuart and Nautley watersheds. These sockeye have one of the longest migrations of any Fraser River sockeye, travelling up to 1,000 km or more. They are grouped by DFO's *Wild Salmon Policy* into four conservation units known colloquially as the Early Stuart, the Nadina, the Late Stuart, and the Stellaquo populations.

[444] Unlike the Chinook, these sockeye salmon only spend a matter of days in the Nechako River during their migration to and from the ocean. The plaintiffs claim, however, that regulation of the Nechako River has resulted in a shallower and warmer river whose temperatures are lethal to sockeye returning to their spawning grounds. Whether it be en-route mortality (death before actually reaching the spawning grounds) or pre-spawn mortality (death at the spawning grounds before spawning occurs), the plaintiffs claim the result is a reduction in the number of spawning fish and hence a significant contribution to the overall demise of the sockeye salmon which they have traditionally harvested for sustenance since time immemorial.

[445] The reduction in flow and the resulting increase of potentially lethal temperatures for sockeye was the genesis of the Summer Temperature Management Program (STMP) mandated as part of the 1987 Settlement Agreement incorporated into RTA's Amended Conditional Water Licence issued December 29, 1987. Section 2.1A(b) of the 1987 Settlement Agreement obligated RTA to release a certain Annual Water Allocation through the Skins Lake Spillway, "plus such additional flows as are determined to be required for cooling purposes by the Computer Models and Protocol".

[446] Schedule "C" to the 1987 Settlement Agreement specified the default volume of water releases required for each month of the year. The volumes specified for the months of July and August were marked by an asterisk which explained that the specified volume was to be supplemented by "additional flows as are determined to be required for cooling purposes".

[447] In May 1989, the Technical Committee of the NFCP determined the temperature criteria for cooling purposes as (1) eliminating all occurrences of mean daily water temperatures above 21.7°C, and (2) reducing occurrences of mean daily water temperatures above 20.0°C when compared to the historical data (exceedances of 20.0°C on 3.88 days per year). The temperature restrictions were to be monitored upstream of the confluence of the Nechako and Stuart Rivers during the period July 10 to August 20 of each year.

[448] The NFCP data indicate that the four major stocks migrating through the Nechako River to their natal spawning grounds do so between the following dates:

Nechako River Basin: timing of adult sockeye migrations

Nechako River location	Nadina run				Stellako run		Stuart run			
	early		late				early		late	
	earliest date	latest date	earliest date	latest date	earliest date	latest date	earliest date	latest date	earliest date	latest date
Prince George	Jul 18	Aug 14	Jul 25	Aug 21	Aug 12	Sep 29	Jul 10	Aug 09	Aug 01	Sep 06
Stuart	Jul 20	Aug 16	Jul 27	Aug 23	Aug 15	Oct 02	Jul 12	Aug 11	Aug 03	Sep 08
Nautley	Jul 22	Aug 18	Jul 29	Aug 25	Aug 18	Oct 05				

An individual sockeye migrating to Nadina or Stellako typically spends 4 to 6 days in the Nechako from Prince George to the entrance of the Nautley River.

[449] The plaintiffs adduced evidence that the 20°C threshold has been regularly exceeded over the years, at least 55 days between 2004 and 2014. In this latter year, 2014, mean daily temperatures reached as high as 23.8°C. Between 2010 and 2015 there was an average of 4.83 exceedances between July 20 and August 20 and 6.83 exceedances over the same six-year period if the start date is brought back to July 10.

[450] Quite apart from emphasizing the failure of the STMP to prevent exceedances beyond 20°C, the plaintiffs challenge the threshold temperature as inadequate in any event. They say that the 20°C target is simply “too high, virtually guaranteeing that even when it is achieved the Diversion is harming and likely killing sockeye”. It is on this question that much of the expert witness debate was centred.

[451] The primary expert opinions regarding the sockeye salmon were provided by Mr. Cass on behalf of the plaintiffs and Dr. Steven Cooke on behalf of RTA. Canada had served an expert report by Dr. Steve McDonald, apparently DFO’s lead investigator into water temperatures in the Nechako and who had testified before the Cohen Commission that 18°C would be a better STMP target than 20°C “if it was doable”. Mr. Cass prepared a reply report to Dr. McDonald’s evidence, however, Dr. McDonald was not actually called by Canada to testify at the trial and his expert report was not put into evidence.

[452] Although she was also not called as a witness, both Mr. Cass and Dr. Cooke referred to the “ground-breaking research” of Dr. Erika Eliason from UBC identifying stock-specific thermal tolerances of Fraser River sockeye, including those migrating through the Nechako River. Dr. Cooke described the Eliason work as “remarkable”, noted that it had been published in “the most eminent journal in the field in the world”, and explained that it was “quite a ground-breaking study that actually provides the data needed to help identify what those temperature thresholds are for these fish”.

[453] Dr. Eliason's work, including her Ph.D. thesis and subsequent articles, involved subjecting the wild fish to swimming tests and recording oxygen consumption at different speeds and water temperatures. She used the resulting data to generate a graph depicting maximum aerobic scope at different temperatures. Her results indicated that 100 percent aerobic scope was available to the Stellako, Nadina, and Late Stuart sockeye at 16.8°C and to Early Stuart sockeye at 17.2°C, whereas 90 percent of aerobic scope was available to the former at 19.0°C and to the Early Stuart at 19.9°C. She concluded that, while it is simply unknown exactly how much aerobic scope is required for successful river migration, perhaps approximately 90 percent of aerobic scope would be necessary for upriver populations experiencing greater migration difficulty, i.e., in the case of the Nechako Chinook, an actual (not mean) temperature at or below 19.0°C.

[454] Mr. Cass noted that Dr. Eliason's lab research did not measure the other indirect effects of warmer water temperatures such as disease, parasites and immunity suppression that salmon experience as they migrate upriver. These indirect effects suggest the maximum temperature to ensure a safe migration should perhaps be even lower and, indeed, Mr. Cass advocates that a mean daily target of 18°C is the appropriate temperature for the STMP.

[455] The plaintiffs referred to the December 1994 B.C. Utilities Commission Report reviewing the Kemano Completion Project. That report concluded a water release facility should be built at the Kenney Dam to "ensure better protection of sockeye than now exists" and explained:

> The proposed regime for the regulation of temperature calls for a target of 19.4°C as a mean with the objective of not exceeding 20°C. To guard against the occurrence of temperatures in excess of 20°C a target would need to be set at 18.9°C. A target of 18.4°C would provide better protection against stress and might also reduce temperature in the Nechako down to Prince George.

[456] The plaintiffs, and indeed Mr. Cass also, referred to Dr. McDonald's evidence before the Cohen Commission that 18°C would be a better STMP target than 20°C. They also reminded the Court of the February 1986 assessment of DFO scientist, Dr. Don Alderdice, that 23°C would provide no protection at all and even temperatures of 20°C would not be protective but rather would pose a moderate risk to the migrating sockeye salmon. Dr. Mundie of course expressed a similar opinion at the time.

[457] The defendants rely heavily on Dr. Cooke's opinion that the 20° temperature target under the STMP is indeed protective of the sockeye. They say that, unlike Mr. Cass, Dr. Cooke is a renowned expert in the field of fish physiology and his evidence should be preferred over any attempted reliance upon materials or statements by individuals (including Dr. McDonald and Dr. Eliason) who have not actually provided expert testimony at this trial. They point out as well, that the plaintiffs have not actually adduced any statistical evidence linking mortality to higher temperatures in the Nechako (an assertion which they say is not supported by the available mortality data) and that the plaintiffs' arguments on this point are nothing other than impermissible speculation. They argue the plaintiffs' evidence falls far short of establishing actual loss attributable to elevated temperature.

[458] There is no doubt that the installation and operation of the Kenney Dam and related reservoir has substantially reduced the natural flow levels and volume of water in the Nechako River. This alone does not necessarily mean that the water temperature of the river is higher because it is, of course, also influenced by the prevailing weather conditions and their impact on ambient temperature and the ground.

[459] Nevertheless, the very rationale for having the STMP in the first place is that the altered hydrograph will otherwise result in higher temperature water during the spawning migration. The question for present purposes is whether the STMP has sufficiently neutralized any increase in water temperature and associated risk to the health of the sockeye that would otherwise have occurred.

[460] I recognize that the observations by Dr. Alderdice, Dr. Mundie, the BCUC, and even Dr. McDonald may be inadmissible for the truth of their contents, but the very fact such observations have been made amply illustrates the scientific uncertainties regarding the effects of temperature upon migrating salmon and the appropriate criteria for the programming of abatement measures.

[461] Dr. Cooke himself noted in a paper he co-authored in 2008:

> As water temperatures continue to increase above their optimal values (above 16°C), salmon show increased levels of stress as well as increased parasite loads that can cause mortality.

Both he and Mr. Cass obviously agree that high temperatures during upriver migration increase susceptibility to pathogens and thus the likelihood of pre-spawn mortality.

[462] During cross-examination, Dr. Cooke also acknowledged that the STMP goal of 20°C is a mean daily temperature, and that water temperature fluctuates naturally between three to four degrees during any 24 hour period, peaking at a high in the late afternoon and a low overnight. This, of course, means that a mean daily temperature of 20°C might involve sockeye exposure at 21 or 22°C for several hours during the relevant 24-hour period.

[463] I am persuaded by the evidence of Mr. Cass and the work of Dr. Eliason, as endorsed by the experts who testified, that a temperature threshold of 20°C is inadequately protective of the sockeye salmon during their migration through the Nechako River and that a threshold of 19°C, if not 18°C, would be much more effective in that regard. I find as a fact that such is the case.

[464] I have no doubt that some, perhaps many, of the migrating sockeye salmon, are extremely resilient, notwithstanding the fact that they are nearing the end of their lives and have been weakened by an extremely arduous migration of almost 1,000 km since entering the Fraser River. While precise mortality numbers are not available, I am also satisfied on a balance of probabilities, and I find as a fact, that temperatures exceeding 19°C have regularly occurred in the Nechako River during the spawning migration and have caused or at least contributed to the pre-spawning mortality of many migrating sockeye. Whether such mortality is sufficient, either on its own or in

combination with other harm, to sustain a cause of action for the tort of nuisance is a matter addressed next in these reasons for judgment.

[465] It is also clear that factors other than temperature during migration have substantially contributed to the decline in the population of the migrating salmon that would otherwise be harvested by the plaintiff First Nations.

[466] The Cohen Commission was unable to identify any single cause which explained the alarming two-decade decline in sockeye productivity. It suggested that the cumulative effect of multiple stressors, both particular to the river and also region-wide, may be more important than any single factor. It did note that the ocean environment appeared to be particularly implicated in the broad-based regional decline of sockeye salmon stocks.

[467] There is no shortage of research studies, both before, after, and in evidence at the Cohen Commission undertaken by COSEWIC, DFO, academics, and others, identifying the various factors causing or contributing to the decline in the Fraser River salmon stocks. Climate change has negatively impacted both marine and freshwater habitat conditions. It has resulted in increased water temperatures and changes in snowpack accumulation and groundwater availability. Ecosystems are constantly modified by water extraction, forestry activity, wildfires, and agricultural, industrial, or residential development. Pollution is a major contributor, as is fishing and harvesting. Natural events such as the recent Big Bar rockslide create significant barriers for migration. Flood control and river regulation due to hydroelectric developments are obvious contributors to riparian habitat change, but they are only one among a long list of other contributing factors to the decline in population.

XII. IS LIABILITY IN NUISANCE OR FOR BREACH OF RIPARIAN RIGHTS ESTABLISHED?

A. Nuisance

[468] I have found as a fact that regulation of the river is the root cause of the population decline of the Nechako White Sturgeon, a decline so severe that the species is currently at risk of imminent extirpation.

[469] I have found as a fact that regulation of the Nechako River initially had a devastating effect upon the resident population of Chinook salmon but that the Chinook have proved to be remarkably resilient and that their numbers, while still fragile and subject to variability, have generally rebounded to match the estimated escapement in the years immediately before the construction of the Dam. That devastation obviously would not have occurred had the Dam not been constructed, and it is also entirely possible that the Chinook population might even have grown further had the natural hydrograph remained intact. The evidence in this case, however, is not sufficient to convert that possibility into a finding of fact even on the unscientific and less demanding balance of probabilities standard of proof.

[470] Finally, I have found as a fact that regulation of the river has resulted in water temperatures regularly exceeding 19°C during the spawning migration of the sockeye salmon, which in turn has caused or at least contributed to premature mortality, reducing the number of fish successfully spawning and thus contributing to a decline in the population of the four sockeye stocks that migrate through the Nechako River. The precise extent by which such premature mortality of the migrating sockeye exceeds what would have occurred in a natural hydrograph cannot be determined with precision, but I am satisfied on the balance of probabilities that it is not insignificant, and hence it is a contributory cause to the overall decline of that sockeye population.

[471] The question then is whether the resulting decline in the Nechako White Sturgeon and salmon fishery amounts to an interference with the plaintiffs' Aboriginal right to fish that is both substantial and unreasonable, a test that assesses whether the effect goes beyond the "give-and-take" expected in today's society to impose a disproportionately severe burden on the plaintiffs. If so, the defendant RTA will be liable to the plaintiffs for the tort of private nuisance unless it is immunized by one or more of the legal defences raised including defences based on statutory authority and legislation prescribing limitation periods for the institution of litigation.

[472] I have no hesitation in finding as a fact that the reduction of the salmon and Nechako White Sturgeon resources in the Nechako River, Fraser Lake, and Stellako River have had very profound impacts upon the plaintiff First Nations. The salmon fishery, in particular, has always been central to the life and culture of the Saik'uz and Stellat'en (and of course the other First Nations in the region). It was their principal food source. Salmon was dried and preserved in large quantities as a means of sustenance during the winter. The simple fact of life, as noted by Father Morice, was that "without salmon they starve".

[473] Most of the First Nations witnesses gave evidence respecting catching and processing salmon, the abundance and later decline in the fishery, and the impact of that decline, not just as an available food resource but also the resulting loss of culture and community. All of this evidence was essentially uncontroverted and I accept it without reservation. I will not recite this evidence at length but a few examples will illustrate the content.

[474] Many witnesses produced photographs of historical fishing activity by family members (identities omitted), below.

Exhibit 285, p.9 - Cousins with a sturgeon at Wedgwood in the 1970s

Exhibit 285, p.5 - Removing salmon from a net in Wedgwood - 1980s

Exhibit 13, p. 6 - A typical catch during the late 1970s/early 1980s

Exhibit 13, p.9 - Fish processing at a house

Exhibit 42 - Mending a net at Stellaquo

Exhibit 43 - A man with a sturgeon outside his home

Exhibit 13, p. 141 - Sturgeon and sockeye drying in a smokehouse

Exhibit 66 - Stellat'en elder teaching youth at SFN Salmon Fest

[475] Witnesses described how fishing enabled cultural transmission, including the teaching of spiritual practices as well as other important values. Several described offerings to their ancestors. Ms. Thomas stated:

> [W]hen the first salmon come that is a new year. The new year. We always celebrate that first salmon, and we always give some piece of that food after we cook it . . . [Y]ou put some of your first salmon in smoke so you feed our ancestors, and they remember, and you are being respectful to our ancestors.

[476] Ms. Reynolds described what she learned from her grandmother while fishing:

> I learned about respect and hard work. My grandmother worked so hard, and she taught us to be . . . so happy when we were working, and we never were angry like oh, have to go set the net now or anything like that. We were always happy and enjoyed ourselves, so we learned to be respectful. And she told us to be respectful of everything that we were working with because if you are disrespectful, it is just like insulting the salmon. And then the salmon will not come back. And we had to be respectful to everything that we worked with. And she taught us to pray when we were—before we were going out to pray for the salmon and to pray for our safety and to pray for protection. And it was just—you know, I think that has helped me throughout my entire life.

[477] Several witnesses testified about the decline in salmon returns over the past 40 years. Ms. Thomas testified that by the late 1980s the quantity of salmon she and her family caught each season had declined by half. She stopped setting her own net for salmon in 1991 but in 2016 helped two of her aunts set net for a couple of days in Fraser Lake, and at the peak of the salmon season, they only caught ten fish.

[478] Ms. Nooski described salmon season on the reserve now as:

> Too quiet. There is nothing to be happy about. There is no salmon. That is our main food source that us elders like to have, and now we cannot get it.

[479] Mr. Mole described how his family stopped going annually to Wedgewood because:

> [W]e were not catching enough fish to survive on, and we had to go get work to go get food.

[480] Ms. Thomas testified how the Saik'uz' First Nation has been obliged to purchase some salmon from other communities because of the insufficient harvest. She noted:

> [I]t is nutritionally a little bit, but honestly, giving out less than 1% of what we would usually already have free access to is not the same.

She also noted that approximately 70 percent of her community are unemployed and rely on social assistance. They cannot afford to buy fish at the grocery store.

[481] Several witnesses described the cultural impact of the fisheries' decline. Ms. Alexis stated:

> I taught my children and my grandchildren how to fish and hunt and the other skills that I learned from my in-laws at Finmore. Passing down that knowledge and my culture is very important to me. It is much harder to teach our grandchildren our traditions with so few fish and without being able to take any sturgeon. I have showed my children how to prepare sturgeon, but I do not think my grandchildren will ever learn or even see it done because

> there are so few left.

[482] Ms. Reynolds stated:

> It is very difficult to have your—to keep your culture alive and to teach the kids your culture because we learn those lessons for—through fishing. We learn those lessons through hunting. We learn those lessons through picking berries. Every time you are out there doing stuff, you are taught how to take care of everything, and if you are not able to do that then is very difficult to teach. Like, the salmon has been part of our lives for so many years, and . . . it's so important to us. That's what has kept our people alive through generations and generations, and we need to have it.

[483] While the decline in the salmon fishery has been substantial, the decline in the Nechako White Sturgeon fishery is total; fishing sturgeon has been prohibited for almost 30 years because they are on the point of extinction.

[484] Nechako White Sturgeon were clearly not harvested in the same volumes as salmon but the evidence is also very clear that it was part of the plaintiffs' diet and one that was, as A.C. Anderson observed, "highly prized". Anderson's map depicts "sturgeon fishery" locations in the watershed, including locations on the Nechako River. Mr. Inglis expresses the opinion that these were Dakelh fisheries, something the early journals and records seem to confirm, and I prefer Mr. Inglis' evidence on this point over Mr. Dewhirst's speculation to the contrary.

[485] Several of the First Nations witnesses testified that sturgeon was a delicacy, saved for special occasions, and shared with the whole community. Ms. Thomas also stated:

> Our people know it as an old fish. It is an ancient fish. And they hold these things in a higher regard than just, you know, a regular, like, salmon.

[486] And of course, when it listed the species as endangered under *SARA* in 2006, the Federal Crown acknowledged the importance of White Sturgeon to First Nations for subsistence and cultural purposes.

[487] In *Antrim* at paras. 38-40*,* the Supreme Court of Canada noted that certain works or industrial undertakings may have significant utility to society and that such utility must be taken into account when determining whether negative impacts should found liability in nuisance. The current Aboriginal law construct permits such works to infringe upon Aboriginal interests should they be justified by compelling and substantial objectives related to the broader public good: *Sparrow,* at 1113. Industrial and economic development in remote areas of the province, including the production of hydroelectricity in particular, has been expressly identified by the Supreme Court as the type of undertaking which might be justified provided other legal requirements are also met: *Tsilhqot'in* at para. 83, citing *Delgamuukw* at para. 165.

[488] There is no doubt that if the construction of the Kenney Dam was being proposed today, it would trigger the procedural duties of the Crown to consult and to accommodate Aboriginal interests that might be affected: *Haida* at para. 35. This requires a proportionate balancing of

benefits against adverse effects on the Aboriginal interests. It is not, however, the same balancing exercise that is required of the court in a lawsuit asserting liability for the tort of nuisance.

[489] When the Kenney Dam was built in the 1950s there was no consultation with the Dakelh (Carrier) First Nations, including the plaintiffs in this case. This was acknowledged by the Supreme Court in the first paragraph of *Rio Tinto* 2010. However, the Court also noted that "past wrongs, including previous breaches of the duty to consult, do not suffice" to trigger retroactive consultation at some later date (para. 45). The Court stated, at para. 49:

> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.
>
> [Emphasis in original.]

[490] Since the duty to consult is imposed only upon the Crown and not upon third parties such as RTA, the reference to possible damages for past breaches of the duty to consult presumably means the Crown might have liability to the plaintiff First Nations for damages related to their past and perhaps ongoing involvement in the construction and operation of the Kenney Dam and its related reservoir. Interestingly, Article 28 of *UNDRIP* is to the same effect. However, no such claim for damages against the Crown is pursued in this case.

[491] Unlike the Crown, RTA has no constitutional obligation to consult and accommodate First Nations' interests or concerns, although of course there may be sound business reasons for doing so. RTA, however, is nonetheless exposed to liability in tort (the tort of nuisance in particular) if the installation and operation of the Dam results in a substantial and unreasonable interference with Aboriginal interests such as ownership and occupation of land, or fishery rights associated with such land and the rivers or lakes within or adjacent to it. Such liability can exist even where RTA has complied with all contractual obligations and licensing requirements imposed by the Crown. It is not the nature of RTA's conduct that is the focus of inquiry, but rather the character and extent of the interference with the plaintiffs' interests.

[492] In this case, I have concluded that the installation and operation of the Dam and related reservoir has indeed interfered with the plaintiffs' Aboriginal interests in the fishery associated with their traditional territory. In particular, it has caused or contributed to a substantial decline in the population of both Nechako White Sturgeon and sockeye salmon to the extent that the former is at risk of extinction and the fishery of the latter has become a mere shadow of its former abundance. It also had a devastating effect on Chinook salmon, although the population of that particular species appears to have since recovered.

[493] The plaintiffs have a unique interest in their fishery, one that is entirely distinct from other non-Aboriginal members of society. The fishery, particularly the salmon, has always been their principal source of food and has been central to the plaintiffs' very existence since time immemorial. Not surprisingly, it is also a central component of their cultural practices and spiritual beliefs. The decline of the fishery has thus had, and continues to have, a substantial impact upon the plaintiffs as an Indigenous community, one that is hugely disproportionate to the burden imposed on the non-Aboriginal population of the region. It follows that since the Kenney Dam and related reservoir has caused or contributed to the substantial decline of the fishery, RTA must be found liable to the plaintiffs for the tort of private nuisance unless it is immunized by defences based on statutory authority or limitations legislation.

[494] Before addressing possible defences available to RTA, however, I will first address the further and alternative basis upon which the plaintiffs seek to impose liability upon RTA, namely, riparian rights.

B. Water Law and Riparian Rights

1. Applicable Legal Principles

[495] The law regarding ownership and use of water in lakes and rivers is complicated, all the more so when it also involves Aboriginal rights, whether s*ui generis* or related to reserves. While there is considerable, potentially confusing, overlap in the subject matter (land, water, fish), different legal principles apply depending on the nature of the claim and the status of the claimant.

[496] Claims can fall into one or more categories, each of which is governed by distinct legal precepts, i.e. claims based on:

1. ownership of the bed of the river or lake (*ad medium filum aquae*);
2. ownership of the land abutting the water (the bank) (known as riparian rights);
3. public rights such as navigation, flotation, and fishing;
4. an interest in reserve lands; and,
5. *sui generis* Aboriginal rights.

[497] Each category of rights is impacted by the English common law imported into British Columbia on November 19, 1858, as modified by subsequent legislation and case law.

a) *Ad Medium Filum Aquae*

[498] The English common law principles governing water rights reflected the concept that property rights were for the most part either vested in the Crown or derived from Crown grants, with some residual interest, of a non-proprietary nature, being vested in the public. Historically, grants of land adjoining a watercourse would often make no specific mention of the water or its bed. One of

the common law rules that developed in England was that if the water is tidal, a grant of land adjoining the water extends only to the ordinary high water mark, but where the water is non-tidal, the presumption was that the grant included the riverbed to the centreline of the water ("*ad medium filum aquae*"). In other words, an owner who had a river running along the boundary of their property owned half of the bed of that river for the length of the boundary, but an owner who had a river running through their property would own the entire bed of the river between those points where it entered and left the owner's land.

[499] The Supreme Court of Canada has held, however, that the *ad medium* principle does not apply to navigable waters in British Columbia: *R. v. Lewis*, [1996] 1 S.C.R. 921 and *R. v. Nikal*, [1996] 1 S.C.R. 1013.

[500] Where ownership of the waterbed existed at common law, such ownership included everything above or below the land except game and fish, which must first be appropriated, and water, which at common law did not form the subject of ownership. The ownership did, however, include exclusive rights of hunting and fishing.

b) Riparian Rights

[501] Quite apart from rights arising from ownership of the waterbed, the common law also granted "riparian rights" to owners of the bank, the land abutting the lake or river, regardless of who owned the waterbed. The name "riparian rights" is actually derived from the Latin word for bank, *ripa*. Such common-law riparian rights were generally considered to include:

1. The right of unobstructed access to the water (for navigation, non-exclusive fishing, etc.);
2. The right of drainage;
3. Rights related to the flow of water, including:
    - the right to have the water flow in its natural course;
    - rights preventing the alteration of the flow to property downstream;
    - rights preventing permanent extraction of water from the stream; and,
    - the right to have water leave one's land in its accustomed manner.
4. Rights relating to the quality of water (i.e., pollution issues);
5. Rights relating to the use of the water; and,
6. The right of accretion (ownership of any new land created by the silting up of soil or by a decrease in water levels).

See generally, Gerard La Forest, *Water Law in Canada: the Atlantic Provinces* (Ottawa, Information Canada, 1973), as updated in Anne La Forest, *Anger & Honsberger Law of Real Property,* 3rd ed. (Toronto: Thompson Reuters, 2021) at Ch. 19 [*Anger & Honsberger*].

[502] In most provinces, and particularly in British Columbia, all of the above English common law water rights have been significantly modified by statute and by case law in the Canadian courts. English common law was received in British Columbia on November 19, 1858. Almost immediately thereafter, as a result of the Gold Rush, the colony passed legislation starting to regulate water rights by allocating exclusive use of defined quantities of water instead of by property ownership.

[503] Section 109 of the *Constitution Act*, *1867*, gave the four original Provinces to Confederation property rights over "all lands, mines, minerals and royalties", and s. 117 provided that the Provinces retained "their public property" "not otherwise disposed of". The word "lands" in s. 109 of the *Constitution Act*, *1867*, has been judicially interpreted to include all waters, rivers, bays, gulfs, and straits that are within the boundaries of the province.

[504] In 1892, British Columbia enacted its first statute dealing exclusively with water rights: *Water Privileges Act*, 1892. Section 2 of that *Act* provided that "[t]he right to the use of all water at any time in any river, water-course, lake or stream" is vested in the Crown in right of the Province. Section 2 further provided that no person shall divert water from any river, water-course, lake, or stream unless authorized by legislation. Section 3 made it clear that riparian owners were not entitled to exclusive use of water.

[505] The *Water Privileges Act,* 1892, was judicially interpreted to mean that the common law riparian rights of landowners have been eliminated: *Cook v. City of Vancouver*, [1914] A.C. 1077, 18 D.L.R. 305 (P.C.).

[506] In 1925, the then *Water Act,* 1924*,* was amended to grant the province exclusive property rights in provincial waters:

> 4. The <u>property in</u> and the right to the use of all the <u>water</u> at any time in any stream in the Province <u>is for all purposes vested in the Crown</u> in the right of the Province, except only insofar as private rights therein have been established under special Acts or under licenses issued in pursuance of this or some form of Act relating to the use of water.
>
> [Emphasis added.]

The current legislation, the *Water Sustainability Act*, s. 5, is to the same effect.

[507] The common law regarding private ownership of riverbeds or lakebeds has also been modified (eliminated) by legislation: see s. 55 of the *Land Act*, R.S.B.C. 1996, c. 245, as discussed in *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2021 BCCA 99, leave to appeal ref'd [2021] S.C.C.A. No. 111.

c) Public Water Rights

[508] The third category of water rights are those belonging to the public generally:

1. The right of navigation;

2. The right of flotation; and,
3. The right to fish.

[509] In England, the common law recognized a public right to navigate in tidal waters, but not in non-tidal bodies of water. In Canada, the common law rule is that the public right of navigation exists, whether the waters are tidal or non-tidal. The public right of navigation is also treated as paramount, and whenever it conflicts with the rights of the owner of the bed or of a riparian owner, the public right of navigation will prevail: *Anger & Honsberger* at 19:20.20. See also the Court of Appeal's discussion of navigable waters in the *Douglas Lake Cattle Company* case referred to above.

d) An Interest in Reserve Lands

[510] A potential fourth category of distinct water rights relates to lands set aside as Indian reserves. In *Lewis* and *Nikal*, the Supreme Court of Canada addressed the question of whether (apart from any *ad medium* presumption) the reserve allocation process gave rise to a proprietary interest on the part of the First Nations to the waters adjoining the reserves, or to the fisheries in those waters. In each case, the Supreme Court held that:

- government policy was against granting exclusive fishery rights to anyone, including First Nations;
- the Indian Reserve Commissioners who set aside reserves in British Columbia did not have the authority to grant fishery rights without the approval of the Department of Marine and Fisheries;
- the Department of Marine and Fisheries did not allow the grant of an exclusive fishery in perpetuity; and,
- the circumstances surrounding the setting of the reserves negated any intention to convey an interest in the adjoining waters.

On this basis, the Court held that the allocation of reserve lands that included part of a navigable river was not intended to convey any proprietary right as regards the river itself.

[511] Further and in any event, the BC Court of Appeal has already ruled in the 2015 Appeal Decision of this very case that since the lands for the plaintiffs' reserves were only conveyed by the province to the Federal Crown in July 1938, the extinguishment by legislation of common law riparian rights within the province had preceded that transfer. Such riparian rights did not form part of the transfer, and there is therefore no viable claim at law for interference with any riparian rights based on an interest in the reserve lands.

e) *Sui Generis* Aboriginal rights

[512] The fifth potential category of water use claims are those forming part of *sui generis* Aboriginal rights, including Aboriginal title to land. Here, the English common law does not apply, since the Aboriginal rights arise from pre-existing use and ownership of the land (and water) long before the arrival of any Europeans or their assertion of Crown sovereignty in 1846. Instead, the focus is on the pre-existing Aboriginal perspective including Indigenous legal precepts governing the ownership, use, or occupation of land and water.

[513] With respect to this fifth category of claim, the 2015 Appeal Decision held that, depending upon the evidence adduced and the factual determinations made at the trial of this case, it may be arguable that,

- any Aboriginal title the plaintiffs have to lands adjacent to water bestows "a similar kind of riparian rights" as those formerly associated with ownership of land at common-law; and,
- to the extent provincial legislation purports to vest rights in the province, it is "constitutionally inapplicable" insofar as such *sui generis* Aboriginal riparian rights are concerned.

These issues are before me in this trial.

2. Assessment and Determination

[514] While I have made a finding that the plaintiffs' historic use and occupation of Noonla and Stellaquo is sufficient to meet the test for Aboriginal title to those particular tracts of land (even if title cannot be recognized for procedural reasons), and in any case that use and occupation is sufficient to ground a claim in nuisance based on occupancy of the land, I have declined to decide whether the plaintiffs also have title to the beds of the rivers or lake adjacent to the land.

[515] The Court of Appeal has already ruled that the plaintiffs' interest in the land as an Indian reserve cannot support any claim for riparian rights. The issue of public rights to water are not invoked by the plaintiffs. Hence three of the above five categories related to water use entitlement do not apply in this case.

[516] The remaining question, then, is whether the plaintiffs in their capacity as "titleholders" of Noonla and Stellaquo have riparian rights under common law or as another form of *sui generis* Aboriginal rights.

[517] If the plaintiffs are simply invoking riparian rights as they currently exist at common law (as opposed to some sort of *sui generis* incident of Aboriginal title), they are confronted with the fact that riparian rights respecting water flow have been extinguished by provincial legislation. The argument that this legislative abolition is somehow "constitutionally inapplicable" (as in *Tsilhqot'in*) does not apply in such circumstances, because it is not an Aboriginal right per se that is affected, but only the common law the plaintiffs seek to apply.

[518] On the other hand, however, if there is indeed a similar form of riparian right available to the plaintiffs as a *sui generis* aspect of Aboriginal title, a different paradigm applies; provincial law cannot extinguish Aboriginal rights. Hence, it is certainly arguable that any Aboriginal title right to preservation of water flow continues to survive notwithstanding provincial water legislation to the contrary, (albeit, like title itself, subject to infringement of the limited sort still permitted by *Tsilhqot'in*).

[519] It seems to me that the right to fish adjacent waters is a necessary incident of Aboriginal title to land, and particularly so where such fishing was the primary source of sustenance for the First Nations concerned. In this sense, there is perhaps little or no distinction between that incidental right and any “stand-alone” Aboriginal right to fish. In my opinion, both can ground an action in tort in the appropriate circumstances.

[520] However, there is no evidence before me in this case that otherwise addresses ownership or control of water by the plaintiffs' ancestors before the arrival of Europeans or any later assertion of Crown Sovereignty in 1846. There is some (second-hand) evidence from anthropologist Fiske that riverbanks were territorial boundaries and that the rivers/lakes were transportation corridors, the navigation of which was not controlled by the adjacent *keyoh* holders. There is simply no evidence about ancestral practices regarding such things as diversion of water, altering drainage or waterflow, and the like. There may have been Dakelh laws governing such matters within the Dakelh traditional territories but, if so, I have heard no evidence about them. And again, I have heard no evidence from neighbouring First Nations about their use or ownership of the same waters.

[521] In the result, as with the claim for Aboriginal title to submerged lands, I decline to make a determination in *obiter* whether, as the plaintiffs claim, there exists as an incident to Aboriginal title an entitlement to “the undiminished flow of the Nechako River through the areas over which it holds Aboriginal title to the banks, including the places where it has traditionally conducted its fisheries”.

[522] I might add, in any event, that the diversion of water from and the alteration of flow within the Nechako River was expressly authorized by the Crown. Just like the claim in nuisance, any claim for breach of riparian rights thus also raises the defence of “statutory authority” and the plaintiffs’ arguments of “constitutional inapplicability”. I turn to these issues now.

XIII. THE DEFENCE OF STATUTORY AUTHORITY

A. Applicable Legal Principles

[523] The four main cases governing the defence of statutory authority in the province of British Columbia are:

1. *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181;
2. *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201;

3. *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416; and,
4. *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77.

[524] The cases are all discussed in the 2015 Appeal Decision when it was determined that the statutory authority defence was a triable issue which could not be determined on a summary judgment application. Tysoe J.A. quoted the classic formulation of the defence:

> [93] The defence of statutory authority was imported into Canadian law from England. The classic statement of the defence was made by Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.) at 183:
>
>> 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.

[525] The principles discussed in all of the cases referred to above can perhaps be summarized as follows:

- It is a fundamental principle of law that an act which is authorized by statute cannot be tortious. If the commission of a tort, i.e. nuisance or breach of riparian rights, is the inevitable result of exercising the statutory power, then the statutory power must be taken to have implicitly authorized the commission of that tort (*Sutherland,* at para. 66 citing *Tock*).
- The statute must authorize the work, conduct or activity complained of, either expressly or by necessary implication. The test focuses on what work, conduct or activity is actually authorized by the statute, rather than on the person upon whom the authority is conferred (*Sutherland,* at para. 67; *Ryan* at para. 43).
- In determining what work, conduct, or activity has been authorized, the court must consider not only the relevant statutes, but also subordinate legislation such as Orders-in-Council and regulations, and even contracts expressly authorized by those instruments such as leases (*Sutherland* at paras. 68-69, 75).
- Private parties (such as RTA) can rely on the defence of statutory authority if the work in question was authorized by statute (*Sutherland,* at para. 86 citing *Ryan*).
- A work is authorized by statute whether the statute is mandatory or permissive, so long as the work is actually carried out in accordance with that statute (*Sutherland,* at para. 113 citing *Tock*).
- The term “inevitable consequence” or “inevitable result” as used in the formulation of the test

is simply an expression for the necessary causal connection between the work authorized and the damage founding the tort (*Sutherland,* at para. 113 citing *Tock*). Liability cannot be avoided and the defence will not arise if the authorized work could have been or can be carried out in some other practicably feasible manner that would avoid the nuisance or other infringement of private rights (*Ryan,* at para. 55 citing *Tock*).

- Determining the practical feasibility of alternative methods of performing the work includes an assessment of possibilities according to the state of scientific knowledge at the time and a common sense appreciation of practicalities such as finances, expense, and other relevant circumstances (*Sutherland,* at paras. 105-106 citing *Tock* and *Ryan*).

[526] In the 2015 Appeal Decision, Tysoe J.A. suggested some possibly feasible alternatives that might be explored in determining whether any defence of statutory authority applies in this case including:

- whether the Kenney Dam could have been constructed in a manner that would have avoided the alleged nuisance;
- whether water could have been and can be released in a fashion that would avoid the alleged nuisance; and,
- whether RTA could have constructed an additional water release facility separate from the cancelled Kemano Completion Project.

[527] The plaintiffs' first and primary reply to RTA's defence of statutory authorization is that any such authorization is "constitutionally inapplicable". However, albeit in the alternative, they do also argue "the nuisance need not be the inevitable result of the authorizations", because there are "practically feasible alternative" ways to operate the Dam that would provide higher flows in the Nechako.

[528] I will deal with the issue of "constitutional inapplicability" in the next section of these reasons for judgment. Before that, however, I will address the preliminary questions: first, what work, conduct, or activity RTA has actually been authorized to undertake; and second, whether the damage alleged (diversion of water and harm to the fish/fishery) is the inevitable and unavoidable consequence of that authorized work, conduct, or activity.

1. The Authorized Work

[529] In Part IV of these reasons for judgment, I set out in detail the factual background to the construction of the Kenney Dam and the related reservoir, the diversion of the water to the Kemano hydroelectric plant, and the regulation of water flows from the Skins Lake Spillway to the Nechako River at Cheslatta Falls. I will not repeat all of that information here, but the salient points were as follows:

- The Province actively wooed RTA in the 1940s to undertake large-scale hydroelectric development in the province, including an offer of water licences on whatever terms RTA desired.

- The Province passed the *Industrial Development Act* which specifically authorized the government to grant RTA a licence to store and use water and also to make any other necessary arrangements as the government “deems advisable” or “in the best interest of the province”, all “notwithstanding any law to the contrary”.

- The *Industrial Development Act* expressly authorized the Minister of Lands and Forests to execute any agreement for the purposes of “hydroelectric development, works and facilities” to be undertaken or constructed, which Agreement was to include fisheries protection “as may be considered advisable” by the government.

- On December 29, 1950, the Province and RTA entered into such a formal agreement (the 1950 Agreement) authorized by Order in Council 2883/1950 and on the same date the province issued RTA the 1950 Conditional Water Licence, which incorporated the terms and conditions of the 1950 Agreement with respect to the use and storage of water on the lands in question.

- Neither the 1950 Agreement nor the 1950 Conditional Water Licence contained any provision for specific flows to be released into the Nechako River for any purpose, fisheries or otherwise.

- The 1950 Agreement guaranteed RTA a supply of water that would enable full utilization of its generators.

- The Conditional Water Licence authorized RTA to “store, divert and use water” to specified maximums, but the Licence also forbade construction of any works until the plans and specifications had first been approved by the Province.

- The Province knew full well that the construction of dams and reservoirs would have substantial impact upon rivers and lakes within the region and hence potentially upon the fish/fishery in such waters and yet required no protection whatsoever for the fish as part of the review/approval of the design, construction, or regulation of the works.

- DFO had numerous concerns about the impact of the development upon fish, testified on the matter at the 1949 hearing before the province's Water Comptroller, and also directly negotiated with RTA specific release flows from the Skins Lake Spillway before issuing its own approval of the dam-reservoir design and construction plans.

- All three parties agreed, and both levels of government expressly approved, that the project

would not include any type of water release facility at the Dam itself.

- The Province and Canada also knew and expressly approved substantial quantities of water being diverted away from the Nechako River, the dewatering of nine km of the river below the Dam, and the substantial reduction in the flow of the Nechako River from Cheslatta Falls all the way to Prince George.

- When RTA later took full advantage of its permitted water diversion to maximize hydroelectric production, the resulting litigation in the 1980s gave rise to the 1987 Settlement Agreement between RTA and both governments. That Agreement put in place a water flow regime for the Nechako that RTA was required to follow for the protection of the fish/fishery in the watershed, and RTA's Water Licence was amended to incorporate that mandatory flow regime.

- Although there was further litigation in the 1990s between RTA and the Province over the cancellation of RTA's proposed Kemano Completion Project and a further 1997 Settlement Agreement was reached between those parties, the flow regime mandated by the 1987 Settlement Agreement/Amended Water Licence remained in place to the present and still forms part of RTA's Final Water Licence.

[530] The design and construction plans for the Kenney Dam were specifically approved by both levels of government. The Dam was constructed in conformity with those plans. The water licences issued to RTA explicitly authorized and continue to authorize the diversion of water from the Nechako River.

[531] The flow of water from the reservoir into the Nechako is governed by an Agreement between RTA and both levels of government and is incorporated into RTA's Water Licence. The regulation of that flow is directed by a Technical Committee constituted by that Agreement and comprising representatives from both levels of government and an independent expert, as well as a representative from RTA. Both governments are thus directly involved in setting the flow.

[532] RTA has always operated within the parameters of its authorization. It has never diverted more than the diversion limit specified in its Water Licence. The only times it exceeded the reservoir's live storage limit was due to flooding concerns in Vanderhoof, and in each case the exceedances were expressly authorized by the Water Comptroller. RTA has also always complied with the water flow directions provided by the Technical Committee of the NFCP. If those directions are insufficient to fully protect the fish and fishery within the Nechako watershed, which I have concluded is in fact the case, it is not because RTA has been noncompliant with its statutory authorizations.

2. Inevitable Result and Practical Feasibility

[533] RTA suggests it is not necessary to address this topic because it has been given specific authority and direction for the Dam, the diversion of water, and the volume of water to be released into the Nechako River. However, “as a cautionary measure” arising from the Court of Appeal’s reservations respecting water release timing and infrastructure construction, RTA has nonetheless adduced substantial evidence addressing operational and practical constraints applicable to the reservoir regulation.

[534] The plaintiffs join issue on these matters, albeit mostly in the context of defending the viability of the river flows advocated by their geomorphological expert, Professor Eaton (the “Eaton Base Flows”), as part of a proposed “adaptive management” regime for abating the harm inflicted on the fish and related fishery.

[535] I agree with RTA that it is not necessary to determine whether there existed possibly feasible alternatives for the construction and operation of the Dam and the related reservoir or in respect of the timing or volume of water to be released into the Nechako River. Both levels of government were, and still are, responsible for determining the level of protection required for the fish in the watershed as a result of the installation and operation of the Dam. In approving the design and construction proposed by RTA, they both agreed that a water release facility at the Kenney Dam was unnecessary and that the Skins Lake Spillway was the most appropriate mechanism for ensuring a continued flow of water (albeit at a reduced rate) to and through the Nechako River.

[536] The possibility of a water release facility at the Kenney Dam was discussed by the parties, and they agreed no such installation would occur. RTA’s expert Mr. Egbert Sherman explained how such a structure would have materially increased the risk of dam failure and gave an example of such a failure at a similar but much smaller dam in 1952. The Kenney Dam impoundment of water (approximately 23.8 billion m^3) was the largest such impoundment in Canada by far at the time, and RTA was rightly concerned about the catastrophic flooding consequences in the event of structural failure. I find as a fact that it was neither prudent nor practically feasible for a water release facility to have been incorporated into the Kenney Dam at the time of its original construction.

[537] The next possibly feasible operational alternative raised by the Court of Appeal is whether water could have been (and can be) released from the reservoir into the Nechako River in a fashion that would avoid harming the fish or related Aboriginal fishery. In that regard, RTA points out that storage of water to certain maximum limits is expressly authorized by their water licence. Not releasing water, or releasing too little water, is storage and is exactly the activity expressly authorized by the water licences. If exercising that right of storage causes harm to the fish (by depriving them of protective levels or flows of water), it is an inevitable and direct consequence of the authorization. I agree with this characterization.

[538] While neither level of government took any steps to prevent or ameliorate the harm inevitably caused to the fish by the initial operation of the Kenney Dam and related reservoir, the

alarm buttons were finally pushed in the early 1980s when RTA was exploiting its authorized storage to produce maximum amounts of hydroelectricity, and the flows in the Nechako River were substantially reduced. In the ensuing litigation to protect the fish, both levels of government sought to impose and ultimately did impose, by way of the 1987 Settlement Agreement, a flow regime that they considered, rightly or wrongly, to be sufficient for the purpose. That flow regime, which comprises specified flow rates for each month or as otherwise directed by the Technical Committee of the NFCP, is mandatory; while variances at RTA's request are possible, the approval and direction of the Technical Committee is required. It is thus the Technical Committee which governs the flow regime, and whatever may be the inevitable result of the Technical Committee's directions is a matter for the Technical Committee to rectify, assuming practically feasible options exist.

[539] The plaintiffs suggest that RTA could and should change its "hierarchy of reservoir management priorities". That hierarchy presently is as follows:

1. dam safety – keeping the level of the reservoir under 2800 feet;
2. the water flows required by the NFCP;
3. storing water to meet the energy requirements for the Kitimat smelter; and,
4. power generation for hydroelectric sales to BC Hydro.

At the same time, RTA also manages the water within the reservoir to try and minimize flood risk to downstream users such as the Cheslatta First Nation (whose burial grounds are regularly flooded by Skins Lake Spillway releases) and the town of Vanderhoof.

[540] The plaintiffs say they do not seek to displace the first two reservoir priorities set out in this list. They say, however, that additional flows required to protect the fish/fishery should have "third priority" over power generation (for smelting) "with the Eaton Base Flows as a starting point, under ongoing adaptive management".

[541] In essence, the plaintiffs submit that because it is possible for RTA to change or curtail its business priorities and practices to accommodate an increased flow of water into the Nechako, this amounts to a feasible alternative to current operations, an alternative that effectively reduces or eliminates the harm being caused to the fish/fishery. Hence, the plaintiffs say, RTA cannot meet the "inevitable damage" factor required for any defence of statutory authority to apply.

[542] I do not agree. Indeed, in my view, the plaintiffs' argument actually illustrates the inevitable consequences of RTA's expressly authorized activities. As noted above, RTA is expressly authorized to store and use water for maximum hydroelectricity production purposes, subject only to water releases into the Nechako as mandated by the 1987 Settlement Agreement and the Technical Committee of the NFCP. If doing so inevitably causes harm to the fish/fishery, as I have found to be the case, the defence of statutory authority applies. RTA may have very good business reasons for changing its operations—accommodating reasonable requests of First Nations or mitigating flood risk to Vanderhoof may be good examples—but even if inevitable harmful impacts

occur, it is not obliged to make such changes so long as it is acting within the constraints of its lawfully authorized activity.

[543] Of course, the outcome might be entirely different if the statutory authority for RTA's activities can be nullified or otherwise rendered inoperative on constitutional grounds for the purposes of tort liability, a question to which I now turn.

B. Constitutional Inapplicability

[544] In the event the defence of statutory authority otherwise succeeds on the facts, the plaintiffs invoke constitutional principles as an alternative argument. In particular, they argue that the statutes, regulations, licences, and/or agreements made between RTA and the Crown which authorize RTA's activities are:

> Constitutionally inapplicable as a defence to the plaintiffs' claims [for the torts of nuisance and breach of riparian rights] unless justified by the defendants under the *Sparrow/Tsilhqot'in* test for justification.

[545] Put another way, the plaintiffs argue:

> The Crown lacks the constitutional authority to authorize conduct that unjustifiably infringes a constitutional right [in this case, Aboriginal title to land and/or the Aboriginal right to fish].

[546] In reply, RTA says the plaintiffs are "blending and blurring private and constitutional law" in an unprincipled way, "consistently self-serving in their resort to tort law when it suits them, and to constitutional law whenever the tort law does not".

[547] I note at the outset that the parties' arguments on this issue were convoluted and covered little common ground. Hence, it may be useful to first review certain basic constitutional law principles and concepts to ensure the submissions and terminology are placed in proper context.

1. Constitutional Law Principles and Concepts

[548] Constitutional law defines and regulates the role of government in society. Unlike many countries, Canada does not have a single constitutional document codifying the scheme of government. Our primary, but by no means exclusive, sources of constitutional law are the *Constitution Act, 1867* (formerly known as the *British North America Act,* 1867) and the *Constitution Act, 1982* (which originated as a Schedule to a statute of the United Kingdom Parliament, the *Canada Act 1982,* 1982, c. 11 (U.K.) that also formally terminated the UK's authority over Canada).

[549] The 1867 *Act* established the principal institutions of government, including the federal parliament and the provincial legislatures, and listed in ss. 91 and 92 their respective exclusive authority to legislate on "matters" coming within certain specified "classes of subjects". Among other things, the *Constitution Act*, *1982,* provided a non-exclusive definition of the "Constitution of Canada" (s. 52(2)), legislated the *Canadian Charter of Rights and Freedoms,* "recognized and

affirmed" existing Aboriginal rights (s. 35), and also provided that any law would be "of no force or effect" to the extent that it was inconsistent with the Constitution (s. 52(1)).

[550] Challenges to the constitutionality of any given law typically attack one or more of its validity, operability, or applicability, depending on the nature of the challenge and the degree of jurisdictional overlap.

[551] If the challenge is that the subject matter of the law (or its "pith and substance") falls within the class of subjects exclusively allocated to the other level of government, then, subject to possible salvage by a variety of doctrines applicable to classification or interpretation (e.g. "reading down", permissible overlapping aspects or ancillary effects, etc.), the law will be "ultra vires" and thus *invalid.*

[552] If there is an insurmountable conflict or incompatible operational effect between validly enacted but overlapping provincial and federal legislation, the doctrine of "paramountcy" may dictate that the provincial legislation is *inoperative* to the extent of any inconsistency with the federal legislation.

[553] If the impact of a statute seriously and significantly impairs the other level of government's essential powers or core competency, the doctrine of "interjurisdictional immunity" dictates that, although the law is not held to be invalid per se, it will nonetheless be *inapplicable* to the extent of the impairment. "Reading down" is the technique usually applied to accomplish this result. (See generally: Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thompson Reuters, 2007) (loose-leaf updated 2021) ch. 15, and Halsbury's Laws of Canada, vol. 2, *Constitutional Law – Division of Powers* at paras. 447-468 (2019 Reissue)).

[554] In 2014, the unanimous Supreme Court of Canada in *Tsilhqot'in* finally resolved the "ambiguous jurisprudence" respecting the relationship between s. 35 of the *Constitution Act, 1982* and the doctrine of interjurisdictional immunity, holding that the latter "should not be applied" in constitutional challenges involving Aboriginal title (para. 151). Shortly thereafter, the Court also confirmed this ruling applied to all s. 35 rights cases: *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

[555] The result, as expressly affirmed in *Tsilhqot'in,* is that validly enacted provincial laws of general application apply to both Indigenous and non-Indigenous persons and their property interests. However, as with federal legislation, any such measures which infringe or "substantially diminish" Aboriginal rights protected by s. 35 must first pass the *Sparrow* test for justification. If that test cannot be met, the legislation will be of "no force or effect" pursuant to s. 52 of the *Constitution Act*, *1982.*

[556] The phrase "no force or effect" in s. 52 of the *Constitution Act*, *1982* is not a defined term. However, depending on the context, it has triggered a finding of invalidity or inapplicability of the

impugned legislation. The distinction is important in this case because the plaintiffs have advised both the Court of Appeal in the 2015 Appeal Decision and the Court in the present litigation that they are not challenging the validity of the Final Water License and related instruments and legislation; rather, they are only seeking to have them declared "constitutionally inapplicable" to their Aboriginal or proprietary rights, thereby denying any defence of statutory authority to RTA. To clarify this distinction, it is helpful to review cases where similar arguments and factual matrices are present.

[557] *Tsilhqot'in* illustrates circumstances where one form of "inapplicability" may arise. The case involved commercial logging licences granted by the Province with respect to land claimed by the Tsilhqot'in as part of their traditional territory. The Tsilhqot'in sought a declaration prohibiting commercial logging on the land and included a claim for Aboriginal title to the land as part of the litigation.

[558] Ultimately, the Court declared that the Province had breached its duty to consult through its land-use planning and forestry authorizations. It also granted a declaration of Aboriginal title over the area at issue in favour of the Tsilhqot'in. In so doing, the lands lost their status as Crown lands, the beneficial interest in the land vested in the Tsilhqot'in, the "Crown timber" lost its status as such, and the *Forest Act,* R.S.B.C. 1996, c. 157 therefore no longer applied to authorize the licences which had been granted. The ultimate consequences for the licence holders have not been made known to the Court.

[559] In para. 92 of *Tsilhqot'in*, the Court also stated,

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.
>
> [Emphasis added.]

[560] *Desautel* illustrates how constitutional rights can be invoked as a defence to government prosecution of a provincial or criminal offence. In *Desautel*, s. 52 together with Mr. Desautel's Aboriginal right to hunt under s. 35 of the *Constitution Act*, *1982* rendered ss. 11(1) and (47)(a) of BC's *Wildlife Act*, R.S.B.C. 1996, c. 488 "of no force or effect" as they related to him, and he was thus acquitted of the offences with which he had been charged. It is an example of a validly legislated provincial law of general application being held inapplicable to an individual because it was inconsistent with and unjustifiably infringed upon his constitutionally protected Aboriginal right to hunt. The legislation remains applicable to persons who do not enjoy such an Aboriginal right.

[561] *Southwind* illustrates how a First Nation might pursue remedies against the Crown for a historic infringement of Aboriginal rights. In *Southwind,* a hydro dam was built on the southwestern

shore of Lac Seul in 1929, and the resulting reservoir caused considerable, fully anticipated damage to the plaintiffs' nearby reserve lands, one-fifth of which was permanently flooded, thus destroying homes and gravesites, among other things. Canada was found to have breached its fiduciary obligations by failing to consult with the First Nation beforehand, failing to protect and preserve their proprietary interest in the reserve from exploitation, and failing to secure appropriate compensation. The Crown was held liable to pay substantial damages on that account.

2. Submissions of the Parties

[562] As noted earlier, the submissions are complex. Many positions are taken in the alternative. On some points the defendants agree, but on others, their positions differ widely.

[563] The gist of the plaintiffs' submissions is as follows:

- The authorizations granted to RTA by statute, regulations, licenses, and agreements have deprived the Nechako of the water needed to support fish habitat and have ultimately caused declining fish populations, thereby significantly diminishing the plaintiffs' Aboriginal right to fish;

- There was no consultation between the Crown and affected First Nations at any time regarding either the construction of the Dam or the radically reduced hydrograph of the Nechako River in the past 70 years, and the refusal to accommodate the plaintiffs' interests in restoring a more natural hydrograph continues to this day;

- There is no objective so compelling and substantial that it can justify the extirpation of the Nechako White Sturgeon and the suppression of the Chinook and sockeye populations, and the ongoing inadequate flows in the river and resulting diminution of the Aboriginal right to fish require that the licenses and agreements permitting the current flow regime no longer be given any force or effect; and,

- The plaintiffs are not invoking historical infringements of their rights in this case, but rather rely on the <u>continuing</u> interference with their rights as the basis not just for fresh causes of action in tort, but also for rendering any statutory authority defence that might otherwise have been available to RTA at common law "constitutionally inapplicable" to the plaintiffs.

[564] The defendants' arguments include the following:

- The Province had the constitutional power to confer RTA's authorizations in 1950 even if it did in some fashion limit the plaintiffs' Aboriginal rights, and after 1982 the agreements between the parties and modifications to water licenses <u>reduced</u> rather than increased RTA's rights, and hence cannot be inconsistent with the plaintiffs' constitutional rights <u>as they existed in 1982</u>;

- Neither government nor industry could have met the *Sparrow* test in the 1950s given the lack of recognition of Aboriginal rights at that time and the absence of any required consultation regime, hence a modified justification review should be applied to such historical conduct and should be limited to analyzing compelling and substantive objectives in the 1950s and the recognized concept of fiduciary duty arising through the assumption of discretionary control, neither of which supports the outcome the plaintiffs seek;

- The plaintiffs conflate the establishment of a nuisance in tort with the establishment of an infringement of constitutionally protected rights;

- The Crown has not assumed discretionary control over the plaintiffs' Aboriginal fishing rights and does not owe any sort of plenary fiduciary duty in that regard;

- In the post-1982 era, the Crown's conduct has been directed towards conservation measures that limit RTA's operations by requiring the release of minimum flows aimed at protecting fish populations. Ensuring more water where none existed before cannot be an infringement of Aboriginal rights;

- RTA has been granted just a single allocation of water rights, rights which have only been reduced since 1950. The uses to which RTA puts that water do not require separate consultation and justification as they change over time;

- In any event, the compelling and substantial objective of the Dam and reservoir was the development of hydroelectric power, an objective repeatedly endorsed by the Supreme Court of Canada in various decisions, and one which has created thousands of jobs, provides hydroelectric power to British Columbia, and makes a very substantial economic contribution to the Province; and,

- In the result, RTA's statutory authorizations should not be held "inapplicable" to the plaintiffs so as to impose liability for doing exactly what it was authorized to do.

3. Does "Constitutional Inapplicability" Apply?

[565] In the present case, the plaintiffs correctly argue that the authorizations granted by the Crown to RTA were issued without consultation. They also argue, again correctly, that the authorized reduction in the Nechako hydrograph has harmed the fish and negatively impacted their Aboriginal right to fish, whether on a standalone basis or as an incident to title to Noonla and Stellaquo. The question is whether this past and continuing diminution of Aboriginal rights should expose RTA to what would in effect be strict liability in nuisance (or breach of riparian rights, should they exist), even though RTA's activity and the inevitable negative impacts were and continue to be fully authorized by the Crown.

[566] While the plaintiffs' claims in this case have generally fallen on sympathetic judicial ears, for

the reasons below, I am compelled to conclude that the notion of “constitutional inapplicability” framed by the plaintiff is not appropriately applied in the context of this tort case against a private party.

[567] This case is not a constitutional contest based on the allocation of powers in the *Constitution Act*, *1867*. Nor is it a case where constitutional rights are invoked as a defence to government prosecution of a provincial or criminal offence. Instead, this is a civil law case alleging tort liability against a private party where Aboriginal rights are raised to deflect a valid defence otherwise available and applicable at common law. With the greatest of respect to the plaintiffs and Indigenous peoples generally, it is in my opinion a bridge too far.

[568] The plaintiffs argue that statutory authority cannot stand as a defence because governments cannot authorize conduct that is unconstitutional, i.e. conduct that infringes the plaintiffs’ Aboriginal rights. They say any legislation, licence, or agreement that has this effect is “constitutionally inapplicable” unless the government defendants can justify the infringements using the *Sparrow/Tsilhqot’in* justification test. The plaintiffs allege that economic justifications for operation of the Dam cannot outweigh the harm caused by impairment of the plaintiffs’ fishing rights.

[569] In my opinion, “constitutional inapplicability”, as originally defined in the case law, is not available on the facts of this case. Such inapplicability typically works to disallow application of a law that would otherwise apply to a person or persons (as in *Sparrow* and *Desautel*) or an area of land under specific jurisdiction (as in *Tsilhqot’in*). None of the legislation or authorizations in this matter apply to the plaintiffs; rather, they apply to RTA. In the absence of a declaration of title in favour of the plaintiffs or other First Nations, they also apply specifically to the lakes comprising the reservoir and to the Nechako River.

[570] I am inclined to agree with the defendants that the plaintiffs are effectively arguing <u>constitutional invalidity</u> of the instruments authorizing RTA’s impoundment and regulation of the River flows. The *Rio Tinto* 2010 decision put historical government conduct concerning the dam out of the plaintiffs’ reach, except for the issue of compensation, which is not claimed here. In fact, the plaintiffs pleaded at the Court of Appeal in 2015 that they were not seeking to set aside or challenge the validity of the Water Licence and related instruments.

[571] Further, now that *Tsilhqot’in* has ruled that the doctrine of interjurisdictional immunity does not apply to protect Aboriginal rights as an area of federal jurisdiction under s. 91(24) of the *Constitution Act*, *1982*, the plaintiffs cannot maintain their argument against Provincial legislation and authorizations on grounds of invalidity. Thus, the statutory authority upon which RTA relies cannot be undermined by these attacks on its constitutionality.

[572] Moreover, I agree with the defendants’ argument that equating the tests for nuisance and rights infringement blurs some distinct lines that exist to establish responsibility for alleged wrongs. In the nuisance test, the alleged tortfeasor is the responsible party. In the test for rights

infringement, government is the responsible party. By marrying the tests, that distinction is glossed over. If actions authorized by government (whether through unconstitutional legislation, licences, or agreements, or a combination of all of these) result in harm to the plaintiffs' rights, only government must answer for that.

[573] The plaintiffs are invoking the constitutional status of their Aboriginal rights to, at first instance, impose common law liability in nuisance upon a private entity, and at the same time to deny that entity a common law defence that would otherwise be available. In my opinion, it is unjust and inappropriate in the circumstances of this particular case for that to occur. The law does not necessarily require one injustice (to the plaintiffs) to be matched or "balanced" by another (to RTA). In that regard, I agree with professor Brian Slattery's observation, cited in the *Tsilhqot'in* trial decision at para. 1367 that, ". . . to suggest that historical [A]boriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another".

[574] While RTA may well have derived a handsome financial reward in return, it has invested billions of dollars into the infrastructure and economy of this province on the strength of ostensibly legitimate government authorizations, and it should be entitled to defend itself by invoking the common law, legislation, and contracts which have throughout applied to and governed its conduct and commercial undertaking. If that undertaking has unjustifiably harmed the plaintiffs' Aboriginal interests, the plaintiffs' remedy should lie against the Crown and not RTA in the circumstances of this case. As noted in *Haida* at para. 53:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.

[575] However, in the event that the Courts of Appeal disagree and hold that "constitutional inapplicability" is indeed available to the plaintiffs in a civil case such as this one, I turn now to address the issues of breach/infringement and justification.

4. Historical and Ongoing Breaches and Infringements

[576] While RTA acknowledges possible historical infringement of Aboriginal rights in this case, the other parties (including the plaintiffs) say it is not necessary to deal with this issue. I disagree. Both the conduct and the honour of the Crown generally is very much under scrutiny and past failures may inform reassessment of appropriate consultation in the future "in light of the new reality" (i.e. a declared Aboriginal right).

[577] *Sparrow* asks three questions to determine whether or not there exists a prima facie infringement (limitation) of an Aboriginal right (at para. 1112):

- First, is the limitation unreasonable?

- Second, does the legislation/regulation impose undue hardship?
- Third, does it deny the claimant's preferred means of exercising the right?

[578] The plaintiffs do not specifically address each of these questions. They simply equate the factual underpinnings for the nuisance claim with the type of interference that would qualify as an infringement under the *Sparrow* test. It is perhaps a sensible assumption (in this particular case) since the Aboriginal right to fish is the foundation for the nuisance claim.

[579] The Court in *R. v. Gladstone*, [1996] 2 S.C.R. 723, observed with respect to prima facie infringement:

- The test is meant to pose a low hurdle for the Aboriginal rights-holder;
- Should any one of the questions be answered in the affirmative, the rights-holder has shown prima facie infringement; and,
- The onus is then on the Crown to prove the infringement is justifiable.

[580] *Tsilhqot'in* characterized the *Sparrow* notion of an infringement as determining whether application of a law results in "meaningful diminution of an Aboriginal right". In my view, any legislation or license issued pursuant to such legislation which enables the extirpation of or reduction in the fish population and thereby reduces an Aboriginal harvest clearly qualifies as such an "infringement".

[581] *Rio Tinto* 2010 expressly addressed "prior and continuing breaches, including prior failures to consult" in the context of the Kenney Dam:

> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, <u>a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown</u>. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.
>
> [48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and <u>contemplates conduct that might adversely affect it</u>": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.
>
> [Italicized emphasis in original, underlined emphasis added.]

[582] The Court in *Rio Tinto* 2010 expressly acknowledged that the construction of the Dam and reservoir and the resulting alteration of water flows to the Nechako River was carried out without any consultation with the affected First Nations, including the plaintiffs in this case (para. 1). The lack of consultation was simply referred to as “the practice at the time” (para. 6). However, as noted above, the Court observed that remedies do exist for “past and continuing breaches, including previous failures to consult”. It noted one of the remedies referred to in *Haida*, i.e. the awarding of damages, but did not expressly advert to the other remedies mentioned in that case, such as the Crown's authority to legislate change or otherwise vary permits or resource management plans.

[583] I acknowledge that the language in *Rio Tinto* 2010 can be interpreted to mean that historic infringements which continue to the present time (1) may be limited to claims for compensation and/or (2) may not trigger any “fresh duty to consult” (para. 49). I would note, however, the situation may change where damage to the resource continues after a formal declaration of an Aboriginal right and it is “necessary for the Crown to reassess prior conduct in light of the new reality” (*Tsilhqot’in* para. 92).

[584] It is certainly true that the development in the law of the Crown's duty to consult and to accommodate Aboriginal interests is fairly recent relative to the construction of the Dam. The seminal case on the subject is now the *Haida* case in 2004, which stands for the following propositions:

- The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, a concept that is always at stake in its dealing with Aboriginal peoples, and one that must have application in concrete practices (para.16);
- Where the Crown has assumed discretionary control of the specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty (para. 18);
- Where an Aboriginal interest is insufficiently specific or has not been formally determined, the honour of the Crown nonetheless requires consultation and, where indicated, accommodation as part of the ongoing process of reconciling prior Aboriginal occupation of the land with the “reality of Crown sovereignty” (paras. 18, 25, 26);

- The Crown, acting honourably, cannot run roughshod over potential but yet unproven Aboriginal interests, and it is not honourable for the Crown to unilaterally exploit resources and thereby deprive Aboriginal claimants of their benefit. The duty to consult and accommodate is part of the process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The process flows from the rights guaranteed by s. 35(1) of the *Constitution Act*, *1982* (paras. 27, 32);

- The duty arises when the Crown has the knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (para. 35);

- The scope of the duty is proportionate to the strength of the claimed right or title, and to the seriousness of the potentially adverse effect upon it. However, the consultation must always be in good faith and must substantially address the concerns at issue (paras. 39, 40);

- While consultation does not impose any duty to agree and does not grant Aboriginal groups a veto, accommodation may require their full consent in cases of established rights of hunting and fishing on Aboriginal lands, although good faith is a mutual obligation and the parties should be seeking compromise in an attempt to harmonize conflicting interests (paras. 40, 48, 49);

- Because the duty to consult and accommodate flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group, a “theory” which does not apply to non-governmental third parties, the latter owe no such duties to the Aboriginal group and the Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests (para. 53); and,

- In that regard, the government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations, particularly where “interference with an Aboriginal right has rendered . . . [any] management plan inadequate” (para. 55).

[585] If one were to retroactively apply the above principles to Crown conduct in 1950, it is immediately apparent that the honour of the Crown was sorely lacking. The complete absence of consultation and failure to protect fish during the early construction and operation of the Dam and reservoir obviously had a direct impact on Aboriginal rights and interests as they are recognized today.

[586] The Crown took land for dams, flooded other land for reservoirs, and radically reduced the hydrograph in the once mighty Nechako River. In the words of *Haida,* these were all “lands and resources formerly held by” a variety of First Nations. It also was not just a historical displacement but one that continues to this day resulting in, among other things, reduced fish populations for traditional First Nations harvesting and other indignities such as recurrent flooding of the Cheslatta

ancient burial grounds.

[587] In my opinion, it is no answer to say that when the Dam was built, Aboriginal rights had not received judicial acknowledgement to the extent present today. It is a sad truth that in 1950, the cultural genocide resulting from residential schools and systemic discrimination was ongoing, and some of the more discriminatory provisions of the *Indian Act* were still in force. The existence of Aboriginal rights was given no consideration in 1950 and indeed the Crown denied their very existence in litigation extending well into the 1970s (see *Calder*). Even in the 1980s litigation, it was the Crown who opposed the First Nations joinder in the action and who launched an appeal to prevent their participation, notwithstanding the fact Aboriginal rights had by that time been recognized and affirmed in the *Constitution Act, 1982*.

[588] Like other forms of permanent displacement, whether motivated by infrastructure development or otherwise, the ongoing impact of the Kenney Dam and Nechako River continues to infringe the plaintiffs' Aboriginal rights to this day, as does the Crown's persistent refusal to consult with the plaintiffs on river flow.

[589] The remedy for the historical breach may be damages against the Crown, but they are not being claimed by the plaintiffs. However, now that this Court has formally endorsed the plaintiffs' Aboriginal right to fish and recognized, albeit in a limited way, Aboriginal title to some of the land, the Crown's duty to consult the plaintiffs on future matters affecting such interests, including the river flow, is clearly triggered. As well, it is "necessary for the Crown to reassess prior conduct in light of the new reality" (*Tsilhqot'in* para. 92) and perhaps even consider legislative change.

[590] I would note in any event that the Crown still retains some ability to increase the flow of water into the Nechako River even under the present regime. Both the provincial and federal governments are represented on the Technical Committee of the NFCP, the entity which sets the flows and directs the releases to be made by RTA. The federal government has sweeping powers under *SARA*, although thus far it has failed in its obligation to implement an Action Plan for the benefit of the beleaguered White Sturgeon. It also has power to change flow under the *Fisheries Act*, R.S.C. 1985, c. F-14, but has not done so, although I do realize this is what triggered the 1980s litigation and likely would do so again.

5. Justification for Infringement

[591] Having found that the continued presence and operation of the Kenney Dam and related reservoir infringes the plaintiffs' Aboriginal right to fish, the next question is whether such infringement is justified. Earlier in these reasons, I summarized the concept of justified infringement articulated in *Sparrow* and *Tsilhqot'in*:

- The Crown is entitled to regulate/infringe upon existing Aboriginal rights provided such intrusion is justified by compelling and substantial objectives related to the broader public

good. The onus of proof respecting justification lies with the Crown.

- Justification also requires that the Crown has (1) discharged its procedural duty to consult and accommodate Aboriginal interests to the degree required by the circumstances; and, (2) otherwise satisfied its duty to act honourably, including compliance with any fiduciary duty arising from assumed discretionary control of specific Aboriginal interests.

- Justification requires that any infringement of Aboriginal interests be necessary and rationally connected to the objective, as minimally intrusive as possible, and also properly proportionate in the sense that the perceived benefits are not outweighed by adverse effects on the Aboriginal interest.

[592] Again, if one were to retroactively apply the above principles, the Crown conduct in 1950 would fail the test because the required component of consultation is missing. Recognizing the problem, RTA proposes a modified justification test for historical infringements but, as noted above, I am not inclined to oblige. It may be that the remedy for such historical infringement is limited to a claim for damages against the Crown, but no such claim is pressed by the plaintiffs in this case.

[593] What, then, about an infringement that is ongoing or continuous in nature? How should the justification analysis be modified, if at all, to accommodate the historical origin of the infringement?

[594] *Sparrow*, *Gladstone*, *Delgamuukw*, and *Tsilhqot'in* have all contributed to an expansive and nonexclusive list of "compelling and substantial objectives related to the broader public good" which might justify infringement of existing Aboriginal rights including title:

- The development of agriculture, forestry, mining and hydroelectric power;
- The general economic development of the interior of British Columbia;
- Protection of the environment or endangered species;
- The building of infrastructure;
- The settlement of foreign populations to support the above;
- The pursuit of economic and regional fairness;
- Recognition of historical reliance upon resources by non-Aboriginal groups; and,
- According respectful priority, but not necessarily exclusivity, to Aboriginal rights to resources.

[595] It is obvious, and I have found as a fact, that the Crown's objective with respect to the Kenney Dam project was economic development of the province, production of hydroelectric power, and the building of infrastructure, the expense of which was to be mostly absorbed by a third party (RTA). These were, and perhaps still are, compelling and substantial objectives related to the broader public good, although as noted, no consideration whatever was given to Aboriginal

interests at the time.

[596] But times change. The simple fact of the matter is that Aboriginal rights, including title, have gained much greater significance than was the case in 1950 and they must be accorded appropriate respect in any ongoing assessment (or re-assessment) of justification for historic infrastructure and economic undertakings. Depending on the circumstances, such undertakings may no longer be minimally intrusive upon Aboriginal interests or no longer proportionate in the sense of perceived benefits outweighing adverse effects.

[597] The defendants identify ongoing compelling and substantial objectives for the broader public good, which remain much the same as in 1950, i.e.:

- the creation of jobs in a rural part of the province;
- increased availability of hydroelectric power to the Province (beyond RTA's smelter requirements); and,
- significant related benefits for and contribution to the provincial economy as a whole.

[598] However, the plaintiffs are not seeking to close down RTA's smelter. Their point is that operating the hydroelectric generating plant at full capacity so as to maximize not just smelter operations but also the production of additional hydroelectric power for the Province no longer justifies the extirpation of the Nechako White Sturgeon and the suppression of the Chinook and sockeye salmon stocks. They seek an adjustment of the flow regime governing the Nechako River to better promote the health of the fish and to restore, at least to some degree, the previously abundant Aboriginal fishery.

[599] The plaintiffs acknowledge there may be economic consequences if the smelter's production is curtailed by 25 or even 50 percent, but say this does not outweigh the potentially transformative benefits of higher flows in the Nechako including:

- healthier fish stocks;
- improved ability to exercise Aboriginal fishing rights;
- resurgence of cultural practices and intergenerational teaching; and,
- advanced reconciliation between the plaintiffs and the Crown.

[600] I am inclined to agree with Canada when they say that these are polycentric issues classically determined by government and not by the courts. The difficulty with the proposition is that, perhaps because of perceived constraints arising from the settlement agreements, the Crown does not in fact consult with the affected First Nations regarding the flow regime and has made no changes to that regime in the past 34 years, notwithstanding deterioration of fish stocks in the river.

[601] If I was compelled to decide the matter, I would likely determine that RTA's desire to operate

at maximum capacity does not outweigh the resulting adverse effects on the plaintiffs' Aboriginal interests and that the latter infringement is no longer justified. I would first emphasize, however, that a good-faith process of consultation and accommodation with the plaintiffs about their concerns might well lead to a resolution acceptable to all parties. The courts have stated many times that such negotiated outcomes are the preferable approach to such disputes.

C. Assessment and Determination

[602] The Crown expressly authorized the construction of the Kenney Dam and the related reservoir. It expressly authorized the storage and diversion of reservoir waters for maximum hydroelectric power generation by RTA. It expressly directed the manner and amount of water to be released by RTA from the Skins Lake Spillway into the Nechako River. If RTA had in some way exceeded the authorizations, then the plaintiffs' claim in nuisance could have succeeded. However, RTA has at all times strictly complied with the terms of its Water Licence and related contracts with the Crown. The resulting flows in the Nechako River, a significant alteration from its natural hydrograph, have inevitably impacted the fish in the watershed and, in so doing, have negatively impacted the plaintiffs' Aboriginal right to fish.

[603] The plaintiffs seek to impose common law liability upon RTA for the resulting harm to the fish and fishery. They invoke causes of action based on the tort of nuisance and breach of riparian rights. However, while the plaintiffs' Aboriginal rights provide a valid legal foundation for such a claim, both claims are subject to the common law defence of statutory authority, a defence which clearly and appropriately applies in the circumstances of this case. The plaintiffs have failed to establish that the authority is undermined on constitutional grounds, and therefore their claim against RTA cannot succeed.

[604] The plaintiffs may well be entitled to substantial compensation for the historic harm caused to their Aboriginal interests in this particular case. However, such a claim is properly made only against the Crown. No such claim is made, but the findings of Aboriginal rights in this case may trigger an obligation on the part of the Crown to reassess their conduct "in light of the new reality". So too might RTA consider such a reassessment to be prudent.

XIV. THE DEFENCE BASED ON THE *LIMITATION ACT* AND THE DOCTRINE OF LACHES

[605] RTA invokes the provisions of the *Limitation Act* and asserts that the plaintiffs' causes of action against them have been extinguished at law or are otherwise time-barred. The argument is basically as follows:

- While they may involve some aspects of constitutional law, the plaintiffs are making private law tort claims and are seeking personal remedies against RTA.
- The particular causes of action alleged are the tort of nuisance and breach of riparian rights (assuming the latter exist).

- Both claims involve “injury to property” for the purposes of s. 3(2)(a) of the *Limitation Act* and are thus governed by a two-year limitation period.
- Whatever damage may have been caused by RTA’s activities occurred and crystallized long before September 29, 2009 (two years before this lawsuit was issued), and no subsequent or “fresh damage” has occurred since.
- Any and all historic causes of action that might have accrued in the past have been extinguished by s. 9 of the *Limitation Act*.
- In the absence of fresh damage, no new causes of action exist and the plaintiffs’ action must be dismissed.

[606] The plaintiffs respond as follows:

- Had the plaintiffs been seeking monetary damages for losses suffered before September 29, 2009, the provisions of the *Limitation Act* extinguishing causes of action not sued in a timely manner might have application (albeit subject to the principles of “discoverability”, particularly with respect to the Nechako White Sturgeon).
- However, damages are not being sought in this action and hence the *Limitation Act* has no relevance.
- Instead, the plaintiffs are seeking only injunctive and declaratory relief in respect of “ongoing interference by RTA’s annual flow regime which, each day, deprives the Nechako River of its natural or functional flows causing continuous harm to the Nechako and its fishery resources on which the plaintiffs rely” (emphasis added).
- The torts of nuisance and breach of riparian rights can be, and in this case are, for repeated and ongoing damage in respect of which a fresh cause of action arises each day that the tortious activity and the damage continues.
- Injunctive and declaratory relief regarding ongoing operation and negative impacts of RTA’s operations is not barred by the provisions of the *Limitation Act* in any event.
- The harm suffered by the plaintiffs is not a one-time event that occurred in 1952 when the Dam was constructed, in 1987 when the Settlement Agreement was signed, or in 1997 when the Final Water Licence was issued, but rather is ongoing damage caused by ongoing suppression of the fish population such that the plaintiffs cannot harvest them in the same numbers that they once did (salmon) or indeed at all (sturgeon).

[607] I am not sure there is much if any, disagreement with respect to the relevant legal principles. The real question is how they apply in the circumstances of this case.

[608] Essentially, RTA says that no “fresh damage” has occurred since 2009: there has been no identifiable geomorphic change in the Nechako River since 2009, no decline in the number of

sockeye since 2009, no decline in the number of Nechako White Sturgeon, and indeed an actual increase in total population since 2009, the fishery of which has been entirely closed since 1994 in any event.

[609] I should note at this point that the plaintiffs actually do assert a claim for damages against RTA, albeit rather uniquely only in their Reply pleading. Such a claim for damages does in fact attract application of the *Limitation Act*. For example, the plaintiffs' ability to obtain damages (compensation) against RTA for damage inflicted before September 29, 2009 may indeed be extinguished as a matter of law or otherwise statute-barred by the passage of time.

[610] However, while the claim for damages against RTA has not been formally withdrawn, it is clear that damages are not in fact being pursued by the plaintiffs at the trial of this lawsuit. They led no evidence whatsoever relating to the quantification of damages. Their final submissions do not pursue any such claim whether in the alternative to injunctive relief or otherwise. To the contrary, the plaintiffs actually state that "[they] expressly do not seek damages". I therefore consider the claim for damages to have been tacitly if not expressly abandoned. I will therefore address the subject only briefly in the remedies section.

[611] I do not, however, agree with RTA's submissions respecting "no fresh damage". The geomorphological changes may be difficult to discern over a decade but, so long as water is running in the river, they do occur. The fish are living animals. Their natural lifespan may differ but generations die and are reborn annually. In the case of the sockeye salmon, pre-spawning mortality attributable to the temperature of the river occurs every year to different generations of fish. In the case of the Nechako White Sturgeon, eggs are spawned and fertilized, but something about the regulation of the river is destroying the eggs, the hatchlings, and/or the juveniles.

[612] Hence, while the cause may be much the same from year to year (i.e., the regulated flow of the river), the resulting damage (death of fertilized eggs or live fish) occurs anew each and every year. Precise quantification of that damage is challenging, but I am satisfied that in the past 12 years it is sufficiently substantial to sustain the claim in tort.

[613] In these circumstances, it is not really necessary to address the equitable doctrine of laches. Suffice it to say on the subject that, in my opinion, it is completely unrealistic to suggest the plaintiff First Nations have "acquiesced" to RTA's regulation of the river. There is likewise no air of reality to RTA's claim that they have been somehow induced by the plaintiffs' acceptance of the status quo to conduct themselves in a manner they may otherwise have avoided. The plaintiffs have repeatedly engaged or attempted to engage in litigation concerning the Dam and to make their objections to it known since the 1980s. Laches are not available as a defence in this case.

[614] Let me be clear, however, I am not faulting RTA for its conduct. It is not some sort of non-profit benevolent society. It is a business corporation which accepted the government's invitation to invest massive amounts of money into the province in exchange for an opportunity to earn

substantial returns. It has complied with every contract it signed with both levels of government, and it has abided by all the terms and conditions imposed by the Water Licence(s) issued by the province. The failure in this case, if there was one, was on the part of the government who settled upon regulatory requirements that in the result were insufficient to fully protect the fish population in the Nechako watershed. These were ultimately political decisions, possibly well-intended, but ones that discounted express warnings by some of the Crown's own fishery scientists. Whether these decisions now trigger a duty, fiduciary or otherwise, owed to the plaintiff First Nations is an entirely different matter and one which I will address in the next section of these reasons for judgment.

XV. REMEDIES AND ORDERS SOUGHT

[615] I am advised this case is without precedent in Canada and that no court in this country has ever issued a permanent injunction substantially altering the flow regime of a river as part of a designed program of adaptive management. One notable exception, albeit by way of an interim injunction in the 1980s litigation, was the judgment of Berger J. in the 1980 Action which compelled RTA to comply with the Minister of Fisheries' "flow opinion" pending trial of the case.

A. The Parties' Submissions

[616] The plaintiffs say that if they succeed in establishing an actionable nuisance or breach of riparian rights, either of which would constitute an infringement of their constitutionally protected rights (fishing and/or title), they are entitled to a remedy. They argue "a wrong cannot go without remedy simply because it is complex and potentially difficult to define and implement".

[617] The plaintiffs recognize that restoring the natural flow of the Nechako River can only be done by removing the Dam itself, building a high-capacity release facility at the Dam, or running the entire natural flow of the river through the Skins Lake Spillway. While I heard evidence supporting the possibility of a release facility, no evidence was tendered about how the Dam (and reservoir) might be decommissioned and removed.

[618] In any event, the above measures would involve astronomical costs and/or potentially catastrophic effects upon others, whether they be permanent destruction of the Cheslatta First Nation's burial grounds, more frequent flooding of Vanderhoof, or severe curtailment or complete shutdown of RTA's business operations and the like.

[619] The "alternative remedy" is the remedy the plaintiffs actually seek, namely, implementation of a "functional flow" regime proposed by Professor Eaton, i.e., flows which are less than the natural flow of the river, but which should restore natural ecological functioning processes for the benefit of the fish (the Eaton Base Flows). This in turn requires the design of implementation mechanics, monitoring and assessment of results over many years, and making adjustments as necessary, all with the plaintiffs having "substantive involvement in decision-making" and co-management of the project.

[620] Lastly, the plaintiffs ask that the Court retain “supervisory jurisdiction” over the case to ensure that the remedy is implemented and to resolve any disputes that may arise with respect to both implementation and adaptive management over time.

[621] Insofar as the two Crown defendants are concerned, the plaintiffs say that recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act*, *1982* necessarily imposes a fiduciary duty on both levels of government to protect Aboriginal rights. They point out the honour of the Crown requires both that Aboriginal rights be respected by the Crown and also that the Crown act diligently to fulfil its constitutional obligations in that regard. They seek a declaration to this effect with particular reference to the proposed adaptive management regime.

[622] RTA made submissions on the subject of remedies so extensive (over 250 pages) and addressing so many subjects that they defy concise summary. Among other things, however, RTA says:

- Basic injunction law principles militate against such a remedy in this case;
- The Nechako White Sturgeon was a relatively minor aspect of the plaintiffs' sustenance and culture, and any contribution of river regulation to the diminution of sockeye pales in comparison to the many other contributory causes, all of which will continue in any event;
- The proposed adaptive management regime is really just an experiment, a testing of a hypothesis involving ongoing analysis and adjustment spanning decades and one that involves substantial uncertainty. It is simply unknown whether the Eaton Base Flows regime will remedy the Nechako White Sturgeon recruitment failure, and the whole approach, they say, is simply speculation;
- RTA is only able to operate its smelter in 25 percent increments and the implementation of the Eaton Base Flows regime would likely reduce smelter production to 50 percent, a curtailment that would eliminate or at least substantially reduce profitability and negatively impact the broader economic activity throughout the region (including the loss of many jobs);
- The Eaton Base Flows substantially increase the risk of flooding at Vanderhoof, and his “flushing flows” (higher flows released at intervals to offset detrimental ecological effects caused by Dam operation) would cause significant overland flooding similar to that experienced in 2007; and,
- The suggested alternative of buying replacement power from BC Hydro to maintain smelter production is simply not a feasible substitute and would in any event potentially require billions of dollars worth of additional transmission infrastructure that, if it even proceeded, would take many years to construct.

[623] The Crown defendants oppose the remedies sought by the plaintiffs on grounds that are both common and also distinct to their respective unique roles and legislative jurisdiction. They

both emphasize that, as a matter of law, there is no plenary fiduciary duty owed by the Crown to Aboriginal peoples “at large”, i.e. encompassing and applicable to all dealings between the Crown and Aboriginal peoples. They say a fiduciary duty only arises if the Crown has assumed discretionary control over a specific cognizable Indigenous interest. Both levels of government say these requirements have not been met in this case.

[624] Further, the Crown emphasizes that in cases which require balancing competing interests in the allocation of scarce resources, it is the role of government, not the courts, to determine the polycentric policy issues involved. They also say the plaintiffs are seeking a remedy that is at once both highly specific and vague, so much so court supervision is seemingly required, and one which will result in a dramatic change in both the economic and social status quo.

[625] Lastly, the governments argue that the declaratory relief the plaintiffs are seeking against them is not available as a matter of law because:

- however artfully it may be worded, it is intended to be coercive in nature and to (impermissibly) create a mandatory obligation for the Crown to act;
- such a mandate “cannot compel the exercise of a discretion in a particular way, and cannot dictate the result to be reached”: *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at para. 73;
- the Court has no jurisdiction to order mandamus against the federal Crown (*Federal Courts Act*, R.S.C. 1985, c. F-7 s. 18);
- it should not be assumed that the Crown will not abide by any finding that RTA’s operations have created a nuisance and that the Crown owes the plaintiffs certain obligations, fiduciary or otherwise, as a result; and hence,
- the declarations are premature and unnecessary.

B. Assessment and Determinations

[626] Since I have already found that the defence of statutory authority requires dismissal of the plaintiffs’ action against RTA, it is technically unnecessary to comment on the relief sought by the plaintiffs had they been successful. As with other aspects of these reasons for judgment, however, such comments may prove helpful with respect to any appeals that may ensue.

[627] The plaintiffs are correct in saying that injunctive relief is the presumptive and usual remedy in nuisance cases. As recently noted by the Ontario Court of Appeal in *Krieser v. Garber*, 2020 ONCA 699 at para. 73:

> Injunctive relief is the “ordinary remedy” for a nuisance: see Robert J. Sharpe, *Injunctions and Specific Performance* [(Toronto: Thompson Reuters, 2019) (loose-leaf updated 2019, release 28), para. 4.60]. Typically, damages are awarded in lieu of an injunction only where the injury to the plaintiff’s legal rights (1) is small, (2) is capable of being estimated in money, and (3)

> can adequately be compensated by a small money payment; and where it would be oppressive to the defendant to grant an injunction: *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (C.A.).

[628] In the present case, the plaintiffs are essentially seeking a "blended" prohibitory and mandatory injunction following trial. It is not an interlocutory or interim injunction, but rather a final order.

[629] In *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, at para. 28, the Court described a simplified two-part approach to awarding final injunctive relief:

> In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[630] The Court in *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 at para. 72, provided a detailed summary of the considerations relevant to granting permanent injunctions, a summary that has since been cited several times in BCSC judgments (for example, *Grosz v. Guo,* 2020 BCSC 997 at para. 74; *M.M. v. L.M.,* 2020 BCSC 798 at para. 177) :

> [T]he proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
>
> (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
>
> (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
>
> (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy);
>
> (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
>
> (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate

remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[631] Given the complexity of the proposed remedy, the Court requested the plaintiffs to provide the precise wording of the injunction sought against RTA and the declaration sought against the Crown. In response, the plaintiffs produced the following:

1. A permanent injunction restraining the Defendant Alcan, its servants, agents, or otherwise, from the continuance or repetitions of said nuisance, or from conducting its operations at the Kenney Dam in such a manner as to cause like nuisances to the Plaintiffs;

2. A permanent injunction restraining the Defendant Alcan, its servants, agents, or otherwise, from the continuance or repetitions of said interference with the Plaintiffs' riparian rights, or from conducting its operations at the Kenney Dam in such a manner as to cause like interference of the Plaintiffs' riparian rights;

3. Subject to paragraphs 4 and 5 of the Order, the measures taken by Alcan to satisfy paragraphs 1 and 2 must include:

a. Alcan shall release flows at the Spillway Gates sufficient to generate the following flows at the Cheslatta Falls water gauge (the "[Eaton] Base Flows"), subject to paragraph 4:

Flows calculated as weekly averages for 7-day periods starting on January 1:

Week	Q (m^3/s)	Week	Q (m^3/s)	Week	Q (m^3/s)	Week	Q (m^3/s)
1	57	14	57	27	326	40	78
2	57	15	63	28	295	41	69
3	57	16	80	29	269	42	63
4	57	17	105	30	245	43	58
5	57	18	135	31	222	44	55
6	57	19	175	32	201	45	54
7	57	20	233	33	180	46	53
8	57	21	283	34	161	47	54
9	57	22	317	35	144	48	55
10	57	23	344	36	128	49	56
11	57	24	356	37	113	50	57
12	57	25	359	38	100	51	57
13	57	26	352	39	88	52	57

b. Maintaining the temperature of the Nechako River at Finmore at or below a mean daily temperature of 18 degrees Celsius during the sockeye migration period in the Nechako River.

c. Alcan shall release such additional flows as ordered by the Province of British Columbia or the Government of Canada pursuant to paragraph 7 of the Order.

4. Alcan may reasonably modify the release of [Eaton] Base Flows in exceptional circumstances as required for public safety, specifically:

a. Alcan may release additional flows for dam safety purposes to maintain the reservoir level below the limit prescribed by paragraph (e) of the 1997 Final Water Licence, or as directed by the Water Comptroller of British Columbia.

b. Alcan may delay flow increases in the spring until there is an open lead in the ice on the Nechako River to minimize risk of ice jams; and

c. Alcan may, subject to paragraph 7(c) of the Order, modulate for inflows to the Nechako River from the Nautley River and other tributaries downstream of the Spillway gates to cap total flow at Vanderhoof at 550 m^3/s.

5. Alcan's obligation to release the [Eaton] Base Flows shall be modified for a period of up to three years to limit the flow level at the Cheslatta Falls gauge to 330 m^3/s to allow Alcan to

plan for safe release of full [Eaton] Base Flows without damage to the Cheslatta grave sites.

The Plaintiffs suggest that:

> *a. Alcan may be required to report to Court on plans within one year, or*
>
> *b. Alcan may be at liberty to apply to Court for directions*

6. A declaration that the Crown in right of British Columbia and Canada have a fiduciary duty to require Alcan to:

> a. Cease operating the Diversion in a manner that continues to cause nuisance to the Plaintiffs or that breaches the Plaintiffs' riparian rights;
>
> b. Release waters into the Nechako River from such locations, in such manner, in such quantities and at such times as would have the effect of ensuring that the Plaintiffs' Aboriginal rights and/or title are not unreasonably interfered with; and
>
> c. Reinstate the functional flows that make up the natural flow regime of the Nechako River as described in paragraph 7 of the Order.

7. The measures [to be] taken by Canada and British Columbia to satisfy their obligations under paragraph 6 include:

> a. Ensuring that Alcan releases the flows required under paragraphs 3(a) ([Eaton] Base Flows) and 3(b) (Mean Daily Sockeye Temperature);
>
> b. Monitoring the effect of the [Eaton] Base Flows to ensure the following river processes are being achieved:
>
> > i. Annual restoration and enhancement of riffle habitat as described on page 81 (#1) of Appendix B, Exhibit 5;
> >
> > ii. Annual maintenance of active channel width and topographic diversity, as described on page 81 (#3) of Appendix B; Exhibit 5;
>
> c. Monitoring to ensure that flushing flows are being delivered as follows:
>
> > i. Flows to restore and enhance pool habitat as described on page 81 (#2) of Appendix B, Exhibit 5, delivered on average once every five years; and
> >
> > ii. Flows to create diverse multi-age riparian habitat, as described on pages 81-82 (#4) of Appendix B, Exhibit 5, delivered on average once every ten years.
>
> d. Compelling Alcan to deliver increased flows as necessary to meet the requirements of paragraphs (a) – (c) above.
>
> e. The Crown shall provide reports on the monitoring described in paragraphs (a) – (d) to the Plaintiffs and shall consult with the Plaintiffs with respect to monitoring and decisions contemplated under paragraphs (a) – (d).

The Plaintiffs suggest there are several options:

> *1) No provisions for return to Court*
>
> *2) Court may maintain supervisory jurisdiction*
>
> *3) Defendants may wish to be allowed liberty to apply for directions.*

If Supervisory Jurisdiction:

A. The parties are directed to develop a joint decision-making and dispute resolution process to implement parts 1–7 of this order.

B. This Court retains jurisdiction to assist or adjudicate between the parties as follows:

> *1. To assist with the development of a dispute resolution mechanism;*
>
> *2. To adjudicate disputes not resolved through the dispute resolution mechanism respecting:*

> *(a) The adjustment of the Eaton Base Flows pursuant to [3(a)], above;*
>
> *(b) The implementation of British Columbia and Canada's obligation to ensure the provision of flushing flows as described in B, above.*
>
> *C. This Court shall retain jurisdiction for a period of no less than ten years, at which point the defendants shall be at liberty to apply to the Court for the cessation of retained jurisdiction.*
>
> [Italics in original to illustrate options.]

1. Relief Against RTA

[632] In some nuisance cases, both the cause and the remedy for the problem may be obvious and the injunctive relief can be crafted in relatively simple terms; e.g., “stop releasing your effluent into the river”. In this case, however, causation is multi-faceted and scientifically uncertain, and remedying the problem (declining fish populations) may be a challenge of confounding complexity.

[633] RTA submits that the first and second paragraphs of the plaintiffs’ proposed Order are too vague to be enforceable, citing *Zhang v. Davies*, 2018 BCCA 99 at para. 63. I am inclined to agree. They basically request that RTA “stop causing the nuisance/interference with riparian rights” without specifying the precise conduct that must be discontinued. In my view, such vagueness would ordinarily be fatal to the relief sought.

[634] However, paragraphs 3, 4, and 5 of the proposed Order provide for mandatory spillway releases to generate specific flows for each week of the year, albeit subject to modification to protect public safety and also to an initial three-year limit (330 m^3/s) to allow RTA to design a release program that would avoid damage to the Cheslatta gravesites. The specified flows are the Eaton Base Flows. The 18°C temperature specified for the “sockeye migration period” is the temperature suggested by Mr. Cass, although presumably it would now be adjusted upwards to 19°C to reflect my findings in that regard. The specification of precise mandatory flows arguably remedies the vagueness in paragraphs 1 and 2 of the proposed Order.

[635] These Eaton Base Flows and the “sockeye migration” flows are capable of being implemented by RTA although, as indicated earlier in these reasons for judgment, they would likely result in curtailment of their smelter operations. Capping the total flow at Vanderhoof at 550 m^3/s reflects the expert flood mapping evidence of Ms. Lyle, whose evidence regarding flood consequences I prefer and accept over that tendered by RTA. However, whether it is even possible to design flow releases exceeding 330 m^3/s without damaging the Cheslatta gravesites is unclear, and such an obligation may be impractical and unenforceable.

[636] In their submissions, the plaintiffs stated that they were “not seeking a specific order at this time to implement [Professor Eaton’s] flushing flows but nor are [we] ruling them out for future implementation of adaptive management”. The draft order, however, specifically requires Professor Eaton’s recommended “flushing flows” to be delivered once every five years and once every ten years, as set out in Appendix B of his expert report, albeit “as ordered by the [Crown]” (paras. 3(c)

and 7(c) and (d) of the draft Order). Ms. Lyle's expert evidence regarding flooding at Vanderhoof was predicated only on the Eaton Base Flows and not the much larger flushing flows, and hence the flushing flow regime may also be impractical and perhaps impossible to accomplish.

[637] The proposed injunction mandates designing, monitoring, modifying, and reporting as part of a process of adaptive management, all without specifying the mechanics for or the metrics governing such steps. Without such metrics, the obligations are impermissibly vague. The proposed Order also requires the parties to negotiate and agree upon some sort of "joint decision-making process" and also a dispute resolution mechanism, failing which the Court is to "assist" with that task. Again, these are obligations that are also ill-defined and fatally vague.

[638] I am satisfied that a sophisticated entity such as RTA is likely able to engineer the release of increased flows into the Nechako River without necessarily closing its smelter operations in Kitimat. It is, after all, currently in negotiations with the Cheslatta to build a water release facility at or near the Kenney Dam in order to mitigate the nuisance caused by current operations to the Cheslatta traditional territory including gravesites, and RTA has already agreed to both the concept and contributory funding (up to $50 million) of such a release facility as part of the Nechako Environmental Enhancement Fund program forming part of the 1997 Settlement Agreement.

[639] While an injunction may well be the presumptive remedy for nuisance, it remains a discretionary remedy and one that must be exercised judicially having regard to the relevant principles, including the possibility of damages as a substitute for and consideration of, among other things, efficacy, proportionality, and the possibility of serious harm to third parties. Curtailment of RTA's operations would not just affect RTA's profits but would also likely have a negative impact on regional economic productivity (including loss of jobs). An increased flow in the Nechako River will necessarily increase the risk of flooding at Vanderhoof and elsewhere, particularly in high flow years, and although this is a risk that can be somewhat mitigated by sophisticated management, increased incidents of downstream property damage are likely. These factors militate against the injunctive relief sought.

[640] The plaintiffs are not seeking damages against RTA (or the Crown for that matter). Nevertheless, the question of whether damages may be an appropriate remedy must be considered as part of the analysis.

[641] RTA says, rather opportunistically, that because the plaintiffs have not even attempted to quantify their loss in terms of damages, their value should be assessed in only nominal amounts. I do not agree. I do recognize the diminution or loss of an Aboriginal right or traditional practice (i.e. fishing) has major cultural significance to the plaintiffs, the value of which might be impossible to quantify in monetary terms. Still, from a practical perspective, the loss also includes access to what was once low-cost food for sustenance purposes, something that might trigger creative compensation mechanisms. Crudely put, a properly invested and managed present value award of

future loss/costs in, for example, the range of $25-50 million might buy a lot of fish or other resources for sustenance or ceremonial purposes long into the future.

[642] In the end, were RTA to be found liable in tort to the plaintiffs, I would have favoured an injunction increasing water flows into the Nechako River, provided the vagueness and shortcomings referred to above were remedied. In that regard, I would have invited further submissions from the parties regarding mechanics including the possibility of adjourning remedy determination by the Court in favour of a multi-lateral negotiation of available (and preferred) options. A similar “two-phase process” was employed (albeit admittedly unsuccessfully) in the *Ahousaht* litigation, but might have better prospects in the present case.

2. Relief Against the Crown

[643] In *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, Chief Justice Bauman stated at para. 424:

> It is uncontroversial that the Crown has an obligation, constitutionally enshrined, to protect Aboriginal rights both treaty and non-treaty, and to act honourably in doing so.

[644] I have made a finding in this case that the plaintiff First Nations have an Aboriginal right to fish the waters of the Nechako watershed for food, social, and ceremonial purposes, whether as a self-standing right or one incident to their respective title in Noonla and Stellaquo.

[645] An Aboriginal right to fish may not bestow upon the plaintiff First Nations a property interest in the fish themselves, but without the fish, there can be no Aboriginal right to exercise.

[646] It follows that the Crown, both provincial and federal, has an obligation to protect the plaintiffs’ Aboriginal right to fish by taking all appropriate steps to protect the fish and to act honourably in doing so.

[647] I have also found that the installation and operation of the Kenney Dam and related reservoir have harmed the fish and the fishery in the Nechako watershed to such an extent that RTA would have been liable to the plaintiffs for the tort of nuisance, but for the existence of the defence of statutory authorization. The harm to the fish was the inevitable result of the approvals, permits, agreements, and directions made by both levels of government over the years. Such steps were taken without any consultation with or consent of the plaintiff First Nations and hence amount to a historical infringement of their Aboriginal rights.

[648] Even though RTA may have no direct liability to the plaintiffs, the question remains whether the ongoing harm to the fishery triggers any obligation on the part of the Crown to require additional protection for the fish by increasing the water flow from the reservoir into the Nechako River. I recognize any such steps would require modification of the Crown’s contractual and other commitments made with RTA pursuant to the 1987 Settlement Agreement and the Final Water

Licence which incorporated that agreement.

[649] The plaintiffs' proposed Order seeks a declaration of a fiduciary duty on the Crown, to require RTA to stop doing certain things and start doing others (para. 6 of the proposed Order). Paragraph 7 of the proposed Order then requires the Crown to "satisfy their obligations" by compulsory monitoring, compelling, and reporting in a certain specified manner.

[650] The Crown generally enjoys a certain immunity from mandatory injunctions (although there can be an exception in relation to constitutional violations). However, both federal and provincial legislation permits the Court to make a declaration as to the rights of the plaintiff party instead of granting an injunction: see *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 22(1), and *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11(4).

[651] I am inclined to agree with the defendants that, however artfully it may be worded, the relief sought against the Crown is essentially coercive in nature. It is essentially an Order compelling the Crown to require RTA to deliver certain specified increased flows and thus to breach the contracts and other statutory instruments which have governed the relationship between RTA and the Crown over the years. In the absence of any concurrent liability on the part of RTA, it is likely an invitation for another round of complicated litigation between the parties, a development I am not inclined to promote.

[652] The Crown suggests it will not ignore any finding this Court may make respecting the plaintiffs' Aboriginal rights. It does not, however, suggest what it might do as a consequence in that regard, and one perhaps cannot fault the plaintiffs for a certain degree of skepticism on the matter, given their exclusion from critical decision making in the past, the Crown's refusal to formally admit their Aboriginal rights in this litigation, the unexplained delay in implementing *SARA* to address the White Sturgeon crisis, and the limited accomplishments of initiatives such as the NEEF. In saying this, I mean no disrespect whatever to the government employees who are genuinely committed to environmental and fishery preservation and who have worked hard on various NFCP projects attempting to explore and resolve problems of confounding complexity.

[653] For the reasons stated above, I am unable to issue the injunction sought by the plaintiffs against RTA (the terms of which first need significant revision for clarity in any event), and hence I cannot make the proposed "declaration" requiring the Crown to implement the same. However, given the "new reality" articulated in these reasons, there may be considerable benefit for the plaintiffs in making a declaration that:

1. The plaintiffs have an Aboriginal right, as claimed, to fish for food, social, and ceremonial purposes in the Nechako River watershed; and,

2. As an incident to the honour of the Crown, both the provincial and federal governments have an obligation to protect that Aboriginal right.

I therefore make such a declaration at this time.

3. Ongoing Court Supervision

[654] The plaintiffs request that, given the unique nature of this case and the remedies sought, this Court should retain supervisory jurisdiction so that the parties can apply for further directions or declarations in the future regarding implementation of the new flow regime. They point out that while there is little case law on supervisory jurisdiction in Canada, it is actually fairly common for courts to retain supervision over certain matters, including such things as bankruptcy and receivership procedures, administration of trusts and estates, family law cases involving changes in circumstances, and even constitutional cases where the government is required to implement change over time (see for example, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62).

[655] The plaintiffs also point out that the practice of retaining jurisdiction is quite common in the United States, particularly California, in disputes concerning flow regimes and rivers. One notable example is *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, No. 425955, (Alameda County Sup. Ct., Jan. 2, 1990) where the Court was faced with a number of issues similar to the present case, and crafted a remedy that had many of the same attributes as the remedy sought by the plaintiff in this case.

[656] In their proposed Order, the plaintiffs suggest that the Court retain supervisory jurisdiction over this case for a period of no less than ten years so that the Court can, among other things,

1. assist with the development of a dispute resolution process for implementing the new flow regime;
2. adjudicate disputes not resolved through the dispute resolution mechanism (e.g., adjusting the flows, providing for flushing flows, etc.);
3. impose and supervise reporting obligations to the Court; and,
4. otherwise provide directions on matters in respect of which liberty to apply may be granted.

[657] At various points in time during the trial of this case, the Court expressed to the parties its disinclination (and likely incompetence) to design a flow regime for the preservation of fish in the Nechako River. The Court has no expertise whatever in such matters and can hardly monitor the effectiveness of any adaptive management regime in the absence of precise metrics by which to measure success or failure.

[658] In *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633, Madam Justice Humphries of this Court stated that complex resource management issues were not properly the subject of an order for ongoing Court supervision:

> [1775] The plaintiffs appear to want to have the management of their fishery removed from the Minister and placed in the court's hands. That is not in accord with many statements from the Supreme Court of Canada. The Minister, with the large trained DFO staff, has the responsibility for the entire fishery.
>
> [1776] The course of these proceedings has shown the impossibility of a court assuming the role proposed by the plaintiffs. From my experience on this case it is simply not feasible. It has taken many many weeks of evidence from dozens for witnesses and submissions from many lawyers for this court to get even the most superficial understanding of the complexities of fisheries and science and management.
>
> [1777] To require the court to assume an ongoing supervisory role over this fishery seems to me to be an inappropriate use of the court's resources, despite the fact that this occurred in Washington State following what is commonly called the *Boldt* decision (*United States v. Washington*, 383 F. Supp. 312 (W.D. Wash.1974)). The Minister of Fisheries has the responsibility to run all of the multi-faceted interrelated fisheries. The court is available for judicial review of Ministerial decisions and should deal with specific questions put to it to resolve particular disputes, but should not be put in the position of supervising a whole fishery, especially one as complex as this one. If the parties find themselves returning to court for a specific ruling on a particular dispute, the question or questions that the court will be called upon to determine must be concise, limited, and capable of clear definition.

[659] The Court of Appeal confirmed that it was indeed not the Court's role to "design a fishery" and that it was correct for the trial judge to decline the arbitration of technical disputes brought forward by the parties in the future: *Ahousaht* 2021 at paras. 158 and 174.

[660] I agree with these sentiments and, were I obliged to decide the matter at this time, I would decline to retain supervisory jurisdiction over the implementation of any adaptively managed new flow regime for the Nechako River.

XVI. SUMMARY AND CONCLUSION

[661] The key findings of the Court in this case may be summarized as follows:

- The plaintiffs have a constitutionally recognized Aboriginal right to fish the Nechako watershed for food, social, and ceremonial purposes, the modern continuation of a practice and way of life that long pre-existed the incursion of European explorers and settlers into their traditional territory in the first decade of the 1800's.

- On procedural grounds (the absence of overlapping title claimants as parties or witnesses), the Court declines to make any formal "finding" of Aboriginal title to the Crown land bordering or below the plaintiffs' claimed traditional fishing sites. However, the Court does conclude in alternative *obiter dicta* that the evidence in this case satisfies the legal test for finding Aboriginal title to the land currently comprising Noonla Indian Reserve #6 (vested in the Saik'uz First Nations) and Stellaquo Indian Reserve #1 (vested in the Stellat'en First Nations). Such findings are without prejudice to any claims by non-parties with respect to any interest they may have in the land, e.g., joint title with other First Nations.

- Again on procedural grounds (absence of evidence (1) from overlapping title claimants and

(2) regarding relevant tenets of Indigenous law), the Court declines to make any alternative findings in *obiter* regarding either (1) Aboriginal title to the submerged lands and waters of the Nechako River, Stellako River, or Fraser Lake, or (2) Aboriginal rights akin to the type of riparian rights formerly available at English common law in or before the 19th century.

- As a matter of law, the Saik'uz plaintiffs' interest in and occupancy of Noonla Indian Reserve #6 and the Stellat'en plaintiffs' interest in and occupancy of Stellaquo Indian Reserve #1 is sufficient to found an action in private nuisance arising from any substantial and unreasonable interference with their use or enjoyment of the reserve lands.

- Further, as a matter of common law, whether as it presently stands or as an incremental extension of same, the plaintiffs' Aboriginal right to fish, whether independently or as an incident of title, is also sufficient to found an action in nuisance in the appropriate circumstances.

- Regulation of the Nechako River (the installation and operation of the Kenney Dam and related reservoir and the resulting alteration of the river's natural flow regime) has had negative effects on the abundance and health of the fish population in the watershed. In particular,

  (1) it has caused a chronic recruitment failure and imminent extirpation of the Nechako White Sturgeon;

  (2) it initially had a devastating effect upon the Chinook traditionally spawning in the upper Nechako River and, although the Chinook population has rebounded to approximately pre-regulation levels, restoration of a more natural flow regime might further increase their numbers; and,

  (3) it has resulted in warmer water temperatures during the migration of the sockeye salmon through the Nechako River which in turn causes pre-spawning mortality that contributes to the overall decline of the sockeye population.

- The resulting decline in the fish population and in the related Aboriginal fishery in the Nechako watershed has had hugely negative impacts upon the plaintiffs as Indigenous communities, one that is greatly disproportionate to the burden imposed on the non-Indigenous population of the region. In these circumstances, RTA must be found liable to the plaintiffs for the tort of private nuisance unless it is immunized by defences based on statutory authority or limitations legislation.

- The Kenney Dam was constructed in conformity with plans that were specifically approved by both levels of government. The water licences issued to RTA explicitly authorize the diversion of water from the Nechako River, its storage in the reservoir, and its use for maximum hydroelectricity production. The flow of water from the reservoir into the Nechako River is governed by an agreement between RTA and both levels of government as directed by a certain specified Technical Committee. RTA has always strictly complied with the water

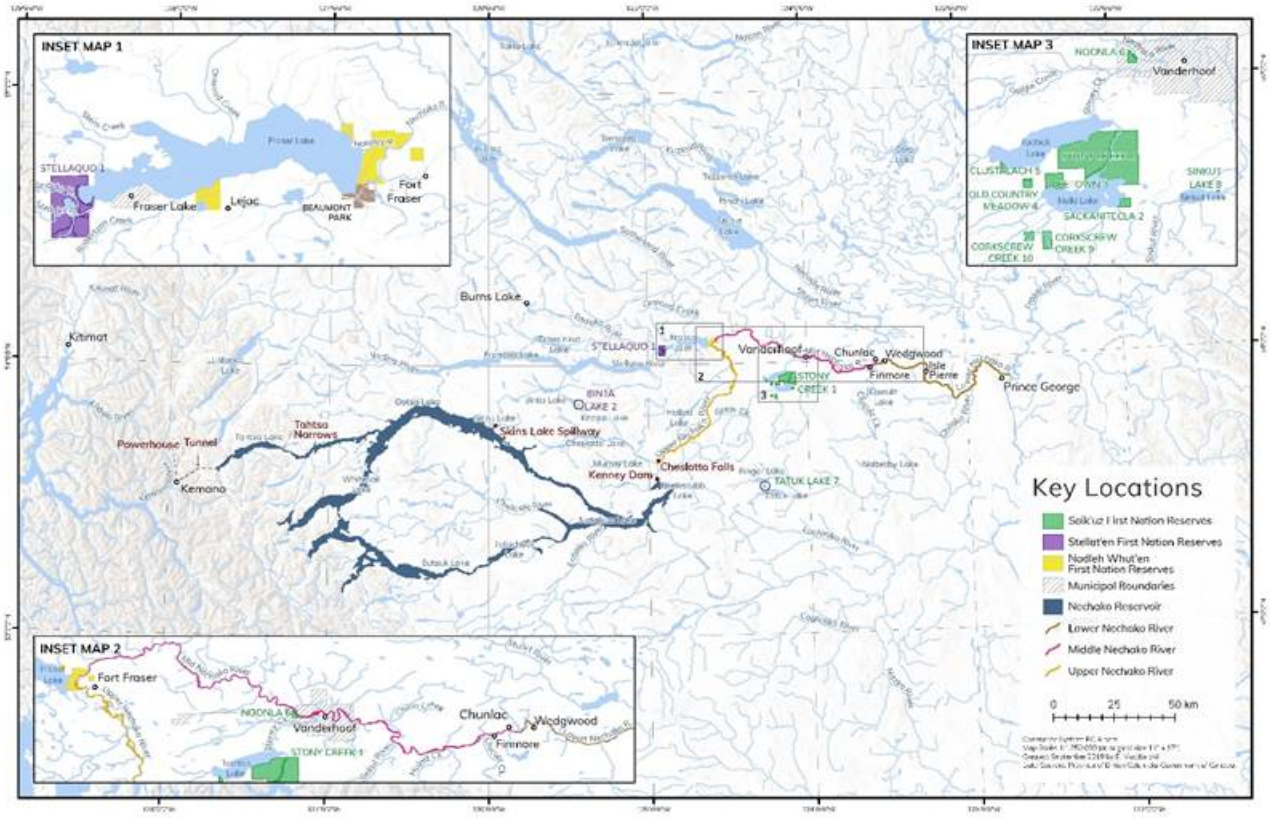
release requirements imposed upon it and any resulting harm to the fish/fishery in the Nechako River is the inevitable result of those regulatory requirements. The defence of statutory authority therefore applies. The plaintiffs' argument that the statutory authority is somehow "constitutionally inapplicable" cannot succeed and the plaintiffs' tort action against RTA must be dismissed.

- While the claim for injunctive relief against RTA must be dismissed and so too must be the plaintiffs' proposed declaration requiring the Crown to implement the requested relief, the Court nevertheless makes a declaration that the plaintiffs do have an Aboriginal right to fish for food, social, and ceremonial purposes in the Nechako River watershed and that, as an incident of the honour of the Crown, both the provincial and federal governments have an obligation to protect that Aboriginal right.

[662] If the parties are unable to agree on the award of costs in this proceeding, they may apply to the court for a hearing on the matter and any necessary directions in that regard.

"Kent, J."

APPENDIX A – REGIONAL MAP OF THE NECHAKO WATERSHED



APPENDIX B - AGREED STATEMENT OF FACTS - TABLE OF CONTENTS

APPENDIX C - GLOSSARY

Acronym/Short Form	Term
1950 Agreement	Formal agreement made between British Columbia and RTA pursuant to the *Industrial Development Act*, S.B.C. 1949, c. 31, which assured storage, diversion, and use of water required for hydroelectric generation for its aluminum smelter.
1980 Action	Granting of Canada's motion for an interlocutory mandatory injunction and ordered RTA to comply with the flow releases set out in the Minister's July 25, 1980 direction: *Canada (Attorney General) v. Aluminum Company of Canada Ltd*, (1980) 115 D.L.R. (3d) 495 (B.C.S.C.)
1987 Settlement Agreement	Established the flow regime for the Nechako River that is in force today.
1997 Settlement Agreement	Under this agreement, the Province issued RTA's final water license and created the Nechako Watershed Council and Nechako Environmental Enhancement Fund.
2015 Appeal Decision	*Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc*., 2015 BCCA 154, restoring the plaintiffs' Notice of Civil Claim as originally filed except the claim for riparian rights based on the plaintiffs' interest in reserve lands.
ASOF	Agreed Statement of Facts
AUC	Area under the curve (a methodology for counting Chinook)
cfs	Cubic feet per second
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
CTSC	Carrier Sekani Tribal Council
CUs	Conservation units
DFO	Department of Fisheries and Oceans
DRIPA	*Declaration on the Rights of Indigenous Peoples,* S.B.C. 2019, c. 44.
Eaton Base Flows	Flows which are less than the natural flow of the river, but which should restore natural ecological functioning processes for the benefit of the fish, as opined by Professor Eaton, expert for the plaintiffs.

HBC	Hudson's Bay Company
IPSFC	International Pacific Salmon Fisheries Commission
KCP	Kemano Completion Project
KDRF	Kenney Dam Release Facility
keyohs	Family-owned resource areas within which a *sadeku* (an extended family unit) held exclusive rights to fishing, hunting, trapping, and gathering.
köyohodachum, also spelled *keyohwhuduchun*	Male head of the *sadeku* (an extended family unit) through whom ownership of the land passes
m^3/s	Cubic metres per second
MELP	Provincial Ministry of Education, Lands and Parks
MW	Megawatts
NEEF	Nechako Environmental Enhancement Fund
New Caledonia	Colonial name for BC Interior in the eighteenth century
NFCP	Nechako Fisheries Conservation Project
NWC	Nechako Watershed Council
NWSRI	Nechako White Sturgeon Recovery Initiative
RL&L Study	A five-year study commissioned by MELP in 1995 on the Nechako White Sturgeon
SARA	*Species at Risk Act*, S.C. 2002, c. 29
sadeku	An extended family unit
SON	Saugeen Ojibway Nation, the claimants in *Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al.*, 2021 ONSC 4181
STMP	Summer Temperature Management Program
T1	Tunnel 1 to Kemano Powerhouse
T2	Tunnel 1 to Kemano Powerhouse
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, UN Doc

	A/Res/61/295 (2007)
UNDRIPA	*United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14